SUPREME COURT OF CALIFORNIA
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In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

JASON ALEJANDRO AGUIRRE,

Defendant and Appellant.

CAPITAL CASE

Case No. S175660

Orange County Superior Court Case No. 07ZF0003
The Honorable William R. Froeberg, Judge

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INTRODUCTION

Appellant Jason Aguirre and several members of his gang, Dragon Family Junior, were mistakenly told that rival gang members were eating dinner at a local taco shop. The "rivals" were actually four teenaged cousins and an uncle who were not affiliated with any gang. Nonetheless, Aguirre and his accomplices arrived at the restaurant and followed the family's car until they reached a residential cul-de-sac, where they blocked the family's car in a driveway. As the family cowered in fear in their seats, Aguirre calmly walked up to the passenger side of the car and repeatedly fired his handgun at point-blank range, killing one of the teenagers and wounding two others. After the shooting, Aguirre and his accomplices fled the scene. Most of them were arrested that same evening, although Aguirre was not arrested until he was discovered months later at his Arizona hideout using an assumed name.

A jury convicted Aguirre of capital murder, two counts of premeditated attempted murder, and street terrorism. At a bench trial, the court found Aguirre guilty of being a felon in possession of a firearm. The jury returned a verdict of death, and the trial court sentenced Aguirre accordingly.

In this appeal, Aguirre challenges various rulings made and instructions given by the trial court, questions the sufficiency of the evidence, accuses the prosecutor and trial court of having committed misconduct, and contends that his death sentence is unconstitutional for several reasons. As discussed in detail below, none of Aguirre's claims entitle him to relief, and the judgment should be affirmed.

STATEMENT OF THE CASE

On April 17, 2009, an Orange County grand jury returned a second amended indictment charging appellant Jason Aguirre with premeditated

murder of Minh Tran with special circumstance allegations for carrying out the murder to further the activities of a criminal street gang (count 1; Pen. Code,[1] §§ 187, subd. (a) & 190.2, subd. (a)(22)); premeditated attempted murder of Anh Tran (count 2; §§ 664, 187, subd. (a)); premeditated attempted murder of Anh Ta (count 3; §§ 664, 187, subd. (a)); street terrorism (count 4; § 186.22, subd. (a)); and possession of a firearm by a convicted felon (count 5; § 12021, subd. (a)(1)). (2 CT 403-404.) As to counts 1 through 3, it was alleged that Aguirre personally discharged a firearm causing great bodily injury and death (§ 12022.53, subd. (d)). (2 CT 404.) As to counts 2 and 3, it was alleged that Aguirre personally inflicted great bodily injury on Anh Tran and Anh Ta (§ 12022.7, subd. (a)). (2 CT 404.) As to counts 1, 2, 3, and 5, it was alleged that Aguirre committed the offenses for the benefit of his criminal street gang (§ 186.22, subd. (b)(1).) (2 CT 405.) It was also alleged that Aguirre had been previously convicted of a serious felony (§ 667, subd. (a)(1)), a serious and violent felony (§§ 667, subds. (d) & (e)(1); 1170.12, subds. (b) & (c)(1)), and a prison prior (§ 667.5, subd. (b)). (2 CT 405-406.)

On May 21, 2009, a petit jury found Aguirre guilty of counts 1 through 4. (3 CT 784-786.) The jury found true the gang murder special circumstance, and found true all of the enhancement allegations, with the exception of the count 3 allegation that Aguirre personally discharged a firearm causing great bodily injury and death. (3 CT 784-786.) That same day, following a bench trial, the trial court found Aguirre guilty as to count 5. (3 CT 788.)

At the penalty phase of the trial, the jury returned a verdict of death. (3 CT 893-894; 4 CT 1035-1040.)

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[1] All further unspecified statutory references are to the Penal Code.

On August 14, 2009, the trial court considered and denied an automatic motion to modify the verdict pursuant to section 190.4, subdivision (e). (4 CT 1041-1046.) On the same date, the court sentenced Aguirre to death for the murder, and struck the remaining counts and enhancements. (4 CT 1047-1048, 1061.)

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

STATEMENT OF FACTS

A. Guilt Phase

1. Summary

Fourteen-year-old Minh Tran, his brother, their two cousins, and their uncle went out to have dinner at a taco shop in Westminster. While they were there, they noticed that a teenager, who was sitting at a nearby table with his girlfriend, was staring them down. A little while later, they saw a carload of teenagers stare at their table as they slowly drove by the restaurant. When the family left the restaurant, they quickly realized they were being followed by the same white car they had seen drive by the restaurant. After attempting to evade the car several times, they pulled into a residential cul-de-sac, entered someone's driveway, and turned off the car. The white car parked near the entrance of the cul-de-sac shortly after and waited. A few minutes later, a third car pulled into the cul-de-sac and parked directly behind the family's car, blocking them in. Aguirre, dressed completely in black, emerged and calmly walked up to the passenger side of the car. As Minh Tran and his family members cowered in their car, petrified from fear, Aguirre fired several rounds into the car from point-blank range. Minh Tran, who was sitting in the front passenger seat, died in the hospital from his wounds. Two other family members were also treated for gunshot wounds.

Bruce Nguyen was helping his sister in the backyard when he heard the gunshots. He ran to the front of the house in time to see the victims' car in his sister's driveway, the figure dressed in dark clothing standing near a green car parked behind the victims' car, and a third car, white, parked in the street. The figure jumped in the passenger seat of the green car and took off. Nguyen pursued the vehicle and was able to relay detailed information about both the white and green cars to police.

Police later located and arrested the four occupants of the white car, which included Aaron Villegas, as well as the owner of the green car, Quang Do, all of them members of a local Vietnamese gang, Dragon Family Junior. Villegas and Do cooperated with law enforcement and singled out their fellow gang member, Aguirre, as the shooter. Police searched Aguirre's home, but it had been abandoned. Months later, the authorities located Aguirre hiding out in an apartment in Tempe, Arizona, using an assumed name. After an attempt to flee, the police arrested Aguirre and searched his apartment. They seized various items belonging to or used by Aguirre, including two computers. Forensic analysts discovered a virus that had been accidentally downloaded on one of the computers, which permitted them to view user keystrokes over a period of time and thus obtain Aguirre's electronic communications and search queries. Investigators were able to read several chat messages in which Aguirre, among other things, admitted to shooting three people. They also were able to see that Aguirre repeatedly searched the Orange County Sheriff's Department website for outstanding warrants in his name.

Aaron Villegas and Quang Do testified at trial that Aguirre was the shooter. They explained that they and their fellow gang members falsely believed that Minh Tran and his family were members of a rival gang. Do testified that Aguirre had previously shown him a revolver at his home, and he saw Aguirre grab the gun before they left to confront their rivals on the

night of the shooting. Bullets found during the autopsy and in the victims' car were consistent with a .38 or .357 caliber firearm, which was also consistent with Aguirre's electronic and handwritten communications seized from his Arizona hideout in which he mentioned .38 and .357 caliber firearms. A cell phone belonging to Aguirre's stepfather was seized on the night of the shooting, and cell phone records corresponding to that phone indicated that it was in the vicinity of the taco shop and the cul-de-sac at the time of the shooting. The call history from the phone also corroborated Quang Do's testimony that Aguirre, who was riding in the passenger seat of Do's car on the night of the shooting, was speaking to specific individuals when determining where to drive.

2. Prosecution's Case

a. The Murder of Minh Tran and Attempted Murder of Anh Tran and Anh Ta

On August 12, 2003, Minh Tran and his brother, Anh Tran, went to Alerto's, a taco shop in Westminster, California, with their uncle, Nam Long, and their two cousins, Ba "Brian" Tran and Anh "Jimmy" Ta. (5 RT 809, 885.) While they ate dinner, Jimmy recognized a teenage girl from school sitting with a teenage boy in the restaurant. (5 RT 886-887.) When Minh looked at the girl, the boy next to her gave him a hard stare. (5 RT 888.) When the couple left the restaurant, Jimmy noticed that the boy looked back and stared at them again. (5 RT 886.) While the family continued eating their dinner, they noticed a white Lexus drive by and stop. Four teenagers aged 14 to 18 inside the car stared at them for a moment before driving on. (5 RT 810, 843.)

When the family finished their dinner and left the restaurant to get into their uncle's car, they noticed the same white Lexus parked in the rear of the parking lot. (5 RT 812.) As they pulled out of the parking lot, they saw the headlights of the Lexus turn on and the car began to follow them.

(5 RT 812, 893.) When their uncle performed a u-turn at an intersection, the Lexus did the same. (5 RT 814.) After being shadowed for several turns, they turned into a residential area that ended with a cul-de-sac. (5 RT 815.) Their uncle pulled into the driveway of a residence, parked, and turned off his lights. (5 RT 816.) Minh Tran was in the front passenger seat, Brian Tran sat behind the driver, Jimmy Ta was in the middle rear seat, and Anh Tran was behind the front passenger seat. (5 RT 892.)

As they waited in the car, they saw the Lexus drive by the entrance to the cul-de-sac, and then come back moments later. (5 RT 896.) The Lexus parked just outside of the cul-de-sac. (5 RT 818.) After watching the Lexus for a few minutes, a second dark-colored car pulled into the cul-de-sac and parked directly behind their uncle's car. (5 RT 818, 897.) A person wearing black clothing emerged and approached their car on the passenger side. (5 RT 819.) He appeared to be a tall and skinny male. (5 RT 898.) The cousins crouched down in their seats, scared and helpless. (5 RT 899, 934.) After the man was within arms-length of the front passenger window, he began firing a gun at the car from close range. (5 RT 824, 825, 827, 898, 901.) After the firing ceased, Anh Tran could not see the person outside the car anymore. (5 RT 825.)

After the shooting, the family drove for a few minutes to Jimmy Ta's house. (5 RT 903.) As they drove, Anh Tran realized he had been shot in his stomach. Minh Tran only made gurgling noises. (5 RT 828, 903.) They called an ambulance, and the cousins were rushed to the hospital to receive treatment for their injuries. (5 RT 904.) Jimmy Ta received medical treatment for a bullet to his buttocks. (5 RT 904.) Anh Tran was shot in his stomach, and part of his intestines later had to be removed due to gunshot wounds. (5 RT 830-832.) Anh Tran remained in the hospital for a while. (5 RT 833.) He was still recovering in the hospital when he learned that his brother, Minh, had died from his injuries. (5 RT 834, 906.)

An autopsy was performed on Minh Tran. (9 RT 1574.) There were five gunshot wounds in total. His lungs were perforated on both sides, his spinal cord was severed, he sustained a bullet wound through the heart, and his liver was severely fragmented. (9 RT 1578-1583.) There were also perforating wounds to his diaphragm, stomach, and spleen. (9 RT 1583.) The pathologist concluded that the cause of death was a gunshot wound to the heart, with massive bleeding. (9 RT 1587.)

Anh Tran later identified Donny Nguyen and Michelle Tran as the couple in Alerto's restaurant. (5 RT 864.)

b. Good Samaritan Follows the Gunman's Vehicle

Bruce Nguyen, a veteran of the United States Marine Corps, was at his sister's house in Westminster on the evening of August 12, 2003, helping her clean up her backyard around 8:00 p.m. or 9:00 p.m. (6 RT 979.) While Nguyen was working in the yard, he heard gun fire. (6 RT 980.) He told his sister and nephew to remain in the backyard while he checked to see what was happening. (6 RT 981.) When he opened the front door of the house, he saw a car parked in the driveway, a second car parked directly behind it, and a third vehicle nearby. (6 RT 983.) The second car appeared to be a dark green car. He saw one person sitting in the driver's seat and a second person, dressed in dark clothing, walking towards the vehicle. (6 RT 983.) The dark green car quickly backed out of the driveway and drove away. (6 RT 985.) Nguyen jumped into his friend's car and followed them. (6 RT 985.)

As soon as he began following the car, he dialed 9-1-1 and informed the dispatcher that there was a shooting and he was pursuing the suspect who was riding in a dark green vehicle. (6 RT 988.) He was able to read the license plate number to the dispatcher as 5AUU969. (6 RT 1003.) After he followed the car for a while, he saw the car pull into a driveway. (6 RT

990.) A white Lexus pulled up as well, and there appeared to be an exchange of passengers between the two vehicles. (6 RT 991.) As the two cars left, they went in separate directions; Nguyen continued following the green car onto the freeway. (6 RT 995, 997.) He reported the direction of the white Lexus to the 9-1-1 dispatcher. (6 RT 995.)

Nguyen followed the green car as it exited the freeway, and after the car performed a U-turn at an intersection, he was able to see that the driver of the car appeared to be Asian. (6 RT 999.) Eventually, the green car came to a full stop and the driver appeared to help the passenger exit the vehicle and enter a residence. (6 RT 1000.) Nguyen observed several police cars nearby, so he asked the 9-1-1 dispatcher if he could leave the scene. (6 RT 1007.) He had outstanding speeding tickets, so he hung up the phone and returned to his sister's house. (6 RT 1008.) When he returned to the cul-de-sac, police units were already there. (6 RT 1008.) After speaking to the investigators, Nguyen went with them to perform field identifications. (6 RT 1009.) Nguyen made a positive identification of the white Lexus and the green vehicle that he pursued. (6 RT 1010, 1012.)

c. The Ensuing Investigation and Arrests

Police officers located the white Lexus and performed a traffic stop of the car near the intersection of Clinton Street and Trask Avenue in Westminster on the same evening as the shooting. (6 RT 1017.) Officers made the four occupants exit the vehicle and lay down in the street. (6 RT 1017.) Harrison Pham was the driver, Aaron Villegas was the front passenger, Dung "Tom" Le was sitting behind the driver seat, and Danny Duong was sitting behind the front passenger seat. (6 RT 1019-1020.) A search of the Lexus revealed a baseball bat and a hammer in the trunk. (6 RT 1029.) They found five cell phones in the car, and a black bandana in the back seat. (6 RT 1034, 1046, 1059.)

Officers also located a dark green Acura parked nearby on Trask Avenue registered to Quang "Hot Dog" Do, a member of the Dragon Family Junior street gang. (6 RT 1040.) A document was found in the vehicle containing Quang Do's name. (7 RT 1141.) A search of the Acura revealed a black nylon holster for a large caliber handgun on the passenger floorboard, which was partially visible underneath the passenger seat. (6 RT 1041; 7 RT 1143.) A dumbbell bar without the weights was discovered in the back seat. (6 RT 1042.) A black bandana was found stuffed into a compartment in the driver's door, and a white bandana was discovered under the driver's seat in the floorboard. (6 RT 1044, 1063; 7 RT 1142-1143.)

Police also stopped a vehicle in the same general area containing Vinnie "Nippy" Nguyen, a known affiliate of Dragon Family Junior. He had been traveling back and forth in an alley near where the others had been detained. (6 RT 1030-1031.) He was arrested and taken to the police station, where Sergeant Mark Nye looked in his cell phone and found several gang monikers and names that he recognized to be members or associates of Dragon Family Junior. (6 RT 1047.) The contacts included "Slim Pad," "Hot Cell," "Corrupt Pad," "Donny Pad," "Slim," "Hot Dog," and "Tom." (6 RT 1047.) Sergeant Nye recognized "Slim" to be Aguirre's moniker. (6 RT 1047.)

Investigators searched a residence at 12571 Trask in Garden Grove and came across paperwork and magazines addressed to Aguirre, as well as gang writings that referred to Dragon Family Junior. (6 RT 1067.)

Investigators collected a bullet fragment from the rear passenger seat of the victims' car. (6 RT 972.) A forensic analyst collected four additional bullets during the autopsy of Minh Tran. (6 RT 1088.) One bullet was recovered from Minh's heart, two bullets were recovered from his body cavity, and one bullet was recovered from the left side of his body. (6 RT

1118.) The analyst determined that all five bullets were fired from a single firearm, and the bullets were either .357 or .38 special caliber. (6 RT 1090-1091.)

The white Lexus was processed for fingerprints. (6 RT 1131.) Eight fingerprint lift cards with fingerprints were collected from the exterior right front door, the exterior right rear door, and the exterior left rear door. (6 RT 1132.) Four fingerprints were identified to Aaron Villegas, four fingerprints were identified to Dung "Tom" Le, and one fingerprint was identified to Danny Duong. (6 RT 1132.)

The green Acura was also processed for fingerprints. (6 RT 1133.) Seven fingerprint lift cards were collected with fingerprints. (6 RT 1133.) Four fingerprints were identified to Quang Do. (6 RT 1133.)

Investigators spoke with Michelle Tran, who admitted that she and her boyfriend, Donny Nguyen, ate at Alerto's on the night of the shooting. (6 RT 1069-1070.) Tran stated that Nguyen borrowed her cell phone that night. (6 RT 1074.)

Detectives interviewed Aaron Villegas (8 RT 1493.) Villegas eventually provided the name of "Slim" as the shooter. (8 RT 1494.) Villegas was presented a photographic lineup with six photos, and he identified Aguirre as the shooter. (8 RT 1496-1497.)

Sergeant Brian Carpenter of the Orange County Sheriff's Department, the lead homicide investigator on the case, obtained cell phone records for the several individuals, including those who were arrested. (8 RT 1500.) Sergeant Carpenter spoke to Michelle Tran, who showed Carpenter the contact list on her cell phone. (8 RT 1501.) Her contacts included Aaron Villegas, Tom Le, "Uncle Jason," and Donny Nguyen, her boyfriend. (8 RT 1503.) On Vinny "Nippy" Nguyen's phone, Sergeant Carpenter saw that Nguyen had attempted to contact Michelle Tran at 10:43 p.m. on the night of the shooting, Danny Duong at 10:46 p.m., Harrison

Pham at 10:46 p.m., Aguirre at 10:51 p.m., and Quang Do at 10:59 p.m. (8 RT 1506.) When he examined Tom Le's phone, he observed that Tom called Aguirre at 8:26 p.m. on the night of the shooting, Michelle Tran at 10:03 p.m., a second call to Aguirre at 10:17 p.m., a call to Vinny Nguyen at 10:30 p.m., and a second call to Nguyen at 10:31 p.m. (8 RT 1507.) Tom Le had also attempted to dial Aguirre five times between 10:10 p.m. and 10:39 p.m. on the night of the shooting. (8 RT 1508.)

Sergeant Carpenter searched a Nokia cell phone belonging to Aguirre's stepfather and associated with Aguirre. (8 RT 1513.) On the night of the shooting, the phone associated with Aguirre received phone calls from Eric Pham at 10:09 p.m. and Tom Le at 10:25 p.m. (8 RT 1514.) He also dialed Eric Pham at 10:15 p.m. and Tom Le at 10:16 p.m. (8 RT 1514.) The phone associated with Aguirre pinged near Wales Circle, which is the cul-de-sac where the shooting occurred, and Alerto's between 10:00 p.m. and 10:30 p.m. on the night of the shooting. (8 RT 1529, 1550.)

A forensic scientist tested the DNA on several items, including several swabs from the green Acura Integra and white Lexus, as well as a black baseball hat and two shirts. (9 RT 1598, 1608.) It was determined that Aguirre did not contribute DNA to any of the items that were analyzed. (9 RT 1605-1606.) The forensic scientist also tested for DNA on the black bandana found in the driver's door of Do's green Acura. Neither Aguirre nor Quang Do's DNA were on the black bandana; instead, the major DNA profile on the black bandana matched to Eric Pham. (9 RT 1610-1611.) The forensic scientist testified that although Aguirre and several other individuals were not the major DNA profile found on the black bandana, that did not indicate whether or not any of those individuals handled the black bandana. (9 RT 1623.)

The parties stipulated that the police bagged the hands of Harrison Pham, Vinnie Nguyen, Dung Le, Danny Duong, and Aaron Villegas, as

well as victims Jimmy Ta and Anh Tran. (10 RT 1825.) Investigators tested for gunshot residue and found no unique gunshot residue particles for any of the individuals except victim Anh Tran. (10 RT 1825.) One unique gunshot residue particle was detected on Anh Tran's right hand and another one on his left hand. (10 RT 1826.)

d. Aguirre's Arrest in Arizona

On March 7, 2004, several months after the shooting, Officer Edward Ouimette of the Tempe, Arizona Police Department received a radio call to perform a welfare check at an apartment complex in Tempe. (9 RT 1563.) Someone had found a trail of blood in the parking lot of the complex. (9 RT 1563.) When he arrived, Officer Ouimette followed the trial of blood to apartment 2042. (9 RT 1563.) He knocked on the door and an Asian man opened the door. (9 RT 1563.) Officer Ouimette found Aguirre in the apartment, sitting on the couch. (9 RT 1564-1565.)

When Officer Ouimette ran a records check on Aguirre, he found a homicide warrant out of California. (9 RT 1565.) When he discovered this information, he wrote down the info about the warrant on a card and stepped aside to show it to his sergeant. (9 RT 1566.) As he was doing that, Aguirre jumped off the couch and ran out of the apartment. (9 RT 1566.) Officer Ouimette chased Aguirre down the stairs and through the apartment complex. (9 RT 1566.) Although Officer Ouimette had already identified himself as a police officer and yelled for Aguirre to stop during the chase, Aguirre only looked at him and continued running. (6 RT 1566.) The chase lasted about 30 seconds until Officer Ouimette caught up with Aguirre and tackled him. (9 RT 1566.) Aguirre struggled on the ground until he was handcuffed. (9 RT 1567.)

Sergeant Carpenter was notified that a homicide warrant had been served by the Tempe Police Department. (8 RT 1531.) He arrived at the apartment with a search warrant on March 11, 2004, and searched the

residence. (8 RT 1532.) Sergeant Carpenter discovered two computers and obtained the hard drives for analysis. (8 RT 1534; 9 RT 1671.) In one of the bedrooms, Sergeant Carpenter found a shirt with the letters "OC" and a California driver's license associated with Aguirre. (8 RT 1535-1536.) He also found a photo of Aguirre and notebook papers in a drawer. (8 RT 1540.)

Qyu Vo and Uyen Vu, the residents of the apartment in Tempe, testified that they knew Aguirre as "Bill." (9 RT 1651, 1660.) They had two computers that everyone shared, and Aguirre used both of them. (9 RT 1653, 1661.) Neither Vo nor Vu ever used the screenname "EVERYBODYKILLA22" on their computers. (9 RT 1654, 1662.) Vo and Vu both testified that they never wrote about Dragon Family or Dragon Family Junior on the computer, they never wrote "I blast three niggaz," they never wrote about activities involving gang-banging, they never wrote "being all dressed in black, coming to take your life," and they never knew or wrote about "Hot Dog." (9 RT 1654, 1663.) They also denied ever writing on any of the notebook pages containing handwriting that were seized from the residence, and they also denied searching the Orange County Sheriff's website for warrants for an individual by the name of Jason Aguirre. (9 RT 1655, 1663-1664.)

An expert in handwriting analysis analyzed prison mail authored by Aguirre from 2004 to 2008 and reviewed the handwritten notes on the seized notebook pages. (9 RT 1812-1813.) After performing a comparative analysis, the expert opined the handwritten notes seized from the Tempe apartment were prepared by Aguirre. (9 RT 1817.)

e. Forensic Analysis of the Computers Seized from Aguirre's Hide Out in Tempe

A forensic investigator examined the two computers seized in Arizona. (9 RT 1671.) The investigator detected a virus on one of the

computers, and discovered that its purpose was to capture all the keystrokes of the infected computer system. (9 RT 1672.) The virus infected the computer on February 2, 2004, and the investigator was able to analyze several instant messages captured on the computer. (9 RT 1676.) The conversations were one-sided, because the virus only captured the user's keystrokes. (9 RT 1678.)

The user of the computer, EVERYBODYKILLA22, was communicating with other users, DREAMINS2KSTYLE, JOHNNYSPD9, and VIETDOG44, through an instant message program. (9 RT 1679, 1682.) EVERYBODYKILLA22 typed the following:

"I just hope no nigga fuk with me. Ahha. Be like U G. Fuked with the wrong whyte boi. The only thing succ is no one can back me up here. But its all good. I can handle minez. Shit homie I gotta bounce. I'll get at you later, like tomorrow. Take care. Haha. You knoe." (9 RT 1677.)

"What's –what your name? Real or S.N.?" and then responded "Slim." (9 RT 1677.)

"Niggaz cant see me for the fact that I stay with my black n beenie disguise so don't be surprised when these guys dressed in black are coming to take your life." (9 RT 1679.)

"22nd letter iz a V. Like my tat." (9 RT 1680.)

"Fuk if I know. U read that shit at the bottom. About us at the bottom. Stupid Huh. 5 Nigg alocked up they think thas it. Haha. So many still out n bangin. Haha." (9 RT 1680.)

"They think they crips haha bitch please huh. Everyone wanna be a crip fuk fags. E.B.K. all day till the day I die. U never saw my E.B.K. tat." (9 RT 1680.)

"Some don't even dress like gangsta. They don't have the ballz to go bangin for fun. They only go if everyone go. U have to make them. They wear tyte close. Ahhaha. Size extra medium. I told one nigga that when we

waz at the mall he ran to his car and changed his shirt. I wanted to call a meeting to tell them all to dress like G'z but they all don't fo real." (9 RT 1681.)

"Cant go nowhere. I need to bounce to another state. Trying to get an ID." (9 RT 1681.)

"Now you c it fuked up shit huh. If tommy was out I couldn't stay with him. He would be on parole. I know. They—see why I really want an ID." (9 RT 1682.)

"Its fun hittin nigga up when u strapped. When you cock that shit, they bow down. Go get one. Save money." (9 RT 1682.)

"Damn nigga I gotta gang of stories to tell u when I see you." (9 RT 1683.)

"Show u how we ride in Cali. Haha. Fuk yea tradin war stories and shit." (9 RT 1683.)

"Asshole. Smoke everyone. Koo. Tyte shit." (9 RT 1683.)

"You went with all the JRZ's. Damn. Oh, yea. Ahahhaha. Shoot them niggaz forst." (9 RT 1684.)

"Sure Bobo. Thas all threre iz. I know but if it weren't for niggaz like me then there would be no gangstaz. They would all stop after the first time they got locked up." (9 RT 1684.)

"Naw not like that. I still maintain. JSS don't give a fuk, tho. I will do anything you tell me too." (9 RT 1684.)

"Nope. But I will never say I stop bangin tho. I don't give a fuk where I go, ima still be a DF Nigga fo lyfe. Haha. U know u represent that shit. Every one thinks ima jr anyway. I don't give a fuk all g to me. Fuk yea." (9 RT 1685.)

"Damn I wanna go bang now. Me n you. Damn tyte. I wanna go bangin by myself for fun with two clips and one gun. Iono. Haha. I

remember me a Hot Dog go bang with the CRV when I had the 38." (9 RT 1685.)

"Last time I told all the JRZ if they wanna kick it with SSTEVE then don't do it in front of SSteve then don't do it in front of me. WTF. Hah. Remember my name Slim. Drinkin that about it." (9 RT 1685.)

"Ask Looney. I got blue eyez. Blonde hair." (9 RT 1686.)

"WTF u want me to tell u. I blast three niggaz. Oops wrong sn. I blast three niggaz. Naw." (9 RT 1687.)

"Naw 1tyme looking for me thas why. Got snitches n shit u know. Fukin niggaz don't know how to keep they mouth shut. Yup. Some but not all. Thas why the homies don't wanna talk about shit so less homies know. Ask Looney. Ask any one. They—if they heard of Slim. They know the whyte boy." (9 RT 1687.)

The text data derived from the computer virus also revealed that the user, EVERYBODYKILLA22, typed the words "warrants" and the initials "OCSD" into the computer. (9 RT 1682.) The user also typed "www dot ocsd dot org" and the name "Jason Aguirre." (9 RT 1682.) The user also typed the address "www yahoo dot com" and "O.C.S.D." (9 RT 1686.) The user again typed "ocsd dot org" and "Jason Aguirre." (9 RT 1686.)

The end date of the text file recovered from the computer virus was March 14, 2004, which was the day the computer was seized by investigators. (9 RT 1688.)

Forensic analysts were also able to analyze a computer belonging to Anh Pham that was seized as a result of a search warrant executed on September 4, 2003. (9 RT 1689.) The investigators found images of a dragon logo with the words "Dragon Family Junior." (9 RT 1691.) They also found a drawing of "Dragon Family" and a photograph of a young male Asian with the words "R.I.P." above the image and the name "Minh

Tran." (9 RT 1691.) The photograph of Minh Tran was downloaded on August 21, 2003, a little more than a week after the shooting. (9 RT 1692.)

f. Aaron Villegas's Accomplice Testimony

Aaron Villegas was a member of the Dragon Family Junior gang in the summer of 2003. (7 RT 1165.) Villegas was acquainted with Aguirre three or four months before the shooting, and knew him as "Slim." (7 RT 1168.) Aguirre lived on Trask Avenue, and Villegas had been there on at least one occasion. (7 RT 1169.) Villegas knew many of the Dragon Family Junior members and associates, including Donny "Lonely Boy" Nguyen, Quang "Hot Dog" Do, Harrison Pham, Danny "Tymer" Duong, and Tom "Outkast" Le. (7 RT 1170-1177.) Villegas testified that Harrison Pham drove a white Lexus and Quang Do drove a green Acura Integra. (7 RT 1172, 1174-1175.)

On the evening of August 12, 2003, Villegas testified he was in contact with Tom Le, Harrison Pham, and Danny Duong. (7 RT 1177.) They were hanging out together at Aguirre's house around 8:00 p.m. or 9:00 p.m., when they received a phone call from Donny Nguyen. (7 RT 1180.) Nguyen informed them that there were some enemies at Alerto's. (7 RT 1181.) Villegas, Harrison, Danny, and Tom left together in Harrison's white Lexus in search of a group of Asian gang members. (7 RT 1179.) According to Villegas, Dragon Family Junior were enemies with Natoma Boys Junior and the Young Locs. (7 RT 1167.)

The group drove around the Alerto's parking lot and looked inside the restaurant. (7 RT 1184.) They were able to see a group of Asian males eating at a table, who appeared to be around their age. (7 RT 1185.) They waited in the parking lot for the Asian group to leave the restaurant, because they intended to fight the group. (7 RT 1186.) While they waited, Tom Le was on the phone with other home boys. (7 RT 1188-1189.)

Meanwhile, Quang Do had pulled up next to them in his green Acura Integra. (7 RT 1190.)

When the Asian group exited the restaurant and left in their car, Harrison Pham followed them in his Lexus. (7 RT 1193.) They followed them to a residential area and saw the other car park in a driveway of a cul-de-sac. (7 RT 1194.) Pham parked his Lexus across the street from the entrance to the cul-de-sac and waited until Quang Do arrived in his Acura. (7 RT 1197, 1201.) Tom Le got out of Pham's Lexus and entered the Acura. (7 RT 1204.) As he got out of the Lexus, Tom said, "Let's go blast 'em." (7 RT 1204.) Once Tom got inside the Acura, Quang Do drove his car into the cul-de-sac and parked behind their targets' car in the driveway. (7 RT 1206.) Aguirre got out of the car, wearing all black, including a black hat, and started shooting the car. (7 RT 1206, 1319.) Villegas heard approximately six shots in rapid succession, and saw Aguirre run back to Quang Do's Acura and get into the front passenger seat. (7 RT 1207.) The Acura drove off quickly to get away, and Pham drove away in his Lexus soon after that. (7 RT 1207-1208.)

Harrison Pham's Lexus met up with Quang Do's Acura a little later around the area of Bolsa Avenue and Brookhurst Street in Westminster. (7 RT 1212.) Tom Le exited the Acura and got back into the Lexus, while Aguirre remained in the passenger seat of the Acura. (7 RT 1215.) Pham drove the Lexus back to Aguirre's house to meet up there, and as soon as they approached the house, they saw Quang Do and Aguirre running out of the Acura towards Aguirre's house. (7 RT 1220.) Do had exited the driver seat and Aguirre had exited the front passenger seat. (7 RT 1224.) The Acura was parked right in front of Aguirre's house, and Pham had parked his Lexus across the street from the house. (7 RT 1221.) Before long, they heard sirens and were eventually detained by the police. (7 RT 1221.)

Villegas was arrested by the police and taken to Westminster police station. (7 RT 1226.) After Villegas realized that the investigators had substantial evidence against him, he told them that Aguirre was the shooter. (7 RT 1227.) Villegas was charged with murder and negotiated a plea agreement with the prosecutor. Under the terms of the agreement, Villegas would not serve a life sentence if he testified in Aguirre's case. (7 RT 1232.) Villegas testified that he initially told the police that the shooter was Vietnamese because he was attempting to protect Aguirre. (7 RT 1314.)

g. Quang Do's Accomplice Testimony

Quang Do testified that he and Aguirre are in the Dragon Family gang. (7 RT 1337.) Do had known Aguirre for about three years, since 2000. (7 RT 1337.) They were good friends, and Do knew Aguirre as "Slim." (7 RT 1339, 1342.) They hung out together about twice a week. (7 RT 1356.) Although the Dragon Family Junior gang was a Vietnamese gang, Aguirre was accepted as one of them despite the fact that he was Caucasian. (7 RT 1344.) Prior to the shooting, Do had been acquainted with Aaron Villegas and Harrison Pham for a couple of months, Tom Le for three or four years, and Danny Duong for two years. (7 RT 1346.)

