In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA, **Petitioner and Respondent,** **v.** **MICHAEL ALLAN LAMB,** **Defendant and Appellant.**	**CAPITAL CASE** Case No. S166168

Orange County Superior Court Case No. 03CF0441
The Honorable William R. Froeberg, Judge

RESPONDENT'S BRIEF

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STATEMENT OF THE CASE

In a third amended information filed by the Orange County District Attorney on April 8, 2007, Lamb was charged with conspiracy to commit murder in violation of Penal Code[1] section 182, subdivision (a)(1) (count 1); murder in violation of section 187, subdivision (a) (count 2); two counts of possession of a firearm by a felon in violation of section 12021, subdivision (a)(1) (counts 3 and 8); carrying a firearm while an active participant in a criminal street gang in violation of section 12031, subdivisions (a)(1) and (a)(2)(C) (count 5); two counts of street terrorism in violation of section 186.22, subdivision (a) (counts 6 and 9); and attempted murder of a peace officer in violation of sections 664, subdivision (e), and 187, subdivision (a) (count 7).[2] (3 CT 669-677.)

It was alleged as a special circumstance that the murder was committed for a criminal street gang purpose within the meaning of section 190.2, subdivision (a)(22). It was further alleged that the attempted murder of a peace officer was willful, deliberate and premeditated within the meaning of section 664, subdivision (f); Lamb personally discharged a firearm in the commission of the conspiracy and murder within the meaning of section 12022.53, subdivision (d); Lamb personally discharged a firearm in the commission of the attempted murder of a peace officer within the meaning of section 12022.53, subdivision (c); counts 1, 2, 3, 5, 7 and 8 were committed for the benefit of, at the direction of, or in association with a criminal street gang within the meaning of section

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[1] All further statutory references are to the Penal Code unless noted otherwise.

[2] Counts 1, 2, 3, 5 and 6 were alleged to have been committed on or about March 8, 2002; counts 7, 8 and 9 were alleged to have been committed on March 11, 2002. (3 CT 669-672.) Hereafter, references to March 8 and March 11 occurred in 2002, unless noted otherwise.

186.22, subdivision (b)(1)(A); and Lamb was previously convicted of two felonies for which he served separate prison terms within the meaning of section 667.5, subdivision (b).[3] (3 CT 670-674.)

On May 10, 2007, a jury was sworn to try the case. (5 CT 1202; 6 RT 1204, 1307.) Between June 21 and July 10, 2007, the jury found Lamb guilty of all counts as charged in the third amended information. The jury set the murder in the first degree, found the attempted murder of a peace officer was willful, deliberate and premeditated, and found the special circumstance and all firearm and gang enhancements true.[4] (6 CT 1438-1439; 8 CT 1843-1861, 1900-1902.)

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[3] Jacob Anthony Rump was charged as a noncapital codefendant in counts 1, 2, 5, 6, 7 and 9, and further charged with being a violent felon in possession of a firearm in violation of section 12021.1, subdivision (a), in counts 4 and 10. Prior to trial, Rump filed a severance motion, requesting to be separately tried from Lamb. (4 CT 678-703.) The motion for separate trials was denied. (4 CT 862-863; 1 RT 82-84.) Thus, Lamb and Rump were jointly tried.

Rump was convicted of the special circumstance murder and conspiracy amongst other counts and enhancements, and sentenced to an indeterminate term of life without possibility of parole tripled under the three strikes law plus 70 years to life and a determinate term of 13 years in prison. Rump's judgment was affirmed in Court of Appeal Case No. G039421 on October 22, 2009, and review was denied by this Court in Case No. S178438 on February 10, 2010.

Billy Joe Johnson was charged with the same special circumstance murder and conspiracy in a separate capital trial, and sentenced to death. Johnson's automatic appeal is currently pending before this Court in Case No. S178272.

[4] On July 2, 2007, when the parties stipulated to excuse Juror No. 7 for health reasons, the jury had already reached some verdicts. (6 CT 1437-1438; 23 RT 4658-4664.) At the request of Lamb and Rump, those partial verdicts – counts 1, 8, 9 and 10 and the gang enhancement attached to count 1 – were received by the court and read prior to excusing Juror No. 7. (6 CT 1438-1439; 23 RT 4660-4665.) Lamb and Rump waived any appeal rights regarding the reading of the partial verdicts. (6 CT 1438; 23 RT 4661-4662.) After Juror No. 7 was replaced with a randomly selected

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On July 12, 2007, the penalty phase commenced. (8 CT 1915.) On July 31, 2007, the jury announced that it was unable to reach a verdict, and the trial court declared a mistrial as to the penalty phase. (9 CT 2094-2095.)

On May 6, 2008, a new jury was sworn for the penalty phase retrial. (9 CT 2262; 30 RT 6167, 6193.) On June 11, 2008, the jury found death to be the appropriate penalty. (10 CT 2583, 2586-2587; 42 RT 8631-8633.) Thereafter, the trial court granted the prosecutor's motion to dismiss the two prior prison term allegations. (10 CT 2587; 42 RT 8637-8638.)

On August 22, 2008, the trial court denied Lamb's automatic motion for modification of the penalty verdict. (10 CT 2639-2643; 42 RT 8640-8646.) On the same date, the trial court sentenced Lamb to death for the murder.[5] (10 CT 2644-2646, 2657-2658;42 RT 8648-8651.)

This appeal is automatic pursuant to section 1239, subdivision (b).

STATEMENT OF FACTS

Lamb conspired with fellow White supremacist gang members, Jacob Rump and Billy Joe Johnson, to murder Scott Miller. The murder was "payback" for Miller's participation in a televised interview wherein he discussed the gang's criminal activities. On the evening of March 8, 2002, Lamb and Rump went to a predetermined location in Anaheim where they waited for Johnson to lure and deliver Miller to the execution site – a dark

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alternate, the jury was instructed to begin deliberations anew on the remaining counts and allegations. (6 CT 1439; 7 CT 1693; 23 RT 4665-4666, 4668-4670.) The balance of the verdicts were received and read on July 10, 2007. (8 CT 1899-1902; 23 RT 4695-4699.)

[5] The balance of the counts and enhancements were "stricken for purposes of sentencing only," and Lamb was ordered to pay a restitution fine and victim restitution. (10 CT 2644-2645.)

alleyway. There, Lamb fired a single fatal gunshot into the back of Miller's head.

Three days later, Lamb and Rump engaged two police officers in a high speed car chase. After abandoning their vehicle, Lamb and Rump fled into an apartment complex. From a second floor balcony, Lamb fired the same gun he used to kill Miller directly at one of the officers. Lamb's gun jammed before he could fire a second shot, and the officers were unharmed.

A. Guilt Phase

1. Prosecution

a. Gang Affiliations and Motive for Miller's Murder

Public Enemy Number One is a Southern California White supremacist street gang which is also active in the state prison system. (16 RT 3093-3095.) The gang is also referred to as P.E.N.I. Death Squad or P.D.S. (hereafter "P.E.N.I."). (12 RT 2142-2143; 16 RT 3093.)

Donald "Popeye" Mazza was believed to be the founder of P.E.N.I. and regarded as the leader of the gang in 2002. (12 RT 2145; 16 RT 3095, 3106-3108.) Nick "Droopy" Rizzo was considered second in command of P.E.N.I. (16 RT 3095, 3098-3099, 3115.) Scott "Scottish" Miller was one of the original P.E.N.I. members who was also considered one of the gang's founders. (12 RT 2155; 16 RT 3095.)

In 1999, Miller participated in a local Fox Channel 11 interview in which he discussed P.E.N.I. and methamphetamine.[6] (20 RT 4027.) The

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[6] A DVD of the news segments was played for the jury during the prosecutor's opening statement and subsequently admitted into evidence as People's Exhibit No. 231 (formerly Court Exhibit No. 6.). (7 RT 1366; 16 RT 3127; 20 RT 3924; 6 CT 1313, 1385.) Prior to presenting the video to the jury, the prosecutor read a limiting instruction. (7 RT 1364-1365.) A transcript of the DVD, which would have been marked as Exhibit No. 231A (continued...)

two-part news segment was broadcasted on February 20 and 21, 2001 – just days before Mazza was to stand trial for P.E.N.I.- related charges. (16 RT 3127-3129; 20 RT 4027.) Despite the television station's efforts to conceal Miller's identity, it was obvious to everyone who knew Miller that he was the person featured in the program due to his tattoos and the fact that he had his pit bull with him. (12 RT 2155; 18 RT 3530-3531; 20 RT 4027.)

By 2000, Miller was becoming increasingly disliked by P.E.N.I. gang members and viewed as being out of control. (16 RT 3123-3124.) After the televised P.E.N.I. news segments were aired in 2001, Miller was considered to be "in the hat." (12 RT 2155-2156.) This meant that Miller was no longer in the good graces of the active gang members and had a "green light" placed on him, which targeted him for an act of violence. (12 RT 2147-2148.) There was an understanding within P.E.N.I. about what was supposed to happen to Miller. (12 RT 2157.)

About a month prior to Miller's murder in March of 2002, there was a recurring rumor that Miller would be "hit" for his participation in the Fox 11 news segments and P.E.N.I. members John Gross or Jesse Wyman

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in conformity with the designation of other transcripts of recordings, was not introduced at trial or included in the record on appeal. (See 1 RT Exhibits Index from first trial; 1 Supp. CT 140, 144; 20 RT 3924.)

Appellate counsel has reproduced in the Opening Brief a transcription of the entire Fox News video as provided to her by the prosecutor, and indicates that she will request transmission of the actual exhibit to this Court after briefing is completed. (AOB 9, fn. 8.) Based on a comparison with the redacted transcript included in the appellate record of *People v. Billy Joe Johnson* (S178272), which is currently pending before this Court, it appears that the transcription of the Fox video provided on pages 9-21 and pages 126-137 of the Opening Brief is accurate. However, as discussed in Argument III, *infra*, the transcription in the Opening Brief does not account for portions of the video which were redacted for Lamb's juries.

might be the ones designated to kill him. (16 RT 3125-3126.) However, Gross was in custody at that time and Miller was out of custody. (16 RT 3125.)

In 2002, Lamb was an active member of P.E.N.I. (16 RT 3168-3169.) His gang moniker was "POK1." (10 RT 1841; 12 RT 2158.) Lamb had the following tattoos on his body: several swastikas; a Celtic cross; an anarchy symbol; a skull; the number "737";[7] a swastika between the words "blood" and "honor"; "P.D.S."; "skin"; "L.A.S." (which signified Los Angeles Skins); "W.P." (which signified White Power or Pride); and "Death Squad." (10 RT 1959-1964.) Prior to Miller's murder, Lamb did not have high status within P.E.N.I. (12 RT 2159.)

Rump was also an active member of P.E.N.I. in 2002. (16 RT 3177.) Rump had the following tattoos on his body: several swastikas; a Celtic cross; the numbers 14 and 88; "skins"; "PENI"; "White Power"; and "1933." (11 RT 1970-1973.)

In the weeks leading up to Miller's murder, Lamb and Rump were residing at Robin Freiwald's apartment located at 318 South Melrose in Anaheim. (10 RT 1834-1835, 1840-1841; 12 RT 2289-2290.) Rump and Lamb wrote "POK1" and P.D.S." on one of the interior doors of Freiwald's apartment.[8] (10 RT 1843-1847.) Both convicted felons and parolees-at-large, Lamb and Rump were seen together most of the time. (10 RT 1842, 1932-1933; 16 RT 3144-3145.)

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[7] The number 737 signifies the corresponding telephone pad letters for P, D and S for P.E.N.I. gang members. (16 RT 3103.)

[8] During a search of Freiwald's apartment, officers also found papers with a swastika and "White Power" written on them, an empty cigarette carton with "PEN1 737" and a swastika written on it, and a piece of tape with the name "JAKE" on it. (10 RT 1902-1903.)

Darryl Mason[9] became a member of P.E.N.I. between 1991 and 1993, and remained active in the gang through June of 2002. (12 RT 2141-2145.) Mason had numerous tattoos on his body, including "Gladiator," "Death Squad," "SS," and "PENI." (11 RT 2122-2123.) Mason was "in the hat" for refusing to take orders from Mazza. (12 RT 2149.)

Tanya Hinson[10] was a P.E.N.I. associate who had been photographed with Mazza and another individual forming a "P" with his hand. (13 RT 2401-2404; 16 RT 3081-3082.) In March of 2002, Hinson occasionally stayed at Christina Harris's two-story apartment located at 1800 West Gramercy Avenue in Anaheim.[11] (13 RT 2406-2407; 14 RT 2564-2565, 3576.) Lamb and Rump visited Hinson at Harris's apartment and spent some nights there as well. (14 RT 2576-2577.)

On March 7, 2002, Robert Henderson[12] rented a Ford Taurus with the assistance of Daniel "Danny Boy" Laning, a P.E.N.I. gang member. (8 RT 1544-1546; 10 RT 1928-1931; 12 RT 2147.) Three days later, Henderson filed a stolen vehicle report with the Riverside Police Department, reporting that he had left his keys in the Taurus at a parking lot the previous night and

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[9] Mason was previously convicted of numerous misdemeanors and felonies. (11 RT 2118-2121.)