On the night of the shooting, Do was hanging out at Aguirre's house. (8 RT 1357.) Around 9:00 p.m., several other gang members arrived in a white Lexus: Tom Le, Harrison Pham, Danny Duong, and Aaron Villegas. (8 RT 1358-1359.) At some point, Do received a phone call from Tom Le saying that the enemy was at Alerto's. (8 RT 1359.) Aguirre was exited to go to Alerto's. (8 RT 1360.) When Tom Le ran into the house and said, "Let's go," Aguirre went inside and grabbed his gun. (8 RT 1361.) Do had previously seen the handgun, about two or three weeks prior to the shooting. (8 RT 1363.) The gun was a revolver with a cylinder instead of a clip. (8 RT 1363.)

When they went to Alerto's, they waited a while until the supposed enemy had finished eating inside the restaurant. (8 RT 1367.) When the group had finished eating and were leaving, Tommy Le called Do from Harrison Pham's Lexus and told him to follow their lead. (8 RT 1369.) Tommy instructed Do where to drive, since Pham was following the target car. (8 RT 1369.) When they parked at the cul-de-sac, Tommy hopped in Do's car and told him to drive over there. (8 RT 1371.) When they parked behind the car, Do told Aguirre, "The enemy is probably gone already. They probably went into the house." (8 RT 1375.) Aguirre responded, "Hold on. Let me go check." (7 RT 1376.) Aguirre walked up to the car, wearing a black baseball cap and a black bandana over his face, smashed the window with the gun, and started firing. (8 RT 1376, 1381, 1383.) Do heard six shots. (8 RT 1378.) Afterwards, Aguirre ran back to the car and said, "Let's go." (8 RT 1380.)

They sped away, and later met up with Harrison Pham, who was driving the white Lexus, and Eric Pham, who had recently joined the group in his own car, near La Quinta high school. (8 RT 1384-1386.) Eric Pham had called Do a couple of minutes after the shooting and told them that they were being followed, so Aguirre told Do to pull over. (8 RT 1390.) The group agreed to split up and go in different directions. (8 RT 1390.) Aguirre and Tom Le jumped out of Do's green Acura; Aguirre went in Eric Pham's car and Tom Le went in Harrison Pham's white Lexus. (8 RT 1385.)

Do arrived at Aguirre's house, parked in front, and attempted to go inside the house. (8 RT 1392.) When no one answered at Aguirre's house, Do abandoned his car and started walking toward another associate's house. (8 RT 1393.) That person was not home either, so Do called his friend Nippy Nguyen to pick him up. (8 RT 1393.) Because Nippy did not come to pick him up on time, Do called another friend, "Goofy," who arrived with his mother to pick up Do. (8 RT 1394.) When Do was dropped

off at another friend's house, Eric Pham was there, and Aguirre soon arrived with another associate, Ben, or "Trigger." (8 RT 1396.) Ben, Eric Pham, Do, and Aguirre stood in front of the other friend's house discussing what happened. (8 RT 1398.)

Aguirre calmly told them that he walked up to the target car, saw the occupants ducking down in their seats, broke the window, and started shooting them. (8 RT 1399.) Aguirre acted out the shooting, and held his hand like he was holding a gun, shooting. (8 RT 1399, 1401.) Aguirre told them he emptied the gun on the car. (8 RT 1404.) Ben told Aguirre to get rid of the gun because it is dirty. (8 RT 1404.) The group discussed what to do with Do's car, and they agreed that Do should report it stolen. (8 RT 1405.) Ben, Aguirre, and Do rode in Ben's car to Do's house, where they dropped off Do. (8 RT 1406.)

Do reported his car stolen to the police. (8 RT 1407.) When police arrived at his house, they asked Do to come down to the station to give a statement. (8 RT 1407.) The detectives asked Do where he had been the night before, and Do lied and said he had not left his house. (8 RT 1408.) Do was still in Dragon Family Junior and was willing to lie to the police to protect Aguirre, the gun, and the gang. (8 RT 1409.) Do told the detectives, "If I did it, you guys would arrest me already," and they arrested him. (8 RT 1412.)

While Do was in jail, he had a discussion with Aguirre about Aaron Villegas and Danny Duong. (8 RT 1419.) They discussed how those guys were "telling on them" and breaking the gang rules. Aguirre said, "Fuck 'em." (8 RT 1419.) Do had another discussion with Aguirre about the fact that the victims were not gang members. Aguirre responded, "Oh well." (8 RT 1425.) Do testified that he asked Aguirre about his EBK tattoo, and Aguirre said it meant "Everybody killer." (8 RT 1488.)

Do entered into an agreement with the prosecutor to testify in Aguirre's case in exchange for not receiving a life sentence. (8 RT 1420.)

h. Gang Expert Testimony

Detective Tim Walker testified as a gang expert for the prosecution. (9 RT 1709.) According to Detective Walker, the Dragon Family gang originated in Westminster at La Quinta High School in the early 1990s. (9 RT 1733.) The gang grew over the years, and a few members of Dragon Family (DF) created a young faction of the gang called Dragon Family Junior (DFJ) around 1998. (9 RT 1733, 1735.) The older members of Dragon Family would advise, direct, and lead Dragon Family Junior members in "gang-banging." (9 RT 1735.) Over time, Dragon Family Junior members became bitter rivals with a gang called the Young Locs. (9 RT 1733.)

Detective Walker testified that tattoos of a happy face and crying face on Aguirre's arm represents the gang lifestyle. (9 RT 1718.) The letter V is the 22nd letter in the alphabet, so the letter and number represents Vietnamese to a lot of Vietnamese gangsters. (9 RT 1719.) Dragon Family Junior had three or more members on August 12, 2003. (9 RT 1730.)

According to Detective Walker, the moniker "Looney" is Minh Nguyen, "Eazy" or "Sleazy" is Eric Pham, "Lonely Boy" is Donny Nguyen, "Scrappy" is Anh Pham, "Kurupt" is Aaron Villegas, "Tymer" is Danny Duong, "Outkast" is Tom/Dung Le, and "Happy Harry" is Harrison Pham. (9 RT 1736-1739.) Detective Walker opined that each of those individuals was a member of Dragon Family Junior on August 12, 2003. (9 RT 1752-1755.)

Detective Walker observed tattoos, such as "V" or "22" on Aguirre's body, including the number 22 on Aguirre's stomach. (9 RT 1755.) Detective Walker noted that on April 18, 2001, Aguirre was served with a STEP notice regarding the Dragon Family gang. (9 RT 1757.) A STEP

notice is a field identification card informing a person that a particular street gang is considered a criminal gang. (9 RT 1751.) On April 26, 2001, Aguirre was again contacted by police and admitted that he had been a member of Dragon Family for three years. (9 RT 1751.) Three days later, on April 29, 2001, Aguirre was seen throwing gang signs in the company of other Dragon Family gang members when contacted by police. (9 RT 1751.) Aguirre was contacted on January 21, 2001, in the company of Quang Do and Minh Nguyen at a music festival. (9 RT 1758.) Aguirre was also contacted on December 19, 2002, in the possession of DF drawings and pictures. (9 RT 1758.) In reviewing prior contacts and documentations, Detective Walker observed an association between Aguirre and the moniker of "Slim." (9 RT 1759.) Detective Walker opined that Aguirre was a member of Dragon Family or Dragon Family Junior at the time of the shooting. (9 RT 1759.)

Detective Walker reviewed several prison letters written by Aguirre. (9 RT 1759.) He reviewed a letter dated December 15, 2005, addressed to Mike that referred to "homies" and fellow gang members Hot Dog and Hitler. (9 RT 1759.) The letter was signed, "Niggaz for life, Slim 07." (9 RT 1760.) Detective Walker also reviewed a letter to Annie Nguyen that Aguirre wrote on July 11, 2008, that stated: "Fuck the world tat. The dude at the shop was like, you don't want to put that, are you sure? And a lot of people be like, why you put that? Nigga, that's how I feel! Still after all these years. Nothing changed. Of course there are a few exceptions like you and Heinekin. I don't hate everyone and everything. Happy face. But I feel like that a lot or often." (9 RT 1760.)

Detective Walker also reviewed a letter by Aguirre dated November 6, 2006, addressed to Danica Khom. (9 RT 1761.) A portion of the letter stated: "I am telling you about me. I am in a Viet gang, Dragon Family. I put E.B.K. cause we black rag. Not bloods, not crips, just E.B.K.

Everybody Killaz." (9 RT 1761.) Detective Walker relied on those letter in concluding that Aguirre was a member of Dragon Family or Dragon Family Junior on the date of the shooting. (9 RT 1762.)

Detective Walker testified that there existed a pattern of criminal gang activity attributable to Dragon Family Junior. (9 RT 1762.) Donny Nguyen and Brian Ha pled guilty to assault with a deadly weapon and gang membership for events that occurred on June 7, 2003, when they were involved in a gang fight between Dragon Family and an affiliate of King Cobra Boys. (9 RT 1762.) Detective Walker opined that Nguyen and Ha were members of Dragon Family or Dragon Family Junior on the date of those crimes. (9 RT 1764.) He also opined that Si Tien Nguyen was a member of Dragon Family or Dragon Family Junior on August 23, 2002, when he committed offenses for which he was convicted of two counts of attempted murder with gang enhancements for street terrorism, three counts of assault with a deadly weapon, and possession of a firearm. (9 RT 1765.)

Detective Walker also reviewed the handwritten notes on sheets of paper retrieved from the Arizona apartment Aguirre used as a hideout. (9 RT 1766.) The notes included poetry and rap lyrics, including:

"Black fitted Detroit Tigers baseball cap, but the D stands for dragon. That's believed that nigga checked the tat on my back. Fool I stay strapped. .357 was 187 with 357's, a.k.'s and all that." (9 RT 1766.)

"Bailing in all black in the black Cadillac with the black tint in the back and the black strap on my lap." (9 RT 1767.)

"Black gangsta baseball cap with the hood on the front and my name on the back." (9 RT 1767.)

"Niggas can't see me for the fact that I stay with my black beanie disguise, so don't be surprised when the guys dressed in black are coming to take your life." (9 RT 1768.)

"I am on a murderous mission in a stolen expedition, hoping and wishing, praying to the lord that I catch a nigga slipping. Every mutha fucka thinks I'm tripping. Tell me a nigga I'm too old to bang, kick back and let the little niggas do the thing. I tell them fuck that shit, banging is in the blood that's pumping through my veins, it's the pain that I feel when I wake up, and the bottle." (9 RT 1768.)

Detective Walker testified that descriptions in the rap lyrics were consistent with the gang lifestyle. (9 RT 1767.) The color black and the words Dragon Family are consistent with the colors and identifiers for the Dragon Family gang. (9 RT 1768.)

Detective Walker considered all of the handwritten notes and letters in forming the opinion that Aguirre was a member of Dragon Family and Dragon Family Junior at the time of the shooting. (9 RT 1771.) Upon hearing a hypothetical similar in nature to the facts of Aguirre's case, Detective Walker opined that the victims hurt or killed in the car would benefit the Dragon Family gang because it stands as an example of a street gang hunting down a perceived enemy. (9 RT 1774.) Detective Walker explained that by committing violent crimes, it enhances the individual and the gang's reputation as a whole, which gives them more power within the gang community. Even if the victims turned out to not be rivals at all, respect is still gained by the violence. (9 RT 1774.) Detective Walker also opined that the downloaded photo of the deceased victim with the letters R.I.P. across the forehead could be seen as a trophy for the gang. (9 RT 1775.)

3. Defense

Aguirre's defense was essentially that there was a reasonable doubt as to the identity of the shooter.

Detective Tim Walker testified that he obtained Aguirre's mail while he was in custody via a mail cover, which is an instruction to copy every

single piece of paper he writes or receives. (10 RT 1831.) Detective Walker agreed that Aguirre was roughly six feet tall. (10 RT 1832.)

Joseph Szeles, a private investigator, measured 53 inches from the pavement to the top of the 1991 Acura Integra in which the victims were riding. (10 RT 1836.)

Donny Nguyen testified that he went to Alerto's on August 12, 2003, with his girlfriend and some family members around 9:00 or 9:30 p.m. (10 RT 1841.) After ten minutes, a group of individuals entered the restaurant dressed in baggy clothes like gangsters. (10 RT 1844.) Nguyen believed he had seen the group of individuals before from a rival gang, Young Locs. (10 RT 1845.) One of the individuals was "mad dogging" him. (10 RT 1848.)

Nguyen called one of his friends, Dung "Tom" Le and told him to come down, telling him, "There's Young Locs out here." (10 RT 1849.) Nguyen told Le, "just come down and jump these guys." (10 RT 1851.) Nguyen felt that the individuals were Young Locs who were mad dogging and disrespecting him. (10 RT 1855.) Nguyen testified that three people mad dogged him. (10 RT 1860.)

The parties stipulated, among other things, that Eric Pham's DNA was compared to DNA taken from a black bandana seized from the driver's side door of Quang Do's 1994 green Acura Integra, which resulted in a match. (10 RT 1879.) All other participants, including Aguirre, were eliminated as possible DNA contributors to the black bandana. (10 RT 1879-1880.)

4. Rebuttal

In rebuttal to Donny Nguyen's testimony that the victim's family members were dressed like gangsters, Anh Tran testified that he was wearing a blue flannel, shorts, and flip-flops at Alerto's on the night of the shooting. (10 RT 1881.) His brother Minh Tran was wearing jeans and a polo shirt. (10 RT 1881.) Tran only made a quick glance and looked away

from Donny Nguyen. (10 RT 1881.) Tran testified that no other individuals arrived at Alerto's with his family. (10 RT 1881.)

B. Penalty Phase

1. Prosecution Case in Aggravation

a. Prior Violent Offenses

(1) The 1998 Honolulu stabbings

On September 26, 1998, Hank Frost picked up Duke Kalima around midnight to meet up with some friends in Honolulu, Hawaii. (12 RT 2179-2180.) While driving, a white car cut them off, then quickly cut off another car ahead of them. (12 RT 2181, 2229.) After being cut off, Frost caught up to the white car and started yelling and swearing at them. (12 RT 2212, 2230.) They eventually were able to pull in front of the white car and stopped at a traffic light about a half a car length in front of the white car. (12 RT 2184, 2215-2216.) The front passenger, Aguirre, exited the white car, and a female back seat passenger exited the car as well. (12 RT 2185.) Aguirre walked quickly towards Frost's car. (12 RT 2188.) As Kalima got out of the front passenger seat, he saw Aguirre was holding his right hand behind his back. (12 RT 2188.) When Aguirre revealed his right hand, it was holding something shiny. (12 RT 2189.) Kalima got back in the car and attempted to close the door, but Aguirre reached for him inside the car and prevented Kalima from shutting it. (12 RT 2189.) Aguirre sliced Kalima's face in a downward motion with a knife. (12 RT 2190.) Kalima pushed Aguirre off with a kick, which caused him to back away from the car, but he rushed in again. (12 RT 2190.)

While Kalima was fighting off Aguirre, Frost got out of the driver's seat and came around to the passenger side to help out his friend. (12 RT 2191, 2231.) As Frost walked around to Kalima's side of the car, Aguirre approached him. (12 RT 2191, 2231.) Frost hit Aguirre twice. (12 RT 2193,

2231.) Aguirre staggered backwards, caught himself from falling down, and ran back to his car. (12 RT 2193.) Frost noticed he had blood on his hand. (12 RT 2231.) As they were getting back in the car, Frost noticed he was bleeding through his shirt. (12 RT 2233.) Frost realized he had been stabbed in the stomach, and when he lifted up his shirt, some of his intestines fell out of a wound that was about an inch-and-a-half to two inches long. (12 RT 2197, 2233.) He had two stab wounds to the abdomen. (12 RT 2237.) Frost was bleeding profusely and quickly became fatigued. (12 RT 2197.)

As Frost and Kalima left the scene and drove to a gas station, the white car followed them. (12 RT 2195.) When they arrived at a Chevron gas station, Kalima had someone call 9-1-1. (12 RT 2196.) When the white car pulled into the same gas station, Kalima yelled to Aguirre, "You stabbed my friend." (12 RT 2195.) The white car eventually left after a couple of minutes and pulled across the street to a Shell gas station. (12 RT 2199.) Kalima last saw Aguirre across the street exiting the white car and fleeing. (12 RT 2201.)

Frost was presented with a photo lineup on November 2, 1998, by Honolulu investigators and was able to identify Aguirre as the perpetrator. (12 RT 2243.) Kalima was presented with a photo lineup on January 27, 1999, and could not eliminate Aguirre's photo as the suspect, but eliminated the other five individuals in the six-pack. (12 RT 2205.)

According to Rochelle Vallero, who was riding in the car with Aguirre, her husband, and another man on the night of the stabbings, Frost's car cut them off. (12 RT 2274.) When Frost's car stopped at the light, it backed up until it was only a couple of feet from their car. (12 RT 2275.) After Frost's car had backed up, both doors opened on each side, and Frost and Kalima stepped out of the car. (12 RT 2276.) Aguirre got out of their car, so she got out as well. (12 RT 2276.) Vallero felt the men were

coming at them, so she felt trapped inside the car. (12 RT 2276.) After the altercation, they followed Frost's car to get their license plate number. (12 RT 2278.) Vallero was unaware until later that the men in the other car had been stabbed. (12 RT 2271.)

(2) The 2001 Garden Grove assault

On April 28, 2001, Sokhoan Sak was riding in a car with friends in the Trask area of Garden Grove. (13 RT 2353.) They exited the freeway, made a left, and discovered a white Acura blocking the intersection. (13 RT 2353.) The two occupants of the car were throwing gang signs towards them. (13 RT 2353.) Aguirre, the driver, had blonde hair and a light complexion. (13 RT 2354.) Neither Sak nor his friends threw any gang signs or made any gang-related statements towards the other car. (13 RT 2356.) Sak's car turned to go a different way, and the white Acura pulled a U-turn and chased after them. (13 RT 2355.) The Acura chased them for about five or six minutes until Sak's car crashed. (13 RT 2356.) When they crashed in a dead-end street, the white Acura pulled up next to them. (13 RT 2357.) Aguirre and the passenger got out and started kicking the driver and passenger doors of Sak's car. (13 RT 2357.) Sak believed he may have seen a handgun in the hands of one of the individuals kicking the car. (13 RT 2359.) Aguirre and his cohort eventually left. (13 RT 2358.) Sak later identified Aguirre as the driver of the white Acura. (13 RT 2360, 2377-2378.)

Officer John Casaccia testified that he made contact with Aguirre in a 1994 Acura in Garden Grove two days prior to the aforementioned assault. (13 RT 2373.) Officer Phuong Pham testified that about ten days prior to the assault, he came into contact with Aguirre while he was driving with two other individuals in a white Acura Vigor in Westminster. (13 RT 2390-2391.) The front passenger was Minh Tiem Nguyen and the rear passenger was Donny Nguyen. (13 RT 2392.) Officer Pham searched the vehicle and

found a metal stick and a wooden stick in the trunk. (13 RT 2392.) He seized them because he believed they could be used as weapons. (13 RT 2392.)

(3) 2001 fight at the Irvine Spectrum Center

Officer William Whalen was working for the Irvine Police Department on August 3, 2001, when he received a call of a fight in progress at the Irvine Spectrum Center around 10:30 p.m. (13 RT 2325-2326.) Aguirre was detained and asked about his gang affiliations. (13 RT 2328.) Aguirre responded he was affiliated with the Dragon Family gang. (13 RT 2329.) Police searched his vehicle and found a baseball bat, a knife under the driver's seat, a second knife under the passenger seat, and Aguirre's driver's license in the center console. (13 RT 2331.) Aguirre admitted the weapons were for protection. (13 RT 2333.) The knifes were approximately 4.5 inches long with fixed blades. (13 RT 2333.) Aguirre later told police that it was "Joe's" car and "Joe's" weapons. (13 RT 2334.) When confronted about the contradiction with his earlier statement that his weapons were for protection, Aguirre said he was not arrested when first asked, but now he was. (13 RT 2335.) Quang Do was also contacted at the scene. (13 RT 2351.)

(4) Jail incidents

On November 20, 2008, Aguirre was found in the indoor recreation room at the Theo Lacy Men's Jail in Orange County. (13 RT 2395, 2397.) Aguirre's cell door had been opened by mistake, and he went to the dayroom and quickly got in a fight with Quach Vu. (13 RT 2398.) After Officer Gregory Allen was able to get the situation under control, he asked Aguirre what happened that caused him to be in the dayroom. (13 RT 2406.) Aguirre admitted he heard the door of his cell pop open, and he knew that Quach was in the dayroom. (13 RT 2407.) They had a problem in

the past, and he wanted to settle it. (13 RT 2407.) Aguirre admitted to Officer Allen that he went to the dayroom, saw Quach there, and started punching him. (13 RT 2407.) Aguirre said his problem with Quach Vu was that Vu was being noisy, the pair discussed it, and the issue escalated into an unresolved matter about disrespect. (13 RT 2407.)

b. Other Evidence

The parties stipulated that Aguirre was on parole on the night of the murder. (13 RT 2417.)

c. Victim Impact

Minh Tran's father, Liem Cong Tran, testified that Minh wanted to become a doctor and help people. (12 RT 2160.) Liem stated he misses his son a lot. The death of his son was the worst moment of his life. (12 RT 2162, 2164.) After the murder, Liem's physical condition became worse. (12 RT 2164.) Whereas before Liem was an energetic, healthy person, he later became ill and ultimately had to sell his business. (12 RT 2164.)

Minh Tran's older brother, Anh Tran, testified that Minh was always laughing. (12 RT 2170.) Minh was playful and liked to help people. (12 RT 2170.) Minh wanted to become a doctor or dentist to help his parents financially so they would not have to work as hard. (12 RT 2175.) After Anh lost his younger brother, it became a struggle without him over the years. (12 RT 2172.) Their parents became very sad and depressed. (12 RT 2174.) Anh missed Minh's funeral because he contracted a stomach infection from his injuries after the surgery. (12 RT 2173.)

Minh's mother, Michelle Phung Ta, testified that Minh was a very happy boy and was always willing to share his toys with other children. (13 RT 2422-2423.) Minh was a very respectful boy to his parents, and was very close to Michelle in particular. (13 RT 2424.) When Michelle went to

the supermarket or was cooking, Minh was always with her or around her, and wanted to help out. (13 RT 2425.)

Michelle testified that the events after the shooting were very difficult. Two of her children were located in two different hospitals, and it was unclear whether either would survive. (13 RT 2427.) At the time, she felt like she was going to die too. (13 RT 2427.) After Minh died, the family went to the hospital where Anh was located and discovered that it would be seven days before knowing whether or not he would survive. (13 RT 2428.) In the six years since Minh's murder, the pain of loss has not become any easier. (13 RT 2429.) Michelle admitted that Minh brought her the most happiness of any of her three children. (13 RT 2431.)

2. Defense Case in Mitigation

a. Aguirre's Friends and Family

Aguirre's mother, Patricia Martinez, testified that she met Mick Evanson when she was in 10th grade and he was a senior. (14 RT 2460.) He was drafted into the military during the Vietnam war in 1970 and they married when their daughter, Jennifer, was one year old. (14 RT 2461.) When Mick returned from Vietnam, he was an empty shell of a person. (14 RT 2463.) Patricia and Mick remained married for another year, but Mick refused to talk about Vietnam and "pretty much shut down." (14 RT 2464.) Mick did not want to be around Patricia or Jennifer so she moved to her mother's house. (14 RT 2465.)

Patricia later met Cesar Aguirre and moved in with him after dating him for a few months. (14 RT 2466, 2468.) Aguirre was born 14 or 15 months after they started dating. (14 RT 2468.) Cesar was verbally and physically abusive, and would often hit and kick Patricia and call her names. (14 RT 2469, 2473.) According to Patricia, her relationship with Cesar was horrific from the time Aguirre was born until she moved out

when he was around one year old. (14 RT 2473.) Cesar was controlling and was having affairs, and finally Patricia again moved to her mother's house with the children. (14 RT 2475.)

After separating from Cesar, Patricia and the children lived on welfare for about three years and lived in low-income housing. (14 RT 2477.) Cesar would take Aguirre on the weekends and would always tell Patricia that he was taking Aguirre to Mexico and she would never see him again. (14 RT 2479.)

Patricia later met Frank Vallero and she and the children moved in with him about six months after they began dating. (14 RT 2484.) They married, and he was very supportive of the children and got along with them well. (14 RT 2484.) After Patricia and Frank separated, Frank moved to Hawaii when Aguirre was 12 years old. (14 RT 2489.) Aguirre became very close to Frank, so when he and Patricia separated, it was very tough on him. (14 RT 2508.) Aguirre wanted to move to Hawaii as well, so Patricia permitted him to do so. (14 RT 2503.)

While in Hawaii, Aguirre slept on a couch for about 12 months, before Patricia demanded that he come back home. (14 RT 2515.) Aguirre was angry with Patricia when he returned to California, and he left for Hawaii again after only a few months with his mother. (14 RT 2516.)

According to Patricia, Aguirre was angry as a toddler, and his anger continued throughout his childhood. (14 RT 2501-2502.) As a toddler, Aguirre would tense up his body and he would have explosive bursts of anger. (14 RT 2502.) Aguirre cried often about going to school from kindergarten until third grade. (14 RT 2521.) Patricia put Aguirre and his sister in a different school every two years so that they could learn to adapt to different situations. (14 RT 2507.) When Aguirre was 10 years old, around the same time Frank moved out of the house, he became more silent, more distant, and looked down more. (14 RT 2525.) Aguirre seemed

like a sad child, and the sadness continued until adulthood. (14 RT 2525.) Aguirre was a loner in school, and he never had friends over or participated in organized sports. (14 RT 2530.) Aguirre drank a lot when he came home from Hawaii at around age 23. (14 RT 2536.)

John Van Truong was friends with Aguirre in Hawaii when Truong was 16 or 17 years old. (14 RT 2546.) Truong worked with Aguirre at a gas station for about a year. Aguirre was 22 years old at the time and drank a lot, but he got along well with Truong's friends. (14 RT 2550-2551.) Sophia Yeun Ping Tam, who met Aguirre when she dated John Van Truong, testified that Aguirre was quiet and never had a girlfriend. (14 RT 2558.)

Nick Pham met Aguirre in high school when Pham moved to Hawaii in the 1990s. (14 RT 2561.) Aguirre dropped out of school in tenth grade, but they still hung out after school. Eventually, Aguirre moved in with Pham's family. (14 RT 2565.) Aguirre drank occasionally and never had a girlfriend. (14 RT 2568.)

John Vallero knew Aguirre since he was two. (14 RT 2578.) Vallero's uncle Frank married Aguirre's mother, and Vallero would play with Aguirre. (14 RT 2578.) Aguirre lived with Vallero in Hawaii after he moved out to live with Frank. (14 RT 2581.) Aguirre's mother never provided money for Aguirre's housing or food, and she never visited. (14 RT 2603.)

Aguirre's sister, Jennifer Evenson, testified that when Patricia and Frank Vallero separated, it was traumatic for the family. (15 RT 2647.) Evenson believed Caesar Aguirre is an evil person. (15 RT 2662.) Her brother was always crying when Caesar came to pick him up for the weekend, and was always upset when he returned. (14 RT 2663.) Evenson testified that Caesar was physically and emotionally abusive to her and their mother, Patricia. (15 RT 2664.) Caesar burned Evenson in the bathtub

with hot water several times and molested her at least once, and possibly on several occasions. (15 RT 2666.)

Quy Vo met Aguirre in March 2004, but knew him as "Bill." (15 RT 2672.) Aguirre lived with him and his girlfriend and their son. (15 RT 2672.) Aguirre cleaned the house and watched their son six days a week while he lived in their apartment. (15 RT 2674.) Vo testified that Aguirre was nurturing, and nothing ever happened that made Vo concerned about Aguirre. (15 RT 2676.)

Caesar Aguirre testified his relationship was great with Patricia before Aguirre was born. (15 RT 2686.) Caesar and Patricia had "quarrels and differences," but he never hit her. (15 RT 2687-2688.) Caesar said he never pushed, shoved, or slapped Patricia. (15 RT 2733.) Caesar denied telling Patricia that she would never see her son again. (15 RT 2735.)

Aguirre's uncle, Carlos Aguirre, testified that he never saw any bruises, scratches, or marks that would suggest Patricia was the victim of violence. (15 RT 2759.) Patricia and Caesar sometimes argued, but the relationship was otherwise fine. (15 RT 2766.)

Aguirre's aunt, Dorothy Castillo, testified that she never saw Patricia with marks or bruises. (15 RT 2791.) Jennifer never expressed fear or hesitation around Caesar. (15 RT 2792.) Aguirre was sometimes withdrawn when he would come to weekend family gatherings. (15 RT 2797.)

Aguirre's step-brother, Aaron Aguirre, testified that Aguirre was part of their family even though he was not always around. (15 RT 2808.) Another step-brother, Brandon Aguirre, testified that Caesar was a great father. (18 RT 3249.)

b. Forensic Mental Health and Developmental Psychologist

Cliff Akiyama, an assistant professor of forensic medicine and certified gang specialist, was hired to look at Aguirre's risk factors and

determine why a Mexican-American would join an Asian gang. (15 RT 2810, 2812, 2839.) Akiyama explained that risk factors are something that increases the probability that a person will suffer harm, whereas protective factors decrease the potential for harm. (15 RT 2848-2849.)

Akiyama explained that when there is low hope for a positive future, low motivation, and low self-esteem, it can lead to behavioral problems. (15 RT 2854.) If a child's mother sent him to live elsewhere at 10 or 11 years old and did not value education, this would create stressors. (15 RT 2850.) Akiyama stated that not having friends during childhood could cause someone to gravitate towards a gang, and opined that Aguirre's rap lyrics were similar to lyrics of rap artists. (15 RT 2858, 2866.) Akiyama explained that in Aguirre's experience living in Hawaii as a Caucasian, being in an isolated minority community increases the risk that one would join a gang, because of a need to protect oneself from other ethnicities. (15 RT 2869.)

Akiyama opined that Aguirre would have felt a sense of belonging with the Vietnamese community more so than with Hispanic or Caucasian people. (15 RT 2905.) When Aguirre sought out the Vietnamese community when he returned to California, it would be consistent with his prior experiences. (15 RT 2906.) The Vietnamese community would offer him cultural similarity, acceptance, brotherhood, fellowship, and a sense of identity. (15 RT 2907.) Akiyama admitted that an attraction to violence may also be a reason that a person might want to join a gang. (15 RT 2930.)

c. Expert Testimony on Risk Factors That Statistically Increase the Likelihood of Adverse Outcomes

Dr. Mark Cunningham, a clinical and forensic psychologist, interviewed Aguirre and 15 others, and reviewed Aguirre's school, police, and jail records. (16 RT 3021, 3041, 3044.) Dr. Cunningham also reviewed

research that would provide meaning to the background factors identified in Aguirre. (16 RT 3044.)

Dr. Cunningham explained that when there is a family history of alcohol or drug abuse, or personality disorder, it puts the individual at a greater risk for bad outcomes. (16 RT 3051.) Bad outcomes include psychological disorder, relationship problems, alcohol or drug abuse, and criminality or violence. (16 RT 3051.)

Dr. Cunningham explained that Aguirre had several individual risk factors, including hyperactivity, concentration problems, risk taking, involvement in antisocial behavior like drug abuse and truancy, and beliefs and attitudes favorable to antisocial behavior. (16 RT 3061-3062.) Aguirre's background exhibited several family risk factors, including child maltreatment, poor family management practices, low levels of parental involvement, poor family bonding, residential mobility, and parent/child separation. (16 RT 3063.) Aguirre's school risk factors included academic failure, low bonding to school, truancy, and frequent school transitions. (16 RT 3066.) Aguirre's peer-related risk factors included delinquent peers and gang membership. (16 RT 3067.) Aguirre's community and neighborhood risk factors included poverty, community disorganization, and availability of drugs and firearms. (16 RT 3069.) According to Dr. Cunningham, Aguirre had 18 out of 26 risk factors, which is "seriously cumulative." (16 RT 3071.) People who have lots of protective factors are most likely to make good choices, while people with lots of risk factors are at greater risk of making bad choices. (16 RT 3079.)

Dr. Cunningham also testified about 20 adverse developmental factors in Aguirre's background, including socialization impairment, ADHD, familial or hereditary predisposition to drug and alcohol abuse, familial predisposition to psychological disorder, generational family distress and dysfunction, chronic domestic conflict, chronic post-divorce parental

hostilities, inadequate parenting structure, parental abandonment and neglect, deficient emotional bonds between family members, inadequate supervision and guidance, amputation of father from Aguirre's childhood, amputation of Aguirre's step-brothers, inability to establish a surrogate family, corruptive peers, availability of alcohol and drugs, teenage poly-drug abuse, dropping out of school, seeking familial support among deviant peers, and marked psychosocial immaturity. (16 RT 3092-3098.)