[10] At the time of trial, Hinson was serving prison sentences for two October 29, 2000, offenses committed for the benefit of P.E.N.I. as well as methamphetamine possession. (13 RT 2397-2400.) Hinson was granted use immunity for her testimony and told she would be prosecuted for accessory to murder and gang enhancements if she refused to testify. (13 RT 2466-2468.)

[11] Harris was the maiden name of Christina Hughes. (14 RT 2563.) Since the other witnesses knew and referred to her as Christina Harris, she will hereafter be referred by her maiden name.

[12] Henderson was afraid to testify at trial; and, when interviewed by Detective Karen Schroepfer on March 19, 2002, he was frightened, evasive and kept changing his story about the circumstances of the car theft. (10 RT 1923-1925.)

the car was gone when he returned in the morning. (8 RT 1544-1545; 10 RT 1925-1929)

b. The Murder of Scott Miller

On March 8, 2002, Harris was in her apartment all day with her two-year-old son. (14 RT 2578-2579.) That evening, Lamb called Harris and asked if Hinson was around. (14 RT 2579.) When told she was not there, Lamb asked Harris to have Hinson call him when she showed up and said it was very important. (14 RT 2580.)

Subsequently, Hinson arrived at the apartment and Harris conveyed Lamb's message to her. (14 RT 2580.) Harris told Hinson that she did not want anyone over that night and then went upstairs to vacuum. (14 RT 2580-2582.) Lamb and Rump left Freiwald's apartment together at 8:30 p.m. and did not return that evening.[13] (10 RT 1856.)

Between 8:00 and 9:00 p.m., Brenda Amezcua visited Harris. (14 RT 2586, 2783.) Subsequently, Amezcua went out to her car. (14 RT 2784.) When she returned, there were several men in the kitchen. (14 RT 2784.)

Amezcua went upstairs and told Harris that someone else was in the apartment. (14 RT 2582-2583.) Harris went downstairs where she saw Hinson, Lamb and Rump standing in the living room.[14] (14 RT 2584, 2758.) Harris said she did not want anyone over and told them to leave. (14 RT 2584.) After they said they were going to a concert and would be leaving right away, Harris went back upstairs to continue cleaning. (14 RT 2484-2585.)

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[13] The distance between Freiwald's residence and the murder scene was approximately 3.2 miles. (14 RT 2782-2783.)

[14] Harris initially did not tell the police about Lamb and Rump being in her apartment because she was scared. (14 RT 2601-2604.) Harris had used methamphetamine that day. (14 RT 2579-2580.)

Two to three minutes later, Harris heard a single gunshot. (14 RT 2586, 2760.) Harris believed this occurred between 10:30 and 11:00 p.m. (14 RT 2595.) However, Luis Mauras, a nearby resident, testified that he heard the gunshot from the direction of the alleyway around 11:30 or 11:40 p.m. followed by the sound of screeching tires about 20 seconds later.[15] (7 RT 1435-1436.) Lois Green, another neighbor, heard a loud "explosion type" bang between 11:15 and 11:30 p.m. (7 RT 1441-1442.)

Upon hearing the gunshot, Harris checked on her son, who was still asleep. (14 RT 2586-2587.) After "a few" or perhaps ten minutes, Harris looked out the upstairs window and observed a blue car proceed eastbound through the alleyway. (14 RT 2596-2597.) There appeared to be three people with shaved heads in the car. (14 RT 2598-2599.)

About ten minutes later, Harris and Amezcua mustered the courage to exit the apartment through the back door which led to the alleyway. (14 RT 2586-2590.) There were no cars in the alley at that time. (14 RT 2592-2593.) Approximately 247 feet down the alleyway, they found Miller's body lying on the ground next to a trash bin.[16] (14 RT 2591-2593, 2761.)

Harris and Amezcua returned to the apartment, but did not call the police. (14 RT 2586, 2593, 2595, 2761.) Some time later, Harris saw the blue car again. (14 RT 2596.)

Anaheim Police Officer Matthew Adrian was dispatched to the scene and arrived at 11:57 p.m. (7 RT 1445-1446.) There, Adrian found Miller lying face-down in a pool of blood next to a dumpster in the north end of the alley. (7 RT 1447.) Adrian observed a gunshot wound to the back of

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[15] Having previously served in the Marine Corps, Mauras recognized the sound of gunshots. (7 RT 1435.)

[16] Neither Harris nor Amezcua knew Miller. (14 RT 2594-2595.)

Miller's head with brain matter splattered on the ground. (7 RT 1447.) The area was immediately secured. (7 RT 1447.)

c. The Car Pursuit, Attempted Murder and Arrests

On the afternoon of March 11, 2002, Anaheim Police Officer Michael Helmick was working as part of an undercover auto theft detail. (8 RT 1574.) He was driving an unmarked Buick Century and wearing plain clothes. (8 RT 1579.)

Officer Helmick was dispatched to an alley behind Freiwald's home at 318 South Melrose where a stolen vehicle was reported as being seen.[17] (8 RT 1579; 14 RT 2709-2710.) He was assisted by Officer Bryan Santy, who was an observer in an Anaheim Police Department helicopter ("Angel") piloted by Officer Jay Poland. (8 RT 1574; 15 RT 2960-2961.) With Officer Santy's guidance, Officer Helmick was able to confirm that the vehicle was the Taurus which Henderson had reported stolen. (8 RT 1583-1585; 15 RT 2961-2962.) Officer Helmick then contacted Detective Danny Allen for assistance. (8 RT 1588; 15 RT 2887.)

While Officer Helmick was waiting for Detective Allen, Rump entered the Taurus and drove it southbound out of the alley. (8 RT 1589, 1591; 9 RT 1648; 15 RT 2916-2917, 2964, 3014.) Officer Santy notified Officer Helmick of this activity. (8 RT 1589; 15 RT 2964.) Rump drove at a normal speed from Santa Ana Street to 318 South Melrose and stopped in front of the apartment complex. (8 RT 1589-1590; 15 RT 2964.)

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[17] Earlier in the day, the apartment manager at 318 South Melrose observed a White male driving Freiwald and her children in the Taurus. (14 RT 2710.) During the preceding two weeks, the apartment manager had also seen Freiwald and some White males use the car. (14 RT 2710-2711.)

Officer Helmick followed Rump and parked about five car lengths behind the Taurus. (8 RT 1590-1593; 15 RT 2965.) Rump looked back and stared at Officer Helmick through his side-view mirror. (8 RT 1593-1595.) Meanwhile, Lamb ran from the apartment complex to the Taurus, carrying a black jacket, and got in the passenger seat.[18] (8 RT 1595-1596; 15 RT 2964, 2983.) Officer Santy descended the police helicopter to an altitude of 600 to 800 feet above the Taurus. (15 RT 2966.)

After Lamb entered the Taurus, Rump made an abrupt U-turn and drove back down Melrose. (8 RT 1597; 15 RT 2964.) Officer Helmick angled his vehicle to block the Taurus as it approached him. (8 RT 1597-1598; 15 RT 2965.) Rump drove over a curb to get around Officer Helmick and accelerated southbound on Melrose. (8 RT 1598-1599;15 RT 2965.)

Officer Helmick pursued Rump as he sped down various streets, running two stop signs. (8 RT 1598-1607; 15 RT 2966-2967.) Along the way, Detective Allen[19] joined the pursuit in an unmarked Monte Carlo and tried to block the Taurus. (15 RT 2967, 2887-2890.) Rump swerved around Detective Allen's vehicle and continued onto Center Street where the officers temporarily lost sight of the Taurus. (8 RT 1605; 15 RT 2967-2968, 2890-2894.)

A couple hundred feet down Center Street, Rump and Lamb abandoned the Taurus while it was still moving and ran into a nearby apartment complex. (8 RT 1607-1608; 15 RT 2968-2970.) By that time,

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[18] Lamb was one of two individuals with shaved heads whom Officer Santy had observed "milling around" in the alley earlier that day. (15 RT 2963-2964.) Lamb and Rump had spent the previous night at Freiwald's apartment. (10 RT 1852-1853.)

[19] Detective Allen was wearing plain clothes at the time of the car pursuit. (15 RT 2887.)

the helicopter had descended to an altitude of 400 to 600 feet above the ground. (15 RT 2969.) Officer Santy maintained continuous observation of Lamb and Rump, and advised the officers of their movements.[20] (8 RT 1608; 15 RT 2669-2670.)

After finding the abandoned Taurus, Officer Helmick exited his vehicle and pursued Rump and Lamb on foot. (8 RT 1609; 15 RT 2970.) He displayed a police badge on his belt and had a hand-held radio through which he communicated with Angel which hovered very loudly above him. (8 RT 1610-1611.)

Following Officer Santy's directions, Officer Helmick ran into the apartment complex. (8 RT 1612-1613.) Along the way, he observed a black jacket discarded on the ground. (8 RT 1614-1615.) The jacket appeared to be the same one Lamb had when he entered the Taurus. (8 RT 1615.)

Meanwhile, Detective Allen parked his vehicle and put on a police raid jacket which had the word "POLICE" printed on the front and back.[21] (8 RT 1617-1618; 15 RT 2895-2897.) He ran into the apartment complex where he joined Officer Helmick. (8 RT 1615; 15 RT 2898-2901.) Both officers had their guns drawn and were holding their radios. (8 RT 1618, 1621; 12 RT 2313; 15 RT 2898.) Since Angel was making such a loud

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[20] Officer Santy testified that, at an altitude between 400 and 600 feet, the helicopter would make an extremely loud "buzz-saw type sound" to those on the ground. (15 RT 2959-2960.)

[21] During the foot pursuit, Officer Helmick and Detective Allen passed Ghassan Alaghbar, a maintenance worker, and asked whether he had seen anybody. (12 RT 2313, 2316.) Alaghbar realized that Officer Helmick and Detective Allen were police officers, and told them that he had seen a man run by him less than a minute earlier. (8 RT 1615-1616; 12 RT 2309-2313, 2320, 2329.) Alaghbar also heard the loud noise from the police helicopter overhead. (12 RT 2319.)

noise overhead, Officer Helmick and Detective Allen had their radios turned up to maximum volume. (8 RT 1618; 15 RT 2897-2898.)

Officer Santy observed Lamb and Rump run to an alcove and up a stairway to a second story balcony area, where Rump lay down on his back with his feet facing a door and Lamb crouched behind a pillar.[22] (15 RT 2970-2973.) Officer Santy directed Officer Helmick and Detective Allen to their location. (8 RT 1619-1621; 15 RT 2971.)

Officer Helmick and Detective Allen approached the stairway leading up to the balcony with their guns drawn. (8 RT 1621; 15 RT 2901-2902, 2973.) As Detective Allen proceeded to "clear" the stairway area, Angel was still hovering loudly overhead and his radio remained on maximum volume. (8 RT 1621-1622; 15 RT 2902-2903.) After Detective Allen determined that the area under the stairs was clear, he and Officer Helmick started to approach the stairway to "clear" the balcony. (8 RT 1622-1625; 15 RT 2905.)

At that moment, Lamb lifted his upper body over the balcony railing while holding a stainless steel handgun in his right hand. (12 RT 2320, 2323; 15 RT 2973-2975.) Lamb lowered the gun in a "a rounded motion" downward and to the left, fired a single shot in Officer Helmick's direction, and crouched back down.[23] (8 RT 1622-1625; 12 RT 2320-2325, 2330; 15

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[22] A nearby resident, Eliseo Pantaleon, was inside in his apartment when he heard the sound of footsteps running up the stairs, someone say "Police," and then the gunshot. (12 RT 2298-2300.)

[23] Officer Santy observed Lamb point the gun towards Officer Helmick when he fired it. (15 RT 2973-2976). Officer Helmick and Detective Allen heard the gunshot come from directly above them. (8 RT 1625; 15 RT 2904.) The distance from the balcony railing to the ground was thirteen and a half feet. (9 RT 1750.)

Alaghbar believed Lamb was pointing the gun at him. (12 RT 2320, 2325.) However, Alaghbar acknowledged that the officers were between him and the shooter. (12 RT 2322-2323.)

RT 2904, 2973-2978, 3015.) Officer Helmick dove for cover under the stairwell, while Detective Allen squatted down against a wall. (8 RT 1625-1627; 15 RT 2904-2905, 2910-2911, 2978-2980.)

Lamb then turned nearly 180 degrees and pointed the gun at the top of the stairs. (15 RT 2980-2981.) Officer Santy advised Detective Allen to flee, but told Officer Helmick not to move. (8 RT 1627; 15 RT 2912-2913, 2981.) Lamb began "fiddling with" the gun close to his stomach as he remained in a crouched position. (15 RT 2982.) Meanwhile, Rump tried to kick in a door next to where he was lying on the balcony.[24] (8 RT 1630; 15 RT 2909-2911.)

Despite Officer Santy's advisal, Officer Helmick retreated to the next apartment opening to the south because he did not feel safe under the stairway. (8 RT 1627-1629; 9 RT 1640.) Detective Allen retreated to the same area. (8 RT 1630; 9 RT 1640; 15 RT 2913.)

From their new position of safety, Officer Helmick and Detective Allen began to loudly and repeatedly yell, "Police officers. Throw down the gun and come out with your hands up." (9 RT 1641-1642; 15 RT 2914.) They also shouted that Lamb and Rump were surrounded and should give themselves up. (15 RT 2914.)