Dr. Cunningham pointed out several examples of how these adverse developmental factors were exhibited throughout Aguirre's childhood, including his concern with being touched as a child (16 RT 3100), his anxiety in social transitions (16 RT 3104), his relationship with friends much younger than him (16 RT 3110), impaired social fluency (16 RT 3111), his avoidance of school and team sports (16 RT 3112), absence of long-term dating (16 RT 3113), no serious adult job (16 RT 3118), living in a family setting as if he were still a teenager (16 RT 3118), high conflict post-divorce interaction between his parents (16 RT 3126), alcohol and drug abuse (16 RT 3137), and the effective absence of parents in his adolescence. (16 RT 3136.) Dr. Cunningham testified that Aguirre's past behavior demonstrated psychosocial immaturity, and all of the adverse developmental factors lead to a disturbed trajectory. (16 RT 3120, 3210.)

Dr. Cunningham opined that Aguirre's history of family problems, experiences, and risk factors would increase the likelihood of making bad choices, toward drug abuse, delinquency, criminality, and violence. (16 RT 3212.) Dr. Cunningham admitted that everyone has a choice at the point of committing a crime. (16 RT 3234.) Dr. Cunningham explained that if a person had no choice, they would either be not guilty by reason of insanity, or a necessary element of the offense would be lacking. (16 RT 3234.)

ARGUMENT

I. THE TRIAL COURT PROPERLY DENIED AGUIRRE'S *BATSON*/*WHEELER* MOTION

Aguirre, who is Caucasian/Hispanic and a member of an Asian gang, argues the prosecutor violated his state and federal constitutional rights by excusing an African-American prospective juror. (AOB 146-183; see *Batson v. Kentucky* (1986) 476 U.S. 79; *People v. Wheeler* (1978) 22 Cal.3d 258.) He also claims the judgment must be reversed because the trial court failed to properly apply the correct legal standard in denying Aguirre's *Batson*/*Wheeler* motion. Aguirre requests, for the first time on appeal, that this Court undertake a comparative juror analysis. The trial court's denial of the *Batson*/*Wheeler* motion was proper, and the record reveals that the juror was excused for valid, race-neutral reasons.

A. The Applicable Law

Peremptory challenges, in both California and federal courts, occupy "an important position in our trial procedures" (*Batson v. Kentucky*, *supra*, 476 U.S. at p. 98) and are considered a "necessary part of trial by jury" (*Swain v. Alabama* (1965) 380 U.S. 202, 219, overruled in part on other grounds in *Batson v. Kentucky*, *supra*, 476 U.S. at p. 106.) By enabling each side to exclude those jurors it believes will be most partial towards the other side, such challenges are a means of eliminating extremes of partiality on both sides, thereby assuring the selection of a qualified and unbiased jury. (*Holland v. Illinois* (1990) 493 U.S. 474, 484.)

However, both the federal and state Constitutions prohibit the use of peremptory challenges to excuse prospective jurors based on unlawful discrimination stemming from membership in a cognizable group, such as race. (*People v. Duff* (2014) 58 Cal.4th 527, 544.) This is because a prosecutor's "use of peremptory challenges to remove prospective jurors

based on group bias, such as race or ethnicity, violates a defendant's right to trial by a jury drawn from a representative cross-section of the community under article I, section 16 of the California Constitution and his right to equal protection under the Fourteenth Amendment to the United States Constitution." (*People v. Blacksher* (2011) 52 Cal.4th 769, 801.)

The *Batson*/*Wheeler* three-step inquiry is well established. First, the trial court must determine whether the defendant has made a prima facie showing that the prosecutor improperly exercised a peremptory challenge. Second, if the showing is made, the burden shifts to the prosecutor to demonstrate that the challenges were exercised for a non-prohibited reason. Third, the court determines whether the defendant has proven purposeful discrimination. The ultimate burden of persuasion regarding improper motivation rests with, and never shifts from, the opponent of the strike. (*Rice v. Collins* (2006) 546 U.S. 333, 338.)

When a trial court requests reasons for a peremptory challenge and subsequently rules on the ultimate question of intentional discrimination, the issue of whether a defendant established a prima facie case is rendered moot. (*Hernandez v. New York* (1991) 500 U.S. 352, 359; *People v. Taylor* (2010) 48 Cal.4th 574, 612-613.)

Reviewing courts must keep in mind that peremptory challenges are not challenges for cause—they are peremptory. (*People v. DeHoyos* (2013) 57 Cal.4th 79, 102.) Such challenges may be made on an "apparently trivial" or "highly speculative" basis. (*People v. Duff*, *supra*, 58 Cal.4th at p. 547.) For example, a "prospective juror may be excused based upon facial expressions, gestures, hunches, and even for arbitrary or idiosyncratic reasons." (*People v. Elliott* (2012) 53 Cal.4th 535, 569 [internal quotation marks omitted]; see also *People v. Chism* (2014) 58 Cal.4th 1266, 1318 ["In the trial court . . . advocates and trial judges watch and listen as the answer is delivered. Myriad subtle nuances may shape it, including attitude,

attention, interest, body language, facial expression and eye contact."].) In addition, a *Batson*/*Wheele*r claim may be denied where the challenging party offers one valid, race-neutral ground for the challenge, even if other proffered assertions for exercising the challenge are relatively weak. (*People v. McKinzie* (2012) 54 Cal.4th 1302, 1322, overruled on other grounds in *People v. Scott* (2015) 61 Cal.4th 363, 391.)

"All that matters is that the . . . reason for exercising the peremptory challenge is sincere and legitimate, legitimate in the sense of being nondiscriminatory." (*People v. Reynoso* (2003) 31 Cal.4th 903, 924.) "[A] 'legitimate reason' is not a reason that makes sense, but a reason that does not deny equal protection." (*Ibid*. [internal quotation marks and citations omitted].)

B. The Relevant Trial Court Proceedings

Throughout voir dire, both the prosecutor and defense counsel exercised several peremptory challenges. While the record is unclear regarding the precise racial makeup of the jury venire, it appears that there was only one African-American in the box at the time the prosecutor exercised the peremptory strike at issue. (3 RT 549.) The following juror is the subject of the *Batson*/*Wheeler* challenge.

1. Prospective Juror No. 179

Prospective Juror No. 179 ("juror no. 179") was a 45-year-old African-American man. (5 JQ 1479.) He was married with three children, a college graduate, and employed as an engineer with Boeing. (5 JQ 1479-1480; 3 RT 507.)

In his juror questionnaire, in response to the question whether any of his friends or family members had drug problems, juror no. 179 responded that his "cousin has been in and out of prison due to his drug habit relating to crack and marijuana use and gang activity." (5 JQ 1481.) In response to

the question whether it should be a crime to be a member of a street gang, he responded, "Would have to agree. I've always been told not to join gangs. I grew up seeing my friends and family hurt by gang activity." (5 JQ 1485.) In response to the question whether he had heard of Dragon Family/Dragon Family Junior or Young Locs gang, he responded, "I heard it is an Asian gang and I heard it from my friends in Garden Grove." (5 JQ 1485.) In response to a question regarding his feelings about a defendant who is a member of a criminal street gang, he responded, "I feel sorry for the defendant. He probably has had a rough life and was look[ing] to the gang to provide the support in his life." (5 JQ 1485.) When asked whether any of his close friends or relatives ever associated with a criminal street gang, he responded, "I grew up in Harbor City, California. Gangs were an everyday visual. Mexican/Blacks(Bloods/Crips)/White. Drug activity and shooting occurred all the time. A lot of my friends were in the gang." (5 JQ 1486.)

Juror no. 179 also stated in his juror questionnaire that he knew a close friend or relative who was a victim of a gang shooting. (5 JQ 1488.) Juror no. 179 stated he has visited jail or prison to visit his cousin and step-brother. (5 JQ 1489.) And although he believed in the death penalty in certain instances, he believed it is imposed too racially disproportionately. (5 JQ 1492-1493.)

During voir dire, and in response to the trial court's questions, juror no. 179 explained that his knowledge of Dragon Family was limited to having heard the name. (3 RT 507-508.) He explained that he knew of several gang shootings growing up, and his best friend was shot in a drive-by shooting. (3 RT 508.)

In response to defense counsel's limited questioning, juror no. 179 stated he had a good attention to detail and would have no problem being fair. (3 RT 519-520.)

In response to the prosecutor's questions, juror no. 179 acknowledged that he has known gang members, he has been friends with some of them, he has seen gang violence, and that is a part of who he is. (3 RT 540-541.) Juror no. 179 stated he had heard of Dragon Family when talking with people at work. (3 RT 542.) He could not recall the specifics of the conversation at work, but he recalled the acronym "V.F.N." (3 RT 542.)

The prosecutor exercised his third peremptory challenge against juror no. 179 of those currently within the box, and the fifth peremptory challenge in total. (3 RT 499, 549.)

2. The *Batson/Wheeler* Motion

After the prosecutor exercised a peremptory strike against juror no. 179, defense counsel objected:

> The record should reflect juror number 179 is an African-American, the only African-American in the box. I listened very carefully to his answers, all very neutral, not favoring one side or the other. So I can't think of a reason why counsel would have excused him for anything he said, neither extremely for the death penalty or extremely against it. So therefore we are going to make a *Wheeler*/*Whitherspoon*/*Witt* objection, ask that he is a protected class, and ask the prosecutor to justify the challenge.

(3 RT 549-550.)

The trial court simply responded, "Ms. Balleste?" (3 RT 550.)

The prosecutor then explained:

> Thank you, your honor. Juror 179 is an engineer, very precise type area of work. He is friends with gang members, has been friends with gang members in the past, had heard of D.F.J., but didn't know if it was in connection to any crime. Although he answers certain questions okay, he had some level of hesitation in giving the answer. So that's my reason for excusing him.

(3 RT 550.)

The trial court responded, "They appear to be race neutral." (3 RT 550.)

Defense counsel disagreed that juror no. 179 gave any hesitation, and argued that he answered questions very forthrightly. (3 RT 550.) The trial court stated, "Well, he had heard of Dragon Family…" (3 RT 550.) Defense counsel responded that it was in an old conversation without any details, that he could not really remember. (3 RT 550.) The prosecutor stated, "That's my point." (3 RT 550.)

The court denied the motion, stating, "The question is whether or not there are any race neutral grounds, and there appear to be race neutral grounds, so I will deny it." (3 RT 551.)

C. Aguirre Is Not Entitled to a Less Deferential Standard of Review

Aguirre claims the trial court denied his *Batson*/*Wheeler* motion without making a sincere and reasoned effort to evaluate the nondiscriminatory justifications offered. (AOB 148-149.) Essentially, Aguirre argues the trial court failed to make a step-three *Batson* determination, which requires the court to undertake an evaluation of the prosecutor's credibility. Further, Aguirre claims the trial court labored under the misimpression that it was required to deny the motion if the prosecutor cited race-neutral reasons. (AOB 150-151.) Accordingly, Aguirre claims no deference should be given and *de novo* review is required. (AOB 151.) Contrary to Aguirre's claims, the trial court made a sincere and reasoned effort to evaluate the nondiscriminatory justifications offered, which would entitle its conclusions to deference on appeal. (*People v. Lenix* (2008) 44 Cal.4th 602, 614.)

Once a prosecutor provides race-neutral reasons, the trial court must satisfy itself that the explanation is genuine. (*People v. Hall* (1983) 35

Cal.3d 161, 167.) "In [this] process, the trial court must determine not only that a valid reason existed but also that the reason actually prompted the prosecutor's exercise of the particular peremptory challenge." (*People v. Fuentes* (1991) 54 Cal.3d 707, 720.) In undertaking this evaluation, the trial court need not make affirmative inquiries, but must find the race-neutral explanations to be credible. (*People v. Hamilton* (2009) 45 Cal.4th 863, 907.) "[T]he trial court is not required to make specific or detailed comments for the record to justify every instance in which a prosecutor's race-neutral reason for exercising a peremptory challenge is being accepted by the court as genuine." (*People v. Reynoso*, *supra*, 31 Cal.4th at p. 919.) "When a trial court has made a sincere and reasoned effort to evaluate each of the stated reasons for a challenge to a particular juror, [this Court] accord[s] great deference to its ruling, reviewing it under the substantial evidence standard. [Citations.]" (*People v. Jurado* (2006) 38 Cal.4th 72, 104–105; accord, *People v. Lenix*, *supra*, 44 Cal.4th at p. 627.) Deference does not, of course, "imply abandonment or abdication of judicial review." (*Miller–El v. Cockrell* (2003) 537 U.S. 322, 340.)

Here, the trial court made a third-step finding that the prosecutor's race-neutral reasons were credible, and that Aguirre had failed to prove purposeful discrimination. Notably, the court credited the prosecutor's reasons for excluding juror no. 179, finding the prosecutor's explanations—rather than race—were the motivation for the prosecutor's peremptory challenge. (3 RT 550-551.) For instance, the court agreed with the prosecutor's explanation that juror no. 179 had heard of the Dragon Family gang. (3 RT 550.)

But even assuming, *arguendo*, the trial court made no findings at all, it does not necessarily require less deference to the court's denial of Aguirre's motion. When "the trial court has not conducted any inquiry and has not made any particularized findings, but the prosecutor's explanations

are both plausible and supported by the record, [this Court] has not found reversible error in the denial of the defense motion." (*People v. Reynoso*, *supra*, 31 Cal.4th at p. 931; see *People v. Ward* (2005) 36 Cal.4th 186, 205 [no detailed findings by trial court necessary where stated reasons not contradicted by record or inherently implausible].) Conversely, when the prosecutor's stated reasons are either unsupported by the record or inherently implausible, or both, more is required of the trial court than a finding that the prosecutor's reasons appear sufficient. (*People v. Silva* (2001) 25 Cal.4th 345, 386.)

Aguirre cites *Green v. LaMarque* (9th Cir. 2008) 532 F.3d 1028, in arguing that de novo review is necessary (AOB 151), but that case is neither controlling nor relevant. In *Green v. LaMarque*, that Ninth Circuit noted the reviewing court engages in a de novo review only when the lower court fails to determine whether the prosecutor engaged in purposeful discrimination. (*Id.* at pp. 1030–1031.) But as explained above, the trial court did not fail in its duty. And as will be explained below, the prosecutor's explanations are indeed both plausible *and* supported by the record. Furthermore, as this Court has previously recognized, a trial court is not required to make explicit and detailed findings for the record in every instance in which the court credits a prosecutor's demeanor-based reasons for exercising a peremptory challenge. (*People v. Williams* (2013) 56 Cal.4th 630, 653, fn. 21, citing *People v. Silva*, *supra*, 25 Cal.4th at pp. 385-386, and *People v. Reynoso*, *supra*, 31 Cal.4th at p. 929.)

Finally, Aguirre claims the trial court was laboring under the misimpression that it was required to deny the motion if the prosecutor simply "cited" race-neutral reasons, which would have erroneously ended the *Batson* inquiry at the second step. (AOB 151.) Aguirre's contention is not supported by the record. The court's own language demonstrates that it understood it had an obligation to assess the credibility of the prosecutor's

explanations. The court stated, "the question is whether or not there are any race neutral grounds, and there appear to be race neutral grounds." (3 RT 550-551.) The only reasonable interpretation of the court's language is that it credited the prosecutor's race-neutral justifications for striking juror no. 179. Had the court stated: "the question is whether or not the prosecutor *offered* race neutral explanations, which she did," Aguirre's contention might arguably be supported by the record. But considering the record reasonably reflects that the trial court understood its obligation to assess the credibility of the prosecutor's proffered race-neutral explanations, and it did so, Aguirre's argument should be rejected. The trial court's determination in this case is, therefore, entitled to the typical deferential standard of review.

D. The Trial Court Properly Denied the *Batson*/*Wheeler* Challenge as to Prospective Juror No. 179 at Step Three of the Inquiry

Aguirre claims that a comparison of the excluded juror (juror No. 179) and the seated jurors shows that the prosecutor's stated, race-neutral reasons were pretextual. (AOB 152-171.) But the prosecutor's explanations were inherently race-neutral and the trial court's credibility determination was adequately supported by the record. Furthermore, Aguirre's proffered comparative juror analyses are not very probative in this case, and fail to demonstrate impermissible racial bias.

1. Substantial Evidence Supports the Trial Court's Determination That Aguirre Failed to Carry His Burden of Establishing Purposeful Discrimination Under *Batson*/*Wheeler*

Aguirre does not appear to specifically address whether the trial court's denial of his *Batson* motion was supported by the record. Instead, Aguirre focuses exclusively on a comparative juror analysis to demonstrate that the prosecutor's race-neutral reasons were pretextual. (AOB 152-171.)

In any event, the trial court's denial of Aguirre's *Batson* motion is supported by substantial evidence.

The *Batson* three-step inquiry begins with the determination whether the defendant has made a prima facie showing that the prosecutor exercised a peremptory challenge based on race. (*People v. Lenix*, *supra*, 44 Cal.4th at p. 612.) Here, the trial court requested the prosecutor's reasons for the peremptory challenge and ruled on whether they were pretextual. (3 RT 550-551.) Thus, the question of whether Aguirre established a prima facie case for racial bias is moot. (*Id.* at p. 613, fn. 8, citing *Hernandez v. New York*, *supra*, 500 U.S. at p. 359.)

Regarding the second step of the *Batson* inquiry, Aguirre does not appear to contest the fact that the prosecutor's proffered reasons were inherently race-neutral, only that they were pretextual. (AOB 152-171.) In any event, none of the four justifications the prosecutor offered to the court run afoul of *Batson*. To meet the second step's requirement that the explanation be nondiscriminatory, the opponent of the motion must provide "a 'clear and reasonably specific' explanation of his 'legitimate reasons' for exercising the challenges." (*Batson*, *supra*, 476 U.S. at p. 98, fn. 20.) When evaluating a trial court's finding that a party has offered a neutral basis for the peremptory strike, the reviewing court keeps in mind that "'[u]nless a discriminatory intent is inherent in the prosecutor's explanation,' the reasons will be deemed neutral." (*People v. Gutierrez* (2017) 2 Cal.5th 1150, 1158.) Here, each of the prosecutor's reasons: (1) the juror was an engineer; (2) he was friends with gang members; (3) he had heard of the Dragon Family Junior gang; and (4) he hesitated in responding about his knowledge of Dragon Family, were clear, reasonably specific, and nondiscriminatory reasons for striking juror no. 179. There was nothing inherently discriminatory about any of the prosecutor's four explanations, and Aguirre has offered no arguments to the contrary.

As to the third-step of the *Batson* inquiry, the trial court's credibility finding is supported by the record. Credibility may be gauged by examining, among other things, the prosecutor's demeanor, how reasonable or improbable the explanations are, and whether the proffered rationale has some basis in accepted trial strategy. (*People v. Gutierrez*, *supra*, 2 Cal.5th at p. 1168.) Here, the trial court did not provide an explicit assessment of the prosecutor's demeanor, but the court appeared to credit the legitimacy of her proffered reasons when it responded to defense counsel, "Well, he had heard of Dragon Family…" and "the [reasons] appear to be race neutral." (3 RT 550.)

Furthermore, the prosecutor's explanations are supported by the record. Juror no. 179 stated he was an engineer. (5 JQ 1479-1480; 3 RT 507.) He admitted both in his written questionnaire responses and in voir dire that he had several friends who were gang members. (3 RT 508; 5 JQ 1486.) He stated in his written questionnaire that he had heard about Dragon Family from his friends in Garden Grove, and told the prosecutor that he had heard of Dragon Family talking with coworkers. (5 JQ 1485; 3 RT 542.) Although defense counsel disputed the prosecutor's explanation that juror no. 179 hesitated when discussing his knowledge of Dragon Family, the trial court did not discredit that explanation, and implicitly accepted the prosecutor's explanations. "When the trial court has inquired into the basis for an excusal, and a nondiscriminatory explanation has been provided, [a reviewing court] . . . assume[s] the court understands, and carries out, its duty to subject the proffered reasons to sincere and reasoned analysis, taking into account all the factors that bear on their credibility." (*People v. Hung Thanh Mai* (2013) 57 Cal.4th 986, 1049, fn. 26.) Likewise, "'[w]hen the prosecutor's stated reasons are both inherently plausible and supported by the record, the trial court need not question the prosecutor or

make detailed findings.'" (*Ibid.*, quoting *People v. Silva*, *supra*, 25 Cal.4th at p. 386.)

Finally, as a matter of accepted trial strategy, it is unlikely that any prosecutor who was prosecuting a defendant for a gang-related murder would choose to keep a juror who had admitted to being friends with several gang members. It would be imminently reasonable for a prosecutor to conclude that such a juror could be sympathetic towards a gang member who was facing the possibility of a first degree murder conviction and capital punishment. Indeed, in this case, juror no. 179 *admitted* that he would feel sorry for a defendant who was a member of a criminal street gang. (5 JQ 1485.) Thus, the prosecutor's reasons were substantially supported by the record, her proffered explanations were based on sound trial strategy, and Aguirre has not rebutted the presumption that the prosecutor properly exercised her peremptory challenge. (*People v. Mills* (2010) 48 Cal.4th 158, 184.)

2. Aguirre's Comparative Analysis Does Not Demonstrate Discriminatory Intent

Aguirre argues, for the first time on appeal, that a comparison of the excluded juror and the seated jurors demonstrates that the prosecutor's proffered reasons were a pretext for purposeful discrimination. (AOB 152-171.) Aguirre's belated comparative analysis fails to demonstrate impermissible racial bias.

A comparative analysis involves a "side-by-side comparison of [] black venire panelists who were struck and [non-black] panelists allowed to serve. If a prosecutor's proffered reason for striking a black panelist applies just as well to an otherwise-similar non-black who is permitted to serve, that is evidence tending to prove purposeful discrimination to be considered at *Batson*'s third step." (*Miller-El v. Dretke* (2005) 545 U.S. 231, 241.)

Comparative analysis "is a form of circumstantial evidence courts can use to determine the legitimacy of a party's explanation for exercising a peremptory challenge, although such evidence may not alone be determinative of that question, can be misleading, especially when not raised at trial, and has inherent limitations given the myriad subtle nuances of a person's demeanor that might communicate meaning to an attorney considering a challenge." (*People v. Mills*, *supra*, 48 Cal.4th at p. 177 [internal quotation marks and citations omitted]; *People v. Lenix*, *supra*, 44 Cal.4th at pp. 620-627; see also *People v. Williams*, *supra*, 56 Cal.4th at p. 662 [noting inherent limitations of comparative juror analysis on appellate review in contrast to trial judges who observe and listen to answers given]; *People v. Riccardi* (2012) 54 Cal.4th 758, 788 [comparative analysis on cold appellate record has inherent limitations].) "Two panelists might give a similar answer on a given point. Yet the risk posed by one panelist might be offset by other answers, behavior, attitudes or experiences that make one juror, on balance, more or less desirable. These realities, and the complexity of human nature, make a formulaic comparison of isolated responses an exceptionally poor medium to overturn a trial court's factual finding." (*People v. Lenix*, *supra*, 44 Cal.4th at p. 624.)

Despite problems inherent in conducting comparative analysis for the first time on appeal—including the difficulties of comparing what might be superficial similarities among prospective jurors and trying to determine why the prosecutor challenged one prospective juror and not another when no explanation was asked for or provided at trial—both the United States Supreme Court and this Court have done so on request. (See *Snyder v. Louisiana* (2008) 552 U.S. 472, 483; *Miller-El v. Dretke*, *supra*, 545 U.S. 231; *People v. Jones* (2011) 51 Cal.4th 346, 364-369; *People v. Lenix*, *supra*, 44 Cal.4th at p. 622, 628-631.)

Although the United States Supreme Court engaged in comparative analysis for the first time on appeal in *Snyder*, it cautioned "that a retrospective comparison of jurors based on a cold appellate record may be very misleading when alleged similarities were not raised at trial. In that situation, an appellate court must be mindful that an exploration of the alleged similarities at the time of trial might have shown that the jurors in question were not really comparable." (*Snyder v. Louisiana*, *supra*, 552 U.S. at p. 483.) The court engaged in such analysis in that case only because there, "the shared characteristic, *i.e.,* concern about serving on the jury due to conflicting obligations, was thoroughly explored by the trial court when the relevant jurors asked to be excused for cause." (*Ibid*.) In *Jones*, this Court also noted that, although the United States Supreme Court relied on comparative juror analysis as part of its reasons for not deferring to the lower courts in both *Snyder* and *Miller-El*, in neither case was that analysis the sole reason for its conclusion that the challenges in question were improper. The comparative analysis in both cases, this Court continued, "merely supplemented other strong evidence that the challenges were improper." (*People v. Jones, supra*, 51 Cal.4th at p. 364, fn. 2, citing *Snyder v. Louisiana*, *supra*, 552 U.S. at pp. 476, 482-483; *Miller-El v. Dretke*, *supra*, 545 U.S. at pp. 240-241, 253-266.) Here, in contrast to *Snyder* and *Miller-El*, as already explained above, there was no "strong" evidence that the challenges in question were improper.

As previously set forth, the prosecutor excused juror no. 179 for several reasons: (1) he was an engineer; (2) he demonstrated some level of hesitation in answering questions about his knowledge about Dragon Family Junior; (3) he had heard of Dragon Family Junior; and (4) he was friends with gang members. (3 RT 550.) Respondent will address Aguirre's comparative analysis as to each of the four reasons.

a. Occupation: Engineer

First, Aguirre argues that the prosecutor's stated reason for dismissing juror no. 179—that he was an engineer—was pretextual. This was shown, according to Aguirre, because the jury panel contained three other non-black engineers who ended up as seated jurors. (AOB 154.) However, a review of the seated jurors shows that the prosecutor's concerns about juror no. 179's profession was genuine and not pretextual.

Aguirre argues that Juror Nos. 274, 182, and 196 were either engineers (juror nos. 274 and 196) or studying to be an engineer (juror no. 182). (AOB 154.) But juror no. 274 had other qualities that the prosecutor would have favored. For example, in his written questionnaire, when asked whether he had read, viewed or listened to any accounts or reports of this case, he indicated that he had read about the case in the OC Register and had already formed the opinion that Aguirre was "most likely guilty, [and] would need strong proof of innocence." (9 JQ 2428.) Furthermore, juror no. 274 had served on a jury in a murder case that reached a verdict only two years prior. (9 JQ 2433.) Thus, despite his occupation as an engineer, juror no. 274's indication that he had already read about the case and assumed that Aguirre was probably guilty, combined with his having recently sat on a jury that reached a verdict in a murder case, made him an extremely favorable prosecution juror.

As for juror no. 182, he indicated in his written questionnaire that—unlike juror no. 179—he would be unbiased towards a defendant who is a member of a criminal street gang. (9 JQ 2474.) Although he also indicated in his questionnaire that the death penalty was imposed too often and is only necessary in extreme cases involving mass murders, he later indicated to the trial court that he changed his mind after listening to others during voir dire and indicated he would be able to vote for the death penalty in cases that did not involve mass murders. (4 RT 612.) Similarly, juror no.

196 indicated in his written questionnaire, in response to the prompt about his feelings towards a defendant who is a member of a criminal street gang, that he would "need to hear details of [the] crime to determine innocence or guilt." (9 JQ 2606.) Juror no. 196 also indicated that he had "no idea how often the death penalty is imposed. It's dependent on the nature of the crime." (9 JQ 2614.) Thus, although they were engineers, there were no other indications in their written statements or statements in court that would suggest they would be detrimental jurors for the prosecution.

In contrast, juror no. 179 presented a much different appearance as a potential juror in comparison with jurors no. 274, 182, and 196, regardless of his race. Primarily, juror no. 179 indicated that he was sympathetic towards gang members. In his written questionnaire, juror no. 179 indicated that he would "feel sorry" for a defendant who was a member of a criminal street gang, and noted that he "probably has had a rough life and was look[ing] to the gang to provide the support in his life." (5 JQ 1485.) Further, juror no. 179 indicated that he believed the death penalty was imposed "too racially disproportionately." (5 JQ 1493.) He also indicated that he had heard of the Dragon Family Junior gang from his friends in Garden Grove (5 JQ 1485), a lot of his friends were in a gang (5 JQ 1486), and his cousin was in and out of prison due to crack use and gang activity (5 JQ 1481). Furthermore, all three of the other engineers on the panel were questioned *after* Aguirre had already raised his *Batson*/*Wheeler* motion against the prosecutor. (3 RT 549; 4 RT 561-602, 611-648, 676-708.) It cannot be reasonably concluded that the prosecutor intended to strike every juror that happened to be an engineer or was studying to be an engineer based on that specific trait alone. However, as a race-neutral factor, it was a plausible reason, among several others, to exercise a peremptory challenge against juror no. 179. (See *People v. DeHoyos*, *supra*, 57 Cal.4th at p. 110

[A prospective juror's educational background, interest and experience in the field of psychology was a race-neutral reason justifying his excusal].)

b. Hesitation When Responding to the Gang Question

Second, Aguirre argues that the prosecutor's stated reason for dismissing juror no. 179—that he exhibited hesitation in answering how he had heard about Dragon Family Junior—was a pretext. (AOB 154-155.) Aguirre argues that another juror who was ultimately selected, juror no. 160, also hesitated on answers, which was reflected by dashes in the reporter's transcript. (4 RT 623.) Aguirre, however, places far too much reliance on the dashes indicated by the court reporter in the transcript. In any event, juror no. 160 was a stronger juror for the prosecution.

Juror no. 160 did indeed speak in a manner in which dashes were indicated in the transcript: "No. It was just—he was—they were friends … it's just—that's a heavy decision." (4 RT 623.) But those dashes do not necessarily indicate hesitation. They could have simply indicated stuttering or a quick change in the direction of the juror's thought. On the other hand, if juror no. 179 paused for several seconds before attempting to answer the prosecutor's question about his familiarity with Dragon Family Junior, that pause could have demonstrated hesitation without a corresponding notation in the transcript. Ultimately, there is very little in the record, by itself, to indicate definitively whether juror no. 179 hesitated in responding to the prosecutor's questions. As this Court has previously stated, it is difficult to evaluate the idiosyncrasies of juror responses from trial transcripts:

> [C]omparative juror analysis on a cold appellate record has inherent limitations. In addition to the difficulty of assessing tone, expression and gesture from the written transcript of voir dire, we attempt to keep in mind the fluid character of the jury selection process and the complexity of the balance involved. Two panelists might give a similar answer on a given point. Yet the risk posed by one panelist might be offset by other answers,

> behavior, attitudes or experiences that make one juror, on balance, more or less desirable. These realities, and the complexity of human nature, make a formulaic comparison of isolated responses an exceptionally poor medium to overturn a trial court's factual finding.

(*People v. DeHoyos*, *supra*, 57 Cal.4th at p. 103, internal quotation marks & citations omitted.) And although Aguirre argues that reasons unsupported by the record and not explicitly endorsed by the trial court "cannot support an otherwise suspected strike" (AOB 155), nothing in *Batson v. Kentucky*, *supra*, 476 U.S. 79 or *Snyder v. Louisiana*, *supra*, 552 U.S. 472, requires that a demeanor-based explanation must be rejected if the judge either did not observe, or does not recall, the prospective juror's demeanor. (*Thaler v. Haynes* (2010) 559 U.S. 43, 47-49 (per curiam); see also *People v. Williams*, *supra*, 56 Cal.4th at pp. 657-658 [reviewing court does not discount trial court's ability to assess prosecutor's credibility even absent trial court's recollection of the prospective juror's demeanor].)

Nonetheless, juror no. 160, even assuming she did hesitate in her responses as well, had other favorable qualities that would have made a prosecutorial peremptory challenge less likely. In her written questionnaire in response to the question whether it should be a crime to be a member of a street gang, juror no. 160 indicated, "I have never seen a street gang take a positive roll [sic] in our society so it might not be a bad idea." (10 JQ 2540.) In response to her feelings about a defendant who is a member of a criminal street gang, she stated, "He/she is probably not to [sic] bright." (10 JQ 2540.) She also indicated that she believes our criminal justice system is "too lenient." (10 JQ 2545.) Contrasted with the previously-noted statements made by juror no. 179 that were unfavorable for the prosecution, juror no. 160, despite her son's friendship with a gang member, made several explicit indications that she would be a quite favorable prosecution juror.

c. Knowledge of Dragon Family Junior Gang

Third, Aguirre argues that the prosecutor's stated reason for dismissing juror no. 179—that he had heard about Dragon Family Junior—was also pretextual. (AOB 155-160.) Aguirre argues that three other jurors who were selected for the jury, Juror Nos. 225, 200, and 274, had also heard of Dragon Family Junior. (AOB 158-159.) Aguirre fails to show that the prosecutor's reason was pretextual.

As an initial matter, it is noteworthy that some discrepancies existed between juror no. 179's written and stated explanation of his knowledge of Dragon Family Junior. Juror no. 179 indicated in his written questionnaire that he had heard of Dragon Family/Dragon Family Junior or Young Locs gang before, and stated, "I heard it is an Asian gang and I heard it from my friends in Garden Grove." (5 JQ 1485.) During voir dire, however, juror no. 179 told the prosecutor that he had heard about it from people at work. (3 RT 542.) Although friends and coworkers in Garden Grove are not necessarily mutually exclusive, juror no. 179's responses were slightly different between the written questionnaire and voir dire. And although Aguirre points out that juror no. 179 stated "VFN" during voir dire, which he argues was a reference to a separate Vietnamese gang, "VFL," he merely speculates about the reason for juror no. 179 stating that acronym. (AOB 157.) Indeed, if "VFN" actually *was* a reference to another Vietnamese gang as Aguirre hypothesizes, it tends to betray a deeper knowledge of the Vietnamese gang culture in Orange County than juror no. 179 may have been acknowledging to the prosecutor.

In any event, only one of the three jurors that Aguirre provides in his comparative analysis indicated that he had ever heard of the Dragon Family Junior gang. But the explanation for that juror's knowledge of the gang was straight-forward. Juror no. 274 indicated that he had heard of the Dragon Family Junior gang, but only because he had read about the gang and the

murder that very day in a copy of the OC Register that he found on a bench outside of the courtroom. (9 JQ 2429-2430.) And in any event, as previously mentioned *ante*, juror no. 274 was an extremely favorable juror for the prosecution after he noted in his written questionnaire that he had read about Aguirre's case (probably from the same article) and formed the opinion that he was "most likely guilty, [and] would need strong proof of innocence." (9 JQ 2428.)

Juror no. 200, on the other hand, indicated specifically that she had *not* heard of Dragon Family Junior. (10 JQ 2562.) Furthermore, juror no. 200 was, generally speaking, a favorable juror for the prosecution. She noted in response to the question about her feelings towards a defendant who is a member of a criminal street gang: "Regardless of association, each individual is accountable for his or her own actions. Associating with companions who choose to engage in criminal acts, however, certainly puts one at risk." (10 JQ 2562.) Juror no. 200 noted she had a good experience with the prosecutor when she attended the Castellanos murder trial that involved a victim who was a close friend of her sons. (10 JQ 2564-2565.) She also believed that life imprisonment without the possibility of parole may be a punishment worse than death for some defendants, but the facts and circumstances should prevail in every case. (10 JQ 2570.) Thus, even though she had indicated that Aguirre's case sounded "vaguely familiar in general, but I cannot recall anything specific," (10 JQ 2560), her answers were unlike those of juror no. 179, who indicated that he heard from either friends or co-workers at Boeing about the gang, but that he could not remember any details.

Similarly, juror no. 255 also indicated that he had heard about Aguirre's case on television, but he explicitly stated that he had *not* heard of Dragon Family Junior gang. (10 JQ 2629.) And like juror no. 200, juror no. 255 generally demonstrated that he was a favorable juror for the

prosecution. He noted that he thought the criminal justice system was not too lenient or too harsh, but "about right." (10 JQ 2634.) He had also served on a jury for the crime of evading arrest and driving with a suspended license, and indicated that a verdict was reached. (10 JQ 2632.) Combined with the fact that juror no. 255 had heard about the victim's murder on the television, which would tend to slightly benefit the prosecution, juror no. 255, unlike juror no. 179, made no indication that he would have been an unfavorable juror for the prosecution.

d. Friends with Gang Members

Fourth, and finally, Aguirre argues that the prosecutor's stated reason for dismissing juror no. 179—that he was friends with gang members—was also pretextual. (AOB 160-171.) Aguirre argues that one other juror who was selected for the jury, Juror No. 160, also knew a street gang member. (AOB 160-171.) Aguirre fails to show that the prosecutor's reason was pretextual.

Juror no. 179 indicated in his written questionnaire that his "cousin has been in and out of prison due to his drug habit relating to crack and marijuana use and gang activity." (5 JQ 1481.) He also indicated that he "grew up in Harbor City, California. Gangs were an everyday visual. Mexican/Blacks (Bloods/Crips)/Whites. Drug activity and shootings occurred all the time. A lot of my friends were in the gang." (5 JQ 1481.) Juror no. 179 indicated that he would agree that gang membership should be criminalized, noting, "I've always been told not to join gangs. I grew up seeing my friends and family hurt by gang activity." (5 JQ 1485.) During voir dire, juror no. 179 acknowledged that he has known people who are gang members, was friends with some of them, that he has seen gang violence, and that was part of who he was. (3 RT 540-541.)

Juror no. 160 indicated in her written questionnaire that she was a restaurant manager with three sons. (10 JQ 2534-2535.) In response to the

question whether she or any of her close friends or relatives ever associated with a criminal street gang, juror no. 160 indicated that her oldest son "is friends with a member of PLAC." (10 JQ 2541.) During voir dire, juror no. 160 explained that her oldest son *was* friends with a gang member in Placentia, but that she would not even be able to identify the friend. (4 RT 622-623.)

Juror no. 160's gang member experience is not even remotely close in nature to juror no. 179's experience. Juror no. 160 indicated that it was *her son* that used to be friends with a gang member, and she indicated that she would not even be able to identify that friend. (4 RT 622.) In contrast, juror no. 179 indicated that he was personally friends with several gang members, his cousin was a gang member, and he acknowledged that had seen gang violence and it was a part of who he was. (3 RT 540-541.) Moreover, juror no. 179 indicated that if he knew the defendant was a member of a gang, he would "feel sorry for the defendant. He probably has had a rough life and was look[ing] to the gang to provide the support in his life." (5 JQ 1485.)

As noted previously, juror no. 160 had several qualities that would have made her a favorable juror for the prosecution. In her written questionnaire in response to the question whether it should be a crime to be a member of a street gang, juror no. 160 indicated, "I have never seen a street gang take a positive roll in our society so it might not be a bad idea." (10 JQ 2540.) In response to her feelings about a defendant who is a member of a criminal street gang, she stated "He/she is probably not to [sic] bright." (10 JQ 2540.) She also indicated that she believes our criminal justice system is "too lenient." (10 JQ 2545.) Contrasted with the totality of juror no. 179's statements, juror no. 160 appeared to be a much more favorable juror for the prosecution.

For all these reasons, Aguirre's comparative analysis as to juror no. 179 is not very probative, and the prosecutor was justified in excusing him.

3. Aguirre Presents No Evidence to Demonstrate that the Prosecutor Used Juror No. 179's Childhood Residence as a Proxy for Racial Discrimination

Aguirre argues that the prosecutor used juror no. 179's childhood residence as a proxy for impermissible racial bias. (AOB 171-181.) Aguirre claims the juror no. 179's childhood residence was an area heavily populated by poor black people and gangs, so the prosecutor necessarily used this geographical stereotype as a substitute for impermissible racial bias. (AOB 181.) Specifically, Aguirre claims the prosecutor "assumed" that juror no. 179 was born in a "poor black gang area" and would therefore be hostile to the prosecution. (AOB 178.) Aguirre, however, provides no support in the record for any of his conclusions. Indeed, juror no. 179 described his childhood experience in multi-racial terms: "I grew up in Harbor City, California. Gangs were an everyday visual. Mexican/Blacks (Bloods/Crips)/Whites. Drug activity and shootings occurred all the time. A lot of my friends were in the gang." (5 JQ 1486.) Moreover, although Aguirre asserts the prosecutor "invoked" residence (AOB 179-180), the prosecutor never once mentioned residence or the nature of juror no. 179's childhood community; instead, she focused her inquiry on the nature of his relationships with gang members. (3 RT 540-541.)

In any event, it is unclear upon what basis in the record Aguirre postulates that juror no. 179 was necessarily raised in an area populated by "poor black people," or why juror no. 179 must have *only* been friends with African-American gang members in his youth. Aguirre provides no citation from the record that supports his theory. Nor does he provide any evidence the prosecutor labored under the same racial assumptions, much less exercised a peremptory challenge based on those racially-motivated

reasons. Instead, as mentioned previously, juror no. 179 was an objectively questionable juror for the prosecution based on the fact that he was *personally* friends with gang members (5 JQ 1486), he indicated he would feel "sorry" for a defendant who happened to be a member of a gang (5 JQ 1485), and he indicated he felt that the death penalty was imposed "too racially disproportionately." (5 JQ 1493.) Whether considered subjectively or objectively, juror no. 179 was a questionable juror for the prosecution.

Citing *U.S. v. Bishop* (9th Cir. 1992) 959 F.2d 820, Aguirre argues the prosecutor excused the juror no. 179 based on his childhood raised in a gang-infested neighborhood, which was a pretext for his race. (AOB 171-172, 175-176.) *Bishop* is neither controlling[2] nor apposite. In *Bishop*, the prosecutor explained his challenge of an African–American prospective juror as based in part on the fact the prospective juror lived in a predominantly low-income African–American neighborhood and accordingly was likely to believe police "'pick on black people.'" (*Bishop*, *supra*, 959 F.2d at p. 821.) There is no evidence in the record that the prosecutor in this case labored under the same racial stereotypes; her concern about the juror's friendships with gang members was not placed in a racial context nor did she refer to any residential stereotypes about African-Americas. Moreover, in *Bishop*, while the court found the excuse before it did not constitute a race-neutral explanation for the strike (*id.* at pp. 821–822), the court stated: "This is not to say that residence *never* can constitute a legitimate reason for excluding a juror.... On the contrary: What matters is not *whether* but *how* residence is used. Where residence is utilized as a link connecting a specific juror to the facts of the case, a

[2] Decisions of lower federal courts interpreting federal law are not binding on state courts. (*People v. Zapien* (1993) 4 Cal.4th 929, 989.)

prosecutor's explanation based on residence could rebut the prima facie showing." (*Id.* at p. 826.)

In this case, unlike *Bishop*, residence was not even mentioned as a reason. Instead, it was juror no. 179's personal friendships with gang members that gave concern. Aguirre's case was predominantly about gang violence, and juror no. 179 indicated that he had friends in a gang and indicated that he maintained some amount of sympathy for gang members. The prosecutor here did not run afoul of *Bishop*.

Aguirre also cites *People v. Gutierrez*, *supra*, 2 Cal.5th 1150 in support of his argument, but that case is also distinguishable. (AOB 172-173.) In *People v. Gutierrez*, three Hispanic defendants made an unsuccessful *Batson/Wheeler* motion after "the prosecutor exercised 10 of 16 peremptory challenges to remove Hispanic individuals from the jury panel." (*Id.* at p. 1154.) This Court reversed the judgment against the defendants, concluding the record did "not sufficiently support the trial court's denial of the *Batson/Wheeler* motion with respect to one prospective juror." (*Ibid.*)

This Court focused on the third step of the *Batson/Wheeler* inquiry, finding error in the trial court's evaluation of the credibility of the prosecutor's neutral explanation for removing prospective Juror No. 2723471. (*Gutierrez*, *supra*, 2 Cal.5th at pp. 1168–1172.) The prosecutor stated he used a peremptory challenge on this prospective juror because "'[s]he's from Wasco and she said that she's not aware of any gang activity going on in Wasco, and I was unsatisfied by some of her other answers as to how she would respond when she hears that Gabriel Trevino [a prosecution witness] is from a criminal street gang, a subset of the Surenos out of Wasco.'" (*Id.* at p. 1160.) He did not enumerate any "other answers" with which he was dissatisfied. (*Ibid.*)

The circumstances in this case are unlike *Gutierrez*. Here, the prosecutor did not suggest she was dissatisfied with juror no. 179 because his childhood neighborhood was rife with gang activity. Instead, she stated she exercised a peremptory strike because juror no. 179 was an engineer, he admitted that he has been friends with gang members in the past, he had heard of Dragon Family Junior, and he had some level of hesitation in providing answers. (3 RT 550.) This was not a case of using juror no. 179's childhood residence as a racial pretext for striking him, this was a case of using juror no. 179's gang-related responses for striking him in the context of a *gang-related murder trial*.

Moreover, Aguirre has not demonstrated that the prosecutor's reasons were *subjectively* unreasonable. "The proper focus of a *Batson*/*Wheeler* inquiry … is on the subjective genuineness of the race-neutral reasons given for the peremptory challenge, not on the objective reasonableness of those reasons." (*People v. Jones* (2013) 57 Cal.4th 899, 917.) When all of the evidence in the record is considered with the prosecutor's race-neutral justifications offered to the trial court, there is little doubt that the prosecutor in *this* case, which involved a gang-related murder, would have believed that a juror with *those* qualities might be unfavorable to the prosecution. A prosecutor's reasons need not be sufficient to justify a challenge for cause, and even a trivial, arbitrary, or idiosyncratic reason, if it is genuine and neutral, is sufficient justification for exercising a peremptory challenge. (*People v. Duff*, *supra*, 58 Cal.4th at p. 547.) Aguirre has failed to establish any discriminatory intent on the part of the prosecutor.

II. SUFFICIENT EVIDENCE SUPPORTS AGUIRRE'S CONVICTION

In his second claim, Aguirre argues there was insufficient evidence to corroborate the testimony of his accomplices, Aaron Villegas and Quang Do. (AOB 183-195.) Specifically, he contends there was "no independent

evidence" corroborating the accomplices' testimony that he was the shooter. (AOB 186.) Aguirre is mistaken. There was ample independent evidence apart from the accomplice testimony, including the testimony of several witnesses who were not accomplices, as well as physical evidence, that corroborated the accomplice testimony and demonstrated that Aguirre was the shooter.

A. Relevant Legal Principles

In reviewing the sufficiency of evidence, the critical question is "whether the record evidence could reasonably support a finding of guilt beyond a reasonable doubt." (*Jackson v. Virginia* (1979) 443 U.S. 307, 318.) In reviewing a conviction for sufficient evidence, the appellate court "must review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence—that is, evidence which is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." (*People v. Bradford* (1997) 15 Cal.4th 1229, 1329, citations omitted, italics in original.) The relevant question is whether "*any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." (*People v. Johnson* (1980) 26 Cal.3d 557, 576, quoting *Jackson v. Virginia*, *supra*, 443 U.S. at p 319, original italics.)

Penal Code section 1111 provides that the testimony of an accomplice may support a conviction only if it is "corroborated by such other evidence as shall tend to connect the defendant with the commission of the offense; and the corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof." (Pen. Code, § 1111.) "The requisite corroboration may be established entirely by circumstantial evidence." (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1128.) In addition:

> The corroborating evidence may be slight and entitled to little consideration when standing alone. However, it must tend to

> implicate the defendant by relating to an act that is an element of the crime. It need not by itself establish every element, but must, without aid from the accomplice's testimony, tend to connect the defendant with the offense. The trier of fact's determination on the issue of corroboration is binding on review unless the corroborating evidence should not have been admitted or does not reasonably tend to connect the defendant with the commission of the crime.

(*People v. Nelson* (2011) 51 Cal.4th 198, 218.)

If a witness provides the necessary corroboration of an accomplice's testimony, that witness must not be an accomplice himself. (*People v. Davis* (2005) 36 Cal.4th 510, 543.) But the "necessary corroborative evidence for accomplice testimony can be a defendant's own admissions." (*People v. Williams* (1997) 16 Cal.4th 635, 680.) The independent evidence "need not corroborate the accomplice as to every fact to which he testifies but is sufficient if it *does not require interpretation and direction from the testimony of the accomplice* yet tends to connect the defendant with the commission of the offense in such a way as reasonably may satisfy a jury that the accomplice is telling the truth." (*People v. Davis*, *supra*, 36 Cal.4th at p. 543, quoting *People v. Perry* (1972) 7 Cal.3d 756, 769, italics added by *Davis*.) Further, corroboration of an accomplice's testimony may be provided by independent evidence of a motive to commit the crime. (See *People v. McDermott* (2002) 28 Cal.4th 946, 985.)

In accordance with these principles, the trial court instructed the jury on accomplice testimony pursuant to CALCRIM Nos. 335. (3 CT 653-654.)

B. There Was Sufficient Corroborating Evidence

Aaron Villegas and Quang Do, both accomplices, testified that Aguirre was the shooter. (7 RT 1206-1207, 1315; 8 RT 1376-1380.) There was ample independent evidence presented at trial that corroborated their testimonies.

Villegas testified that Aguirre was wearing all black, including a black hat, when he shot the victims. (7 RT 1206, 1319.) He also testified that Aguirre's moniker was "Slim." (7 RT 1168.) The murder victim's brother, Anh Tran, testified that the shooter would have been taller than five feet seven inches, had a slim build, and was dressed entirely in black clothing. (5 RT 821, 877, 883.) The victim's cousin, Jimmy Ta, also testified that the shooter was tall and skinny. (5 RT 898.) Detective Tim Walker testified that Aguirre is roughly 6 feet tall. (10 RT 1832.) Aguirre wrote in instant message communication that: "Niggaz cant see me for the fact that I stay with my black n beanie disguise so don't be surprised when these guys dressed in black are coming to take your life." (9 RT 1679.)

Do testified that before they left Aguirre's house to drive to Alerto's restaurant on the night of the shooting, Aguirre grabbed his gun and placed it in his waistband. (8 RT 1361-1362.) Aguirre had shown Do the gun about two or three weeks prior; it was a revolver with a cylinder instead of a clip. (8 RT 1363.) A forensic analyst testified that five fired bullets were collected, four of them from the autopsy, and the bullets were of either .357 or .38 special caliber. (6 RT 1091.) She testified that those caliber bullets are often fired from a revolver that can shoot both calibers of ammunition. (6 RT 1091, 1093.) In electronic communications seized from a computer in his Arizona hideout, Aguirre indicated that he had a "38." Specifically, Aguirre wrote about going around armed with a gun with his friend, Hot Dog: "Damn I wanna go bang now. Me n you. Damn tyte. I wanna go bangin by myself for fun with two clips and one gun. Iono. Haha. I remember me a hot dog go bang with the CRV when I had the 38." (9 RT 1685.) In handwritten poetry collected from the Arizona hideout and attributed to Aguirre, he discussed "187" with his ".357": "Fool I stay strapped. .357 was 187 with 357's, a.k.'s and all that." (9 RT 1766; 10 RT 1817-1818.)

Quang Do was known as "Hot Dog." (7 RT 1171.) Do testified that Aguirre's EBK tattoo stood for the phrase "Everybody Killer." (8 RT 1488.) When investigators analyzed the computers that Aguirre had used in his hideout in Arizona, they noted that the computer user in question used the screenname "EVERYBODYKILLA22." (9 RT 1679.) Aguirre also indicated in electronic communications that his name was "Slim" and he had an E.B.K. tattoo. (9 RT 1678, 1680, 1685.) Aguirre *twice* bragged about shooting three individuals: "WTF U want me to tell u. I blast three niggaz. Oops wrong sn. I blast three niggaz. Naw." (9 RT 1687.)

Do testified that while Aguirre was riding in his car between Alerto's and the location of the shooting, he was speaking to Duong "Tommy" Le on the phone to receive directions. (8 RT 1369-1370.) The parties stipulated that the cell phone number 714-454-8003 is associated with Aguirre's stepfather, Mr. Martinez. (8 RT 1524.) That phone number dialed Duong "Tommy" Le's cell phone number at 10:16 p.m. and received a phone call from Duong Le's phone at 10:25 p.m. (8 RT 1514.) The number associated with Aguirre's stepfather also pinged several times between Alerto's and the location of the shooting in the cul-de-sac between 10:00 p.m. and 10:30 p.m. (8 RT 1529-1530.)

All of this evidence corroborated Villegas' and Do's testimonies in several ways. Through Aguirre's own electronic and handwritten communications and writings, he admitted that he was a gang member and had shot three individuals with either a .38 special or a .357 caliber firearm, which was consistent with Villegas' and Do's testimonies. He also bragged about carrying a ".38" while going around with his friend Hot Dog, which was consistent with Villegas' and Do's testimonies. And he bragged about being dressed in all black clothing, which was consistent with the testimony of the accomplices and one of the victims. Further, the records associated with Aguirre's stepfather's cell phone showed phone calls to and from

Duong "Tommy" Le between 10:00 p.m. and 10:30 p.m. while the phone's signal was pinging off cell towers in the area of Alerto's restaurant and the scene of the shooting, which was consistent with the timing of the shooting, as well as Do's testimony that Aguirre received driving directions from Duong Le while they were leaving Alerto's. Considering that the requisite accomplice corroboration may be established entirely by circumstantial evidence (*People v. Rodrigues*, *supra*, 8 Cal.4th at p. 1128), there was ample evidence to support the accomplice testimony and Aguirre's conviction for murder.

Aguirre attacks the corroborating evidence in several respects. First, Aguirre argues that the victims and Bruce Nguyen all initially told police that the shooter was a short, 18-year-old Asian. (AOB 186.) Viewed in context, however, those initial identifications were seriously flawed and of limited value to Aguirre's position. Defense counsel was able to cross-examine each of the victims regarding their prior inconsistent descriptions of the shooter, and the jury was able to hear the victims' testimonies and weigh their responses to various questions about their prior statements. (5 RT 863, 920-923.) Defense counsel declined to cross-examine Nguyen at all. (6 RT 1014.)

Specifically, Anh Tran testified that he had simply assumed the shooter had been Asian, but he had told Officer Carpenter that the shooter was tall. Further, his memory of the shooter remained the same from 2003 to the trial: the shooter was tall and of slim build. (5 RT 863, 878, 883.) Jimmy Ta also testified that he had simply assumed the shooter was Asian, based on the fact that the other individuals all appeared to be Asian. (5 RT 907.) Both victims testified that they could not see the shooter's face, and Ta testified that he could only see part of the shooter's chin. (5 RT 821, 900, 932.) A court reviewing the record for sufficient evidence must presume in support of the judgment the existence of every fact the jury

could reasonably have deduced from the evidence. (*People v. Zaragoza* (2016) 1 Cal.5th 21, 44.) Where the evidence of guilt is largely circumstantial, the court does not resolve credibility issues or evidentiary conflicts, nor does it inquire whether the evidence might reasonably be reconciled with the defendant's innocence. (*Ibid.*) In light of all the evidence presented, a reasonable trier of fact could have found that the victims were telling the truth, and that they simply guessed that the shooter was Asian.

In addition, although Mr. Nguyen testified that the two individuals that were either in the driver's seat or walking toward the dark green vehicle parked behind the victim's car appeared to be "Asian figures, small, small in physique," he admitted that he could not get a clear look at the face of the individual walking toward the car. (6 RT 984.) Later, when Mr. Nguyen testified that he was able to get a good look at the driver of the vehicle as it passed by, and noted the driver "looked Asian," he did not testify that he was able to see the passenger or his facial features. (6 RT 999.) Moreover, Mr. Nguyen admitted that when the police took him to a location to look at one of the suspects' cars, he could not make a clear identification of any of the suspects. (6 RT 1010.) Based on his testimony, a reasonable trier of fact could have determined that Mr. Nguyen simply believed, much as the victims did, that both the shooter and the driver were Asian, based upon the characteristics of the driver alone. And in light of all of the other damning evidence presented at trial that demonstrated Aguirre's culpability, it is appropriate to conclude that a reasonable trier of fact could have found him guilty beyond a reasonable doubt.

Aguirre next attacks the prosecutor's use of the cell phone records, arguing that his step-father's phone was found in the white Lexus rather than Do's green Acura. (AOB 189.) Aguirre points out that gang members often swapped phones, and his fingerprints were not found on the phone,

which suggests there was no way to tell who was actually making the phone calls that were described in the cell phone call records. (AOB 189-190.) However, viewing the evidence in the light most favorable to the judgment, the jury could have reasonably concluded that those facts were immaterial. The jury heard Bruce Nguyen's testimony in which he stated that he observed several individuals switch between the white Lexus and the green Acura after the shooting. (6 RT 991.) Do also testified that at some point after the shooting when they realized they were being followed by Nguyen, Aguirre told Do, "Pull over. Stop the car," and he got in a different car. (8 RT 1390.) That exchange of individuals between cars could have included Aguirre, Aguirre's cell phone, or both. And although Aguirre's fingerprints were not found in the vehicles, or on the phones, there is no way of knowing whether Aguirre, as the shooter, simply wore gloves at the time of the shooting. Nor was there any testimony that the individuals actually swapped phones, other than when Donny Nguyen borrowed the phone of his girlfriend, Michelle Tran, in order to make calls to his fellow gang members. (6 RT 1074, 1076.) Viewing the evidence in the light most favorable to the judgment, the jury could have reasonably concluded that the defense's theory was unpersuasive.

Aguirre also argues that there was no evidence to suggest that he fled to Arizona immediately after the shooting. (AOB 190.) Instead, he rented a room in Tempe around six months later, which he claims would not constitute evidence of flight that would support an inference of consciousness of guilt. (AOB 190.) Contrary to Aguirre's claim, however, Aguirre attempted to physically flee from the police when they appeared at his apartment door. (9 RT 1566.) It was only after Officer Ouimette tackled Aguirre to the ground on the other side of the apartment complex when the attempt to flee ended. (9 RT 1566-1567.) Once again, a reasonable trier of fact could have concluded that Aguirre manifested a consciousness of guilt

when he attempted to flee Officer Ouimette in Tempe, Arizona. Moreover, the jury could have reasonably believed that Aguirre fled after the shooting when he failed to return to his residence in California. (6 RT 1064-1067.)

Aguirre next argues that the instant messages on the computer and written rap lyrics were insufficient to corroborate the accomplices' testimonies or identify him as the shooter. (AOB 191-193.) Specifically, Aguirre argues that the electronic message, "I remember me a Hot Dog go bang with the CRV when I had the 38," was insufficient to show he was present during the murder, because he and Quang Do were not riding in a CRV on the night of the shooting. Aguirre also argues there were several types of firearms that could have fired the bullets. (AOB 192.) But the value in Aguirre's statement is not how much it tracks the events of the night of the shooting. Instead, the value of the statement is that it tends to show that Aguirre was in possession of a firearm that could have fired a .38 special caliber bullet, which was consistent with Do's testimony that Aguirre was in possession of a revolver. (8 RT 1363.) It was also consistent with the testimony of the forensic analyst, who testified that the recovered bullets were of either .357 or .38 special caliber, which can often be fired from the same revolver. (6 RT 1091, 1093.) Further, one of his lyrics talked about being armed with a ".357" during a "187," which is consistent with being armed with a revolver during a murder, and also corroborates Do's testimony.

Finally, Aguirre argues that his electronic and handwritten communications, in which he indicated he was a member of Dragon Family gang, was insufficient to put him at the scene of the crime. (AOB 193-194.) Aguirre is correct that this information, by itself, does not place him at the scene of the crime. But in his writings, Aguirre embraced the moniker "Slim," which was consistent with the testimony of Villegas and Do. Further, unlike several other monikers that were listed in the contacts of the

phone belonging to Aguirre's stepfather, the "Slim" moniker was absent from the phone (8 RT 1515), which further suggests that Aguirre was the individual who was using the phone, and not someone else. That evidence, in turn, corroborates Do's testimony that Aguirre was using his cell phone while they were driving from Alerto's to where the shooting occurred. Thus, contrary to Aguirre's claims that there was "no evidence to corroborate that [he] was the shooter, or that he was even present at the scene of the crime," there was abundant circumstantial evidence in the record corroborating the accomplice testimony such that a reasonable trier of fact could conclude that Aguirre was the shooter.

III. THE TRIAL COURT DID NOT ERR BY NOT INSTRUCTING THE JURY ON THIRD-PARTY CULPABILITY OR DENYING A REQUEST FOR CONTINUANCE; NOR WAS DEFENSE COUNSEL INEFFECTIVE FOR FAILING TO REQUEST AN INSTRUCTION

In his third claim, Aguirre claims there was substantial evidence to support the theory that Eric Pham, an uncharged gang member, shot the victims rather than Aguirre. (AOB 195-236.) Because of this, Aguirre claims the trial court should have instructed the jury on the theory of third party culpability (AOB 223-228), and he was prejudiced by the failure to do so. (AOB 228-232.) In the event this Court finds Aguirre forfeited the argument, he argues that his counsel rendered ineffective assistance by failing to request the instruction. (AOB 232-236.) Aguirre further argues the trial court abused its discretion by denying his motion for a continuance to look into why Eric Pham's DNA was initially logged under another inmate's name who had the same surname. (AOB 219-223.)

Aguirre's claims should be rejected. Although Aguirre claims the trial court abused its discretion by denying the motion for a continuance, his claim fails because there was no good cause for the continuance. The prosecutor had already agreed to stipulate that Pham's DNA was found on the bandana in Do's car, and she had provided all of the documentation

related to the DNA result mix-up that was in her possession. Even though defense counsel wanted additional time to attempt to prove that Eric Pham had somehow masterminded the mix-up, the four-week request for a continuance to determine malfeasance on the part of the prosecutor, the Department of Justice, or Eric Pham amounted to little more than a speculative fishing expedition. Thus, defense counsel provided no good cause to the trial court to support his request for a continuance, and the trial court properly exercised its discretion in denying the motion.

Additionally, the trial court did not err by failing to instruct the jury on third-party culpability, because there was no evidence presented at trial to demonstrate that Eric Pham was the shooter. There was no evidence or testimony to suggest that Pham was at the scene at the time of the shooting, and the black bandana found in Quang Do's driver-side door compartment, which contained Pham's DNA, did not demonstrate that Pham was the shooter or that he was even in Do's car on the day of the shooting. Because there was insufficient evidence to support a finding that Pham, rather than Aguirre, was the shooter, the trial court did not err by failing to instruct the jury sua sponte on third party culpability. And even if there was error, it was harmless beyond a reasonable doubt, due to the weight of the evidence against Aguirre, as well as the other instructions provided to the jury.

A. The Inadvertent DNA Name Swap

1. The Accidental DNA Name-Swap Between Two Incarcerated Phams on the Same Cellblock

On January 16, 2009, the prosecutor and defense stipulated to a continuance of the trial to April 20, 2009. (1 RT 100.) The prosecutor notified the court that she received a report in late December regarding a CODIS hit on DNA that had previously been considered unknown DNA. (1 RT 100.) She informed the court that they just took a new sample of DNA

from the individual that was identified from the CODIS hit, and would need a few weeks to resolve the matter. (1 RT 101.)

On April 17, 2009, the parties revisited the issue and notified the court that DNA taken from a bandana found in the car in which the shooter had been riding matched to the DNA of Henry Pham, a chiropractor, in the CODIS database. (1 RT 177.) However, additional DNA testing revealed that it was not Henry Pham's DNA. (1 RT 177-178.) The prosecutor explained that the California Department of Justice had initially informed her that the DNA from the bandana had hit on Henry Pham's DNA in their CODIS database. (1 RT 179.) The prosecution team obtained a swab directly from Henry Pham in the jail, but his new DNA swab did not match the DNA found on the bandana. (1 RT 179.) The prosecutor informed the court that the Department of Justice was investigating to see how the mistake occurred, and whether the samples were somehow switched. (1 RT 179.)

Defense counsel informed the court that there were seven other individuals in the case that are involved and could match the DNA found on the bandana. (1 RT 181.) The prosecutor informed the court that she tested the bandana only against the DNA of people that had been witnessed driving or riding in the car. (1 RT 181.) The individuals in the other car were not tested. (1 RT 181.) Defense counsel asked that the other seven people be tested so they did not have to reveal their defense strategy. (1 RT 182.) The prosecutor told the court that four of the seven individuals had not been DNA tested. (1 RT 183.)

The court had the prosecutor step outside of the courtroom (1 RT 184), and the court and defense attorneys held a hearing in chambers that was subsequently sealed. (1 RT 185-189.) When the parties returned, the court stated it would constitute ineffective assistance of counsel for the defense to not pursue the issue. (1 RT 190.) The prosecutor notified the

court that it could get the DNA from the other individuals quickly: Harrison Pham, Danny Duong, Aaron Villegas, and Eric Pham. (1 RT 190, 192-193.) The prosecutor clarified that Henry Pham, the chiropractor, was neither Harrison Pham nor Eric Pham. (1 RT 192.) Defense counsel noted that Henry Pham was convicted of molesting one of his patients. (1 RT 192.) The parties stipulated to another continuance to obtain the results. (1 RT 194.)

On April 22, 2009, the parties informed the trial court that the DNA on the bandana matched to Eric Pham. (1 RT 201.) Defense counsel suggested that the mistaken match to Henry Pham, the chiropractor, could have been a result of prosecutorial misconduct. (1 RT 202.) The prosecutor informed the court that her understanding from the Department of Justice was that there was a mistake somewhere in the DNA collection process at the jail, and the issue was being investigated. (1 RT 202.) The prosecutor reiterated that the DNA on the bandana was now known to be Eric Pham's and not Henry Pham's. (1 RT 203.)

The court asked defense counsel why they would need to know why the mistake occurred. (1 RT 203.) Defense counsel posited that Eric Pham could have intentionally manufactured the DNA discrepancy. (1 RT 204.) The prosecutor noted that Henry Pham's DNA is not in the CODIS database at all, and that it was impossible for Eric Pham to have somehow caused Henry Pham to provide his DNA instead of Eric Pham. (1 RT 204.) Instead, the mistake was that Eric Pham's DNA was mislabeled as Henry Pham's. (1 RT 204.) The prosecutor argued that it was irrelevant why that happened, as it was clearly a mistake. (1 RT 204.)

The trial court asked if the defense was suggesting that Eric Pham mistakenly gave his name as Henry Pham. (1 RT 204.) Defense counsel responded that it was uncertain what happened, and supporting documentation of the process was required to confirm what occurred. (1 RT

205.) The prosecutor again noted that Eric Pham was not a sentenced prisoner, so the only scenario was that Henry Pham, as a convicted molester, would have been called to provide a DNA sample as a Penal Code section 290 registrant, and Eric Pham's DNA was accidentally collected instead. (1 RT 205.) The prosecutor noted that she had no idea how the mistake occurred other than Henry Pham and Eric Pham shared the same surname and were housed in the same facility. (1 RT 205.)