Thirty to sixty seconds later, Lamb walked up to the balcony railing and tossed the gun, which was wrapped in a white cloth, into a planter directly below. (9 RT 1643-1645; 15 RT 2914-2915, 2982-2983.) Lamb then came down the stairs, complied with the officers' orders to crawl to their location and was taken into custody. (9 RT 1645-1646; 15 RT 2915.)

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[24] There were black scuff marks on two apartment doors near the balcony. (9 RT 1776, 1784-1785.) Two buttons were subsequently found on and near the landing where Rump was hiding. (9 RT 1755-1757.) At the time of his arrest, Rump was wearing a shirt which was missing three buttons. (11 RT 2103-2105.)

As other officers arrived, they commanded Rump to surrender himself. (9 RT 1646-1647; 13 RT 2523-2527; 15 RT 2915-2916.) Several minutes later, Rump came downstairs and was taken into custody.[25] (9 RT 1647-1648; 13 RT 2527-2528; 15 RT 2916-2917.)

d. Investigation

An autopsy showed Miller died from massive bleeding resulting from a single gunshot wound to the back of the head. (8 RT 1532-1535, 1540.) The fatal bullet was fired at a slightly rightward angle. (8 RT 1539.) The bullet's core lodged in Miller's right ear canal, while the copper jacket lodged inside his skull. (8 RT 1538-1539.) The absence of burnt tissue, sooting, stippling or unspent gunpowder markings on the skin showed the gun was not placed against or within a couple inches of Miller's head when it was discharged.[26] (8 RT 1536-1537.) Death most likely occurred several minutes after infliction of the injuries to the brain and skull. (8 RT 1540-1541.)

When Officer Adrian secured the murder scene, he found a spent Winchester nine-millimeter bullet casing underneath his patrol car which was parked just east of Miller's body.[27] (7 RT 1448, 1452, 1468-1469.) A black baseball hat and Pepsi can were underneath the body. (8 RT 1480-1481.) There were eastbound tire impressions in the blood around the

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[25] At Freiwald's direction, her son Michael A. walked to a nearby park from which he observed Lamb and Rump being arrested. (10 RT 1849-1850.) After Michael reported back what he had seen, Freiwald went to the park with him while the police were still there. (10 RT 1850-1851.)

[26] Miller had no defensive wounds. (8 RT 1533.) However, there were fresh abrasions on his face which were consistent with the right side of his head striking the pavement. (8 RT 1533-1534.)

[27] Fingerprints on the casing had insufficient ridge detail for comparison purposes. (7 RT 1471-1472.) Scott Flynn, a forensics specialist, explained the factors militating against finding a usable latent print on an ejected casing. (8 RT 1474-1475.)

body, which did not match the tread pattern on the Taurus's tires. (7 RT 1459; 8 RT 1483-1484; 11 RT 2095.)

The gun which Lamb had tossed into the planter at the March 11 shooting scene was a Browning high-powered nine-millimeter, single-action semiautomatic handgun. (9 RT 1758-1759.) A black and white bandanna was tied loosely around the grip of the gun, the hammer was cocked back in a firing position, and the safety was off. (9 RT 1759, 1767-1768.) However, a spent cartridge casing was stuck in the weapon, jamming the firing mechanism.[28] (9 RT 1759-1761; 13 RT 2363.)

The gun's magazine was loaded with ten additional rounds of live ammunition, including six hollow-point Winchester bullets and four "Super-Vel" bullets. (9 RT 1761-1765.) When the jammed casing was removed, the weapon was fully operable.[29] (13 RT 2364-2366.) Forensics specialist Rocky Edwards believed the bandana may have caused the gun to jam. (13 RT 2364.)

Through tool mark comparisons with test-fired ammunition from the seized weapon, Edwards determined that the expended casing found by Officer Adrian at the homicide scene was fired by the Browning semiautomatic handgun Lamb used in the March 11 shooting. (13 RT 2354-2366.) The bullet jacket removed from Miller's head had "class characteristics" consistent with it being fired from the same gun, but was damaged and did not have enough markings for a conclusive determination. (13 RT 2365-2367.) The bullet core removed from Miller's head was of

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[28] On a prior occasion, Michael A. observed Rump "playing around with" a white bandanna. (10 RT 1859.)

[29] No strike marks from the fired bullet were located at the March 11 shooting scene. (9 RT 1785-1787.) Forensics specialist James Conley explained that the expended bullet could have easily penetrated dirt or greenery, and would not be detectible by metal detectors since the area was over a parking garage saturated with metal. (9 RT 1786.)

insufficient quality to reach any conclusion as to its source.[30] (13 RT 2358.)

Following their arrests, Lamb and Rump were tested for gunshot residue. (11 RT 2101-2103.) Lamb had two unique gunshot residue particles on his right hand.[31] (13 RT 2383.) No gunshot residue was found on Rump's hands. (13 RT 2382.) A unique gunshot residue particle was also found on one of two black knit gloves found in the Taurus.[32] (11 RT 2092-2093; 13 RT 2386-2387.)

Lamb and Rump were initially placed in two adjoining interview rooms at the Anaheim police station. (10 RT 1899-1900.) Through the wall, they conspicuously shouted back and forth that they thought someone in the other car was trying to hit them, they did not know who the person was, they were being held for hitting someone or running a stop sign, and they had permission to use the Taurus. (10 RT 1899-1900, 1938-1939; 11 CT 2724-2730.) Lamb referred to Rump as "Comrade." (11 CT 2724.)

Subsequently, Sergeant Jay Clapper interviewed Lamb. (10 RT 1900-1901; 11 CT 2692.) Lamb yelled through the wall at Rump that he had

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[30] Edwards' independent "complete, thorough and from the beginning" testing and examination of the evidence prior to trial at the request of Lamb's trial counsel confirmed the findings of Laurie Crutchfield, another forensic specialist who conducted her examination and testing in 2002. (13 RT 2354-2359, 2365.)

[31] Forensic specialist Steve Guluzian, explained that a positive result for unique gunshot residue particles can mean that the person fired a gun, was in close proximity to a gun when it was fired, handled a gun after it was fired, or touched a surface that was in close proximity to the gun when it was discharged. (13 RT 2380-2381.) However, a negative result is inconclusive since gunshot residue can be eliminated simply by washing or rubbing one's hands against something. (13 RT 2381.)

[32] Lamb's DNA was not found on the gloves. (16 RT 3061-3062.) However, the parties stipulated that the presence or absence of DNA did not conclusively prove the person wore or did not wear the gloves. (16 RT 3062.)

nothing to say and then told Sergeant Clapper that he was being chased, was afraid for his life and did not know who he was shooting at. (11 CT 2693-2698.) Lamb initially consented to a blood draw, but later withdrew that consent. (10 RT 1901-1902.)

Sergeant Charles Sullivan interviewed Rump. (10 RT 1905-1907; 11 CT 2700.) Rump told Sergeant Sullivan that he had permission to drive the Taurus, the person in the other car tried to hit him and he did not know the other person was a police officer. (11 CT 2704, 2716-2718.) Rump refused to identify who gave him the Taurus, said he could not remember who was with him during the pursuit, and declined to answer any questions about P.E.N.I. (11 CT 2709-2719.)

Lamb and Rump were transferred from the interview rooms to separate cells at the Anaheim facility. (10 RT 1941.) Each cell had a phone for outgoing calls. (10 RT 1942.) Rump's and Lamb's calls were monitored and recorded. (10 RT 1942.)

In a March 11, 2002, phone conversation between Lamb and Rump, they discussed who was chasing them in the white car, Lamb said he did not know who the man was, and Rump said that that he thought the person in the other car might have been a parole agent. (10 RT 1939-1940; 11 CT 2724-2730.)

During a March 12, 2002 phone conversation, Lamb and Freiwald discussed the search of Freiwald's home by three police officers. (10 RT 1958-1959; 11 CT 2837-2844.) Lamb wanted to know what questions the officers asked and what nights they were asking about. (11 CT 2844.) Freiwald said she told the officers that Lamb and Rump were with her almost every night, that they were at her home when she went to bed

around 11:30 on Friday night, and that Michael A. was mistaken when he said they left at 8:30 that evening.[33] (11 CT 2844-2845, 2871.)

Lamb asked what the officers were looking for, and Freiwald read the search warrant to him. (11 CT 2893-2894.) Lamb asked Freiwald whether her phone book which was taken by the officers had "all the numbers in it" and suggested that she throw his phone book away if she could find it. (11 CT 2878-2879.)

Lamb told Freiwald that he was being held for attempted murder of a police officer, that he thought Officer Helmick and Detective Allen were "a bunch of" Mexican "gang bangers" during the pursuit, he did not know they were officers until after he fired the gun, and he could "beat" the case. (11 CT 2845-2852, 2867-2869.) Freiwald said Rump had already called and told her the same thing. (11 CT 2847.) Subsequently, Lamb told Freiwald, "That's my story, and I'm sticking to it," and that he would say he was on drugs. (11 CT 2861.) They also discussed the stolen car and Freiwald's phone being tapped. (11 CT 2862-2867.)

Correspondence between Rump, Lamb and various other individuals was copied by jail personnel. (11 RT 1976-1978.) Between April 19 and August 2, 2002, Lamb and Rump exchanged correspondence wherein (as redacted by the court) they expressed their affections and loyalty to each other, Rump stated how they "still fit together like a precision tuned machine," they referenced "the family," "twists" and "twirls," they referred to each other as the right and left "butt cheeks," Rump signed, "Love and Loyalty, Jake, P.D.S.," and Lamb signed, "With Love, Loyalty, POK1, P.D.S." (11 RT 1982-1994; 19 RT 3759-3820, 3825-3831; 20 RT 3933-3937.)

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[33] The date of Miller's murder – March 8, 2002 – was a Friday. (7 RT 1445; 14 RT 2762.)

On April 19, 2002, Lamb wrote a letter to Rump stating, "The water is calm in this ocean, but my ship's sails are flying high." (11 RT 1982; 19 RT 3758-3760.) In an August 2, 2002, letter to Rump, Lamb wrote that he has "done a lot more than anyone else in this game" and referenced the number "737." (11 RT 1989; 19 RT 3796-3798.) On February 28, 2003, the date scheduled for Lamb's and Rump's arraignment for Miller's murder, Lamb sent a letter to Rizzo in which he bragged, " 'I'm now charged with a homicide. Look for me on the famous Fox 11 on the news,' " and signed the letter, "Your brother, Pokes.' " (11 RT 1992-1993; 19 RT 3820-3825.)

Between June 13 and 18, 2002, Lamb and Darryl Mason were housed in adjacent cells. (12 RT 2142, 2161; 14 RT 2548-2550.) On one occasion, Lamb stood outside Mason's cell door and quietly told him "how he whacked Scottish and that he had stripes coming for that." (12 RT 2164-2166.) Mason testified that he might have asked how it was done, and Lamb said he shot Miller in the back of the head.[34] (12 RT 2165-2166.) Lamb seemed serious and appeared as if he "was looking for a little bit like a pat on the back or something."[35] (12 RT 2166.)

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[34] Sheriff's Department Deputy Terry Bowers testified that it was possible for someone on the outside of the cell to talk to the occupant underneath the door or through the cracks where the door opens. (14 RT 2545-2546.) Bowers further testified that there were times in the normal course of a day where some inmates would be in their cells and others would be outside the cells. (14 RT 2546-2547.)

[35] Mason reported the incident to investigators, and was interviewed by Detective Blazek, Garden Grove Officer Brian Echavarria and a parole agent in the California Institution for men in Chino (hereafter "Chino"), while in segregated protective custody on November 8, 2002. (11 RT 2123-2124; 12 RT 2167; 14 RT 2784-2785.) No promises were made to Mason in return for the information he gave. (11 RT 2125.) Mason had mixed feelings about testifying because he wanted to do the right thing, but was concerned for his family's safety. (11 RT 2125-2126.) "Paperwork"

(continued...)

When Detective Robert Blazek interviewed Hinson on April 2, 2002, she claimed that she did not know Lamb very well, she had never met Rump in person (but had talked to him since his arrest), she pretty much ran Harris's home and could do whatever she wanted there, and she was at Harris' home on the evening of March 8 but left in Harris's car prior to the shooting. (14 RT 2766-2776.)

On February 5, 2003, Detective Blazek interviewed Hinson again following her arrest. (14 RT 2777.) In that interview, Hinson denied seeing Lamb, Rump or Miller on the night of the murder and claimed she did not even remember that weekend. (14 RT 2777-2780.)

e. Gang Expert Testimony

Lieutenant Clay Epperson of the Costa Mesa Police Department had training, education and experience in criminal street gangs. (16 RT 3063-3064.) This included expertise in White supremacist gangs. (16 RT 3064-3070.)

Lieutenant Epperson explained that White supremacists are not turf-oriented like other gangs. (16 RT 3072-3073.) Instead, they are ideologically motivated, embracing others from the same race that are of the same mind set. (16 RT 3073.)

Lieutenant Epperson discussed the importance of monikers and tattoos in White supremacist gangs. (16 RT 3075-3077.) He explained that tattoos reflect a "very deep and strong commitment to that gang," and that it would be very dangerous for a person to have tattoos of a specific gang if he was not a member, since false claiming of a gang could lead to violent sanctions. (16 RT 3077, 3081.) Tattoos which are generally common

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(...continued)
about Mason's statements to the detectives was out on the streets, and he had been confronted by some skinheads about it. (11 RT 2126-2127; 12 RT 2140-2141.)

among White supremacists include swastikas, Celtic Crosses, "SS" tattoos and the anarchy sign. (16 RT 3078-3080.) The numbers 14 and 88 signify racist ideals in White supremacist gang culture. (16 RT 3103-3104.)

Lieutenant Epperson explained the importance of respect in White supremacist gangs. (16 RT 3084-3085.) Gang members earn respect through their willingness to use violence, "the more egregious the violence, the better." (16 RT 3085.) Respect is also earned through the commission of criminal offenses, a willingness to fight for the benefit of the gang, not informing on peers, and "just being a very hard individual."[36] (16 RT 3084.) Respect is lost by not standing up for the gang in confrontations. (16 RT 3085.)

Bragging about one's crimes and violence to other gang members garners respect. (16 RT 3085.) Conversely, if someone bragged about a crime he did not commit and others became aware of that fact, that individual would lose respect and status within the gang. (16 RT 3085-3086.) Lieutenant Epperson would expect White supremacists to be aware of crimes and violence committed by fellow gang members because it constitutes the very business of the gang, and it is important that as many people in the gang knows about the crime for the individuals involved to make a name for themselves and enhance their status. (16 RT 3090.)

It is also expected and important that fellow gang members "back up" each other in all circumstances. (16 RT 3088-3089.) Being a lookout or a getaway driver, luring the victim to a specific location, or simply being present and available for assistance to another gang member committing a crime are all forms of backup. (16 RT 3089.) Thus, one would be expected

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[36] Mason also discussed how newcomers gain status through violence, the commission of crimes and obtaining money for the gang. (12 RT 2157-2158.)

to take a fellow gang member with him as backup when committing a violent crime. (16 RT 3088-3089.) Like the actual perpetrator, the more violent the act backed up by a gang member, the greater status he will earn. (16 RT 3089-3090.) However, "the person who pulls the trigger" would still gain more status than his backup. (16 RT 3090.)

Lieutenant Epperson explained that guns are important tools for intimidation, running criminal enterprises and achieving violent ends in White supremacist gangs. (16 RT 3090-3091.) However, guns present a "double-edged sword," since many members have prior felonies and do not want to get caught with firearms. (16 RT 3091.) Thus, guns are only carried and used when needed. (16 RT 3091.)

"Payback" is a sanction for a perceived wrong in White supremacist gang culture, which might take a long time – even years – to implement due to various factors. (16 RT 3086-3087.) "Ratting" on the gang, providing intelligence to law enforcement or discussing the gang's activities on television, would be viewed as acts of disrespect or treason against the gang, requiring a response and warranting serious violence as payback against the offending individual. (16 RT 3087-3088.)

Lieutenant Epperson testified that the Aryan Brotherhood (also known as "The Brand") was a gang formed in 1967 to control the White prison population. (16 RT 3082-3083.) It remains the most powerful and dominant White gang in the state prisons, despite having being severely weakened through federal racketeering investigations. (16 RT 3083.)

P.E.N.I. was formed in the 1980's by followers of a punk rock group named Rudimentary P.E.N.I. which played in White racist venues. (16 RT 3094.) By 1986, P.E.N.I. evolved into a "skinhead" street gang based on the British model. (16 RT 3094-3095.) Subsequently, P.E.N.I. modeled itself after California prison gangs, capitalizing on racial polarization in

state and local custodial settings and motivated by mercenary and self-serving issues rather than racist ideology. (16 RT 3095-3096.)

Since the Aryan Brotherhood's members were confined to secured housing units, they needed associates to act for them in the "mainline" of the prison. (16 RT 3099-3100.) Until 1999, the Nazi Lowriders fulfilled that role. (16 RT 3100.) When the Nazi Lowriders were validated as a prison gang and its members were also placed into secured housing units, P.E.N.I. filled the power vacuum and became the fastest growing White gang in the state prison system. (16 RT 3100.) P.E.N.I. was also tasked with organizing all Southern California White supremacist gangs into the Southern California Skinhead Alliance. (16 RT 3100-3101.) However, P.E.N.I. remained subordinate to the Aryan Brotherhood in the prison hierarchy as well as on the street. (16 RT 3097.)

Based on the criminal history of its members, Lieutenant Epperson testified that the primary activities of P.E.N.I. were drug trafficking (primarily in methamphetamine), theft of property, fraud, identity-theft, and crimes of violence including assault with a deadly weapon and attempted murder. (16 RT 3130-3142.) P.E.N.I. used the vehicles of willing friends, vehicles obtained through gang pressure or fraud, or "crack rentals" as payment for drug debts which were used until they were reported stolen. (16 RT 3121-3123.)

Lieutenant Epperson characterized violence as "an absolute cornerstone of" P.E.N.I. (16 RT 3104.) P.E.N.I. had a "blood in, blood out" philosophy which meant "once you're in, you can't get out." (16 RT 3105.) P.E.N.I. had an internal discipline process for those members engaged in misconduct. (16 RT 3104-3105.) Such discipline could be implemented by senior members or shot callers "on the spot" or at any given time or place. (16 RT 3105.) P.E.N.I. also engaged in witness intimidation. (16 RT 3106.)

Like other gangs, P.E.N.I. hated law enforcement. (16 RT 3101-3102.) Lieutenant Epperson testified that a member's status within the gang would be "hugely increased" by killing a police officer, and his backup's status would be increased as well. (16 RT 3103.)

In 2002, P.E.N.I. had at least 200 active members.[37] (16 RT 3097.) Its top three members – Mazza, Rizzo and Devlin Stringfellow – were also validated Aryan Brotherhood associates.[38] (16 RT 3098-3099.)

Based on an intelligence meeting, police reports, field identification cards, Department of Corrections validations, tattoos, prior admissions to various law enforcement and custodial officers, and letters written between them and other P.E.N.I. members and associates, Lieutenant Epperson testified that Lamb and Rump were active P.E.N.I. gang members in March of 2002. (16 RT 3143-3157, 3166-3177.) Between February 21 and June 2001, Lamb added the tattoos of the letters "P.D.S." and the number "737" above his eyebrows. (16 RT 3147-3148.)

Prior to 2002, Billy Joe Johnson was associated with the Nazi Lowriders and ordered by the Aryan Brotherhood to conduct a "hit" on his cellmate and friend Joey Guvey in Chino.[39] (16 RT 3116-3117.) After Johnson refused to follow the Aryan Brotherhood's order, he was assaulted in prison. (16 RT 3117-3118.) Johnson got "out of the hat" by identifying with P.E.N.I. and his participation in Miller's murder. (16 RT 3120-3121.)

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[37] White supremacists in general do not consider female associates who work on behalf of the gang to be full-fledged members. (16 RT 3075.)

[38] Lieutenant Epperson explained that gang members and associates are validated as such within the Department of Corrections based on criteria such as tattoos, admissions of gang membership and possession of gang paraphernalia. (16 RT 3098.)

[39] Johnson had a Nazi-style "SS" in the form of lightening bolts on his neck and swastikas on the back of both legs amongst the tattoos on his body. (16 RT 3119-3120.)

When presented with a hypothetical of a prominent member of a White supremacist gang who has become marginalized to some degree and runs afoul of the gang by bringing negative "heat" when its leaders are facing criminal charges and assuming some of the gang's members formulated a plan to lure the offending individual to a secluded area to kill him, Lieutenant Epperson opined that such a killing was consistent with it being committed for the benefit of, at the direction of and in association with the gang and with the intent to promote, further and assist in the criminal conduct of the gang. (16 RT 3177-3179.)

When presented with a hypothetical of a shooting and attempted killing of a police officer by one of two active gang members attempting to flee pursuing police officers, Lieutenant Epperson opined that the crime was consistent with an offense committed for the benefit of, at the direction of and association with the gang, and with the intent to promote, further and assist in the criminal conduct of the gang. (16 RT 3179-3180.)

2. Defense

a. Lamb's Evidence

Michael Jones owned South County Billiards in Costa Mesa. (17 RT 3400.) Between March 1 and 8, 2002, a man named "Jesse" called Jones nine or ten times, asking for Miller. (17 RT 3406-3407.)

On the morning of March 8, 2002, Jones bought a pool table from two acquaintances of Miller in Costa Mesa. (17 RT 3400-3401.) Miller took the money on behalf of the two men and accompanied Jones back to South County Billiards with the pool table. (17 RT 3402.) After Miller left around 12:30 p.m., someone called Jones, asked him whether he had bought a pool table that day, and said the table was stolen property. (17 RT 3402-3404.) When Miller returned in the late afternoon with an unidentified person, Jones asked him about the pool table. (17 RT 3403.)

At approximately 7:00 that evening, Jones and Miller were in an alley behind South County Billiards when police officers arrived to investigate.[40] (17 RT 3404-3405.) Upon noticing the police cars, Miller told Jones not to mention his name to the police and took off running. (14 RT 2580-2582.)

That same day, John Raphoon had a birthday party at his home in Costa Mesa. (17 RT 3274-3275.) Miller arrived sometime in the morning and spent the entire day there, working on his skateboard and drinking vodka with Raphoon. (17 RT 3276-3278, 3285, 3292.) In the afternoon, Billy Joe Johnson,[41] Andrea Metzger and others arrived at the party. (17 RT 3279-3281, 3303-3308.)

At the party, Metzger, Johnson and Miller were drinking and laughing together. (17 RT 3315.) Miller joked with Johnson about keeping his guard up. (17 RT 3315-3316.) Between 8:00 and 9:00 p.m., Raphoon left the party to go to a restaurant. (17 RT 3285-3286.) Around 9:00 p.m., Johnson left the party with Metzger to have sex in a parking lot, and then he took her home.[42] (12 RT 3312-3314.)

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[40] Gordon Bridges went to South County Billiards between 1:00 and 1:30 the following morning and spoke to Jones about the incident. (19 RT 3719-3720.) Bridges told Detective Blazek that he "heard that the police had showed up at South County Billiards" and Miller fled around 10:30 or 11:00 p.m. the prior evening. (19 RT 3719-372.) However, Jones testified that the police arrived and Miller fled at "7:00'ish; 6:30, 7:00'ish" that evening when he though "it was just starting to get dark." (12 RT 3404.)

[41] Raphoon and Johnson were cousins. (17 RT 3279, 3281; 18 RT 3534.)

[42] Metzger and her boyfriend, Jesse Wyman, later visited Claudia Beeman. (17 RT 3332-3333, 3341-3345.) Metzger told Beeman that Raphoon's party was "going off" because there were P.E.N.I. guys and Nazi Lowriders there, and that "Ugly Boy" was "getting pissed off at Scottish" at the party. (17 RT 3338, 3342-3343.)

Shirley Williams, who was dating Miller at the time, arrived at Raphoon's party around 10:00 p.m. after she got off work.[43] (17 RT 3357, 3362.) When she arrived, Miller was in the front yard playing with some children and talking to a friend named Rob Ayres. (17 RT 3363.) Williams stayed 10 to 15 minutes and then left to get some heroin. (17 RT 3363-3365.) Miller was still at the party when Williams left. (17 RT 3365-3366.)

At approximately 10:30 p.m., Miller called his ex-girlfriend, Marnie Simmons, and left a message on her voicemail. (17 RT 3414-3414.) In the message, Miller said he had been at Raphoon's party, that he was scared, he was going to another address which he wanted her to "dialogue," and he did not know what else to say. (17 RT 3415-3416.) Simmons heard a voice in the background which sounded like Johnson, telling Miller to get off the phone and to "tell her, see ya." (17 RT 3416.)

Williams testified that she returned to the party around 11:00 p.m. and Johnson, Raphoon and "pretty much" everyone except Miller were there. (17 RT 3366-3369.) However, Raphoon testified that he did not see Johnson, Miller or anybody else at his home when he returned at approximately 11:00 p.m. (17 RT 3292-3293.)

Williams asked if anyone knew where Miller was and "hung out" with Johnson the rest of the night. (17 RT 3369, 3374.) In the early morning hours, Williams and Johnson went to a hotel in Costa Mesa to pick up some "speed" and returned to Raphoon's house where they got high. (17 RT 3375-3377.)

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[43] Raphoon believed Miller left the party to pick up Williams at approximately 7:00 p.m. (17 RT 3281-3285.) However, Raphoon testified that he "was pretty well in the sack" and "pretty much a blank after" 9:00 in the morning due to his drinking. (17 RT 3282, 3286.)

Between 3:00 and 4:00 a.m., Williams and Johnson drove to Noel Smith's house in Williams' truck. (19 RT 3721-3722.) Smith was there with Gordon Bridges.[44] (19 RT 3722.) Everyone got high on drugs.[45] (19 RT 3722.) Johnson asked Bridges if he heard what happened, and proceeded to tell him that Miller was found in an alley in Anaheim at approximately 11:45 the preceding night with a gunshot to the back of his head.[46] (19 RT 3724.)