The trial court stated that it did not appear that any more information was needed since Henry Pham had nothing to do with the case. (1 RT 206.) Defense counsel explained that it needed to know how the error occurred, so that it could confirm whether Eric Pham did anything to intentionally create the error. (1 RT 206.) Defense counsel requested documentation that described the DNA collection process. (1 RT 207.) The prosecutor noted that she already produced the Department of Justice report in discovery, and stated that it was uncertain whether the parties would ever get an answer as to who collected the DNA or how the testing was performed at the jail. (1 RT 207-208.) The trial court suggested that they call Eric Pham to testify in order to see whether he had an explanation as to how his DNA sample was provided. (1 RT 208.) The court noted that it did not want to delay the trial for a "wild goose chase" that would not result in anything, considering the main issue was whose DNA was on the bandana. (1 RT 208.)

2. Eric Pham Testifies That His Cell Door Opened and he Provided DNA Without Confirming His Identity

Later that afternoon, Eric Pham was brought to court to testify about the DNA collection. (1 RT 226.) He stated that, about a year before, a deputy sheriff took a DNA sample from him while he was housed in jail. (1 RT 226.) He explained that someone at the jail used the speaker in his cell

to order him out of his cell, and they took his DNA with a cotton swab. (1 RT 226-227.) The DNA test took place at approximately midnight. (1 RT 230, 232.) Pham had never seen the man who took his DNA. (1 RT 231.) He noted that he had his DNA taken three times: once by a police officer when he was arrested on April 16, 2004, once while he was housed in jail, and a third time by a district attorney investigator only a week before. (1 RT 227-228.)

Eric Pham further explained that Henry Pham, a chiropractor in his 40s, was housed in the same facility only a couple of doors down from him on the same cell block. (1 RT 233.) To his knowledge, there were no other individuals on his cell block with the same surname. (1 RT 238.) Pham explained that when they called him out of his cell, they simply called out the surname "Pham," and his cell door popped open. (1 RT 238.) When he went to the dayroom to give the sample, no one asked him to repeat his full name or show any identification. (1 RT 239.) They took his DNA and fingerprints, and he was returned to his cell a few minutes later. (1 RT 239.)

3. Defense Counsel Requests a Four-Week Continuance to Find Any Possible Evidence of Malfeasance; the Trial Court Denies the Request

Following Eric Pham's testimony, defense counsel suggested that further investigation was required. (1 RT 240.) Defense counsel stated that there was no fingerprint attached to the DNA. The prosecutor corrected him that Eric Pham's prints were taken but were considered unreadable, which was why they could not be verified. (1 RT 240.) Defense counsel requested another hearing in chambers outside of the prosecutor's presence. (1 RT 241.) The hearing was again transcribed and sealed. (1 RT 242-246.)

When the parties reconvened, the prosecutor agreed to stipulate that the DNA on the bandana belonged to Eric Pham, pending written confirmation from the DNA report. (1 RT 247.) Defense counsel requested

records regarding when Henry Pham's DNA was taken, and the prosecutor responded that his DNA was never taken. (1 RT 248.) The prosecutor stated that she would provide records indicating whether Henry Pham's DNA was taken at the same time as Eric Pham's, and also whether he was in custody at the same time. (1 RT 248-249.)

On May 4, 2009, during jury selection, defense counsel requested a four-week continuance so that his DNA experts could review the bench notes from the CODIS verification. (3 RT 391.) Defense counsel stated that the prosecutor had provided all of the documentation she had available to her regarding the DNA collections of Henry Pham and Eric Pham. (1 RT 391.) But defense counsel wanted to demonstrate that Eric Pham somehow orchestrated the mix-up in order to protect himself. (1 RT 391.) Thus, he needed more information about the CODIS hit, as well as Henry Pham's information card that he filled out when he went to prison, to see if Eric Pham's fingerprints or DNA happened to be on it. (3 RT 391.)

The prosecutor reiterated that Henry Pham's DNA was never collected. (3 RT 391.) There was not a DNA switch between the two Phams; rather, they only collected Eric Pham's DNA and mislabeled it as Henry Pham. (3 RT 391-392.) The prosecutor noted there was no DOJ card for Henry Pham unless he was swabbed within the previous week. (3 RT 392.) Defense counsel expressed disbelief that the prosecutor could not find information about Henry Pham's DNA or bench notes for the CODIS verification. (3 RT 392.) The trial court noted the prosecution "can't produce what doesn't exist." (3 RT 392.)

The trial court denied the four-week request without further comment. (3 RT 392.)

B. The Trial Court Properly Exercised Its Discretion by Denying Aguirre's Motion for Continuance that Lacked Good Cause

Aguirre initially claims the trial court denied him due process by denying his four-week request for a continuance to find evidence of intentional malfeasance with respect to the DNA name-swap. (AOB 219-223.) The trial court did not abuse its discretion because the continuance request amounted to a speculative inquiry with no chance of success considering the reason for the DNA mix-up had already been established.

"A continuance in a criminal trial may only be granted for good cause. [Citation.] 'The trial court's denial of a motion for continuance is reviewed for abuse of discretion.' [Citation.] 'There are no mechanical tests for deciding when a denial of a continuance is so arbitrary as to violate due process. The answer must be found in the circumstances present in every case, particularly in the reasons presented to the trial judge at the time the request is denied.' [Citations.]" (*People v. Mungia* (2008) 44 Cal.4th 1101, 1118.) "The party challenging a ruling on a continuance bears the burden of establishing an abuse of discretion, and an order denying a continuance is seldom successfully attacked. [Citation.] [¶] Under this state law standard, discretion is abused only when the court exceeds the bounds of reason, all circumstances being considered. [Citations.]" (*People v. Beames* (2007) 40 Cal.4th 907, 920.) "A reviewing court considers the circumstances of each case and the reasons presented for the request to determine whether a trial court's denial of a continuance was so arbitrary as to deny due process." (*People v. Doolin* (2009) 45 Cal.4th 390, 450.) "Absent a showing of an abuse of discretion and prejudice, the trial court's denial does not warrant reversal." (*Ibid.*)

Here, the trial court reasonably exercised its discretion by denying the motion for a continuance because Aguirre failed to show good cause for the

motion. Aguirre argues that further investigation was needed because the prosecutor did not explain how it was possible that only Eric Pham's DNA was collected, considering a CODIS-acceptable profile was uploaded from the bandana, which provided a cold hit to Henry Pham. (AOB 221.) And Aguirre also argues that he would have had a potential defense except for the fact that they were unable to further develop the issue: whether either Eric Pham or the prosecution orchestrated the DNA mix-up, which could have sowed doubt in the prosecutor's case or shown consciousness of guilt on the part of Eric Pham. (AOB 223.) But Aguirre's theory was already refuted by the record, and no further investigation was necessary. He failed to show good cause for the continuance, and he cannot demonstrate that the trial court abused its discretion in denying the request.

The evidence before the trial court at the time of the motion demonstrated that the DNA mix-up was an inadvertent result of two inmates with identical surnames housed in close proximity to each other. Eric Pham testified that the jailhouse authorities called out "Pham" and his cell door popped open. (1 RT 238.) When he provided his DNA and fingerprints, he was never asked to confirm his name. (1 RT 239.) A CODIS profile was established to Henry Pham, although subsequent DNA testing of Henry Pham showed that the CODIS profile did not match his DNA. (1 RT 203-204.) And Henry Pham's DNA, as of May 2009, was still not in the database. (3 RT 392.) As the prosecutor stated to the trial court, the mistake was that Eric Pham's DNA was mislabeled as Henry Pham's, and it was irrelevant why that happened, as it was clearly a mistake. (1 RT 204.) And the defense theory intuitively makes no sense: Eric Pham had no way of opening his own jailhouse cell door and providing his DNA to the authorities instead of Henry Pham. The only possible explanation for the mix-up was that the authorities accidentally opened the wrong cell door and failed to confirm which Pham appeared before them to provide DNA.

Furthermore, the prosecutor told the trial court that she had discovered all of the documentation that she was able to obtain from the Department of Justice regarding the DNA testing, which apparently was extensive. (3 RT 391.) The trial court rightly noted that there was no further evidence for the prosecution to provide from the Department of Justice regarding the mix-up. (3 RT 391-392.) Essentially, the trial court weighed the low possibility that any further information could be developed on this issue with a four-week continuance, particularly the extremely slim chance of finding any evidence of intentional malfeasance, against the prospect of an unnecessary delay of the trial. Aguirre has not demonstrated that the court's denial of the continuance request exceeded the bounds of reason, all circumstances being considered. Nor has he demonstrated that the denial of the request for a continuance was so arbitrary as to deny due process.

And in any event, even if the court erred, Aguirre has not demonstrated that he was prejudiced by the denial of his motion for continuance. Even assuming the denial implicated his constitutional due process rights, the denial of the motion was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24.) For the same reasons as indicated above, there is no possibility that the court's denial of the request would have resulted in a different outcome in the proceedings or deprived Aguirre of a fair trial. There is simply no scenario in which the defense could have obtained any evidence demonstrating that either Eric Pham, or the prosecution team, somehow orchestrated a false upload of information to the Department of Justice's CODIS database. The level of conspiracy required to achieve such a monumental usurpation of justice—between Eric Pham, Henry Pham, the prosecutor, and the jailhouse staff—is truly staggering. And even if the trial court had granted the four-week continuance, Aguirre's experts could not have interpreted the documents in a way that suggested malfeasance. Instead, the Occam's razor explanation

for the DNA mix-up is almost certainly the correct one, which is what the record already established: the jailhouse authorities opened the wrong cell door and negligently failed to confirm that Henry Pham had actually arrived for DNA testing. Thereafter, Eric Pham's DNA was erroneously uploaded as Henry Pham's DNA in CODIS, and that resulted in a positive identification to the DNA found on the black bandana. Even if the trial court had granted a four-week continuance, there is no possibility that Aguirre would have proven a conspiracy instead of a mistake.

C. The Trial Court Did Not Err by Failing to Instruct the Jury About Third-Party Culpability; There Was No Evidence to Support the Defense's Theory of Third-Party Culpability

Aguirre claims overwhelming evidence of third-party culpability existed that Eric Pham was the shooter rather than himself, therefore the court erred by failing to instruct the jury that they should acquit if they determined that Pham was the shooter. (AOB 223-228.) But, the evidence did not support the defense theory that Eric Pham was the shooter, therefore, the trial court did not err in failing to instruct the jury.

The "trial court has a duty to instruct the jury 'sua sponte on general principles which are closely and openly connected with the facts before the court.'" (*People v. Abilez* (2007) 41 Cal.4th 472, 516.) The "trial court has a sua sponte duty to give instructions on the defendant's theory of the case, including instructions 'as to defenses "'that the defendant is relying on ..., 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. Gutierrez* (2009) 45 Cal.4th 789, 824.) A different rule applies to pinpoint instructions. Those instructions, i.e. "'instructions [that] relate particular facts to a legal issue in the case or 'pinpoint' the crux of a defendant's case, such as mistaken identification or alibi ... are required to be given upon request when there is evidence supportive of the theory, but

they are not required to be given sua sponte." (*Ibid.* ["As an initial matter, defendant bore the burden of requesting a pinpoint instruction."].)

This Court specifically addressed whether a trial court can have a sua sponte duty to instruct on third party culpability in *Gutierrez*, *supra*, 45 Cal.4th 789, and *Abilez*, *supra*, 41 Cal.4th 472. In those cases, neither of the defendants requested a pinpoint instruction on third party culpability, but both argued on appeal that the trial courts erred by failing to provide the instruction sua sponte. (*Gutierrez*, at pp. 824–825; *Abilez*, at pp. 564–565.) This Court held that the additional pinpoint instruction on third party culpability was not required because the trial courts had instructed the juries that a criminal defendant is entitled to a presumption of innocence, and may only be convicted if the jury is convinced of the defendant's guilt beyond a reasonable doubt. (*Ibid.*) "Because the jury was properly instructed as to these issues, and because the jury could have acquitted defendant had it believed that a third party was responsible for [the victim]'s death, no third party culpability instruction was necessary." (*Gutierrez*, at p. 825.)

Likewise, in this case, Aguirre did not request a pinpoint instruction on third party culpability. The trial court instructed the jury that Aguirre was entitled both to a presumption of innocence, and to a verdict of not guilty if the jury was not convinced of his guilt beyond a reasonable doubt. (3 CT 635 (CALCRIM No. 220).) As in *Gutierrez* and *Abilez*, this instruction empowered the jury to find Aguirre not guilty if his theory of the case raised a reasonable doubt as to his guilt. Even if the jury had adopted the defense theory that Eric Pham was the shooter instead of Aguirre, it still would have understood that it could find Aguirre not guilty of murder. Accordingly, the trial court was not required to give, sua sponte, an instruction on third party culpability.

In any event, the evidence did not support the defense's theory that Eric Pham was the shooter. Aguirre claims the shooter was a short, small 18-year-old Asian who matched the description of Eric Pham. (AOB 201.) But as noted in Argument II, the victims never testified that the shooter was Asian. Instead, they testified that they could not see the shooter's face, and only initially told the police that the shooter was Asian because the other individuals were Asian. (5 RT 821, 900, 907, 932.) Mr. Nguyen testified that the individuals in Quang Do's car appeared to be Asian "in physique," but he admitted he was never able to get a good look at the shooter's face. (6 RT 984.)

Furthermore, there was no evidence to place Eric Pham at the location of the shooting when it happened. Aaron Villegas and Quang Do's testimony were consistent that Eric Pham was around before and after the shooting, but that he was not in the vicinity of the cul-de-sac when the shooting actually occurred. Villegas testified that Eric Pham's car was not in the cul-de-sac at the time of the shooting. (7 RT 1263.) He saw Pham's car at Aguirre's house before the shooting, and after the shooting, but not during the shooting. (7 RT 1264.) He testified that he may have seen Eric Pham's car near Brookhurst Street when they were leaving the location of the shooting, but he could not recall specifically where. (7 RT 1269-1270.) He testified that he did not mention Eric Pham to the police, but noted that he was never asked. (7 RT 1265, 1316.)

Like Villegas, Quang Do testified that he saw Eric Pham on the night of the shooting, but not in the cul-de-sac at the time of the shooting. Do stated he got a phone call from Pham while they were all waiting in the parking lot of Alerto's. (8 RT 1368.) Do told him to join him so that they would have greater numbers in their posse. (8 RT 1368.) Do testified that he did not see Pham at the location of the shooting, but once they had fled the scene, Pham called him to let him know they were being followed by

someone. (8 RT 1384.) Do testified that he received the call from Pham only a couple of minutes after they fled the scene, which was consistent with Villegas's testimony that he may have seen Pham's car on one of the streets nearby the cul-de-sac. (8 RT 1385.) Do specifically stated he received Pham's call around the time they were on McFadden Avenue, near La Quinta High School. (8 RT 1386.) Do testified that he saw Eric Pham's car when it pulled up next to them near La Quinta High School. (8 RT 1386.) Eventually, Do's green Acura, the white Lexus, and Eric Pham's car all pulled over and Aguirre and Duong Le jumped out of Do's car. (8 RT 1388.) Aguirre entered Eric Pham's car and Duong Le entered Harrison Pham's car. (8 RT 1388.)

And although Eric Pham's DNA was found on the black bandana, there was no evidence to suggest that his DNA was placed on the bandana on the night of the shooting, or that he even wore it at all. A forensic scientist testified that there was no way to know how close in time Pham handled the bandana found in the driver's door compartment, or whether he actually wore it at all when his DNA was left behind. (9 RT 1612.) The forensic scientist testified that Pham could have simply handled it or he could have been talking over the bandana when his DNA was placed on the bandana. (9 RT 1612.)

More importantly, there was no evidence that *the shooter* actually wore the black bandana with Pham's DNA. Do testified that Aguirre was wearing a black bandana over the bottom part of his face at the time of the shooting, and he removed the bandana when he returned to Do's car. (8 RT 1379-1380.) But there was no evidence that Aguirre actually dropped his bandana in Do's car when he removed it, nor was there any evidence explaining how or why Aguirre would have placed his bandana in the door compartment of the driver's door where it was found by investigators. (6 RT 1044.) Furthermore, Do testified that the black bandana found in his

vehicle was his, and he explained that Aguirre had his own black bandana at the time of the shooting that was distinct from the black bandana found in the car: "He had a black one, too." (8 RT 1382.)

Needless to say, there was no physical evidence or testimony that supported the theory that Eric Pham was the shooter instead of Aguirre. Instead, the defense merely speculated that Eric Pham was the shooter, presumably based on the DNA found on Quang Do's black bandana.

In any event, just as in *Gutierrez* and *Abilez*, even assuming arguendo the trial court erred by not giving a third-party culpability instruction, there is no reasonable probability the result would have been different in light of the instructions provided to the jury and the evidence presented at trial. (*People v. Watson* (1956) 46 Cal.2d 818, 826.) Aside from the fact that there was no evidence or testimony to support a jury determination that Eric Pham was the shooter, the weight of the evidence against Aguirre was strong. Between the accomplice testimony that identified Aguirre as the shooter, Aguirre's evidence of flight, the cell phone records, and Aguirre's electronic and written communications that corroborated the accomplice testimony and the bullets found during the autopsy, there was no reasonable possibility that someone other than Aguirre was the shooter.

Aguirre argues, however, that the jury deliberations must have been very close, because it sent out several notes for testimony read-backs regarding Eric Pham. (AOB 229.) He argues this suggests a reasonable probability that there would have been a different outcome had the jury been instructed on third-party culpability. (AOB 231-232.) The jury asked for a read-back of Bruce Nguyen's testimony (3 CT 687), the cross-examination of Aaron Villegas (3 CT 688), and any testimony regarding Eric Pham (3 CT 689.) When the jury was asked to be more specific about the third request, the jury requested any testimony by Aaron Villegas and Quang Do regarding Eric Pham. (3 CT 690.) Aguirre claims these

questions, plus the four days of deliberations, indicate that the identity of the shooter was a close question for the jury. (AOB 230-231.)

Respondent disagrees that such an inference should be drawn from the jury read-back requests. One could just as reasonably conclude that the jury was simply being as thorough as possible in light of the fact that the defense raised the Eric Pham-as-shooter theory for the first time during closing argument. Once the jurors were able to review all of the testimony about Eric Pham, they would have noticed that the accomplices consistently testified that Pham was not present at the shooting and that Do's black bandana found in his driver-side door compartment with Pham's DNA was distinct from the bandana worn by Aguirre. Considering the dearth of evidence or testimony pointing to anyone other than Aguirre, the jury would have necessarily concluded that the defense theory was unpersuasive. Even if the jury had been instructed with a third-party culpability instruction, there is no reasonable possibility that they would have reacted to the evidence any differently or determined that Aguirre was not the shooter.

In sum, Aguirre's contention lacks merit, is contrary to established authority from this Court, and must be rejected. In the alternative, any error was harmless. (*Gutierrez*, *supra*, 45 Cal.4th at pp. 824-825; *Abilez*, *supra*, 41 Cal.4th at pp. 517-518.)

D. Aguirre's Trial Counsel Was Not Prejudicially Ineffective by Failing to Request an Instruction on Third-Party Culpability

Aguirre claims, in the alternative, that if this Court finds he forfeited the issue by failing to request a pinpoint instruction on third-party culpability, defense counsel was ineffective for failing to do so. (AOB 232-236.)

According to Aguirre, there could be no reasonable tactical explanation for his counsel's failure because the defense strategy and closing argument were premised solely on the theory that Eric Pham was the shooter. (AOB 235.) This contention is not supported by the record. Aguirre does not even explain how the alleged omission was prejudicial in light of all the evidence, arguments, and instructions given at trial.

To establish a violation of the constitutional right to effective assistance of counsel, a defendant must show (1) his counsel's performance was deficient when measured against the standard of a reasonably competent attorney, and (2) counsel's performance was prejudicial in the sense that it "so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." (*People v. Mayfield* (1997) 14 Cal.4th 668, 783-784, disapproved on another ground in *People v. Scott*, *supra*, 61 Cal.4th at p. 390, fn. 2; see also *Strickland v. Washington* (1984) 466 U.S. 668, 686-694; *People v. Bradford* (1997) 14 Cal.4th 1005, 1051.) In reviewing whether counsel's representation fell below an objective standard of reasonableness, this Court "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance" and should not "second-guess counsel's decisions, nor apply the fabled twenty-twenty vision of hindsight." (*Strickland*, *supra*, at p. 689; *Bonin v. Calderon* (9th Cir. 1995) 59 F.3d 815, 833.) In addition, the appellate record must affirmatively disclose that counsel had no rational tactical purpose for the act or omission. (*Bradford*, *supra*, 14 Cal.4th at p. 1052; *People v. Zapien*, *supra*, 4 Cal.4th at p. 980.)

As this Court has repeatedly cautioned,

> "In some cases, . . . the record on appeal sheds no light on why counsel acted or failed to act in the manner challenged. In such circumstances, unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation, *these cases are affirmed on appeal*.

> [Citation.] Otherwise, appellate courts would become engaged 'in the perilous process of second-guessing.' [Citation.] Reversals would be ordered unnecessarily in cases where there were, in fact, good reasons for the aspect of counsel's representation under attack. Indeed, such reasons might lead a new defense counsel on retrial to do exactly what the original counsel did, making manifest the waste of judicial resources caused by reversal on an incomplete record. [¶]*Where the record does not illuminate the basis for the challenged acts or omissions, a claim of ineffective assistance is more appropriately made in a petition for habeas corpus*."

(*People v. Avena* (1996) 13 Cal.4th 394, 418-419, quoting *People v. Pope* (1979) 23 Cal.3d 412, 426; italics added in *Avena, supra*; see, e.g., *People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266-268; *Bradford*, *supra*, 14 Cal.4th at p. 1052.)

Aside from the conclusory allegation that trial counsel had no tactical reason for failing to request an instruction on third-party culpability, Aguirre fails to provide any evidence that counsel actually had no tactical reason for the alleged omission. Moreover, the appellate record does not affirmatively show the lack of tactical reasons for the omission. In fact, the record refutes Aguirre's claim that the defense strategy and closing argument were premised solely on the theory that Eric Pham was the actual shooter. Instead, defense counsel's closing argument mainly focused on trying to raise a reasonable doubt about Aguirre's own involvement in the killing without necessarily attempting to convince the jury that Eric Pham was the shooter. (11 RT 2000-2070.) Eric Pham was mentioned several times during the defense argument (11 RT 2007-2008, 2029-2031, 2033, 2036-2040, 2044), but it was almost exclusively in an attempt to demonstrate that the accomplices were lying, rather than argue specifically that Pham was the shooter instead of Aguirre. Thus, trial counsel could have reasonably concluded that the reasonable doubt instructions given at trial were sufficient to support his main defense strategy and that asking the

jury to determine whether Pham was the actual killer was counterproductive in light of the totality of the evidence.

In any event, as explained *ante*, Aguirre cannot show prejudice from his trial counsel's failure to request an instruction on third-party culpability. First of all, the trial court would not have been required to give such instruction, even if requested, because it was not supported by the evidence. The purported evidence of Pham's culpability for the murder (i.e., Pham's DNA on the black bandana found in the driver-side door compartment) did not raise a reasonable doubt about Aguirre's own culpability. Assuming arguendo the bandana or the other testimony suggesting the shooter was Asian had supported a pinpoint instruction, it is not reasonably probable that there would have been a different outcome if the instruction had been given. As already explained, the missing instruction was not necessary for the jury to consider Aguirre's defense in light of the closing arguments and the instructions given at trial. And ultimately, the prosecution presented overwhelming evidence that Aguirre was guilty of murder instead of someone else. In sum, this Court should reject Aguirre's claim of ineffective assistance of counsel.

IV. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION BY ADMITTING AGUIRRE'S POETRY

In his fourth claim, Aguirre argues the trial court abused its discretion by admitting rap lyrics or poetry that he claims were overly prejudicial. (AOB 236-256.) Aguirre claims the admission of the lyrics rendered the trial unfair, which requires reversal. (AOB 252-256.) The trial court properly exercised its discretion in admitting the lyrics. Aguirre admits the lyrics were relevant, and the trial court properly balanced their prejudicial effect against their probative value. Because courts have routinely upheld the admission of rap lyrics under similar circumstances, Aguirre's claim should be denied.

A. Background

Aguirre filed a pretrial motion to exclude evidence of poems and prose that he wrote because they were obtained almost a year after the crime and were prejudicial under Evidence Code section 352. (1 CT 257.) In her written response, the prosecutor argued that Aguirre's writings were relevant and probative because they showed his motive and intent by describing his gang membership, role, activities, goals, values, attire, and slang language. They also tended to show that Aguirre was the shooter. (1 CT 269-270.) Specifically, the prosecutor noted the following relevant statements:

"Black fitted Detroit Tigers baseball cap but the D stands for Dragon best believe that, nigga check out the tat on my back, fool stay strapped .357's equals 187's with 357's, Ak's and all that."

"Niggars can't see me for the fact that I stay with my black beanie so don't be surprised when the guys dressed in black are coming to take your life."

"When I blast then back to the pad to get something to eat and another forty of old E after I cut up this body of the enime that we just murdered on these OC streetz Mutherfucka."

"Catch an enemy slippin you know Im empty that clip, cuz whether I'm jackin or = bang you know it don't mean a thang, I do it for two reasons that the hood and some change, its DFJ every day all day till the day I die 357, AK, 9mil, Glock 45…"

"We always gonna bang for our block, that why the streets is so motha fuckin hot, and you know we on top so just pack your bags like a bunch of fags and find another spot. OC is ours we da OG's with fly cars…" (1 CT 269-270.) The prosecutor cited *People v. Olguin* (1994) 31 Cal.App.4th 1355, which upheld the admission of gang rap lyrics to show the defendant's motive. (1 CT 270.)

At the hearing on the motions in limine, the trial court stated that the lyrics seemed relevant on issues of motive and intent on the street terrorism charge. (1 RT 77.) The court denied the motion to exclude the lyrics. (1 RT 78.)

During trial, Detective Carpenter testified that he found several notebook papers with handwriting on them in a drawer at Aguirre's hideout in Arizona, which was identified as People's Exhibit 110. (8 RT 1540.) The gang expert later testified that he had reviewed the writings in Exhibit 110, some of which the prosecutor read into the record. (9 RT 1766-1767.) After reading some of the writings into the record, the trial court called a sidebar and asked whether the prosecutor intended to read all of the letters into the record. (9 RT 1769.) The prosecutor explained that she wanted to read several of the writings, then ask the gang expert about his opinion. (9 RT 1769.) Defense counsel noted that he had already objected to the writings in the pretrial motion, and the trial court responded that admissibility was a separate matter from the prosecutor reading the pages into the record. (9 RT 1769-1770.) After the prosecutor read additional writings into the record, defense counsel objected that the evidence was cumulative. (9 RT 1770-1771.) The trial court struck the prosecutor's prior lyric reading, and the prosecutor did not read any more lyrics. (9 RT 1771.)

At the close of evidence, the prosecutor moved to admit Exhibit 110. (10 RT 1946.) Defense counsel objected to the admission, arguing that Aguirre made no statements about the murder within the writings. (9 RT 1946.) Instead, defense counsel argued much of the lyrics were about guns and "creeping at nighttime" that was not specifically about the murder. (9 RT 1946-1947.) Defense counsel argued the probative value of the lyrics were substantially outweighed by their prejudicial effect. (9 RT 1947.)

The prosecutor argued that the primary purpose of the writings was to establish that Aguirre was an active participant in a criminal street gang and

to show that he glorified the gang lifestyle. (9 RT 1951.) The court noted that the last four pages of lyrics seemed to not add much to the first three pages, and the prosecutor argued there were other indications of relevance, such as references to Orange County, the .38, and moving out of state. (9 RT 1953.) After a discussion between counsel, defense counsel objected to the entire exhibit as inadmissible propensity evidence, since they are merely rap lyrics that did not amount to a confession. (9 RT 1956.) The entire Exhibit 110 was admitted into evidence without any redactions. (10 RT 1966.)

During closing argument, the prosecutor argued the lyrics supported a finding of guilt and demonstrated an individual who committed murder and was proud of it. (11 RT 1985.) Specifically, the prosecutor discussed the lyrical references to "38's" which was consistent with the bullets recovered that could have been fired from either a .357 or a .38 caliber weapon. (11 RT 1985.) The prosecutor also called attention to the fact that the lyrics referenced black fitted baseball caps, which was consistent with Quang Do's testimony that Aguirre was wearing a black baseball cap with a D. (11 RT 1994.)

No limiting instruction regarding the lyrics appear to have been requested or given.

B. Relevant Law on Admissibility of Rap Lyrics

"Gang evidence is admissible if it is logically relevant to some material issue in the case other than character evidence, is not more prejudicial than probative, and is not cumulative." (*People v. Avitia* (2005) 127 Cal.App.4th 185, 192.) The specific type of gang evidence at issue here, rap lyrics containing gang references, has been found to be admissible. In *People v. Zepeda* (1998) 167 Cal.App.4th 25, the jury heard two tracks from a "gangster rap" CD that the defendant had written, which contained violent and profane lyrics. (*Id*. at pp. 32-34.) On appeal, Zepeda

contended the evidence was cumulative, and that the lyrics referencing his gang membership, the gang's violent character, and its animosity toward a rival gang were unduly prejudicial. (*Id*. at p. 34.) The Court of Appeal disagreed, concluding the trial court did not abuse its discretion in determining the tracks were not unduly prejudicial under Evidence Code section 352. The evidence was probative of Zepeda's state of mind and criminal intent, as well as his gang membership and loyalty. Thus, although the lyrics were written before the killing, the evidence was relevant to the murder charges against the defendant. (*Id*. at p. 35.)

Similarly, in *People v. Olguin*, *supra*, 31 Cal.App.4th at pages 1372-1373, the appellate court affirmed the trial court's admission of rap lyrics that tended to show the defendant's gang membership, his loyalty to the gang, his familiarity with gang culture, and, by inference, his motive and intent. In that case, Olguin, accompanied by fellow gang members, shot the victim, who had yelled out the name of a rival gang. Three weeks after the shooting, rap lyrics were found in the home of one of Olguin's companions. The lyrics included references to their gang. (*Id.* at p. 1372.) Under the abuse of discretion standard, the Court of Appeal held that the lyrics were properly admitted. The crime at issue was alleged to be gang-related, and the rap lyrics tended to show the defendant's membership in a gang. Therefore, the court rejected Olguin's complaint that the lyrics were inadmissible character evidence.

C. The Trial Court Did Not Abuse Its Discretion in Permitting the Rap Lyrics to Be Admitted

The reasoning of *Olguin* and *Zepeda* applies with equal force here. As an initial matter, Aguirre appears to concede the lyrics were relevant to show his loyalty to his gang. (AOB 250.) The prosecution's theory was that Aguirre committed a gang-related shooting against individuals that he and his associates believed were rival gang members. Like *Olguin* and *Zepeda*,

the lyrics, in conjunction with the testimony of the accomplices, the gang expert, and Aguirre's other written statements, provided evidence that Aguirre was associated with the Dragon Family Junior gang, that he was loyal to the gang, that he was familiar with the gang's culture of violence, and that he was willing to use firearms and violence to defend the gang's honor and territory. For instance, Aguirre wrote lyrics like "I cut up this body of the enime that we just murdered on these OC streetz muthafucka," and "catch a enime slippin you know Ima empty that clip," and "its DFJ every day all day till the day I die 357, AK, 9 milli, Glock 45, I bang for the hood, clang for the hood." (4 Supp. CT 938-840.) And "we always gonna bang for our block, that's why the streets is so mutha fuckin hot, you know we on top, so just pack your bags like a bunch of fags and find another spot. OC is ours we da OG's." (4 Supp. CT 840.)

Further, the lyrics were highly probative in that Aguirre's words linked him to the shooting. In particular, Aguirre rapped about "fool I stay strapped .357's equals 187's with 357's, Ak's and all that." (4 Supp. CT 837.) As well as, "Niggaz cant see me for the fact that I stay with my black beanie, so don't be suprized when these guys dressed in black are coming to take your life," and "black fitted Detroit Tiger baseball cap but the D stands for Dragon." (4 Supp. CT 837.) A forensic scientist testified the bullets recovered from the murder victim were of either .357 or .38 special caliber, both of which could have been fired by a .357 caliber firearm. (6 RT 1091, 1093.) It was also consistent with the testimony of Quang Do that Aguirre was wearing a black cap (8 RT 1381) and the victims' testimony that Aguirre was dressed in all black. (5 RT 821, 898.) Thus, the lyrics supported the prosecution's theory of the case and were relevant to the way Aguirre was dressed, what gun he used, and why he committed the crime, which was for the benefit of the gang.

The trial court also properly exercised its discretion in finding the lyrics were not unduly prejudicial. The lyrics did not portray any acts of violence or particularly offensive language, or other imagery that would inflame the jurors' passions. The lyrics mostly talked about shooting guns at other individuals for the benefit of his gang (4 Supp. CT 837-844), which was consistent and no more inflammatory than the evidence the jury had already heard at trial in much greater detail. For instance, Aguirre wrote in his instant messages about participating in his gang, shooting individuals, and taking lives. (9 RT 1677-1687.) Essentially, the rap lyrics were the same as any of Aguirre's other writings that had already been admitted without objection. In light of the clear relevance of the rap lyrics, and the limited inflammatory nature of the words, the trial court did not "exceed the bounds of reason" in admitting Aguirre's rap lyrics.