At some later date, Williams told Bridges that Johnson made her drive Miller to Anaheim with Jesse Wyman hiding in the back of the truck and they picked up Miller off Baker Street.[47] (19 RT 3725-3726, 3730.) Bridges was upset and began talking a lot "on the street" about Miller's death. (19 RT 2589.) A couple weeks after the killing, Bridges heard through Smith that Johnson and Donny McLachlan were looking for him. (19 RT 3728.) Subsequently, Bridges asked Johnson to look him in the eye and tell him that he had nothing to do with Miller's murder. (19 RT 3732.) Johnson told Bridges to shut his mouth and mind his own business, that it was politics which did not involve him, and to back off of Wyman.[48] (19 RT 3729, 3732.)

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[44] Bridges had numerous prior felony convictions and parole violations. (19 RT 3735-3737.)

[45] Smith testified that he was at home alone around 3:00 and 4:00 a.m. on the morning of March 9, 2002. (18 RT 3648-3650.)

[46] In July of 2002, Bridges told Detective Blazek that the word on the street from Johnson was that Miller was shot in the back of the head three times. (19 RT 3737-3738, 3740.)

[47] Williams did not recall going to Smith's house with Johnson or having a conversation about Miller's death. (17 RT 3381-3383.) Williams denied telling Bridges that Johnson made her take Miller to Anaheim with Jesse Wyman hiding in the back of her truck or that Johnson had her set up Miller. (17 RT 3382-3384.)

[48] Bridges testified that Smith loaned his truck to a girl a couple days after the murder, Wyman ended up with the truck, and Wyman confronted

(continued...)

On March 9, Williams called Simmons and gave the phone to Johnson. (17 RT 3417, 3419.) Johnson told Simmons that he "he had some bad news" and told her, "'Scott's no longer with us.'"[49] (17 RT 3417.)

Johnson testified on Lamb's behalf. (18 RT 3522.) At the time, Johnson was serving a sentence of 45 years to life for murdering Cory Lamons with a hammer. (18 RT 3551-3552, 3599.) Johnson also had prior convictions for robbery, burglary and assault with force likely to produce great bodily injury. (18 RT 3552, 3570.)

Johnson had various tattoos on his body which included two "SS" lightening bolts on his throat, an eagle with a swastika on his stomach, a demon with a swastika on his left leg, an iron cross on his neck, and the words "White" and "Pride" on his arms. (18 RT 3548-3551.) Johnson and his wife owned a clothing line which used the emblem of an iron cross with a swastika. (18 RT 3550.) At a court appearance for the Lamons case, Johnson made a "Heil Hitler" salute to the spectators. (18 RT 3557-3558.) In letters, he referred to the court as "the house of Jews." (18 RT 3558.)

Johnson identified himself in a photograph in front of a board that had the numbers 44, 88 and 737 on it, and admitted that the number 737 could stand for PDS. (18 RT 3567-3568.) Johnson also admitted that he had his picture taken with P.E.N.I.'s name above his head. (18 RT 3601.) In the Lamons case, Johnson admitted that he committed the murder and related charges for the benefit of, at the direction of and association with P.E.N.I.,

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(...continued)
Smith and a friend with a gun when they tried to recover the truck. (19 RT 3729-3730.) Smith testified that no such altercation occurred and that the police recovered his truck from a hotel. (18 RT 3652-3654.)

[49] Williams did not remember calling Simmons and giving the phone to Johnson. (12 RT 2241-2242.)

and conditioned his plea on his codefendants not receiving sentences in excess of 12 years each. (18 RT 3564, 3573-3574.)

Although he claimed not to care about P.E.N.I., Johnson admitted that he was a "homeboy" who would put his life on the line for his "fellow homeboys."[50] (18 RT 3558-3559.) Johnson knew Lamb as "POK1." (18 RT 3545.) Johnson, Lamb and Rump exchanged friendly comments and smiled at each other at a joint court appearance. (18 RT 3582-3584.) However, Johnson denied any prior affiliation with the Nazi Lowriders, receiving an order to kill Guvey, having a "green light" placed on him by the Aryan Brotherhood, talking to Lieutenant Epperson about it, or setting up Miller to be killed by his "homeboys" in order to get "out of the hat." (18 RT 3579-3581.)

Johnson testified that he and Miller were good friends who had known each other for 20 to 25 years and had a lot of mutual friends. (18 RT 3523, 3531-3532.) Despite a voice-over, it was obvious to Johnson and "everybody" that Miller was the person in the Fox news program due to Miller's tattoos, his range of movement and his surroundings which included the presence of his pit bull. (18 RT 3530-3532.) Johnson was angry with Miller due to the Fox interview as well unspecified personal issues involving women. (18 RT 3528-3530, 3603.)

Johnson went to Raphoon's birthday party between 4:00 and 4:30 p.m. on March 8, 2002. (18 RT 3524.) Miller arrived around 6:00 p.m. (18 RT 3424-2425.) Approximately 30 people, including Williams, were at the party. (18 RT 3525-3526.) Jesse Wyman was not there. (18 RT 3525.)

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[50] Johnson refused to answer other gang-related questions, explaining that he would get in trouble and "might end up dead." (18 RT 3553-3554.)

Other than Miller, no one from P.E.N.I. or the Nazi Lowriders attended the party. (18 RT 3526-3527.)

Johnson had not seen Miller since the airing of the Fox news segments and was upset to see him at Raphoon's party. (18 RT 3530-3533.) However, Johnson greeted Miller and talked to him "off and on" during the evening. (18 RT 3525-2536.)

Between 8:00 and 10:00 p.m., Johnson left the party with Miller to get some heroin in Anaheim. (18 RT 3527-3528, 3533.) Johnson drove his truck, and no one else was with them. (18 RT 3533-3534, 3620.)

Along the way, Miller asked Johnson to stop at a strip mall to make a call from a payphone. (18 RT 3533.) After Miller talked on the phone for a few minutes, Johnson told him to hurry up and Miller hung up. (18 RT 3533.) Johnson then drove to an alley where he parked his truck. (18 RT 3522.)

Johnson and Miller got out of the truck and began walking down the alley. (18 RT 3533.) Because he was "pretty perturbed" and "really had it with" Miller, Johnson "just reached in [his] waistband and grabbed [his] gun and blasted [Miller]" when they reached an inlet off the alleyway.[51] (18 RT 3533-3534.) Johnson claimed that he shot Miller from a distance of a foot and a half to two feet after Miller stepped in front of him. (18 RT 3610-3611.)

After the shooting, Johnson got back into his truck and "just drove away" in a "normal way" without screeching his tires. (18 RT 3534, 3617-3618.) Johnson testified that there were no other cars in or near the alley

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[51] Johnson testified that it was "pretty much" time to kill Miller that evening and that he knew during the drive that Miller would cease to exist before the night was over. (18 RT 3604.) However, Johnson subsequently claimed he "didn't know if it was going to happen then." (18 RT 3604.)

when he left, and that he got the heroin after the killing. (18 RT 3608-3609, 3617.)

Johnson drove back to the party. (18 RT 3534.) Subsequently, Johnson and Williams left and drove to various places. (18 RT 3535.) Between 3:00 and 4:00 in the morning, they went to Smith's mobile home to get some clothes for Williams. (18 RT 3535-3536.) There, Johnson told Bridges, "'Hey, did you hear that Scottish got blasted.'"[52] (18 RT 3536.) Johnson and Williams then got a motel room where they spent the rest of the morning. (18 RT 3537.)

Johnson testified that he ran into Lamb the following evening in a bar in Anaheim, gave Lamb the murder weapon and told him that it was "hot," meaning stolen. (18 RT 3545-3547, 3594-3596.) According to Johnson, Lamb was looking for a gun because some Hispanic gang members had been shooting at him. (18 RT 3595-3596.)

Johnson claimed that he had bought the gun about six months prior to Miller's murder from a "mutual friend" whom he refused to identify. (18 RT 3597-3598.) He testified that the gun held eleven bullets, but could not describe the bullets because he never removed the clip and did not know how many safeties the weapon had because he was "not a gun person." (18 RT 3601-3602, 3609-3610.)

In 2004, while Rump was awaiting trial for Miller's murder, he and Johnson were cell mates at the Orange County jail. (18 RT 3581-3582.) They got along very well. (18 RT 3582.) At that time, Johnson contacted Rump's investigator and told him that Lamb and Rump were not guilty and that the gun was his. (18 RT 3590-3592, 3606.)

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[52] Johnson admitted that he later told Bridges that he " better watch his fuckin' mouth." (18 RT 3538.)

In 2006, five days after entering a guilty plea for the Lamons murder, Johnson left a phone message for Lamb's defense investigator, Gail Greco, stating that he needed to talk to her about the case. (18 RT 3555, 3584-3588.) The following day, Greco met Johnson at the county jail. (18 RT 3587.) Johnson told Greco that he killed Miller, that Lamb and Rump had nothing to do with it, and he "wante[ed] to see right done." (18 RT 3555-3556, 3589-3592.)

Johnson spoke to another of Lamb's investigators a few days before trial. (18 RT 3622-3623.) However, in October of 2002, Johnson told Detective Blazek that he had nothing to say to him about Miller's murder. (18 RT 3560.)

David Smith, a physician who specialized in addiction medicine, reviewed the videotaped police interviews of Lamb, Rump and Harris. (18 RT 3450-3468.) Based on those videos, Dr. Smith opined that Harris was under the influence of amphetamine,[53] Rump was "crashing" after being under the influence of methamphetamine, and Lamb was under the influence of methamphetamine but less impaired than the others. (18 RT 3468-3479.) Dr. Smith also examined Lamb in the jail for about an hour a few weeks before trial in 2007, but based his opinions solely on the videos. (18 RT 3486-3487, 3503.)

Dr. Smith asked trial counsel for biological fluids and clinical information since he wanted as much relevant information as possible, but all he "got back was a videotape." (18 RT 3492.) Dr. Smith was told about Lamb's and Rump's recorded phone calls which he considered a "conflict in the historical information," but felt no need to review the transcripts of

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[53]Although Harris's interview was at 2:00 in the morning and the shooting was at approximately 11:30 p.m. the preceding evening, Dr. Smith was not interested in the police officers' observations of Harris around midnight. (18 RT 3516-3517.)

those calls to determine whether there was any malingering. (18 RT 3503-3508.) Dr. Smith did not know that Rump refused and Lamb withdrew consent to give blood samples. (18 RT 3509-3510.)

Sergeant Charles Knight spoke with several officers at the March 11 shooting scene. (19 RT 3662-3664.) However, pursuant to department procedures, he did not discuss the shooting with Officer Helmick or Detective Allen since they were involved in the incident. (19 RT 3666-3667.) Based on the limited information he had, Knight was unable to determine the direction that the gun was pointed when Lamb fired it. (19 RT 3664-3665.)

Daniel Vasquez, a former correctional officer and state prison warden, testified about gangs and guns. (19 RT 3671-3678.) Vasquez would not expect a gang member to carry a "hot gun" which he knew was used in a murder a few days before. (19 RT 3678-3679.) Vasquez testified that P.E.N.I. was a street gang rather than a validated prison gang which would require its members to be placed in a secured housing unit. (19 RT 3679-3683.) Between December 2002 and January 2003, Daryl Mason was "endorsed" for a sensitive needs yard classification due to enemies within the prison and for another confidential matter. (19 RT 3687-3689.)

Based on Department of Corrections records, Wynette Augustine, a licensed optometrist, testified that Lamb had 20/200 vision in both eyes in 2001, which meant that his vision would begin to blur at a distance of about 16 inches and get exponentially worse the farther away the object was. (20 RT 3853-3856.) By May of 2007, Lamb had 20/400 vision in either one or both eyes.[54] (20 RT 3856-3857.)

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[54] At the penalty phase, the prosecutor elicited testimony from Dr. Augustine that Lamb's records indicated that he wore contact lenses and "will wear them well." (39 RT 7823.)

Deputy Sheriff Wayne Richards testified about the Orange County Jail Intake and Release Center (hereafter "IRC") where Lamb and Mason were housed in June of 2002. (20 RT 3860-3861.) Inmates were usually released for exercise or phone calls two cells at a time. (20 RT 3861-3862.) The order would change on different days. (20 RT 3863.) Richards observed inmates released for dayroom privileges talk to others still in their cells through cracks on the side of the cell doors "all the time." (20 RT 3865.)

b. Rump's Evidence

Some time after 8:00 p.m. on the evening of March 8, 2002, Frances Valdovinos observed five to ten people, including Amezcua and her cousin, in the downstairs level of Harris's home. (20 RT 3866-3868, 3886-3887.) When shown photographs of Lamb and Rump, Valdovinos did not recognize them as being in the apartment. (20 RT 3870-3874.) However, she was not paying attention and "barely glanced" at the other people in the apartment before heading upstairs. (20 RT 3873-3874, 3877, 3882.)

Valdovinos only recalled a White male with a "dark" face wearing a black hat and a black or dark gray jacket, who later came upstairs and tried to talk to Harris. (20 RT 3875-3876, 3878, 3883.) After the man left, Valdovinos heard a loud noise "like a car backfiring" and stayed upstairs with Amezcua's cousin, while Harris and Amezcua left the room. (20 RT 3878-3789.) When Valdovinos exited the apartment an hour and a half or two hours later, no one else was downstairs. (20 RT 3879.) Subsequently, Amezcua told her that the sound they heard was a gunshot, described how they found the body, and said they needed to leave. (20 RT 3880-3881, 3884-3885, 3888-3889.)

Defense Investigator Tom Gleim testified about photographs of Rump and other individuals he presented to Amezcua and Valdovinos, which they were unable to identify. (20 RT 3889-3897.) The parties stipulated that the

Anaheim Police Department did not display any signs indicating that inmate phone calls were recorded. (20 RT 3994.)

3. Rebuttal

On June 4, 2007, Bridges told defense investigator Richard Rowell that, in the early morning hours following Miller's murder, he told Johnson, "'Look me in the eyes and tell me you didn't kill Scottish,' " and Johnson responded, "You've been around. It's politics. There is nothing that could have been done about it." (20 RT 3994-3996.)

Defense Investigator Greco testified that Johnson unexpectedly left a voicemail message for her on July 4, 2006, in which he identified himself and said he wanted to see her. (20 RT 3998-4001.) The following day, Greco spoke to one of Lamb's attorneys before driving to Orange County to interview Johnson.[55] (20 RT 4001-4002.) Greco accurately documented her interview in a report dated July 17, 2006. (20 RT 4004-4005.)

Johnson told Greco, " 'I was there. I did it. They had nothing to do with this murder.' " (20 RT 4005-4006.) Johnson said he had previously spoken with Rump's investigator approximately a year after the murder when he was Rump's cell mate and the he had told the investigator that the murder weapon had come from him (Johnson). (20 RT 4006-4007.) However, Johnson also stated that he had never previously told anyone about what he did. (20 RT 4011.)

Johnson told Greco that he did not really know Lamb when he ran into him at a bar, Lamb was looking for a weapon because Mexican gang members were shooting at him, and he (Johnson) just happened to have the

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[55] Although she wrote in her report that "we" visited and interviewed Johnson, Greco testified that no one else accompanied her and the use of the term "we" was "a stylized way of writing." (20 RT 4002-4003.)

gun. (20 RT 4007-4008.) Johnson then said, " 'That was it,' " and, " 'This should clear the books.' " (20 RT 4008.)

Johnson also told Greco that he gave Miller a "Born Solid" shirt when they were at Raphoon's home because he and Miller were friends, they went to Anaheim to get some heroin, "they got out of their vehicles," and they "scored" from a guy who came out of an apartment.[56] (20 RT 4008-4009.) Johnson said that he told Miller, "'I don't have to listen to you. Fuck you,'" before he "'blasted his ass,'" he got back into the truck, he removed his shirt and wiped down the gun before returning to the party, "it was a clean kill, and he "want[ed] to see right being done." (20 RT 4010.)

Officers David Heinzel and Rich Castro arrived at the murder scene a few minutes after midnight on March 9, 2002. (20 RT 4019-4020.) The officers spoke with Maria Baumgartner, who lived in an apartment which faced south towards Gramercy. (20 RT 4020-4022.) Baumgartner reported that she heard two gunshots at 10:50 or 10:55 p.m. which appeared to be coming from the area south of her apartment and that she observed "two people kind of running in an easterly direction in front of her residence." (20 RT 4022-4023.)

The officers then searched the area and found two shoe prints near Harris's apartment. (20 RT 4023.) Heinzel knocked on the door and spoke to Harris, who appeared nervous and inquisitive. (20 RT 4023.)

The parties stipulated that, in two interviews videotaped on the evening of March 11, 2002, Freiwald told detectives that Lamb and Rump were at her residence continuously on March 8 from 7:00 p.m. until she went to sleep, that they watched the movie *Joe Dirt* with her children, and

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[56] Greco testified that she understood there to be only one vehicle involved and the word "vehicles" in her report was a "typo" resulting from her word processing program's automatic grammar check. (20 RT 4015-4017.)

Lamb and Rump were not there when she awoke at 9:00 a.m. the next morning. (20 RT 4026.) However, Freiwald told one detective that she went to bed between 9:30 and 10:00 p.m. on March 8, and told the other that she went to sleep at 11:30 p.m. that night. (20 RT 4026.) It was further stipulated that Costa Mesa police officers responded to South County Billiards at 6:32 p.m. on March 8, 2002. (20 RT 4027-4028.)

The March 8 message left by Miller on Simmons' voicemail was played for the jury. (20 RT 4028-4030.) In the message, Miller gave directions to the address of Rob Ayers in Huntington Beach, said he was at Raphoon's home for his birthday and said he was scared, which was followed by an unintelligible comment from a voice in the background. (12 CT 3183; 20 RT 4030.) Miller then told Simons that he loved her and the background voice said, "See you. See you," before the message ended. (12 CT 3183.)

Jones told Detective Blazek that Miller would never have left his skateboard at Raphoon's home unless he had left it with friends or knew that he was returning. (20 RT 4030-4031.) Jones also told Detective Blazek that "Jesse" had called and was looking for a white truck that Miller was driving. (20 RT 4042.)

When Detective Blazek interviewed Valdovinos, she described the men in Harris's apartment as White, but did not note anything distinctive about any of them. (20 RT 4032.) Although she described a man with a baseball cap who briefly came upstairs as a White male, Valdovinos said she did not notice whether he had a mustache or beard because "he was dark." (20 RT 4032-4033.) Valdovinos said "all those White people" in the apartment disappeared by the time she went downstairs. (20 RT 4034.) She did not recognize, Rump, Lamb or Miller in individual and six-pack photographs, explaining that she "never stared at anybody." (20 RT 4034-4035.)

Sergeant Clapper interviewed Andrea Metzger.[57] (20 RT 4035.) When asked who else was at Raphoon's party besides Johnson, Metzger said, " 'Shhh.' " (20 RT 4035.) When Sergeant Clapper told her " 'they can't hear me,' " Metzger responded, " 'Oh, they can. I'm going to get in trouble, stupid shit.' " (20 RT 4035.)

Detective Blazek further testified about prior statements from Amezcua, Raphoon, Beeman and Williams as well as photographic lineups conducted with Henderson and Valdovinos. (20 RT 4036-4051.)

B. Penalty Phase[58]

1. Prosecution

a. Evidence of the Current Offenses

Through the testimony of Officers Matt Adrian, Michael Helmick and Bryan Santy and Detective Danny Allen (31 RT 6357-6369; 32 RT 6449-6521, 6527-6586; 33 RT 6586-6615), Deputy Seth Tunstall (36 RT 7257-7279), Detectives Robert Blazek and Karen Schoepfer (32 RT 6437-6448; 33 RT 6701-6728), Lieutenant Clay Epperson (38 RT 7644-7747), Forensic Specialists Scott Flynn, Marc Symon, James Conley, Steven Guluzian and Rocky Edwards (32 RT 6377-6423, 6522-6525; 33 RT 6616-6695), Dr. Richard Fukumoto (37 RT 7427-7446), Defense Investigator Gail Greco (37 RT 7594-7601), Luis Mauras (31 RT 6347-6355), Marnie Simmons (32 RT 6423-6436), the prior testimony of Andrea Metzger (34 RT 6765-6788) and guilt phase exhibits, the prosecutor presented evidence of the Miller murder and the attempted murder of Officer Helmick.

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[57] Although the record refers to Andrea Iacono, it appears from the record that this is the same person as Andrea Metzger.

[58] Only evidence from the penalty phase retrial is included in this Statement of Facts.

The prosecutor also introduced the testimony of Eric Kraus, who was Billy Joe Johnson's parole agent in 2001. (37 RT 7449-7450.) On May 24, 2001, Johnson was arrested for a parole violation and subsequently sent to Chino, where he was stabbed or sliced by another inmate. (37 RT 7450, 7453.) Shortly thereafter, Johnson requested to speak with Agent Kraus. (37 RT 7451-7452.)

On May 31, 2001, Johnson told Agent Kraus (who was accompanied by Lieutenant Epperson) that he was attacked because he refused to carry out an order to assault his prior cellmate, Joseph Guvey. (37 RT 7450-7453.) Johnson explained that he did not carry out the order because he considered Guvey a friend and because he was concerned about the sentence he would receive as "a third striker." (37 RT 7453-7454.) Johnson did not identify who gave him the order. (37 RT 7454.)

b. Prior Acts and Threats of Violence

Nineteen-year-old Marc Gunderson and his girlfriend lived in Dallas. (7315-7315.) On June 22, 1995, they travelled to San Clemente to visit the girlfriend's brother. (36 RT 7315-7316.)

Shortly after arriving in San Clemente, Gunderson, his girlfriend and the brother's girlfriend went to the beach. (36 RT 7316-7317.) Lamb was standing by the pier with a group of males and a couple females. (36 RT 7317.) As Gunderson walked past them, Lamb, said, "White Power." (36 RT 7317-7319.) Gunderson ignored him. (36 RT 7317.) Lamb said "White Power" again, asked what Gunderson was doing, and asked why he was wearing Doc Martin boots.[59] (36 RT 7317-7319.)

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[59] Gunderson had a partially shaved head and was wearing boots and a leather jacket with a chain wallet, which he described as "[a] little bit more of an alternative, grunge kind of look." (36 RT 7318.)

When Gunderson continued to ignored him, Lamb said, "Hey, I'm talking to you." (36 RT 7319.) Gunderson replied, "Hey, that's cool. I'm not White Power. I'm just coming down to the beach just hanging out." (36 RT 7319.) Lamb then told Gunderson, "Well, you know, if you're not White Power, you're not allowed to wear those boots."[60] (36 RT 7319.) Gunderson replied, "That's fine. I just won't wear the boots." (36 RT 7329.)

Lamb told Gunderson that he did not understand, and ordered him to take off the boots. (36 RT 7320.) When Gunderson refused, Lamb became angry, started using profanities, and said, "You're not walking out of here with those boots. We're gonna beat 'em off of you." (36 RT 7320-7322.) Gunderson was afraid. (36 RT 7322.)

As Lamb and his companions began to approach Gunderson, two officers on four-wheel vehicles pulled up. (36 RT 7320-7322.) Gunderson reported the incident to the officers, who arrested and searched Lamb. (36 RT 7322.) The officers recovered from Lamb's pocket a large "mag" type flashlight that was about 18 inches long. (36 RT 7322-7323.) After he was taken into custody, Lamb angrily told Gunderson that he better not return to the beach because he was going to find him, "he had a ton of friends around there," and they would "beat [his] ass." (36 RT 7323.) Fearful, Gunderson never returned to the beach during his two-week stay in Orange County. (36 RT 7323-7324.)

On November 27, 1996, Lamb was incarcerated in a facility in the city of Taft which contracted with the California Department of Corrections to house prison inmates. (36 RT 7330-7333.) It was a relatively low

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[60] Gunderson testified that everyone wore that type of boot where he was from and it was "not that big of a deal." (36 RT 7320.)

security facility for inmates completing the last 16 months of their sentences. (36 RT 7332.)

At approximately 8:00 p.m. that evening, Correctional Lieutenant Deborah Thiess observed Lamb and inmates Joe Courson and Michael Maydon attack inmate Ace Munding.[61] (36 RT 7333-7334.) Lamb, Courson and Maydon were taking turns punching Munding in the face and torso. (36 RT 7333-7336.) Munding, who was pinned on the ground between a toilet and the wall, curled up in a ball attempting to cover his head and did not fight back. (36 RT 7334-7335.)

When Lieutenant Thiess yelled at them to stop, Lamb turned and looked at her, covered his bloody hands with a beanie he was wearing and ran up the stairwell towards his dormitory. (36 RT 7335-7337, 7342.) Lieutenant Thiess commanded Lamb to stop; but he did not comply. (36 RT 7337.) Courson and Maydon fled as well. (36 RT 7335-7336.)

Correctional Officer Sheri Everett observed the beating and followed Lamb up the stairs. (36 RT 7337, 7341-7342.) By the time Officer Everett caught up with him, Lamb had already removed his clothing and was showering. (36 RT 7343.)

Blood was running down Munding's face, soaking his sweatshirt and the ground beneath him. (36 RT 7337, 7351.) Munding was transported to the hospital, where he received approximately seven stitches for a laceration near his right eye. (36 RT 7346, 7351.)

Munding testified that he was never in any gang in or outside of prison, he was sentenced to 42 months at the time of the assault, he spent most of his time in custody reading and playing cards, someone asked him

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[61] Munding was previously convicted of possession of cocaine and marijuana for sale, possession of a deadly weapon with the drugs, possession of a firearm and felony driving under the influence. (36 RT 7348-7349.)

to go outside, Lamb and the two others jumped and began beating him as he walked through the door, and they did not say why they were attacking him. (36 RT 7349-7352.) Shortly after the incident, Lamb admitted participating in the assault, said that "he did what he had to do," promised it would not happen again, and stated that he did not want to go to Corcoran State Prison. (36 RT 7351-7352.)

On September 26, 1999, Lamb was incarcerated at the Chino Reception Center. (36 RT 7373-7374, 7378.) At about 6:20 p.m. that evening, Culinary Officer Richard Matute was passing out utensils when he heard inmate Edward Walsh yell out, "Hey, what the fuck?," and observed Lamb walking away from Walsh. (36 RT 7376-7378.) Officer Matute ordered Walsh to approach. (36 RT 7379-7380.) Walsh complied and told Officer Matute that Lamb had just hit him for no reason. (36 RT 7379-7382.)