People v. Lee (2011) 51 Cal.4th 620 is instructive. In *Lee*, the defendant shot his victim seven times in the face because she was unwilling to have sex with him; the defendant used the moniker "Point Blank." In finding that the moniker was relevant, the court stated: "[E]vidence of defendant's nickname was relevant and extremely probative with regard to the intent with which defendant shot [the victim] and whether the killing was premeditated and deliberate. The prosecution's theory was that defendant shot [the victim] the way he did, with seven shots to her face at close range, to live up to his nickname. In that regard, in her closing argument, the prosecutor reminded the jury that, immediately after the murder, defendant did not respond when [a witness] asked, 'So, is that why they call you Point Blank?' The prosecutor also reminded the jury that defendant sang a gloating rap song about the shooting and said, '"They're never gonna really have to make a rap about my name being Point Blank."' The next words of the prosecutor's argument to the jury were, 'Does that

show his express intent to kill? Absolutely. Absolutely.'" (*Lee*, *supra*, 51 Cal.4th at p. 643, fn. omitted.)

In rejecting the defendant's contention the moniker was unduly prejudicial, this court stated: "[T]he trial court did not abuse its discretion by finding the risk that the jury would improperly infer criminal disposition from defendant's nickname did not substantially outweigh the fact that evidence of defendant's nickname was highly probative because it uniquely tended to prove defendant had a specific reason for shooting [the victim] multiple times at very close range. We note that, in order to minimize the prejudicial impact of the evidence, the prosecutor avoided any reference to the subject of gangs throughout the trial by reminding the court to instruct witnesses not to mention defendant's gang affiliation, and, at defendant's request, the jury was instructed not to consider the evidence of defendant's nickname 'to prove that defendant is a person of bad character, has a disposition to commit crimes, or has ever acted in a manner consistent with this nickname.'" (*Lee*, *supra*, 51 Cal.4th at p. 644, fn. omitted.) In this case the lyrics were even more probative and less prejudicial than the gang moniker in *Lee* precisely because other evidence and testimony established that Aguirre was a gang member, and the rap lyrics discussed gang shootings, and the murder involved a gang-related shooting.

Nonetheless, Aguirre argues they were unduly prejudicial because they were cumulative to already admissible evidence, and the lyrics did nothing to demonstrate his identity as the shooter. On the contrary, the lyrics did corroborate other evidence to demonstrate identity, so the lyrics constituted more than simply cumulative evidence of gang participation. As noted above, the lyrics tended to corroborate the fact that Aguirre used a .357 revolver to shoot the victim, and he tended to wear black clothing, which was consistent with the testimony of three witnesses. And although Aguirre claims this case is different from *Zepeda* because the prosecutor

repeatedly discussed them in closing argument, the use of the lyrics during closing argument was no more inflammatory than any of Aguirre's other written communications, particularly his electronic instant messages where he discussed shooting three people and even quoted some of his own poetry. (9 RT 1679, 1684, 1687.) To the extent the lyrics were inflammatory, they were not unduly so, and the potential for unduly inflaming the jury was outweighed substantially by their probative value.

D. Any Error Was Harmless

Even if this court finds that the trial court erred in admitting the rap lyrics, the error is harmless. Aguirre suggests that the lyrics rendered his trial fundamentally unfair, and thus prejudice should be analyzed under *Chapman*. (AOB 255.) However, "[o]nly if there are no permissible inferences the jury may draw from the evidence can its admission violate due process." (*People v. Albarran* (2007) 149 Cal.App.4th 214, 229.) But as Aguirre appears to concede, the rap lyrics were relevant to demonstrate Aguirre's loyalty to the gang. (AOB 250.) Therefore, the jury *could* draw a permissible inference from the evidence, and admission of the gang evidence did not violate due process. Accordingly, prejudice should be evaluated under the state law standard of *Watson*, *supra*, 46 Cal.2d at page 837.

Under either standard, however, any error was harmless. Even if the lyrics had been excluded, there was still overwhelming evidence that Aguirre committed murder. As noted previously, both Aaron Villegas and Quang Do testified that Aguirre was the shooter and a member of Dragon Family Junior. (7 RT 1168, 1206, 1342; 8 RT 1376.) Aguirre's electronic written communications corroborated the testimony and evidence when he stated, twice, that he shot three people and that he possessed a .38 caliber firearm. (9 RT 1685, 1687.) Aguirre also fled to Arizona and repeatedly searched for warrants in his name on the Orange County Sheriff's

Department website. (9 RT 1682.) Further, the cell phone records for his stepfather's cell phone placed the user in the vicinity of the shooting at the correct time, and the phone made calls that were consistent with Quang Do's testimony regarding Aguirre's phone usage that night. (8 RT 1513-1514, 1524.) Even without the lyrics, the prosecution could have still argued the gang motivation for the shooting, and the identity of the shooter, based on the other gang evidence as well as the timing and circumstances of the killing. Because the remainder of the evidence would have been unaffected, and the prosecution could still have argued its theory of the case, Aguirre has not demonstrated any possibility, much less a reasonable probability, that the outcome of his trial would have been any different without the rap lyrics. Therefore, Aguirre's claim should be denied.

V. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION BY PERMITTING THE VICTIM-WITNESSES TO REMAIN IN THE COURTROOM AT THE SAME TIME

In his fifth claim, Aguirre argues the trial court erred by failing to exclude victim-witness Anh (Jimmy) Ta from the courtroom while his cousin, victim-witness Anh Tran testified. (AOB 256-270.) Aguirre claims the second victim was influenced by the first victim's description of the shooter. (AOB 256-257.) But Aguirre's mere claim of a "substantial risk" is insufficient to demonstrate that the trial court abused its discretion. As Aguirre acknowledges, Jimmy Ta's testimony was consistent with his Grand Jury testimony. Considering the fact that defense counsel presented the trial court with no evidence of a substantial risk that the victims would coordinate their testimonies, as well as the fact that the Grand Jury transcripts were available to the defense for cross-examination, the court's decision to permit Jimmy Ta to remain in the courtroom did not exceed the bounds of reason.

A. The Defense Counsel's Request to Exclude

On May 6, 2009, while victim-witness Anh Tran was testifying, defense counsel interrupted the prosecutor's direct examination to request that the trial court exclude the second victim-witness, Anh (Jimmy) Ta, from the courtroom while Anh Tran testified. (5 RT 819.) At sidebar, the prosecutor told the court that the two witnesses were family members of the victim, and she had already informed defense counsel of her intent to have them present in the courtroom pursuant to Marsy's Law. (5 RT 820.) The prosecutor stated she intended to put the two victims on first so that their testimony could be preserved. (5 RT 820.) The court asked whether the victims had given statements in the past or testified in the past, and the prosecutor responded that both victims had previously testified in Grand Jury proceedings. (5 RT 820.) The court asked if there were transcripts of the Grand Jury proceedings, and the prosecutor stated there were. (5 RT 820.)

Defense counsel stated he believed the court had ruled the victims could remain during the opening statement, but would be excluded during the trial. (5 RT 820.) Defense counsel argued the second victim should be excluded because the current victim's testimony was "critical" about how the events transpired. (5 RT 820.) The court asked if the victims had been questioned about these same events in front of the Grand Jury, and the prosecutor responded, "extensively." (5 RT 820.) The court ruled that the victims were entitled to remain in the courtroom. (5 RT 820.)

Later that day, defense counsel requested a hearing. (5 RT 852.) Defense counsel informed the court that he had seen a huddle of individuals, including the victim-witnesses, in the back of the courtroom. (5 RT 852.) Defense counsel stated there was "not a doubt in my mind they were going over testimony, and talking about it." (5 RT 852.) Defense counsel renewed the motion to exclude all of the witnesses that were not

currently testifying. (5 RT 852.) The prosecutor responded that when she saw the huddle of individuals at the lunch break, she walked over and told them that they could not discuss their testimony, and they indicated that they understood that. (5 RT 852.) The trial court asked if both of the shooting victims were involved, and the prosecutor responded that the cousins had been through these kinds of proceedings before and, to her knowledge, there was no violation of the rule to not discuss the proceedings. (5 RT 853.)

The trial court asked defense counsel whether, other than a gut reaction, he had anything else upon which to base his objection. (5 RT 853.) Defense counsel responded that he was not listening their conversation, but requested the trial court to order Anh Tran and Jimmy Ta not to discuss their testimony with each other until they were excused from the trial. (5 RT 853.) The trial court ordered the two witnesses not to discuss their testimony with each other during the pendency of the proceedings. (5 RT 853-854.) The trial court then stated it would not exclude the two victim-witnesses, citing *People v. Griffin* (2004) 33 Cal.4th 536, 574, and *People v. Bradford*, *supra*, 15 Cal.4th at p. 1321. (5 RT 854.) The court told defense counsel that his speculation that the victims might influence each other was insufficient in light of their prior testimonies in front of the Grand Jury:

> And mere speculation or feeling that their testimony could or would be influenced is insufficient. Since both of these witnesses have testified at the Grand Jury proceedings, that testimony has been memorialized by way of transcript, any discrepancies, I am sure, will be duly noted on cross-examination, and certainly any changes in that testimony based on alleged conversations can be explored by the defense.

(5 RT 854.)

B. Relevant Law

The trial court has the statutory authority to exclude witnesses (Evid. Code, § 777), and also may exclude a victim, which is defined to include the victim of the offense and one person of his or her choosing, from a criminal proceeding. (Pen. Code, § 1102.6, subds. (b) & (c)) But a victim may be excluded only if he or she is subpoenaed as a witness (Pen. Code, § 1102.6, subd. (d)), and otherwise only under certain conditions, including when the person seeking to exclude the victim "demonstrates that there is a substantial probability that overriding interests will be prejudiced by the presence of the victim" (Pen. Code, § 1102.6, subd. (b)(1)). Overriding interests may include the defendant's right to a fair trial. (Pen. Code, § 1102.6, subd. (b)(1)(A).)

The trial court's ruling on a motion to exclude a witness is reviewed for an abuse of discretion. (*People v. Wallace* (2008) 44 Cal.4th 1032, 1053.)

C. The Trial Court Properly Exercised Its Discretion

Aguirre claims the trial court's failure to exclude Jimmy Ta while Anh Tran was testifying denied him a fair trial, because it provided Jimmy Ta with the opportunity to change his testimony and influence his description of the shooter. (AOB 264-267.) Without citing any evidence in the record that the witnesses changed their testimonies to complement each other, Aguirre merely claims there was "a substantial risk" that Jimmy Ta would be "brave enough to follow his older cousin's lead, and change his story too." (AOB 267.) Aguirre has failed to demonstrate that the trial court abused its discretion. He has not shown any evidence of a substantial probability that his right to a fair trial was prejudiced by Jimmy Ta's presence during the proceedings. The trial court properly denied Aguirre's motion to exclude the witness.

People v. Griffin, *supra*, 33 Cal.4th 536, overruled on another ground in *People v. Riccardi*, *supra*, 54 Cal.4th at p. 824, fn. 32, is instructive. There, this Court found no abuse of discretion when the trial court, under former section 1102.6 of the Penal Code, granted the prosecutor's motion to permit the presence in court of two witnesses who were victims as defined by the statute (the murder victim's mother and sister). "In light of the circumstances, the trial court reasonably determined that the presence of [the two witness-victims] would not pose a 'substantial risk of influencing or affecting the content of any testimony.' [Citation.]" (*Griffin*, at p. 574.) This court continued: "Nothing before the trial court at the time it made its ruling suggested that [the witness-victims'] presence posed a substantial risk that either woman would craft or shape her own testimony, or cause any other witness to do so, as a result of her presence." (*Ibid.*)

Notably, *Griffin* stated: "[D]efense counsel asserted only that such a risk existed, *but an assertion of this sort is insufficient to support a claim that the trial court abused its discretion* [citation]. Further, although we review the trial court's ruling on the basis of the record of the proceedings before it at the time the ruling was made, we note that subsequent events do not suggest that either [witness] tailored her testimony on rebuttal to conform with what she had learned from being present at trial.... In addition, subsequent events do not support any inference that either [witness-victim], by her presence, caused any other witness to give testimony different from what the witness otherwise would have given...." (*Griffin*, *supra*, 33 Cal.4th at p. 574, italics added.)

Here, although Aguirre claims there was a "substantial risk" that Jimmy Ta would change his story to fit his cousin's (AOB 267), nothing before the court suggested a substantial risk of that actually occurring. The court reasonably relied on the fact that the victim-witnesses had previously testified before the Grand Jury, the transcripts of those proceedings were

available to the defense, and defense counsel would have ample opportunity to cross-examine each of the witnesses if any discrepancies arose from their prior Grand Jury testimonies. (5 RT 854.) Considering the fact that defense counsel informed the court that he did not actually hear the victims discussing their testimonies during the lunch break (5 RT 853), and there was no other evidence to suggest the victims were attempting to coordinate their testimonies, the trial court could have reasonably concluded that excluding Jimmy Ta from the courtroom was an unnecessary action. The trial court could have also reasonably relied on the fact that the prosecutor, as an officer of the court, had reminded the witnesses not to discuss their testimony, and the court had also explicitly admonished the victims not to discuss their testimonies with each other. (5 RT 853.)

As in *Griffin*, Aguirre's mere assertion that a risk existed is insufficient. As he acknowledges, even though Jimmy Ta initially told police that the shooter was Asian, his Grand Jury testimony was consistent with his trial testimony in that he testified that he could not see the race of the shooter. (AOB 267; 5 RT 932.) Any differentiation between Jimmy Ta's Grand Jury testimony and his trial testimony would inevitably have been seized upon by defense counsel during cross-examination. Thus, Aguirre's claim that there was a "substantial risk" that Ta would craft his testimony to fit the other witness and prosecution theory is likewise nothing more than speculation, and certainly not a showing of a substantial risk of collusion. (See *People v. Tully* (2012) 54 Cal.4th 952, 1006 [referring to the emphasis in California Supreme Court decisions "that the substantial risk referred to be real, not speculative or hypothetical"]; *People v. Bradford*, *supra*, 15 Cal.4th at p. 1322 [the defendant's mere assertion that the witness-victims "*could or would be* influenced by the opening statements was insufficient to establish that the victims' presence posed 'a

substantial risk of influencing or affecting the content of any testimony'"].) Accordingly, Aguirre has failed to demonstrate the trial court abused its discretion.

D. Even if the Trial Court Abused its Discretion Under State Law by Denying the Motion to Exclude, the Error Was Harmless

Even if this Court finds that the trial court abused its discretion, reversal is unwarranted because Aguirre has failed to demonstrate that the decision not to exclude Jimmy Ta resulted in a miscarriage of justice. (*People v. Watson*, *supra*, 46 Cal.2d at pp. 836-837 [California Constitution precludes reversal unless error results in a miscarriage of justice, which will be found only if, after an examination of the whole record, the court determines it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error]; Cal. Const. art. VI, § 13 ["No judgment shall be set aside, or new trial granted, in any cause, … for any error as to any matter of procedure, unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarrariage of justice."].) And as stated *ante*, Aguirre has provided no evidence from the record that the victims somehow tailored their testimony to each other at trial. Even if the trial court had excluded Jimmy Ta from the courtroom, there is no question that his testimony would have remained the same as his prior testimony during the Grand Jury proceedings: that he was unable to see the shooter's face and was unsure of his ethnicity. Aguirre's speculative claims to the contrary should be rejected.

VI. THE PROSECUTOR DID NOT COMMIT MISCONDUCT IN HER GUILT PHASE ARGUMENT BY USING A YELLOW LIGHT TRAFFIC ANALOGY TO EXPLAIN PREMEDITATION AND DELIBERATION OR BY TELLING THE JURY TO "TAKE BACK" THEIR STREETS

In his sixth claim, Aguirre claims the prosecutor committed prosecutorial misconduct during closing argument by analogizing premeditation and deliberation to traffic-related decisions, as well as telling the jury to "take back" their streets. (AOB 270-297.) Aguirre argues this Court may reach the issue even though defense counsel failed to object; in the alternative, he contends he received ineffective assistance of counsel. (AOB 290-297.) Aguirre's claim of prosecutorial misconduct is forfeited for failure to object and request an admonition. In any event, the prosecutor's arguments, in context, did not constitute misconduct, and any error was harmless in light of the court's instructions and strong evidence of Aguirre's guilt. For the same reasons, Aguirre did not receive ineffective assistance of counsel.

A. Relevant Proceedings

During closing argument, the prosecutor explained the concept of premeditation and deliberation by way of a yellow traffic light analogy:

> What do we need to show to get to a first-degree murder? "Defendant intended to kill a human being. Defendant weighed the consequences—the considerations for and against killing and decided to kill. Defendant decided to kill before committing the act that caused the death."
>
> …
>
> Well who hasn't seen that? [Referring to yellow traffic light] At least one of us, maybe even today, running a little bit late to court, thought to themselves, "Well, what do I do when I see that?"
>
> And you do several things. We gauge our speed. Can we make it? We look at the car in front of us. Are they going to stop? We

> look at the car in back of us. What are they going to do? Are they going to slam on their brakes and hit me if I stop too fast? How about looking out for cops? Some of us may even gauge how many tickets we have and whether, if we get caught, we can afford traffic school. This all happens in seconds.
>
> And, ladies and gentlemen, every time you've done that, you've shown premeditation and deliberation. Every single time. Sometimes you make a good decision about that, and sometimes you don't. But the law says that if you consider these things in a matter of seconds, as long as you thought about: Do I stop? Do I not stop? What are the pros? What are the cons? Then you have formed the necessary mental state to prove premeditation and deliberation.

(11 RT 1976-1978.) Defense counsel did not object to the analogy. (11 RT 1978.)

Later in the argument, the prosecutor read some of Aguirre's poetry that suggested his gang ruled Orange County, and she closed her argument by suggesting that they take their "streets back":

> So I will tell you that there is nothing, almost nothing that you could do to take away the respect he earned that day. You can't do anything about that. He can't do anything about that. But what you can do is you hold him accountable for what he did. Your turn to do the right thing and hold him accountable for what he did.
>
> And when he tells you that "Niggaz cant see me for the fact that I stay with my black beanie disguise. So don't be surprised when these guys dressed in black are coming to take your life. We da illest mutha fuckin straight killaz. So just pack you bags like a bunch of fags and find another spot. O.C. is ours." Exhibit 12 and 110.
>
> "O.C. is ours."
>
> With your verdict, ladies and gentlemen, take your streets back. Thank you.

(11 RT 1999.) Defense counsel did not object to the prosecutor's statements. (11 RT 1999.)

The jury was instructed that in the event of any conflict between the attorneys' comments and the trial court's instructions, the jury was to follow the court's instructions:

> You must follow the law as I explain it to you, even if you disagree with it. If you believe that the attorneys' comments on the law conflict with my instructions, you must follow my instructions.

(3 CT 632; CALCRIM No. 200.)

The jury was also instructed about when a killing is "deliberate and premeditated":

> The defendant is guilt of first degree murder if the People have proved that he acted willfully, deliberately, and with premeditation. The defendant acted willfully if he intended to kill. The defendant acted deliberately if he carefully weighed the considerations for and against his choice and, knowing the consequences, decided to kill. The defendant acted with premeditation if he decided to kill before committing the act that caused death.
>
> The length of time the person spends considering whether to kill does not alone determine whether the killing is deliberate and premeditated. The amount of time required for deliberation and premeditation may vary from person to person and according to the circumstances. A decision to kill made rashly, impulsively, or without careful consideration is not deliberate and premeditated. On the other hand, a cold, calculated decision to kill can be reached quickly. The test is the extent of the reflection, not the length of time.
>
> All other murders are of the second degree.

(3 CT 665; CALCRIM NO. 521.)

The jury was also instructed about the limited purpose of evidence of gang activity:

> You may not consider [gang] evidence for any other purpose. You may not conclude from this evidence that the defendant is a person of bad character or that he has a disposition to commit crime.

(3 CT 675; CALCRIM No. 1403.)

B. The Claims Are Forfeited

Claims of prosecutorial misconduct are ordinarily forfeited unless the defendant interposes a timely objection and asserts misconduct and requests an admonition of the jury. (*People v. Clark* (2011) 52 Cal.4th 856, 960.) A defendant is excused from the forfeiture rule if a request for an admonition would have been futile or the admonition would not have cured the harm caused by the misconduct. (*People v. Harrison* (2005) 35 Cal.4th 208, 244.) There is no exception to the forfeiture rule simply because the matter was "a closely balanced case." (*People v. Green* (1980) 27 Cal.3d 1, 27-34, overruled on another ground by *People v. Martinez* (1999) 20 Cal.4th 225, 237.) There is also no exception to the objection rule for capital cases. (*People v. Clair* (1992) 2 Cal.4th 629, 662.) A defendant asserting an excuse for the objection-and-admonition requirement must find support for the exception in the record. The ritual incantation that an exception applies is not enough. (*People v. Panah* (2005) 35 Cal.4th 395, 462.)

Because a prompt objection and an admonition would have sufficiently addressed any concerns Aguirre now raises on appeal, this court should find that all of Aguirre's claims of alleged prosecutorial misconduct are forfeited. (*People v. Thornton* (2007) 41 Cal.4th 391, 454.)

C. Relevant Law on Prosecutorial Misconduct

A prosecutor's conduct violates the federal Constitution only when it is "'so egregious that it infects the trial with such unfairness as to make the conviction a denial of due process.'" (*People v. Gionis* (1995) 9 Cal.4th 1196, 1214.) A prosecutor's conduct that does not rise to the level of a

constitutional violation will constitute misconduct under state law only if it involves "the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury." (*Gionis*, *supra*, 9 Cal.4th at p. 1215, internal quotation marks omitted.)

"To prevail on a claim of prosecutorial misconduct based on remarks to the jury, the defendant must show a reasonable likelihood the jury understood or applied the complained-of remarks in an improper or erroneous manner. In conducting this inquiry, [reviewing courts] do not lightly infer that the jury drew the most damaging rather than the least damaging meaning from the prosecutor's statements." (*People v. Adams* (2014) 60 Cal.4th 541, 577, internal quotation marks and citations omitted. The remarks are not reviewed in isolation, but in the context of the argument as a whole. (*People v. Cole* (2004) 33 Cal.4th 1158, 1203.)

D. There Was No Misconduct; in Any Event, Any Error Was Harmless

If this court finds that Aguirre has avoided application of the forfeiture rule, each of his misconduct claims fails on the merits because the prosecutor did not commit misconduct. As a threshold matter, because there is no evidence the prosecutor intentionally or knowingly committed misconduct, Aguirre's claim should be characterized as one of prosecutorial "error" rather than "misconduct." (*People v. Hill* (1998) 17 Cal.4th 800, 823, fn. 1 ["We observe that the term prosecutorial 'misconduct' is somewhat of a misnomer to the extent that it suggests a prosecutor must act with a culpable state of mind. A more apt description of the transgression is prosecutorial error"]); see also ABA House of Delegates, Resolution 100B (August 9–10, 2010) [adopting resolution urging appellate courts to distinguish between prosecutorial "error" and "misconduct"].) Moreover, even if the prosecutor erred, any error was harmless.

1. The Prosecutor Did Not Misstate the Law on Premeditation and Deliberation

Aguirre argues that the prosecutor misstated the law in closing argument regarding premeditation and deliberation with respect to first degree murder. (AOB 273-282.) Specifically, Aguirre claims the prosecutor misled the jury by implying that the process of deliberation occurs every time a person runs a yellow light. (AOB 277-278.) The prosecutor did not misstate the law, nor did she commit prosecutorial misconduct.

Here, the prosecutor's analogy about deciding whether to proceed through a yellow light did not misstate the law. The true test of premeditation and deliberation is not the duration of time, but the extent of the reflection. (*People v. Halvorsen* (2007) 42 Cal.4th 379, 419.) The prosecutor's examples of making a quick decision in everyday life, such as deciding whether to stop at a yellow light or drive through it after considering whether it is safe to do so, accurately illustrated the meaning of "deliberation" and "premeditation." The prosecutor was arguing that just as a person weighs the pros and cons before deciding to drive through a yellow light after considering any safety hazards, Aguirre weighed the pros and cons before deciding to shoot the victims.

Aguirre's argument that the analogy suggests a person could unconsciously decide to drive through a yellow light removes the prosecutor's comments from their context and omits her subsequent language. Aguirre cites the comment, "And, ladies and gentlemen, every time you've done that, you've shown premeditation and deliberation. Every single time" (11 RT 1978), as evidence that the prosecutor meant that every time a person drives through a yellow light, whether without conscious decision or not, is a process of premeditation or deliberation. (AOB 277.) But that is not what the prosecutor said. Instead, the prosecutor stated that every time a person consciously weighs his or her options, including

gauging the car's current speed, considering whether the car in front will stop, or considering whether the police are around, constitutes forming the necessary mental state that would demonstrate premeditation and deliberation. (11 RT 1978.) As such, the prosecutor did not suggest to the jury that an action "without any thought process at all" could be considered a premeditated and deliberate decision. (AOB 278.) Indeed, the prosecutor elaborated on her point, stating that Aguirre's actions on the day of the murder, including arming himself with a gun, his "pumped up" demeanor, creeping up to the victim's car with his face hidden by a bandana, demonstrated "careful consideration and premeditation and deliberation" as she walked the jurors through the detailed evidence supporting her theory. (11 RT 1979-1981.) As such, the prosecutor accurately stated the law and applied the law to the evidence adduced at trial.

Moreover, the jury was also properly instructed on the law pertaining to first and second degree murder and the mental states the prosecutor was required to prove. (3 CT 663-665 [CALCRIM Nos. 520, 521].) Notably, "[w]hen argument runs counter to instructions given a jury, [reviewing courts] will ordinarily conclude that the jury followed the latter and disregarded the former, for [courts] presume that jurors treat the court's instructions as a statement of the law by a judge, and the prosecutor's comments as words spoken by an advocate in an attempt to persuade." (*People v. Osband* (1996) 13 Cal.4th 622, 717, internal quotation marks and citation omitted.) The jurors were also told the arguments of counsel are just that, and if there is any conflict between the arguments of counsel and the instructions, they should rely on the latter. (3 CT 632, 636-637 [CALCRIM Nos. 200 & 222].) Because jurors are presumed to understand and follow the court's instructions (*People v. Sanchez* (2001) 26 Cal.4th 834, 852), even assuming error, it was harmless.

Aguirre argues the instant case is distinguishable from *People v. Avila* (2009) 46 Cal.4th 680, 715, where the court rejected a similar claim when the prosecutor used a traffic analogy to determine whether the murder was "'cold'" and "'calculated.'" Unlike the prosecutor in *Avila*, Aguirre argues the prosecutor essentially equated the traffic decision with the decision to kill. (AOB 280-281.) In *Avila*, the court found:

> Nor, contrary to defendant's assertion, did the prosecutor argue that "the 'cold, calculated' judgment of murder is the equivalent of deciding whether to stop at a yellow light or proceed through the intersection." Rather the prosecutor used the example of assessing one's distance from a traffic light, and the location of surrounding vehicles, when it appears the light will soon turn yellow and then red, and then determining based on this information whether to proceed through the intersection when the light does turn yellow, as an example of a "quick judgment" that is nonetheless "cold" and "calculated." He then immediately said, "Deciding to and moving forward with the decision to kill is similar, but I'm not going to say in any way it's the same. There's great dire consequences that have a difference here."

(*People v. Avila*, *supra*, at p. 715.)

Here, the prosecutor's yellow light analogy included the same basic level of detail as the analogy in *Avila*. Further, the prosecutor explained to the jurors that the test for premeditation is the extent of the consideration and not simply the length of time. (11 RT 1978-1979.) And she then explained how Aguirre reflected and deliberated over the course of the evening before he fired the gun into the victims' car. (11 RT 1979-1981.) Contrary to Aguirre's claim, the prosecutor did not equate premeditated and deliberated killing with an unconscious running of a yellow light.

Aguirre's reliance on *People v. Nguyen* (1995) 40 Cal.App.4th 28 and *People v. Centeno* (2014) 60 Cal.4th 659, 670, is misplaced. (AOB 278, 281-282.) In those cases, everyday decision-making was equated to the reasonable doubt standard of proof, rather than to explain the concept of premeditation and deliberation as an element of first degree murder.

(*Nguyen*, *supra*, at pp. 36-37; *Centeno*, *supra*, at p. 671.) Using the analogy of a traffic light to explain that premeditation and deliberation can be arrived at quickly is nothing like using everyday decision-making to define the concept of proof beyond a reasonable doubt. Here, the prosecutor properly argued to the jury that ample evidence existed to prove that Aguirre considered, thought about, and planned what he was going to do before he actually did it, and correctly explained that neither deliberation nor premeditation requires thought over an extended period.

2. The Prosecutor Did Not Appeal to The Jurors' Passions by Telling the Jury to "Take Back Your Streets"

Aguirre also claims the prosecutor committed prosecutorial misconduct by telling the jury they could "hold him accountable for what he did … by "tak[ing] your streets back." (11 RT 1999; AOB 287-289.) Specifically, Aguirre claims this statement was calculated to arouse the passions or the prejudices of the jury, and appealed to the jury to be the "conscience of the community." (AOB 287-288.) Respondent disagrees. To be sure, it is misconduct for a prosecutor to appeal to the passions and prejudice of the jury. (*People v. Mayfield*, *supra*, 14 Cal.4th at p. 803.) But there was nothing in the prosecutor's remarks that appealed to the passions of the jury or suggested that it was the jury's duty to solve society's ills.

"'A prosecutor may not urge jurors to convict a criminal defendant in order to protect community values, preserve civil order, or deter future lawbreaking. The evil lurking in such prosecutorial appeals is that the defendant will be convicted for reasons wholly irrelevant to his own guilt or innocence. Jurors may be persuaded by such appeals to believe that, by convicting a defendant, they will assist in the solution of some pressing social problem. The amelioration of society's woes is far too heavy a burden for the individual criminal defendant to bear.'" (*United States v.*

Weatherspoon (9th Cir. 2005) 410 F.3d 1142, 1149.) That is not what occurred here. In this case, the prosecutor told the jurors that they had the opportunity to hold Aguirre, and Aguirre alone, accountable for murder: "But what you can do is you hold him accountable for what he did. Your turn to do the right thing and hold him accountable for what he did." (11 RT 1999.) This was not a case of appealing to the jury's sense of civic duty to protect community values. The prosecutor's words, in context, constituted nothing more than an appeal to hold a single culpable individual accountable for the murder of a 14-year-old.

Aguirre compares the prosecutor's remarks to those found to be improper in *Viereck v. U.S.* (1943) 318 U.S. 236 and *Com. of Northern Mariana Islands v. Mendiola* (9th Cir. 1992) 976 F.2d 475. There is no similarity. In *Viereck,* the prosecutor told the jury: "The American people are relying upon you ladies and gentlemen for their protection against this sort of a crime, just as much as they are relying upon the protection of the Men who man the guns in Bataan Peninsula, and everywhere else. They are relying upon you ladies and gentlemen for their protection. We are at war." (*Viereck, supra,* 318 U.S. at p. 248, fn. 3.) In *Mendiola,* the prosecutor told the jury: "Now as I said, a lot of people are interested in your decision.... Everyone in Saipan is interested. That's why there are so many people in the courtroom. The people want to know if they are going to be forced to live with a murderer. … Your job is to worry about Mr. Mendiola. And when I say worry, I mean worry. Because that gun is still out there. … Mr. Mendiola deserves to be punished for what he did and that's your decision. And it's important because, as I said, that gun is still out there. If you say not guilty, he walks out right out the door, right behind you." (*Mendiola*, *supra*, 976 F.2d at p. 486.)

The remarks in this case are not remotely similar to those in *Viereck* and *Mendiola.* They do not call on the jury to convict Aguirre to keep the

public safe. While the prosecutor's remarks suggested that the jury could hold Aguirre accountable for murder, and that they could respond to Aguirre's lyrics that "OC is ours" by taking their "streets back," viewed in context, the prosecutor was simply taking artistic license of Aguirre's rap lyrics to demonstrate that the jury could hold *him* accountable. There is nothing in these remarks that appealed to the jury to be the "conscience of the community" or suggest that it was the jury's duty to solve the problem of Orange County gang violence by convicting the individual who was standing trial for murder.

3. Any Error Was Harmless

Even assuming error, Aguirre cannot demonstrate any prejudice. Prosecutorial misconduct in the guilt phase of a capital trial is generally state law error assessed for prejudice under the standard articulated in *Watson, supra,* 46 Cal.2d 818. (See e.g., *People v. Booker* (2011) 51 Cal.4th 141, 186.) Only where prosecutorial error rises to the level of a due process violation under the federal Constitution is it reviewed for prejudice under the "beyond a reasonable doubt" standard set forth in *Chapman, supra,* 386 U.S. at p. 24. (*Ibid.*)

Regarding the first claim that the prosecutor misstated the law on premeditation and deliberation, Aguirre cannot demonstrate any prejudice. The jurors were instructed to follow the court's instructions on the law if they conflicted with the attorneys' comments. (3 CT 632, 636-637 [CALCRIM Nos. 200 & 222].) Following the instructions, the jurors would have understood that a finding of premeditation and deliberation required careful consideration and reflection. (3 CT 663-665 [CALCRIM Nos. 520, 521].) On that account, there was ample evidence Aguirre premeditated and deliberated when he shot the victims. As the prosecutor explained, Aguirre armed himself with a gun and was excited about the prospect of engaging with a rival gang. Further, he put on a bandana, snuck up beside the

victims' car, shot the occupants successively in both the front and back seat of the car, and calmly walked back to Quang Do's car. (11 RT 1979-1982.) The jury's verdict finding Aguirre guilty of first degree murder instead of second degree murder indicates the jury implicitly rejected Aguirre's defense. Under the circumstances, Aguirre would not have received a more favorable result absent the prosecutor's use of a yellow light analogy during closing argument. For the same reason, the comment was harmless beyond a reasonable doubt.

Regarding the second claim that the prosecutor appealed to the jurors' passions by telling them to "take back your streets," Aguirre again cannot show prejudice. Aguirre cites no statement by the prosecutor urging the jury to convict him because of the crisis of gangs terrorizing citizens. The prosecutor merely read Aguirre's rap lyrics, responded to them, and completed her closing argument. (11 RT 1999.) The trial court instructed the jurors that they were to decide the case based on the evidence, and not based on bias, sympathy, prejudice or public opinion; they were also instructed that the lawyers' statements were not evidence. (3 CT 632 [CALCRIM No. 200].) Furthermore, the case against Aguirre was strong—especially considering the corroborated testimony of two accomplices pinning Aguirre as the shooter (7 RT 1206-1207, 1315; 8 RT 1376-1380), Aguirre's attempts to hideout in Arizona and flee from police before his arrest, the cell phone records that triangulated his location to the area of the shooting, the corroborated phone calls with fellow gang members, and Aguirre's electronic and handwritten communications in which he admitted to shooting three individuals and discussed ammunition and firearms that were consistent with bullets recovered from the victim's body. It is inconceivable that the jurors convicted Aguirre, guilty or not, based on the prosecutor's statement that they "take back" their streets.

E. Defense Counsel's Failure to Object Did Not Constitute Ineffective Assistance of Counsel

Aguirre claims, in the alternative, that if this court determines his prosecutorial misconduct claims are forfeited, then his counsel was ineffective by failing to object. (AOB 292-297.) To establish constitutionally inadequate representation, a defendant must establish that: (1) counsel's representation was deficient, i.e., fell below an objective standard of reasonableness under professional norms; and (2) counsel's representation subjected the defendant to prejudice, i.e., a reasonable probability that, but for counsel's failings, the result would have been more favorable to the defendant. (*Strickland v. Washington*, *supra*, 466 U.S. at pp. 687-696.)

As the prosecutor did not misstate the law, nor inappropriately appeal to the juror's passions, defense counsel was not required to interpose a meritless objection. (*People v. Anderson* (2001) 25 Cal.4th 543, 587.) Further, even if defense counsel believed an objection was meritorious, he could have made the strategic decision not to object, and instead simply chose to respond to the prosecutor's comments in his argument. (*People v. Lopez* (2008) 42 Cal.4th 960, 972 ["[D]eciding whether to object is inherently tactical, and the failure to object will rarely establish ineffective assistance"].) Indeed, defense counsel could have reasonably concluded that objecting would have irritated the jury or further highlighted the prosecutor's statements to the jurors. (*People v. Riel* (2000) 22 Cal.4th 1153, 1197 [noting that in "the heat of a trial, defense counsel is best able to determine proper tactics in the light of the jury's apparent reaction to the proceedings," and "[t]he choice of when to object is inherently a matter of trial tactics"].) Review of decisions by trial counsel is deferential; the reviewing court must make every effort to avoid the distorting effects of hindsight and evaluate counsel's conduct from counsel's perspective at the

time. (*People v. Scott* (1997) 15 Cal.4th 1188, 1212.) Because counsel very well may have had a rational tactical purpose for not objecting, Aguirre fails to establish deficient performance. (*Lopez*, *supra*, 42 Cal.4th at p. 966 [noting the record on appeal "rarely shows that the failure to object was the result of counsel's incompetence"].)

But even assuming that the failure to object was somehow unreasonable, Aguirre nonetheless has failed to demonstrate how the arguments could have prejudiced him. The jury was admonished under CALCRIM No. 200 that, to the extent counsel's statements of the law conflicted with the instructions, the instructions were controlling. (3 CT 632.) The same instruction also informed the jury that they were not let "bias, sympathy, prejudice, or public opinion" influence their decision. (3 CT 632.) The jury was also properly instructed on the meaning of "deliberated" and "premeditated" under CALCRIM No. 521. (3 CT 665.) It is presumed that the jury understands and follows the trial court's instructions, and would have looked to the instructions to define "deliberated" and "premeditated." (*People v. Sandoval* (2015) 62 Cal.4th 394, 422.) There was no reasonable probability that had counsel objected, and his objection sustained, that the outcome would have been any different, in light of the fact that the jury was adequately instructed on the relevant law. Because Aguirre fails to show deficient performance or prejudice, his ineffective assistance of counsel argument fails. (*Strickland*, *supra*, 466 U.S. at p. 687.)

VII. THERE WAS NO CUMULATIVE EFFECT OF GUILT PHASE ERRORS WARRANTING REVERSAL

In his seventh claim, Aguirre contends the guilt phase and instructional errors alleged in Claims II through VI of his Opening Brief had a cumulative effect requiring reversal of the judgment of

conviction. (AOB 298-299.) As with his individual claims, Aguirre's contention of cumulative error is meritless.

This Court has recognized that multiple trial errors may have a cumulative effect. (*People v. Hill*, *supra*, 17 Cal.4th at pp. 844-848; *People v. Holt* (1984) 37 Cal.3d 436, 458-459.) In a "closely balanced" case, this cumulative effect may warrant reversal of the judgment "where it is reasonably probable" that it affected the verdict. (*People v. Wagner* (1975) 13 Cal.3d 612, 621.)

If the reviewing court rejects all of a defendant's claims of error, it should reject the claim of cumulative error as well. (*People v. Anderson*, *supra*, 25 Cal.4th at p. 606.) Even where "nearly all of [a] defendant's assignments of error" are rejected, this Court has declined to reverse based on cumulative error.[3] (*People v. Bradford*, *supra*, 14 Cal.4th at p. 1057; see, e.g., *People v. Sattiewhite* (2014) 59 Cal.4th 446, 491 [one possible trial court error]; *People v. Bennett* (2009) 45 Cal.4th 577, 618 ["single erroneous evidentiary ruling"]; *People v. Koontz* (2002) 27 Cal.4th 1041, 1094 [single non-prejudicial instructional error in guilt phase]; *People v. Hughes* (2002) 27 Cal.4th 287, 406-407 ["one possible significant error" at penalty phase]; *People v. Jones* (1998) 17 Cal.4th 279, 315 [single "ministerial error in imposing an incorrect sentence" on non-capital count]; *People v. Williams* (1997) 16 Cal.4th 153, 228-229 [single instructional error].)

As discussed in Arguments II through VI, *ante*, there were no evidentiary or instructional errors in the guilt phase. Accordingly, there can be no cumulative error and the judgment should be affirmed in its entirety.

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[3] "'[A] defendant is entitled to a fair trial, but not a perfect one,' for there are no perfect trials. [Citations.]" (*Brown v. United States* (1973) 411 U.S. 223, 231-232; see also *People v. Bradford, supra,* 14 Cal.4th at p. 1057; *People v. Cooper* (1991) 53 Cal.3d 771, 839.)

VIII. THE TRIAL COURT PROPERLY DENIED THE AUTOMATIC MOTION TO MODIFY THE VERDICT

In his eighth claim, Aguirre claims the trial court erroneously denied his motion to modify the death verdict under Penal Code section 190.4, subdivision (e), because (1) the court misapprehended the law by stating that Aguirre's dysfunctional childhood was not mitigating, and (2) the court failed to independently and meaningfully reweigh the guilt phase evidence regarding the possibility of another shooter. (AOB 300-317.) Respondent disagrees. Aguirre's guilt phase evidence claim is forfeited, but even assuming otherwise, both claims lack merit.

A. The Relevant Trial Court Proceedings

At the hearing on the automatic motion to modify the death verdict, the trial court correctly identified the relevant law governing its duties in deciding the motion (18 RT 3375), summarized whether any evidence supported the various factors under Penal Code section 190.4 (18 RT 3375-3376), summarized the evidence supporting the conviction (18 RT 3376-3377), and summarized the factor (k) mitigating evidence presented by the defense (18 RT 3377-3379). As relevant to Aguirre's claims on appeal, the court stated that, under factor (k), "[t]he defense produced evidence geared towards lingering doubt … [but] [t]here is no credible evidence that anyone except Mr. Aguirre fired the six rounds into the Trans' car." (18 RT 3377.) After reciting all of the remaining mitigating evidence presented regarding Aguirre's upbringing, the court concluded that Aguirre's childhood history was not particularly mitigating when balanced with the circumstances of his crime:

> In determining whether the defendant should receive the death penalty or life without possibility of parole, the court places substantial weight on the circumstances of this crime and the extent to which Mr. Aguirre is willing to commit crimes of violence.

> The dysfunctional aspect of Mr. Aguirre's upbringing, while unfortunate, is not mitigating. He had choices throughout his life. He could have stayed with his mother; he chose not to. He could have reached out to his father; he chose not to. He could have stayed in school; he chose not to. He could have walked away from trouble; he chose not to. He could have stayed out of the gang life; he chose not to. He had no rational reason to empty his revolver into the Tran vehicle, yet he chose to do so. To spare him the death penalty because he made poor choices would be equivalent to saying the death penalty should be abolished. People making good choices do not commit special circumstance murders.
>
> Mr. Aguirre was, in effect, a hired assassin. He had no personal quarrel with the victims in this case. He did not even know who they were. With complete and utter disregard for the lives of innocent human beings, he snuck up on a car full of adolescents who were, in his own words, ducking down and hiding, and started shooting. Later, when he was told that the people had shot—that he had shot were not gang members, Mr. Aguirre's response was "Oh, well."
>
> This defendant did not participate in a shootout between rivals, nor was he involved in a fair fight among equals. This was a cold, calculated execution of a vulnerable, scared, defenseless boy. Had he been a better shot, the defendant would have killed four other defenseless people.
>
> There is no excuse, justification, nor mitigation for the devastation the defendant has inflicted on the family of Minh Tran. The court is completely satisfied that the evidence in aggravation far outweighs any evidence in mitigation. The evidence and the law support the imposition of the death penalty as determined by the jury.

(18 RT 3379-3381.)

Following the trial court's denial of the motion for modification of verdict, defense counsel requested to be heard on the matter. (18 RT 3381.) Counsel argued that with respect to his childhood upbringing, Aguirre was unable, as a 12-year-old, to make significant choices about where to live and with whom. (18 RT 3381-3382.) Defense counsel reiterated that

Aguirre was basically abandoned by his mother, he had no place to stay in Hawaii, and, as the forensic psychologist noted during the penalty phase, Aguirre carried 18 of 26 negative risk factors that suggested a strong correlation of performing violent acts. (18 RT 3382-3383.)

The court stated again that Aguirre's dysfunctional upbringing was outweighed by his criminal actions:

> The choices the court referred to are choices that the defendant made. The circumstances of those choices I will not debate, but I believe if you look at the vast majority of people who are on death row, they have the same or similar backgrounds as Mr. Aguirre. And I don't believe that any evidence of his dysfunctional upbringing is sufficient to overturn what he has done. One does not need to be much of a human being to know that taking a gun and shooting at five innocent, cowering people in a car is something you should not do.

(18 RT 3389.)

B. Relevant Law

"Every death verdict triggers an automatic application for modification of the sentence." (*People v. Gamache* (2010) 48 Cal.4th 347, 403, citing Pen. Code, § 190.4, subd. (e); *People v. Mungia*, *supra*, 44 Cal.4th at p. 1139.)

> Pursuant to section 190.4, in ruling upon an application for modification of a verdict imposing the death penalty, the trial court must reweigh independently the evidence of aggravating and mitigating circumstances and then determine whether, in its independent judgment, the weight of the evidence supports the jury's verdict. The statute thus requires the court to make an independent determination concerning the propriety of the death penalty. The court must state the reasons for its ruling on the record, but need not describe every detail supporting its ruling so long as the statement of reasons is sufficient to allow meaningful review.

(*People v. Cunningham* (2015) 61 Cal.4th 609, 669, internal quotation marks and citations omitted.) A trial court is "not required to find that

evidence offered in mitigation does in fact mitigate." (*People v. Alfaro* (2007) 41 Cal.4th 1277, 1334; *People v. Guerra* (2006) 37 Cal.4th 1067, 1162, overruled on other grounds, *People v. Rundle* (2008) 43 Cal.4th 76, 151 [same].)

C. Aguirre Forfeited His Claim that the Trial Court Erred When Stating the Evidence Did Not Support a Finding that Someone Else Was the Shooter

"If a defendant fails to make a specific objection to the court's ruling at the modification hearing, the claim is forfeited. (See *People v. Riel, supra*, 22 Cal.4th at p. 1220.) This rule applies only to cases in which the modification hearing was conducted after the finality of this court's decision in *People v. Hill* (1992) 3 Cal.4th 959, 1013. (*People v. Riel, supra*, 22 Cal.4th at p. 1220.) As [appellant's] modification hearing was held post-*Hill*, the forfeiture rule applies here." (*People v. Mungia*, *supra*, 44 Cal.4th at p. 1140.) "[T]he defendant must bring any deficiency in the ruling to the trial court's attention by a contemporaneous objection, to give the court an opportunity to correct the error." (*Id*. at p. 1141.)

As Aguirre concedes, defense counsel did not object or address the trial court's comments that there was "no credible evidence" to support a finding that another person was the shooter. (AOB 311.) Accordingly, that claim—that the trial court improperly concluded that the evidence only supported the conclusion that Aguirre was the shooter—is forfeited.

Aguirre claims, in the alternative, that if this court determines the claim is forfeited, his counsel was ineffective by failing to object. (AOB 312-316.) To establish constitutionally inadequate representation, a defendant must establish that: (1) counsel's representation was deficient, i.e., fell below an objective standard of reasonableness under professional norms; and (2) counsel's representation subjected the defendant to prejudice, i.e., a reasonable probability that, but for counsel's failings, the

result would have been more favorable to the defendant. (*Strickland v. Washington*, *supra*, 466 U.S. at pp. 687-696.) Aguirre cannot demonstrate his trial counsel performed deficiently, however, because there was no evidence to support the conclusion that someone other than Aguirre was the shooter. Thus, defense counsel would have reasonably concluded that any objection on that ground would have been futile. Aguirre appears to agree that an objection would have been futile. (AOB 312.) Counsel cannot be faulted for not raising a meritless objection. (*People v. Anderson*, *supra*, 25 Cal.4th at p. 587.)

But even assuming counsel performed deficiently by failing to object, it is not reasonably probable that there would have been a more favorable outcome. As argued *ante* in Argument III, there was simply no evidence presented at trial that someone other than Aguirre shot the victims in this case. Two accomplices testified that Aguirre was the shooter (7 RT 1206-1207, 1315; 8 RT 1376-1380), and their testimonies were corroborated by other evidence and witness testimony as described in detail in Argument II. No other evidence was presented that suggested another individual was the shooter instead of Aguirre. Aguirre's ineffective assistance claim fails.

D. The Trial Court Properly Weighed the Mitigating Evidence

The record is clear that the trial court understood its duties and properly weighed the mitigating evidence presented by the defense. In ruling on such a motion, "the trial court must reweigh independently the evidence of aggravating and mitigating circumstances and then determine whether, in its independent judgment, the weight of the evidence supports the jury's verdict. [Citations.] The trial court must 'consider, take into account, and be guided by' the aggravating and mitigating circumstances referred to in section 190.3." (*People v. Crittenden* (1994) 9 Cal.4th 83, 150.)

"The trial court is presumed to have acted to achieve *legitimate* sentencing objectives." (*People v. Carmony* (2004) 33 Cal.4th 367, 376-377, emphasis added; see also *People v. Coddington* (2000) 23 Cal.4th 529, 644, overruled on other grounds in *Price v. Superior Court* (2001) 25 Cal.4th 1046, 1069, fn. 13 ["As an aspect of the presumption that judicial duty is properly performed, we presume . . . that the court . . . is able to distinguish . . . relevant from irrelevant facts, and to recognize those facts which properly may be considered in the judicial decisionmaking process."]; Evid. Code, § 664 [presumption that official duty has been regularly performed]; Cal. Rules of Court, rule 4.409 [trial court is presumed to have considered all of the relevant sentencing criteria unless record affirmatively reflects otherwise].) On appeal, this Court reviews the trial court's ruling independently, but the penalty is not redetermined in the first instance. [Citations.]" (*People v. Gamache*, *supra*, 48 Cal.4th at p. 403.)

Here, the trial court correctly stated,

> Penal Code section 190.4 provides that in every case in which a trier of fact has returned a verdict imposing death, a defendant is deemed to have made an automatic application for a motion to modify the verdict under Penal Code section 1181, subdivision (7). Pursuant to such section, it is the duty of this court to reweigh the evidence of aggravating and mitigating factors to determine if the weight of the evidence supports the jury's verdict of death.

(18 RT 3375; see also 18 RT 3389 ["The court's role is to review the evidence to see if it supports the jury's verdict. I am convinced that it does."].)

Aguirre claims that the trial court held that his "dysfunctional childhood was not mitigating," which suggests the court did not "independently review the evidence and decide the proper weight to accord it." (AOB 302, 304.) He argues the court's comments suggested that it

believed that to grant relief on automatic review, Aguirre had to make a showing that "evidence of his dysfunctional upbringing was sufficient to overturn the murder conviction." (AOB 305.) Viewed in context, the record does not support Aguirre's claims.

The trial court's comments did not suggest that it misunderstood the relevant law or misapplied it when reweighing the evidence. Instead, the trial court stated that it considered all of the mitigating factor (k) evidence, including the character evidence of Aguirre's mother, his father, and Aguirre himself. (18 RT 3377.) And the court explicitly stated that it was "completely satisfied that the evidence in aggravation far outweighs any evidence in mitigation. The evidence and the law support the imposition of the death penalty as determined by the jury." (18 RT 3381.) Even after listening to defense counsel's extensive recitation of the mitigating facts (18 RT 3381-3388), the trial court reasonably concluded that the evidence supported the jury's verdict, and that the evidence of Aguirre's dysfunctional upbringing was insufficient to overcome the aggravating evidence of the circumstances of the murder. (18 RT 3389.) Considering the legal presumption that the trial court properly performed its judicial duties (*People v. Carmony*, *supra*, 33 Cal.4th at pp. 376-377), it cannot be reasonably concluded, in light of the court's own statements, that it failed to adequately weigh the mitigating evidence against the aggravating evidence in concluding the evidence supported the jury's determination.

Aguirre claims the trial court's comments—that to spare him the death penalty because he made poor choices would be the equivalent of saying the death penalty should be abolished—was a "stunning disregard of what constitutes mitigating evidence and amounted to an abuse of discretion and a mockery of justice." (AOB 305.) Aguirre's concern for the integrity of criminal justice is overstated. In context, the trial court was simply cautioning that if it were to find that the choices Aguirre made as an

adult were necessarily *predetermined* by his upbringing, then no one could ever be punished with the death penalty. (18 RT 3380.) The court was not redefining the relevant law, nor was the court saying that it did not consider the mitigating evidence at all. Instead, the court explained it was not persuaded that the mitigating evidence outweighed the nature of the crime. (18 RT 3389.) In light of the record, Aguirre has not overcome the presumption that the trial court acted to achieve legitimate sentencing objectives when it found that the evidence, on balance, supported the jury's determination. (*People v. Carmony*, *supra*, 33 Cal.4th at pp. 376-377.)

Finally, assuming this court reaches the merits of Aguirre's second contention—that the trial court failed to meaningfully evaluate the evidence supporting a finding that someone else was the shooter (AOB 306-310)—Aguirre has not shown that the trial court erred. Aguirre argues the trial court improperly failed to reweigh the evidence in finding there was no credible evidence that someone else was the shooter. (AOB 307-308.) The trial court properly concluded there was no credible evidence, because *there was no* credible evidence to support the defense theory that someone else was the shooter.

No one ever testified at trial that they were able to determine that the shooter was Asian. The victims testified that they could not see the shooter's face, and only initially told the police that the shooter was Asian because the other individuals were Asian. (5 RT 821, 900, 907, 932.) Mr. Nguyen testified that the individuals in Quang Do's car appeared to be Asian "in physique," but he admitted he was never able to get a good look at the shooter's face. (6 RT 984.)

And there was no evidence that Eric Pham was at the scene of the shooting when it happened. Aaron Villegas and Quang Do's testimony were consistent in that respect. Villegas testified that Eric Pham's car was not in the cul-de-sac at the time of the shooting. (7 RT 1263.) He saw

Pham's car at Aguirre's house before the shooting, and after the shooting, but not when Aguirre shot the victims. (7 RT 1264.) He testified that he may have seen Eric Pham's car near Brookhurst Street when they were leaving the location of the shooting, but he could not recall specifically where. (7 RT 1269-1270.)

Like Villegas, Quang Do testified that he saw Eric Pham on the night of the shooting, but not in the cul-de-sac when Aguirre shot the victims. Do stated he got a phone call from Pham while they were all waiting in the parking lot of Alerto's. (8 RT 1368.) Do told Pham to join them so that they would have a greater show of force. (8 RT 1368.) Do testified that he did not see Pham at the location of the shooting, but once they had fled the scene, Pham called him to let him know they were being followed by someone. (8 RT 1384.) Do received the call from Pham only a couple of minutes after they fled the scene, which was consistent with Villegas's testimony that he may have seen Pham's car on one of the streets nearby the cul-de-sac. (8 RT 1385.) Do specifically stated he received Pham's call around the time they were on McFadden Avenue, near La Quinta High School. (8 RT 1386.) Do saw Eric Pham's car when it pulled up next to them near La Quinta High School. (8 RT 1386.) Eventually, Do's green Acura, the white Lexus, and Eric Pham's car all pulled over and Aguirre and Duong Le jumped out of Do's car. (8 RT 1388.) Aguirre entered Eric Pham's car and Duong Le entered Harrison Pham's car. (8 RT 1388.) The evidence was consistent: Eric Pham was late to arrive, but he participated in the subsequent events of the night.

Finally, although Aguirre makes much ado about the black bandana found in the driver's door of Do's car, there was no evidence that *the shooter* actually wore the black bandana containing

Eric Pham's DNA. Do testified that Aguirre was wearing a black bandana over the bottom part of his face at the time of the shooting, and he removed the bandana when he returned to Do's car. (8 RT 1379-1380.) There was no evidence that Aguirre actually dropped his bandana in Do's car when he removed it, nor was there any evidence explaining how or why Aguirre would have placed his bandana in the door compartment of the driver's door where it was found by investigators. (6 RT 1044.) Finally, Do testified that the black bandana found in his vehicle was his, and he explained that Aguirre had his own black bandana at the time of the shooting that was distinct from the black bandana found in the car: "He had a black one, too." (8 RT 1382.)

Finally, in light of the corroborated testimony of two accomplice witnesses identifying Aguirre as the shooter, the cell phone records, Aguirre's own electronic and handwritten writings, his evidence of flight, his electronic searches for warrants in his name, the caliber of the bullets that matched Aguirre's written statements, and Aguirre's own words that he shot three people, the evidence was truly overwhelming that Aguirre, and Aguirre alone, was the shooter.

Contrary to Aguirre's claim, this case is similar to *People v. Alfaro*, *supra*, 41 Cal.4th 1277. (AOB 308-310.) In that case, the defendant argues the trial court improperly failed to consider several mitigating factors. (*Id.* at p. 1332.) Specifically, the defendant argued the court discounted or ignored her youth and troubled background, as well as evidence suggesting that she "acted under the substantial domination of another person in committing the murder." (*Ibid.*) This court rejected the argument, noting that the court acknowledged that the jury heard evidence in support of that theory, but that there was an "utter lack of physical evidence to support the

presence or participation of another person in the murder." (*Ibid.*) This case is no different. The trial court stated that it considered all of the aggravating and mitigating evidence. (18 RT 3375, 3389.) But after reevaluating the entire record in search of any support for the defense theory that someone else was the shooter, the trial court reasonably concluded that there was no "credible" evidence to support that theory. (18 RT 3377.) Aguirre's claim to the contrary should be rejected.

IX. THE PROSECUTOR DID NOT COMMIT MISCONDUCT IN HER PENALTY PHASE ARGUMENT

In his ninth claim, Aguirre argues the prosecutor committed misconduct during the penalty phase closing argument (AOB 317-323.) Specifically, Aguirre claims the prosecutor disparaged defense counsel and his expert when she called attention to the fact that the defense expert had not performed any psychological evaluations or read Aguirre's writings when arguing that the defense should "get their money back." (AOB 320.) There was no misconduct. The prosecutor's arguments were not an attack on defense counsel, nor were they an unreasonable statement of the evidence.

A. The Prosecutor's Comments During Closing Argument

During the prosecutor's closing argument during the penalty phase, she stated the following:

> There is a reason, ladies and gentlemen, that we put these decisions in the capable hands of 12 people from our community. You folks will be making this decision. And who better to make this decision, because his family doesn't know what you know. They don't know what you know. They didn't hear all the evidence in the guilt phase of this trial, to know what you know.
>
> His friends from years ago don't know what you know. They knew him a while back. They knew him 10 years ago. They

> knew him 15 years ago. They knew him as a little boy. They don't know what you know.
>
> And even some of them came here and said, that's not the Jason I know.
>
> His $150 an hour east coast scholar who wants to talk to you about gangs, race and beauty, also does not know what you know.
>
> And certainly his $300 an hour psychologist, who can't be bothered to perform a single cognitive test on the defendant, a single psychological test on the defendant, but wants to tell you that he is diagnosed with A.D.H.D. and all kinds of social disorders. Not one test, ladies and gentlemen, did he perform on him, $300 an hour, $25,000, to interview 16 people, he doesn't know what you know. He couldn't be bothered to read five and a half years of mail cover. The defendant's letters. Couldn't be bothered to read his rap lyrics. To find out what his thoughts are, what his desires are, what he likes to write about, what he fantasizes about. Couldn't be bothered to read that. He doesn't know what you know.
>
> Frankly, I think the defense should get their money back.

(18 RT 3300-3301.)

Defense counsel objected that the argument was improper, and the court overruled the objection. (18 RT 3301.) Defense counsel did not request a curative admonition. (18 RT 3301.)

B. Relevant Law

The same standard is applied on appeal to evaluate a claim of prosecutorial misconduct in the penalty phase as in the guilt phase. However, when misconduct has been established, the determination of prejudice is based on deciding whether there is a "reasonable possibility that the jury construed or applied the prosecutor's comments in an objectionable manner. In conducting this inquiry, [the court does] not lightly infer that the jury drew the most damaging rather than the least damaging meaning from the prosecutor's statements." (*People v. Guerra*,

supra, 37 Cal.4th at p. 1153, internal citations and quotation marks omitted.)

C. The Claim is Forfeited

As previously stated, "To preserve the issue of prosecutorial misconduct on appeal, the defendant must both object *and* request a curative admonition unless such admonition would have failed to cure any prejudice." (*People v. Lopez* (2013) 56 Cal.4th 1028, 1073, overruled on other grounds in *People v. Rangel* (2016) 62 Cal.4th 1192, 1216 [emphasis in original].) Here, defense counsel did not request a curative admonition. Instead of both objecting *and* requesting a curative admonition in the trial court, Aguirre merely objected below. (18 RT 3301.) "'Because we do not expect the trial court to recognize and correct all possible or arguable misconduct on its own motion [citations], defendant bears the responsibility to seek an admonition if he believes the prosecutor has overstepped the bounds of proper comment, argument, or inquiry.'" (*People v. Wilson* (2008) 44 Cal.4th 758, 800, quoting *People v. Visciotti* (1992) 2 Cal.4th 1, 79.) Having deprived the trial court of the opportunity to easily cure the misconduct now alleged on appeal, Aguirre forfeited this prosecutorial misconduct claim.

D. There Was No Misconduct

Even assuming Aguirre has not forfeited his claim, it fails on the merits. Aguirre claims that by suggesting the defense experts were overpaid, and by stating, "Frankly, I think the defense should get their money back," the prosecutor somehow denigrated defense counsel, which violated his right to effective assistance of counsel. (AOB 320-321.) Aguirre's argument should be rejected. Viewed in context, the prosecutor did nothing more than criticize the fact that the defense's psychiatric expert, who happened to charge $300 per hour—for a total of $25,000—failed to

perform a single psychological test on the defendant or even read his personal writings, and yet diagnosed Aguirre with several disorders. (18 RT 3300-3301.) This was a reasonable statement of the evidence in light of the prosecutor's cross-examination of the psychologist. The psychologist admitted that he did not perform any cognitive testing or personality tests on Aguirre; and he did not review Aguirre's rap lyrics, computer conversations, or prison mail. (17 RT 3220-3222.) Thus, in light of the substantial fees charged by the psychologist, a reasonable interpretation of the prosecutor's comment that the defense should "get their money back," was that the expert's testimony was not persuasive in light of his lack of preparation before diagnosing Aguirre with mental disorders such as Asperger's syndrome. (17 RT 3162.) This was not a denigration of defense counsel. Instead, it was a colorful attack on the credibility of the defense witness's testimony.

As Aguirre acknowledges, harsh and colorful attacks on the credibility of opposing witnesses are permitted. (*People v. Arias* (1996) 13 Cal.4th 92, 161; AOB 320.) Indeed, it is not inappropriate for the prosecutor to comment upon an expert witness's fee. (*People v. Redd* (2010) 48 Cal.4th 691, 753.) In addition, no misconduct has been found where the prosecutor referred to a defense psychiatrist as a "liar," when that is an inference that could be drawn from the trial testimony. (*People v. Clark* (1993) 5 Cal.4th 950, 1017, overruled on other grounds, *People v. Doolin*, *supra*, 45 Cal.4th at p. 421, fn. 22.) In another case, it was not improper for the prosecutor to argue that an expert's opinion was entitled to less weight due to failure to administer certain tests to defendant after the trial court had sustained an objection to the prosecutor's hypothetical question about why the expert did not give certain tests. (*People v. Bennett*, *supra*, 45 Cal.4th at p. 615.) Here, the prosecutor made a permissible argument that the defense expert, who admitted that he had not personally

performed psychological evaluations of Aguirre and had not read his writings, provided testimony that was limited in value. It is unreasonable to conclude that the prosecutor's statements somehow denigrated the integrity of defense counsel when the comments were directly focused on the credibility of the opposing witness.

E. The Alleged Misconduct Was Harmless

Even assuming prosecutorial error, the error was harmless. As at the guilt phase of the trial, at the penalty phase a prosecutor commits misconduct under the federal standard by engaging in conduct that renders the trial so unfair as to constitute a denial of due process. (*Darden v. Wainwright* (1986) 477 U.S. 168, 181; *People v. Earp* (1999) 20 Cal.4th 826, 858.) State law characterizes the use of deceptive or reprehensible methods as misconduct. (*People v. Earp*, *supra*, 20 Cal.4th at p. 858.) For prosecutorial misconduct at the penalty phase, the reasonable possibility standard of prejudice is applied, which is the 'same in substance and effect' as the beyond-a-reasonable-doubt test for prejudice articulated in *Chapman v. California*, *supra*, 386 U.S. 18. (*People v. Wallace*, *supra*, 44 Cal.4th at p. 1092.)

Aguirre contends the alleged misconduct in closing argument was prejudicial, but he merely asserts the mitigation evidence "was powerful," while the evidence against him in the guilt phase was "far from overwhelming." (AOB 322-323.) As respondent has argued previously, the evidence was, indeed, overwhelming in light of the corroborated testimony of two accomplice witness, cell phone data, Aguirre's own writings, and his admission that he shot three people. The mitigating evidence of Aguirre's upbringing, in contrast, was not very powerful in light of the cold-blooded manner in which Aguirre calmly walked up to the victims' car where they were cowering and attempted to execute all of them, as well as his prior violent history. In light of the prosecutor's relatively mild comments

denigrating the value of the defense expert's testimony, there is no possibility that the result would have been any different absent the complained-of remark.

X. THE TRIAL COURT DID NOT COMMIT MISCONDUCT DURING THE PENALTY PHASE

In his tenth claim, Aguirre argues the trial court committed judicial misconduct when it denigrated the defense expert in front of the jury, unreasonably excluded the defense expert's slide show, and denied a continuance for the expert to prepare to testify without his slide show. (AOB 323-346.) Aguirre claims that these actions denied his right to a fair trial and right to present a defense, which rendered his death sentence unreliable. (AOB 344-346.) Aguirre fails to show that the trial court committed misconduct or even abused its discretion by its actions and rulings, which were reasonable in context.