Officer Matute ordered Lamb to stop; but he did not comply. (36 RT 7380.) Officer Matute commanded Lamb to stop three more times in a loud voice; but he continued walking away. (36 RT 7380.) Officer Matute escorted Walsh out of the culinary area while another officer activated the alarm. (36 RT 7382.) All of the inmates except Lamb got on the floor in response to the alarm. (36 RT 7381, 7384.) Officer Matute specifically ordered Lamb to get down. (36 RT 7384.) However, Lamb walked to a specific table at the end of the hall where he finally took a position on the floor. (36 RT 7384.)

After back up officers arrived, Officer Matute instructed Lamb to place his hands behind his back, retrained him and escorted him out of the dining hall. (36 RT 7384-7385.) After all the inmates were systematically cleared from the hall, Officer Matute looked for weapons. (36 RT 7386.) Approximately three feet away from where Lamb was detained, Officer Matute found a piece of metal which was approximately seven inches long,

half of an inch wide and sharpened to a point with a handle manufactured from cloth at the other end. (36 RT 7386-7388.)

Walsh suffered a stab wound to the back left side of his neck which was approximately four inches in length, two inches in diameter and bleeding profusely. (36 RT 7415.) There was a second wound in Walsh's mid-back area which was about one inch in length with a small amount of bleeding. (36 RT 7415.) Walsh was sent to the prison emergency room.[62] (36 RT 7415-7416, 7419.) Lamb had blood splatter on his shirt and hands, while no other inmates showed any signs of being involved in an altercation. (36 RT 7403-7404.)

David Wolfe[63] was a P.E.N.I. associate who met Lamb in the county jail and considered him a friend. (37 RT 7469-7470.) In the jail, Wolfe was housed in an area where he had dayroom contact with Lamb and Rizzo on almost a daily basis. (7 RT 7498.)

In September of 2002, while Lamb was in custody and Wolfe was out of custody, Lamb wrote a letter to Wolfe, thanking him for sending stamps and signed 'Love and Loyalty, Pok1." (37 RT 7503-7505.) In November of 2002, while in Chino for a parole violation, Wolfe wrote a letter to Lamb updating him on the status of his (Wolfe's) case, referring to Lamb as his "homey" and expressing his "love and racial loyalty," sending his regards to "all the rest of the comrades," and writing the numbers "88" near his signature. (37 RT 7505- 7508.)

In December of 2002, Wolf wrote another letter to Lamb discussing his (Wolfe's) case and expected release date, expressing his respect to

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[62] At trial, Walsh recalled getting stabbed and identified photographs of the injuries, but otherwise gave nonresponsive, rambling testimony. (37 RT 7455-7459.)

[63] Wolfe had numerous prior drug, weapon, forgery and theft-related convictions. (37 RT 7492-7495.)

Lamb as well as "to those on the tier," referencing the Fox News program, and stating, "I just wanted to let you know, I love your life and I haven't forgotten you. If I happen to prop and hit the street, I haven't or won't forget to touch you, comrade." (37 RT 7509-7512, 7515.)

Monika Witak[64] corresponded with Lamb using the name "Stella" with an anarchy sign for the letter "A," and signing her moniker of "Mouth" with two SS bolts on the sides of the word. (38 RT 7752-7753.) Witak also knew Mazza, and wrote to Lamb in one of her letters, "Pops just called, said he loves you, and you're a miniature him." (38 RT 7751-7753.) Witak and Wolfe denied knowing each other. (37 RT 7528; 38 RT 7758-7759.)

On February 10, 2003, Witak wrote a letter to Lamb, addressing him as "Pok1," stating that she did everything asked of her and he should not be mad for something she had no control over "as if I can just tie him down, pack his ass and force him to do that," and explaining that she did her best for him and made sure she "had the other part all ready." (38 RT 7756-7757.)

On February 12, 2003, Wolfe was released from custody and ordered to report to a drug program. (37 RT 7496.) Wolfe immediately violated the terms of his release, and an arrest warrant was issued. (37 RT 7469, 7496.) On the evening of February 18, 2003, as well as the following

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[64] Witak, whose middle name is Izabella, was previously convicted of giving false information to a police officer, impersonating another person, giving false identification to obtain jail access, felony unlawful taking of a vehicle and felon in possession of a firearm. (38 RT 7748-7749.) In 2005, Witak pled guilty to entering into a September 2003 conspiracy to dissuade and intimidate a witness as an active participant of and with the specific intent to promote further or assist in the criminal conduct of P.E.N.I. (38 RT 7749-7750.) At times, Witak referred to herself as Monika Lamb. (38 RT 7758.)

morning, Wolfe checked the Internet and "probably" saw there was an outstanding warrant for his arrest. (37 RT 7497-7498.)

On February 19, 2003, Sheriff's Investigator Larry Zurborg arrested Wolfe while a passenger in a car near his Garden Grove residence. (37 RT 7468-7470.) At the time of the arrest, Wolfe had a syringe in his right sock, a tenth of a gram of methamphetamine in the right front coin pocket of his pants, and a small four-inch long hacksaw blade in his rear pant pocket. (37 RT 7472, 7498-7499.) Where Wolfe had been seated, deputies found a clear plastic baggie containing a steel spring-loaded punch tool, and a five-inch long steel tube which contained five four-inch long hacksaw blades, a tightly wrapped baggie of marijuana and another punch tool.[65] (37 RT 7472-7474, 7481.) Wolfe was thereafter incarcerated in the administrative segregation unit of the county jail. (37 RT 7515.)

Wolfe told investigators that he used the hacksaw to cut off lug nuts to change a tire and used the punch tool to break the window of his car since he had lost the key. (37 RT 7500-7501, 7547.) Wolfe had no explanation for the additional broken and bent hacksaw blades, and said they must have fallen into the tube. (37 RT 7547-7548.) Wolfe testified that that he had the marijuana wrapped to "cheek it" although he did not "really mess with weed." (37 RT 7501-7502.) Wolfe denied receiving an assignment from Lamb to smuggle escape tools into the jail or to call anyone while he was out of custody. (37 RT 7498, 7519.)

That same day, Deputy Wayne Richards and another deputy searched the two-man cell assigned to Lamb and fellow inmate Patrick Howard in Module M of IRC. (37 RT 7549-7551; 38 RT 7629.) Inside the cell, the

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[65] Investigator Zurborg testified that a "keister kit" was something used to smuggle contraband between the buttocks of someone knowing they were going into custody. (37 RT 7474-7475.)

deputies found a metal shank, another piece of metal and two plastic lighters concealed behind an intercom speaker box which had been loosened.[66] (37 RT 7551-7553, 7556.) The shank was about seven inches long, and the second piece of metal was about three and a half inches long.[67] (37 RT 7556.) Richards testified that such objects present safety concerns for deputies and other inmates. (37 RT 7557.)

Richards explained how plumbing and rebar could be exposed by moving the sink in the cell and then cut with a hack saw in order to gain access to a plumbing tunnel and effectuate an escape through a window. (37 RT 7557-7559.) Richards was familiar with an inmate having attempted this previously, who was apprehended before leaving the jail premises. (37 RT 7559, 7564.) If an inmate were to try to escape through breakage of the glass portion of the cell door, he would most likely be confronted by a deputy as well. (37 RT 7552, 7565.)

On February 22, 2003, Witak was arrested while visiting Lamb in the Orange County Jail. (38 RT 7754-7755.) At the time of the arrest, Witak was in possession of a note which stated there was going to be a major manhunt and she was being watched. (38 RT 7755.) Witak explained to deputies that the note meant she was not being faithful to Lamb and that Lamb's friends were watching and reporting her activities. (38 RT 7755-7756.) At trial, Witak explained the note as "just joking around." (38 RT 7754.)

In May of 2003, Wolfe wrote Lamb a letter in which he explained that he was not placed in administrative segregation because he "ratted on" Lamb or cooperated with the police, and stated that his mother, rather than

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[66] The screws of the interior door handle had also been loosened. (37 RT 7551-7553.)

[67] "[A] shank is a handcrafted item that can be used for stabbing or slashing to injure somebody else." (35 RT 6916.)

he, called "Stell" as requested by Lamb. (37 RT 7515-7520.) On cross, Wolfe testified that the name written in the letter was "Shell" rather than "Stell" before trial counsel even asked a question about the word.[68] (37 RT 7524.)

On June 22, 2005, Deputy Julio Vargas and another deputy conducted a search of Lamb's one-man cell in the administrative segregation section of the Orange County Jail. (38 RT 7614-7616, 7628.) After handcuffing Lamb and removing him from the cell, they conducted the search with Lamb observing from about eight feet away. (38 RT 7616-7617.) Before the search, Lamb told Deputy Vargas several times that he had nothing to hide. (38 RT 7625.)

In Lamb's cell, Deputy Vargas noticed some toothpaste on the metal part of the wall behind the bunk. (38 RT 7617- 7618.) The toothpaste, which was still soft and not dry, was covering an area where a piece of metal had been cut and removed. (38 RT 7619-7620.) Deputy Vargas found the missing piece of metal attached to some cloth which was concealed within and barely protruding from the interior cell door.[69] (38 RT 7620-7622.) The metal was six inches in length, three quarters of an inch wide and sharpened to a point. (38 RT 7622-7623.) Deputy Vargas testified that this object presented a safety concern for staff and other inmates. (38 RT 7625.)

When Deputy Vargas displayed what he had found, Lamb smiled or smirked and said, "How did that get there?" (38 RT 7625-7626.) When

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[68] In July of 2003, Wolfe sent Lamb another letter in which he referred to "certain protocol" and rules, and explained his efforts to get out of administrative segregation by acting like he would assault someone. (37 RT 7520-7521.)

[69] The concealed piece of metal had the same dimensions as the metal missing from the wall. (38 RT 7624.)

told the weapon possession would be documented, Lamb replied, "This is just like a traffic ticket to me." (38 RT 7627.) As Deputy Vargas and the other deputy were leaving, Lamb said, "Shank you later," still smiling. (38 RT 7626-7627.)

On May 30, 2006, Deputy Guadalupe Ortiz performed a random search of Lamb's cell in the maximum security administrative segregation sector of IRC. (35 RT 6915-6919.) Lamb was the sole occupant of the cell at the time. (35 RT 6919-6920.) Deputy Ortiz found a piece of metal embedded in Lamb's foam mattress.[70] (35 RT 6920.) The copper-colored shank was about three inches long, one-sixteenth of an inch in diameter and sharpened with a half-inch bend at one end. (35 RT 6921-6922.) Deputy Ortiz testified that the shank presented a safety concern for himself, fellow deputies and other inmates because it could be used as a deadly weapon. (35 RT 6923-6925.)

c. Victim Impact Testimony

Bonnie Miller is Scott Miller's mother.[71] (36 RT 7281.) Bonnie testified that Miller had a happy childhood, loved animals and sports, and was an award-winning surfer. (36 RT 7282-7284.) Miller was close with Bonnie, and they were "always there for" each other. (36 RT 7283-7284.) Miller continued to reside with Bonnie most of his adult life and spent every holiday with her. (36 RT 7287.) At one point, Miller told his mother that he was afraid, that "[t]hey've got my name in a hat," and that he was never going to get old. (36 RT 7297-7298.)

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[70] Deputy Ortiz testified that when inmates in the module are transferred to another cell, their assigned mattresses follow them. (35 RT 6919.)

[71] To avoid confusion, Scott Miller's relatives will hereafter be referred by their first names.

Before the murder, Bonnie was a very outgoing and social person with lots of friends. (36 RT 7294.) After the murder, Bonnie "just shut down," and did not want to be around people or smile anymore. (36 RT 7294.) It has not gotten better with time. (36 RT 7294.) When Bonnie goes to the beach and sees surfers, it breaks her heart because she thinks of all the good times with her son. (36 RT 7286.) Bonnie carries around with her a binder containing pictures of Miller because it was the only way to keep him close to her after the murder. (36 RT 7284.) She also gathered and kept all of Miller's old phone messages. (8 RT 7289.)

Bonnie attended every court proceeding in Lamb's case since 2007. (36 RT 7290.) She testified that "it's just torture reliving it over and over and over," especially when she comes to court. (36 RT 7294-7295.)

Miller's father was divorced and living in Michigan. (36 RT 7293.) The murder tore him apart. (36 RT 7294.) Since Miller's father was not healthy enough to attend court, he regularly called Bonnie to follow the proceedings. (36 RT 7294.)

Miller had an older brother, Calvin. (36 RT 7281.) When Calvin developed mental disabilities, Miller promised his mother that he would always take care of him. (36 RT 7283, 7302.) After the murder, Calvin "fell apart," had a total mental breakdown, became suicidal, and was hospitalized most of the following year. (36 RT 7292.)

Miller's death was very stressful on the entire family. (36 RT 7288.) Right after the murder, Miller's grandmother almost died from a heart-related affliction. (36 RT 7288, 7293.) Thereafter, she was nervous all the

time and became very emotional whenever Miller was discussed.[72] (36 RT 7293.)