A. Relevant Background

1. Discussions Regarding Dr. Mark Cunningham's Expert Testimony

During discussions on May 27, 2009, and June 1, 2009, about the testimony of defense expert Dr. Mark Cunningham, the trial court attempted to understand what his ultimate opinion was expected to be to determine whether it was an admissible basis. Defense counsel had previously stated the expert would testify that Aguirre's decisions were influenced by dysfunctional upbringing, which led him to adopt principles of gang loyalty and violence, and which also lessened his moral culpability. (13 RT 2436; 14 RT 2626.) The trial court stated it would never allow an expert to testify that someone has less moral culpability, which was a jury question. (14 RT 2628.) Defense counsel then stated the expert would testify to facts and influences that would "in effect" lessen Aguirre's moral culpability, but that he would not testify as to culpability; that point would

be argued to the jury. (14 RT 2628.) The trial court remained dubious, and wanted to know the value of the expert's opinion. (14 RT 2628.) Defense counsel responded that the expert would refer to studies that indicated how childhood history affects how a person matures and how they make choices as adults. (14 RT 2628-2629.) After lengthy discussion about the expert's expected testimony, the trial court reiterated that the expert could not render an opinion on the ultimate issue: whether Aguirre was culpable for his actions. (14 RT 2639.) Defense counsels agreed, "That's not going to happen," and "We are not going to do that." (14 RT 2639.)

The issue was revisited on June 3, 2009. The prosecutor stated she received a report by Dr. Cunningham, which consisted of a series of slides that he wished to present during testimony. (15 RT 2750.) The prosecutor believed that the slides suggested the expert's testimony would go to the issue of moral culpability. (15 RT 2750-2751.) The prosecutor objected to the nature of the expert's expected testimony, as well as the misleading nature of the slide presentation, which she believed used visual aids that made it appear that Aguirre's dysfunctional background was insurmountable. (15 RT 2751-2752.)

Defense counsel responded that Dr. Cunningham would testify that when a person has risk factors, it "may lower your moral culpability," which in terms of mitigation evidence, may "lessen the gravity of the crime." (15 RT 2753.)

The trial court responded, "I don't have the transcript in front of me, but I will bet my next paycheck that you stood there a couple days ago and said you are absolutely not going to ask him to render an opinion on moral culpability." (15 RT 2753.) Counsel responded, "Not on moral culpability, but whether these [risk] factors tend to lessen it. Not whether he's morally culpable or not." (15 RT 2753.) The trial court stated, "It just is astonishing to me that anyone would hold themselves out as an expert on moral

culpability. I just find that flabbergasting." (15 RT 2753-2754.) The trial court ruled that the expert could not use the term "moral culpability." (15 RT 2754.) Defense counsel indicated that the expert could take "moral culpability" out of his presentation. (15 RT 2753.)

Defense counsel explained to the court that the night before, someone broke into Dr. Cunningham's car and stole his laptop with his slideshow presentation. (15 RT 2754-2755.) Defense counsel indicated the expert still had the slideshow on a smaller computer, but it was unclear whether Dr. Cunningham could make the changes "to delete those terms or references." (15 RT 2755.)

After the trial court had an opportunity to review the slide show, it expressed concern that all it appeared that the expert would offer is that people with historical familial environmental risk factors are more inclined to commit crimes than people who do not. (15 RT 2871.) The trial court believed it was dangerous testimony that described someone that would be on death row. (15 RT 2872.) Defense counsel explained the expert's presentation would show that the things Aguirre was exposed to were "not within his control." (15 RT 2872.) The court asked why an expert was needed to explain to the jury that people with risk factors are more likely to commit violent crimes, defense counsel explained it would assist the jury with determining whether Aguirre was morally responsible for his crimes. (15 RT 2872-2873.) The court replied, "I disagree with you. The factor is whether or not the defendant believes his actions were morally correct." (15 RT 2873.) The trial court stated that as an expert who is not making a diagnosis of mental disease or defect, the most that Dr. Cunningham could testify about was that people who have experienced these particular experiences are more likely than not to commit violent crimes. (15 RT 2874.)

Defense counsel reiterated that the expert was necessary to testify that, based on experience and research, a person with a particular background is more likely to be involved in crimes of violence, which was more understandable than counsel simply arguing that it "really isn't [Aguirre's] fault at all." (15 RT 2877.) The trial court responded, "and there is not an expert in the world that is going to come in and tell anybody that it is not his fault." (15 RT 2877.) The trial court stated that it would not "allow a psychologist to come in and hypothecate that somehow [Aguirre] felt his actions were morally justified based on the statistics." (15 RT 2878.)

2. Discussions About the Use of Dr. Mark Cunningham's Prepared Slide Presentation

After a hearing with Dr. Mark Cunningham under Evidence Code section 402, the prosecutor objected to the expert's use of his slide presentation because it indicated the presence of several risk factors, including alcohol addiction or abuse and physical violence in the home, which had not been testified about by other witnesses. (16 RT 2980-2981.) The trial court stated that experts may rely on hearsay but they may not relay inadmissible hearsay. (16 RT 2982.) The court ruled that Dr. Cunningham could not recite research, literature, and statistics during his testimony. (16 RT 2982.) The court clarified that the expert could state the research he relied on, but not the specifics. (16 RT 2983-2984.) The trial court ruled that the slide show was not permitted to be shown to the jury or entered into evidence, although he could use hand-drawn diagrams as needed to illustrate his testimony. (16 RT 2983-2984.) Defense counsel objected. (16 RT 2985.) The court explained that the slide show "is just surplusage. It produces a lot of information that is not in evidence. It really doesn't add anything to the ultimate opinion, which is: based on this set of

risk factors, there is an increased likelihood of criminal behavior." (16 RT 2985.)

Later that day, counsel explained that the slide show would constitute demonstrative evidence, and the trial court explained that it was not demonstrative, but was instead merely a summary of what has been testified about by other witnesses. (16 RT 2993.) Counsel argued that the jurors needed a visual to understand statements or evidence. (16 RT 2993.) The court asked why Dr. Cunningham should be treated differently than any other expert, and again stated it would not allow the slideshow presentation. (16 RT 2996.) The court sustained the prosecutor's objection to the use of the slideshow presentation. (16 RT 2997.)

Defense counsel stated that if the court would not allow the slide presentation, he would ask for a continuance to redo the slide presentation so that it would be more presentable to the jury. (16 RT 3000.) The court explained that permitting the expert to place all of the prior mitigation testimony within a slideshow would tend to mislead the jury:

> You put all of this stuff up here, all it does is say, see, this expert is stamping his stamp of approval, saying this is all true, everything contained in this slide show is true. It unfairly highlights testimony by showing it up here in this fashion. He can render an opinion based on a hypothetical set of circumstances that are in evidence. By putting this up, you are telling the jury this stuff is established. See, it has already been proved, all of this is true … you can accept it as true. And that's the danger, that's the difference.

(16 RT 3010.) Counsel requested the court to go through each slide "line by line, and diagram by diagram," and make a determination as to what may or may not be allowed into evidence. (16 RT 3010.) The court ruled that none of it could be entered into evidence. (16 RT 3010.)

The court repeatedly expressed concern that it could not get a consistent offer of proof from defense counsel as to the expert's ultimate

opinion, which appeared to change from the expert's testimony at the Evidence Code section 402 hearing. (16 RT 2987-2988, 2995, 3009, 3011, 3013, 3015.) Counsel explained that the material the expert would testify about is complex and voluminous, and that without the slide presentation, the testimony could take several days. (16 RT 3017.) The slide show would speed the process along and make it more understandable. (16 RT 3017.) The trial court denied the request for a continuance. (16 RT 3018.)

3. Trial Court's Comments in Front of the Jury

During trial, Dr. Cunningham used hand written notes to describe some of his points to the jury. (4 Supp. CT 882-907.) At one point during his testimony, he indicated to the trial court that he was down to his last sheet of paper: "It looks like we are down to one sheet; is there another pad?" (16 RT 3050.)

The court responded, "This is California, we have a 23-billion-dollar deficit. I don't know if we can afford paper." (16 RT 3050.) The jury laughed, and Dr. Cunnigham responded, "I am not asking for a bailout, just one or two more sheets." (16 RT 3050.) The court responded, "We might have to take up a collection. While we are doing that, I know you guys haven't been here long, we have, we need a break, we will take a 15-minutes recess." (16 RT 3050.)

B. Relevant Law

A criminal defendant "has a due process right to an impartial trial judge under the state and federal Constitutions. [Citations.] The due process clause of the Fourteenth Amendment requires a fair trial in a fair tribunal before a judge with no actual bias against the defendant or interest in the outcome of the case." (*People v. Guerra*, *supra*, 37 Cal.4th at p. 1111.) The comments of the trial judge about witnesses, evidence and its importance or lack thereof, and indications of hostility toward or displeasure with defense

counsel can all negatively impact a defendant's right to a fair trial. The jurors "rely with great confidence on the fairness of judges, and upon the correctness of their views expressed during trials." (*People v. Sturm* (2006) 37 Cal.4th 1218, 1233.) Indeed, jurors "are apt to give great weight to any hint from the judge as to his opinion on the weight of the evidence or the credibility of the witnesses." (*People v. Robinson* (1946) 73 Cal.App.2d 233, 237.) Judges have a "duty to maintain a strictly judicial attitude and to refrain from comment or other conduct which borders upon advocacy." (*People v. Campbell* (1958) 162 Cal.App.2d 776, 787.) Accordingly, a judge should not criticize the defense's theory. (*People v. Sturm*, *supra*, 37 Cal.4th at p. 1238.) Although a trial court has the duty and discretion to control the conduct of a trial, (*People v. Fudge* (1994) 7 Cal.4th 1075, 1108; see Pen. Code, § 1044), it "'commits misconduct if it persistently makes discourteous and disparaging remarks to defense counsel so as to discredit the defense or create the impression it is allying itself with the prosecution.'" (*People v. Sturm*, *supra*, 37 Cal.4th at p. 1233.)

On the other hand, adverse judicial rulings, impatience, and criticism do not demonstrate bias absent some extrajudicial source. (*Liteky v. United States* (1994) 510 U.S. 540, 555; *People v. Guerra*, *supra*, 37 Cal.4th at pp. 1111–1112.) Indeed, "'[i]t is well within [a trial court's] discretion to rebuke an attorney, sometimes harshly, when that attorney asks inappropriate questions, ignores the court's instructions, or otherwise engages in improper or delaying behavior.'" (*People v. Snow* (2003) 30 Cal.4th 43, 78.) "[M]ere expressions of opinion by a trial judge based on actual observation of the witnesses and evidence in the courtroom do not demonstrate a bias." (*People v. Guerra*, at p. 1111; *Liteky v. United States*, at p. 551)

In reviewing a claim of judicial bias or misconduct, the reviewing court's """role ... is not to determine whether the trial judge's conduct left

something to be desired, or even whether some comments would have been better left unsaid. Rather, [the reviewing court] must determine whether the judge's behavior was so prejudicial that it denied [the defendant] a fair, as opposed to a perfect, trial."' [Citation.] [The reviewing court makes] that determination on a case-by-case basis, examining the context of the court's comments and the circumstances under which they occurred. [Citation.] Thus, the propriety and prejudicial effect of a particular comment are judged by both its content and the circumstances surrounding it." (*People v. Abel* (2012) 53 Cal.4th 891, 914.)

C. Aguirre Forfeited His Judicial Misconduct Claim

A party must seek the disqualification of a judge at the earliest practicable opportunity after discovery of the facts constituting grounds for disqualification. Having failed to do so, any claim of bias is forfeited on appeal, and the defendant cannot complain that any alleged bias affected subsequent rulings. (*People v. Johnson* (2015) 60 Cal.4th 966, 978.) A claim of judicial hostility requires an objection in the trial court to provide the court an opportunity to dispel any misunderstanding with appropriate admonitions. (*People v. Snow*, *supra*, 30 Cal.4th at p. 78.) "A claim of pervasive judicial bias does not necessarily require an objection to be preserved because such an objection may be futile, but '[a]s a general rule,' isolated 'judicial misconduct claims are not preserved for appellate review if no objections were made on those grounds at trial.'" (*People v. Banks* (2014) 59 Cal.4th 1113, 1177, overruled on other grounds by *People v. Scott*, *supra*, 61 Cal.4th at p. 391, fn. 3, quoting *People v. Sturm*, *supra*, 37 Cal.4th at p. 1237.)

Here, as Aguirre acknowledges (AOB 328), defense counsel did not object to the trial court's comments regarding "taking up a collection" to produce additional sheets of paper for the defense expert. (16 RT 3050.) Accordingly, he has forfeited his claim of judicial misconduct on that

ground. Aguirre argues that, due to the evident hostility exhibited by the trial court toward the mitigation expert, it would have been unfair to require defense counsel to choose between "provoking" the judge into making additional comments or giving up his ability to argue misconduct on appeal. (AOB 329.) Aguirre offers a false dichotomy. Even assuming the court might have somehow been provoked by a defense objection, any additional comments by the court would have instead provided Aguirre with a marginally *stronger* argument on appeal. Instead, his claim, as detailed below, is not only forfeited, but meritless.

D. There Was No Misconduct Related to the Court's Comments

Aguirre claims the court's comments conveyed to the jury that the trial court "did not take seriously the defense theory of mitigation, a certain disdain for the defense expert, and the suggestion that tax dollars should not be wasted on his testimony." (AOB 327.) Respondent disagrees with this characterization of the court's comments. Viewed in context, the trial was simply making light of the fact that the state was in a budget crisis in 2009 and could not afford to provide significant resources for witnesses at trial. There was no attack, specifically, on the nature of the expert's testimony or a personal denigration of the witness himself. Indeed, the trial court quickly stated to the parties that there would be a recess, presumably so that paper could be obtained for the expert to use. (16 RT 3050.)

Aguirre argues the court's comments were similar to those held to be judicial misconduct in *People v. Sturm*, *supra*, 37 Cal.4th at p. 1238. (AOB 327-328.) *Sturm* is distinguishable. In *Sturm*, the judicial misconduct occurred during retrial of the penalty phase of a capital case. (*Id.* at p. 1244.) During voir dire, the trial judge twice stated premeditation was a "gimme." (*Id.* at p. 1231.) Additionally, defendant presented evidence his long-term cocaine addiction and abusive childhood were

mitigating factors in determining whether to impose the death penalty. (*Id.* at pp. 1228–1230.) The defense expert on pharmacology testified he received millions of dollars in federal grants to study cocaine abuse when the judge interrupted and stated, "'[i]n other words, you contributed to the federal deficit; is that correct?'" (*Id.* at p. 1233.) The California Supreme Court found the judge's comment disconcerting because it "conveyed to the jury that the trial judge did not take seriously the defense theory in mitigation." (*Id.* at p. 1238.)

In addition, the defense expert psychologist was testifying about concerning behaviors in defendant's family when the judge, without a prosecution objection, interrupted and told the expert she used too many descriptive words and embellished her testimony. (*People v. Sturm*, *supra*, 37 Cal.4th at pp. 1233–1234.) When the expert psychologist began to testify defendant's school records indicated his depression, the judge stated, "'What's the difference if she did or she didn't?'" (*Id.* at p. 1234.) Defense counsel asked the psychologist the effect of positive reinforcement on defendant, the prosecutor objected, and the judge ruled it would not allow evidence concerning the failure of positive reinforcement to cure defendant because "'[i]t didn't, so why do we care? Isn't that the bottom line? I assume because he didn't get it [positive reinforcement] from the father figure or something. Really, where do we go?'" (*Ibid.*) Finally, on two occasions the judge answered for the psychologist. (*Ibid.*)

The *Sturm* court concluded the judge's comments were misconduct. The court stated the judge's statement premeditation was a "gimme" was error because it was related to the key issue, undermined the defense's strategy, and bolstered the prosecution's case. (*People v. Sturm*, *supra*, 37 Cal.4th at p. 1232.) This Court explained the judge's comment the psychologist embellished her testimony conveyed to the jury that the judge questioned the defense expert's reliability and suggested her

testimony was not based wholly on the facts. (*Id.* at pp. 1238–1239.) This Court stated: "[I]t was improper for the judge to rebuke an expert witness in front of the jury by suggesting that she was manufacturing or improperly including the descriptive details of her testimony." (*Id.* at p. 1239.) This Court added the judge's comments concerning what "difference" it made and why do we "care" conveyed to the jury the judge's opinion the psychologist's testimony was "of little consequence," "useless," and "not worth considering." (*Ibid.*) This Court said the judge overstepped when he answered for the psychologist and conveyed to the jury "the message that the questions were so trivial and/or obvious that he himself was able to answer them without possessing the particular expertise of the witness." (*Ibid.*) This Court concluded, "The trial judge's behavior towards the two key expert witnesses for the defense conveyed to the jury disdain for the witnesses and their testimony and therefore constituted misconduct. [Citation.] ... Such behavior, especially considered in the aggregate, conveyed to the jury the unfortunate message that the trial judge did not take seriously the testimony of the defense experts." (*Id.* at p. 1240.)

Thus, the judge in *Sturm* cumulatively made a host of missteps that were found to be prejudicial, including incorrectly stating the law to the venire during jury selection, interrupting defense counsel 30 times during presentation of the defense evidence, and, in the presence of the jury, disparaging defense counsel and defense witnesses. (*People v. Sturm*, *supra*, 37 Cal.4th at pp. 1232-1235.) Because the judge's misconduct affected every aspect of the trial, from jury selection to closing argument, the judge's conduct was found to be prejudicial. In contrast, the judge in this case merely joked that the state could not afford to provide the defense expert additional paper. Unlike the judicial misconduct at issue in *People v. Sturm*, the judge's statements in this case, even if moderately intemperate, were limited in time, quantity, and subject. And unlike *Sturm*,

there was not even a semblance of a personal attack upon the witness himself in front of the jury. Even if improper, the court's brief, isolated comments "fall short of the intemperate or biased judicial conduct which warrants reversal." (*People v. Melton* (1988) 44 Cal.3d 713, 754 [trial court's comment to defense clinical psychologist Dr. Podboy whether it could call him "John Boy for short," and its remark "permission granted" in response to a hypothetical that involved shooting the public defender, "while unfortunate" were not misconduct requiring reversal].)

E. The Court Did Not Deny Aguirre Due Process or His Right to Present a Defense by Limiting His Use of a Visual Aid

Aguirre also argues the trial court denied him due process and the right to present a defense by limiting the expert witness's ability to use a slideshow presentation and by denying the defense request for a continuance to edit the slideshow to be more acceptable. (AOB 330, 340-341.) The trial court properly exercised its discretion when it excluded the slideshow and denied the request for a continuance.

The trial court determines the relevancy of mitigating evidence and retains discretion to exclude evidence where the probative value is substantially outweighed by the probability that its admission will create substantial danger of confusing the issues or misleading the jury. (*People v. Guerra*, *supra*, 37 Cal.4th at p. 1145.)

"Expert opinion testimony is admissible only if it is '[r]elated to a subject that is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact.'" (*People v. Watson* (2008) 43 Cal.4th 652, 692, quoting Evid. Code, § 801, subd. (a).) "When expert opinion is offered, much must be left to the trial court's discretion." (*People v. Carpenter* (1997) 15 Cal.4th 312, 403.) The trial court has broad discretion in deciding whether to admit or exclude expert testimony (*People*

v. Bui (2001) 86 Cal.App.4th 1187, 1196), and its decision as to whether expert testimony meets the standard for admissibility is subject to review for abuse of discretion. (*People v. Alcala* (1992) 4 Cal.4th 742, 788–789; see also *People v. Lindberg* (2008) 45 Cal.4th 1, 45.)

In this case, the trial court did not abuse its discretion by limiting the expert's use of the slideshow presentation during his testimony. The court aptly noted that an expert was not needed to explain to the jury that people with dysfunctional upbringings are more likely to commit violent crimes, which was something the jury could conclude for itself. (15 RT 2872-2873.) To that end, the court repeatedly precluded the expert's ability to testify that Aguirre was less morally culpable for the murder *because* of his childhood. (14 RT 2628, 2639; 15 RT 2754, 2874, 2878.) The court also noted that the expert's presentation, laden with statistics and prior mitigation testimony, would only serve to mislead the jurors by persuading them that the facts in the presentation were necessarily true. (16 RT 2985, 3010.) Considering the slideshow was mostly dedicated to rehashing prior mitigation testimony from other witnesses that the jury had already heard, the trial court did not abuse its discretion by determining that there was substantial danger of confusing the issues or misleading the jury by permitting the use of the slide show. (*People v. Guerra*, *supra*, 37 Cal.4th at p. 1145.)

For much the same reasons, the trial court did not abuse its discretion by denying Aguirre's request for a continuance. "Continuances shall be granted only upon a showing of good cause." (Pen. Code, § 1050, subds. (b) & (e).) Trial courts are vested with broad discretion to determine whether good cause exists to grant a requested continuance, and its decision is reviewed for abuse of discretion. (*People v. Beames*, *supra*, 40 Cal.4th at p. 920.) Here, the trial court had already ruled that the PowerPoint presentation was excluded before Aguirre requested a continuance. Defense

counsel requested additional time to edit the PowerPoint presentation so that it would be presentable to the jury, but the court had already precluded the use of the slideshow altogether. Further, the trial court had already ruled that the expert would be permitted to use hand-drawn diagrams to assist as a visual aid. (16 RT 2983-2984.) Consequently, Aguirre had not presented good cause to the trial court to support his request to continue the proceedings. And without good cause, it cannot be reasonably concluded that the trial court abused its discretion in denying Aguirre's request for a continuance.

Nor was there any prejudice as a result of the exclusion of the PowerPoint presentation or the denial of the request for a continuance. The application of the ordinary rules of evidence generally does not impermissibly infringe upon a capital defendant's constitutional rights. (*People v. Prince* (2007) 40 Cal.4th 1179, 1229.) But assuming *arguendo* that the court's exclusion of the PowerPoint somehow violated Aguirre's constitutional rights, Aguirre fails to show prejudice even under the *Chapman* standard.

As Aguirre acknowledges (AOB 342), Dr. Cunningham was able to use a notepad to diagram any concepts that he was testifying about (4 Supp. CT 882-907), he had ample time to explain his statistics (16 RT 3047-3053, 3056, 3080; 17 RT 3122), and he was able to testify at length about evidence of Aguirre's background that the jury had already heard. Even if the court had permitted Dr. Cunningham to use his PowerPoint presentation, it would have only been used to facilitate the presentation of his opinions, which Dr. Cunningham was able to adequately do with the use of a hand-drawn diagrams and concepts.

Moreover, Dr. Cunningham's testimony, in any event, was not useful testimony in the sense that it only generally showed that Aguirre was more inclined to violence or negative outcomes. The testimony in this case was

much the same as the expert testimony that was found to be of limited value in *People v. McDowell* (2012) 54 Cal.4th 395. In *McDowell*, the trial court excluded the defense expert's testimony about how defendant's childhood could have affected his adult behavior. McDowell grew up in a violent household where his father beat him, his siblings, and his mother. (*Id.* at p. 408.) The trial court had inquired whether the expert's testimony would concern the defendant's mental state at the time of the commission of the offense, and defense counsel responded the expert's ultimate opinion would only concern how the abuse affected the development of McDowell's character. (*Id.* at p. 424.) Defense counsel admitted the expert was not a mental health professional and could not render an opinion on defendant's mental state, but rather she would state that a bad childhood can affect a person as an adult. (*Id.* at p. 425.) This Court held there was no abuse of discretion in excluding the testimony because "the jury did not need the opinion expressed by [the expert] in her proposed testimony to assist it in ascertaining whether defendant's childhood could have affected his behavior as an adult." (*Id.* at p. 423.) Because the expert's testimony was that "defendant's childhood could have affected defendant's behavior as an adult, not how defendant's specific childhood experiences influenced the crimes he committed as an adult," the opinion was neither complex nor technical and addressed a matter readily understood by the jury. (*Id.* at p. 427.)

Just as in *McDowell*, the jury in this case had already heard substantial testimony about Aguirre's childhood upbringing. The jury could readily form its own conclusion about Aguirre's moral culpability, with or without the expert's testimony that people of similar backgrounds are more inclined to commit violent crimes. There is no possibility that the trial court's exclusion of the PowerPoint presentation, nor the denial of the request for continuance, prejudiced Aguirre's case.

XI. THIS COURT HAS REPEATEDLY REJECTED AGUIRRE'S CHALLENGES TO CALIFORNIA'S CAPITAL SENTENCING STATUTE

This Court has repeatedly rejected the claims raised by Aguirre concerning California's death penalty statute and should do so again here.

A. California's Death Penalty Law Adequately Narrows the Class of Death Eligible Defendants

In subpart A, Aguirre argues that California's capital punishment scheme violates the Eighth Amendment because it fails to meaningfully narrow the pool of murderers eligible for the death penalty. (AOB 347.) This Court has repeatedly rejected this argument and should do so again here. (*People v. Salazar* (2016) 63 Cal.4th 214, 255.)

B. Penal Code Section 190.3, Subdivision (A), Does Not Allow Arbitrary and Capricious Capital Punishment in Violation of the Sixth, Eighth, and Fourteenth Amendments

In subpart B, Aguirre argues that Penal Code section 190.3, subdivision (a), which permits the jury to sentence a defendant to death based on the circumstances of the crime, is being applied in a way that institutionalizes the arbitrary and capricious imposition of death. (AOB 347.) Aguirre claims there is no limit to factor (a) evidence regarding the circumstances of the crime, which violates his Sixth, Eighth, and Fourteenth Amendment rights to due process, equal protection, and a reliable penalty-phase jury determination. (AOB 348.) This claim has been rejected by the United States Supreme Court in *Tuilaepa v. California* (1994) 512 U.S. 967, 975-976 and has been repeatedly rejected by this Court as well. (See, e.g., *People v. D'Arcy* (2010) 48 Cal.4th 257, 308.) This Court should decline Aguirre's invitation to reconsider its position.

C. Although the Jury Did Not Need to Make a Unanimous Finding of Aggravating Factors, This Did Not Deny Aguirre His Rights Under the Sixth, Eighth, and Fourteenth Amendments

In subpart C, Aguirre argues that because his jury was not instructed that it needed to find the presence of aggravating factors true beyond a reasonable doubt, or that death was the appropriate penalty, this violated his rights under the Sixth, Eighth, and Fourteenth Amendments. (AOB 348-351.) Respondent disagrees. "Neither the federal or state constitution requires a jury make *unanimous* findings concerning the particular aggravating circumstances, find all aggravating factors *beyond a reasonable doubt*, or find beyond a reasonable doubt that the aggravating factors *outweigh* the mitigating factors. The United States Supreme Court's recent decisions interpreting the Sixth Amendment jury-trial guarantee do not alter that conclusion." (*People v. Salazar*, *supra*, 63 Cal.4th at p. 255, internal citations & quotation marks omitted; italics in original.)

Decisions interpreting the jury-trial guarantee in the Sixth Amendment (*Cunningham v. California* (2007) 549 U.S. 270; *United States v. Booker* (2005) 543 U.S. 220; *Blakely v. Washington* (2004) 542 U.S. 961; *Ring v. Arizona* (2002) 536 U.S. 584; *Apprendi v. New Jersey* (2000) 530 U.S. 466) have not changed the prior conclusions of the California Supreme Court regarding whether a burden of proof or unanimity is required at the penalty phase. (*People v. Bramit* (2009) 46 Cal.4th 1221, 1250 & fn. 22.) This Court has repeatedly determined that there is no requirement under state or federal law that the jury unanimously agree on the aggravating circumstances that support the death penalty, and it should decline Aguirre's invitation to revisit the issue. (See, e.g., *People v. Bacon* (2010) 50 Cal.4th 1082, 1129.)

D. The Constitution Does Not Require the Jury to Be Instructed that the Prosecution Bears the Burden of Proof in Establishing Aggravating Circumstances Beyond a Reasonable Doubt or that the Jury Must Determine Beyond a Reasonable Doubt that Death is the Appropriate Penalty

In subpart D, Aguirre argues that his Sixth, Eighth, and Fourteenth Amendment rights were violated because the jury was not instructed that the prosecution carries the burden of proof in establishing aggravating circumstances beyond a reasonable doubt. (AOB 351-353.) Aguirre also argues his constitutional rights were violated because the jury was not instructed that it must determine beyond a reasonable doubt that the death penalty was appropriate. (AOB 351-353.)

As this Court has already recognized, "[n]either the cruel and unusual punishment clause of the Eighth Amendment, nor the due process clause of the Fourteenth Amendment, requires that jurors in a capital case be instructed that they must find beyond a reasonable doubt that aggravating circumstances exist or that aggravating circumstances outweigh mitigating circumstances or that death is the appropriate penalty." (*People v. Salazar*, *supra*, 63 Cal.4th at p. 255, internal quotation marks & citations omitted.) Trial courts do not instruct the jury in the penalty phase regarding a burden of persuasion because "[u]nlike a guilt determination, the sentencing function is inherently moral and normative, not factual, and hence, not susceptible to a burden-of-proof quantification." (*Ibid*.) This Court should decline to revisit the issue again.

E. The Constitution Does Not Require Juries to Make Written Findings Regarding Aggravated Factors

In subpart E, Aguirre argues that California's failure to require explicit jury findings regarding its reasons for imposing a death sentence violated his Sixth, Eighth, and Fourteenth Amendment rights to due

process, a fair jury trial, a reliable capital verdict, and equal protection. (AOB 353-354.) As Aguirre acknowledges, however, this Court has already held that the Constitution does not require written findings by the jury during the penalty phase. (See, e.g., *People v. Rangel*, *supra*, 62 Cal.4th at p. 1234.) This Court should decline Aguirre's invitation to reconsider its position.

F. This Court Need Not Conduct Intercase Proportionality Review

In subpart F, Aguirre argues that California is "constitutionally compelled to provide Aguirre with intercase proportionality review." (AOB 354.) Not so. As this Court has found, the absence of intercase proportionality review does not violate the federal Constitution. (*People v. Clark* (2016) 63 Cal.4th 522, 644.)

G. California's Death Penalty Statute Does Not Violate International Law

In subpart G, Aguirre argues that the California death penalty procedure violates international law and the Eighth Amendment. (AOB 355.) As Aguirre acknowledges, this Court has repeatedly rejected similar arguments and should do so again here.

International law does not prohibit a sentence of death where, as here, it was rendered in accordance with state and federal constitutional and statutory requirements. (See, e.g., *People v. Clark*, *supra*, 63 Cal.4th at p. 644.) This Court has also rejected the argument that the death penalty violates the Eighth Amendment of the United States Constitution. (*People v. Jackson* (2016) 1 Cal.5th 269, 373-374). Aguirre offers no compelling reason for this Court to reconsider its earlier rulings.

H. California's Capital Sentencing Scheme Does Not Violate the Eighth Amendment Because of Cumulative Deficiencies

In subpart H, Aguirre claims the death penalty constitutes cruel and unusual punishment in violation of both the California Constitution and the Eighth and Fourteenth Amendments because of its cumulative deficiencies. (AOB 355-356.)

As Aguirre acknowledges, however, this Court has consistently held that California's death penalty statute does not constitute cruel or unusual punishment under either the Eighth Amendment or the California Constitution whether due to cumulative deficiencies (*People v. Lucero* (2000) 23 Cal.4th 692, 741), or when the entire capital sentencing scheme is considered (*People v. Jackson, supra*, 1 Cal.5th at p. 374). This Court should again decline Aguirre's invitation to revisit the issue.

XII. THERE WERE NO ERRORS AT THE GUILT OR PENALTY PHASE REQUIRING REVERSAL OF THE DEATH JUDGMENT

In his twelfth claim, Aguirre contends the cumulative impact of state and federal law errors that occurred at the guilt and penalty phases of his trial rendered the trial fundamentally unfair and its results unreliable, requiring reversal of the judgment. (AOB 356-358.) However, because there was no error, there is nothing to cumulate. (*People v. Johnson* (2016) 62 Cal.4th 600, 654.) Aguirre was entitled to a fair trial, not a perfect one. He received a fair trial, and therefore his claim of cumulative error should be rejected. (*People v. Stewart* (2004) 33 Cal.4th 425, 522.)

CONCLUSION

For the reasons stated above, respondent respectfully requests that the judgment be affirmed in its entirety.

Respectfully submitted,

Dated: May 11, 2018

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CERTIFICATE OF COMPLIANCE

I certify that the attached Respondent's Brief uses a 13 point Times New Roman font and contains 52,941 words.

Dated: May 11, 2018

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DECLARATION OF SERVICE

Case Name: **People v. Jason Alejandro Aguirre**

Case No.: **S175660**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter.

On May 11, 2018 I electronically served (via truefiling) the attached **Respondent's Brief,** in compliance with California Rules of Court, rules 2.251(i)(1)(A)-(D) and 8.71 (f)(1)(A)-(D) as follows:

Party/Agency	Address
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and deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business

Honorable William R. Froeberg, Judge
c/o David H. Yamasaki
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Orange County Superior Court
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I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on May 11, 2018, at San Diego, California.

L. Hernández
Declarant

S/ L. Hernández
Signature

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71419116.doc

Supreme Court of California
Jorge E. Navarrete, Clerk and Executive Officer of the Court
Electronically FILED on 5/14/2018 by April Boelk, Deputy Clerk

STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

STATE OF CALIFORNIA
Supreme Court of California

Case Name: **PEOPLE v. AGUIRRE (JASON ALEJANDRO)**
Case Number: **S175660**
Lower Court Case Number:

1. At the time of service I was at least 18 years of age and not a party to this legal action.

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

5/14/2018
Date

/s/Warren Williams

Signature

Williams, Warren (270622)

Last Name, First Name (PNum)

Department of Justice, Office of the Attorney General-San Diego

Law Firm