Miller never married; but he had a son, Scotty, who was born on October 5, 2002, after the murder. (36 RT 7287, 7289-7291.) Bonnie had legal custody of Scotty, who was five and a half years old and attending school at the time of trial. (36 RT 7290.) As Scotty got older, he started asking about his father and whether he would ever be able to see or talk to him. (36 RT 7291.) When Scotty asked if he could go to heaven to see his father, Bonnie told him that it was too far away. (36 RT 7291-7292.) Bonnie testified that it "just tears [her] heart out" because she cannot give Scotty his father. (36 RT 7292.)

2. Defense

a. Evidence Pertaining to the Current Offenses

Through the testimony of Claudia Beeman (34 RT 6789-6815), Michael Jones (34 RT 6816-6835), Shirley Williams (34 RT 6846-6849, 6858-6904), Billy Joe Johnson (35 RT 6933-7128; 36 RT 7146-7185), Noel Smith (36 RT 7186-7194), Gordon Bridges (36 RT 7196-7237), Dr. David Smith (38 RT 7790-7820), Dr. Wynette Augustine (39 RT 7915-7925) and Warden Daniel Vasquez (39 RT 7997-8010), Lamb presented his guilt phase defense evidence.

b. Prior Acts

The prior testimony of Michael Maydon was read into the record.[73] (36 RT 7352-7353.) Maydon testified that he, Lamb and Courson were

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[72] Miller and his grandmother had a very good relationship; and she was the last person in the family to talk to him before he died. (36 RT 7288-7289.)

[73] The parties stipulated that Maydon was legally unavailable as a witness. (36 RT 7312-7314.) Maydon was previously convicted of

(continued...)

"first –termer's" who stuck together at the Taft facility. (36 RT 7354.) Although it was low security, there were still "shot-callers" who ran the prison yard. (36 RT 7355-7356.)

On November 26, 1996, Maydon, Lamb and Courson were given an order to assault Munding because he was informing on people bringing contraband into the facility. (36 RT 7355-7357.) Maydon subsequently testified that that only he was ordered to beat up Munding, that he asked Lamb and Courson to help him, and they agreed. (36 RT 7364, 7372.)

Maydon was afraid what would happen to him if he did not comply with the order. (36 RT 7356.) However, he never told Lamb and Courson that he was scared. (36 RT 7372.) According to Maydon, the attack lasted about ten seconds and Munding fought back. (36 RT 7357, 7366.) Maydon thought Lamb did not throw any punches, but was not sure. (36 RT 7367-7368.)

Since the Taft facility had a zero-tolerance policy for violence, Maydon, Lamb, Courson and Munding were sent to Corcoran State Prison. (36 RT 7358-7359.) Maydon and Lamb were placed in administrative segregation there. (36 RT 7359-7360.) Maydon testified that Corcoran was a very dangerous place. (36 RT 7359.) In 2003, while incarcerated at Wasco State Prison, Maydon sent Lamb a letter, referring to him as his "Homie" and his "Blood," stating his "utmost respect and love," telling Lamb to "stay strong," and sending the respects of other Wasco inmates. (36 RT 7368-7370.)

(...continued)
burglaries, possession of methamphetamine for sale and possession of stolen property. (36 RT 7363-7365.) He was no longer on parole by the time of trial. (36 RT 7365.)

c. Personal, Educational and Social History

Lamb's parents, Cathy and Steve Lamb (38 RT 7852; 40 RT 8245-8246), his brothers, Daniel and Matthew Lamb (39 RT 8179; 40 RT 8278-8279), and his maternal aunt, Claudia Hayes (39 RT 8065-8066) testified about Lamb's personal and family background.[74]

Lamb was born in Long Beach in 1972, approximately six months after his parents married. (38 RT 7853; 39 RT 8066-8068; 40 RT 8246-8249.) They had a house with a nursery for Lamb. (38 RT 7854.) Lamb was happy, loving, "a joy" and "a delight" as a child. (40 RT 8249.)

In Long Beach, Steve was working in the retail business, and life "was pretty good." (38 RT 7854.) However, Cathy began "partying" and drinking with the neighbors while Steve was not around. (38 RT 7854-7855, 7859-7860.)

In 1982, after Daniel was born, the family moved to Cerritos. (38 RT 7854-7856; 40 RT 8255.) Shortly after moving, Lamb observed a girl at his school get struck by a car and killed. (40 RT 8256.)

In Cerritos, the family had a pleasant lifestyle with a nice home and good neighbors in a "fairly tight-knit" community. (38 RT 7856; 39 RT 8077, 8092-8093; 40 RT 8258.) Lamb played baseball, and his athletic skills progressed with Steve coaching him. (40 RT 8258.) The family had many friends and engaged in a lot of activities including trips to Disneyland, Sea World and Hawaii. (38 RT 7857-7858; 40 RT 8204, 8258.)

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[74] Lamb's relatives will hereafter be referred by their first names to avoid confusion.

However, Cathy's began drinking and partying again with the new neighbors and Steve smoked marijuana daily.[75] (38 RT 7856, 7860-7863; 40 RT 8256.) Steve also became involved in money laundering for a marijuana smuggling operation. (38 RT 7864-7866.)

While in the third grade, Lamb developed a serious case of asthma which required hospitalization one week per month on average. (38 RT 7858-7859; 39 RT 8073-8074; 40 RT 8249.) Initially, Steve thought the asthma was "all in his head" and told Lamb to "knock it off." (39 RT 8074-8075; 40 RT 8250.) Lamb underwent allergy testing, and was given various medications which made him agitated. (40 RT 8250-8251.)

In 1986, after Matthew was born, the family moved to Dana Point. (38 RT 7856, 7865; 40 RT 8259.) Lamb, who was 15 or 16 years old at the time, continued to play baseball and had good relationships with his brothers and other kids in Little League. (38 RT 7869-7872; 40 RT 8188-8190.) The first year there, the family did a lot of activities together. (40 RT 8184.)

Steve used the drug smuggling money to buy the Dana Point home and a large boat. (38 RT 7865-7866.) However, Steve was taking on a lot of debt, lost his job because he stole from a vendor, started his own jewelry business which failed, and began dealing marijuana out of the home as financial difficulties increased. (38 RT 7866-7867, 7872-7879; 39 RT 8082; 40 RT 8260-8267.) Steve smoked marijuana in front of Lamb and other family members. (38 RT 7872; 39 RT 8071.) He also gave Lamb marijuana for himself and his friends, but stopped when he learned Lamb was selling it to other students at his high school. (38 RT 7879.)

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[75] Steve was a veteran who started using marijuana and heroin in Vietnam. (38 RT 7860-7861.) He was dishonorably discharged for assaulting and severely injuring someone. (38 RT 7861-7862.) Thereafter, Steve quit heroin but continued to use marijuana. (38 RT 7862-7863.)

In Dana Point, Cathy's drinking problems worsened, she was often intoxicated and belligerent, and had blackouts. (38 RT 7868-7869, 7875-7877; 39 RT 8082-8085; 40 RT 8263-8266, 8269-8270.) She even drank hairspray. (40 RT 8186-8187.) The boys would look for liquor bottles around the house to dump out. (40 RT 8291-8292.) Lamb prevented Cathy from driving his brothers when she was drunk. (40 RT 8191, 8269, 8290-8291.) After moving to Dana Point, Cathy twice entered an alcohol rehabilitation program. (39 RT 8081-8083, 8090; 40 RT 8264-8266, 8273.)

To help the family financially, Cathy worked up to three jobs, including nighttime bartendering. (40 RT 8265-8266; 39 RT 8082.) For a period of time, Steve's niece, Shannon, stayed with the family and looked after the boys. (38 RT 7837; 39 RT 7984-7985) Shannon was close to and a good influence on Lamb and his brothers. (38 RT 7837.) After Shannon left, Lamb was in charge of his brothers and running the household while their parents were out partying. (38 RT 7837-7838; 39 RT 8084; 40 RT 8185-8186, 8263, 8268, 8272, 8286-8289.) Lamb was loving, affectionate and protective of his brothers, and served as a father figure for them. (40 RT 8179-8183, 8281-8286.)

In 1992 and 1993, Lamb umpired youth baseball games in Dana Point. (39 RT 8058-8061.) Lamb got along well with the other youths and their parents, and never caused problems for his employer, David Hart. (39 RT 8062.)

In 1993 or 1994, Steve and Cathy separated. (38 RT 7879.) After the separation, Steve tried to take a more active role in raising the boys. (38 RT 7881-7882.) In 1995, the family was forced to sell the Dana Point home, and Lamb was basically on his own. (38 RT 7879-7880; 40 RT 8273.) Lamb and his brothers moved around a lot and lived with Cathy for a period of time. (40 RT 8273-8274, 8287-8288.) Sometimes, Lamb came

by the home of his maternal aunt, looking for a place to stay. (39 RT 8087.)

Steve was never an affectionate father. (40 RT 8183.) He was strict, sometimes harsh, controlling and verbally abusive. (40 RT 8133-8184, 8252-8253, 8266.) Lamb was always trying to please his father, which was why he played baseball. (39 RT 8077-8078; 40 RT 8289-8290.) When Lamb did not play well, Steve would yell at him and make him cry. (39 RT 8078-3079; 40 RT 8259.) Lamb was intimidated by Steve and never stood up to the verbal abuse. (39 RT 8080; 40 RT 8257.)

Steve also physically disciplined Lamb and Daniel.[76] (40 RT 8193, 8257.) Cathy recalled one incident when Lamb was six or seven years old and Steve beat him with a belt, leaving bruises or welts. (40 RT 8251-8252.) On another occasion, Lamb grabbed Steve by the throat and shoved him against the wall while he was disciplining Daniel; and Steve never hit Daniel again. (40 RT 8193.) After the family moved to Cerritos, the abuse became more verbal and mental than physical. (40 RT 8257.)

Steve testified that he supported Lamb, but was "done" with him after Lamb stole from him and got his brother in trouble.[77] (38 RT 7883.) Steve did not visit or write to Lamb in jail, did not try to contact Lamb's attorneys and had no interest in the case. (38 RT 7882-7884.) The last time he saw Lamb (eight or nine years prior to trial), Steve told him that he had choices,

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[76] Hayes was very close with Lamb and lived with the family for a period of time in Long Beach. (39 RT 8069-8070.) Although Steve was strict and verbally abusive towards the family, Hayes never saw him physically abuse Lamb. (39 RT 8080-8071.)

[77] Daniel was convicted of an unspecified felony when he was 17 years old, was sentenced to eight months in jail, subsequently went into a recovery program and successfully completed probation. (40 RT 8199-8200.)

and he could spend the rest of his life in jail, end up dead or straighten himself out. (38 RT 7882.)

After Lamb's and Daniel's arrests, Cathy changed her life and built a better relationship with Lamb. (40 RT 8275-8277.) Daniel and Matthew loved Lamb and maintained a relationship with him. (40 RT 8201-8202, 8293.) Hayes trusted Lamb and continued to maintain a relationship with him.[78] (39 RT 8085-8086, 8089-8090.)

Friends and prior neighbors of the Lamb family, Claudette and Bernard Cain (38 RT 7821-7822; 40 RT 8129-8131), William Rowland (39 RT 7926-7927), Sheryl Williams (39 RT 7952-7953), Robert Toyias (39 RT 7976-7977), Shayna White (40 RT 8144-8145), and Danielle Sena (40 RT 8151-8152) testified about Cathy and Steve's "partying" lifestyle (38 RT 7835; 39 RT 7936); Cathy's alcohol problems (38 RT 7824-7825, 7836-7837; 39 RT 7943-7944, 7958-7959, 7964-7966, 7986-7988, 7994; 40 RT 8133, 8154, 8159); Steve's marijuana use (38 RT 7834-7835; 39 RT 7932-7933; 40 RT 8133-8134); Lamb's difficulties with Steve (38 RT 7838; 39 RT 7942, 7979-7980; 40 RT 8135-8136); and Lamb's good relationships with and acceptance of responsibility for his brothers (38 RT 7825; 39 RT 7956; 40 RT 8138, 8153-8155).

The friends and neighbors further testified that Lamb was "a great kid," kind, trustworthy, polite, respectful, sensitive, never angry or violent in front of them, and always welcome in their homes. (38 RT 7827, 7846; 39 RT 7930-7931, 7942, 7955-7956, 7960-7961, 7978, 7987; 40 RT 8131, 8146-8148, 8152-8153, 8158-8159.) Other than the first penalty phase

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[78] On October 25, 2002, Lamb wrote a letter to Hayes in which he reminisced about their prior "conversation[s] on history, politics and everyday life," and wrote about Friedrich Nietzsche, Adolf Hitler and *Mein Kampf*. (39 RT 8095-8098.)

trial, Ms. Cain last saw Lamb in 1997 or 1998[79] (38 RT 7840, 7842-7844; 39 RT 7928-7929), Mr. Cain had not seen or communicated with Lamb for nine years (40 RT 8141), Rowland had not seen Lamb since about 1997 (39 RT 7948), and Williams last saw Lamb in 1994 or 1995 (39 RT 7974). Sena maintained contact with Lamb and visited him in custody.[80] (40 RT 8155, 8160-8161.)

John Veeh, an activities director and vice-principal at Dana Hills High School, and Robert Manley,[81] a teacher at the Horizon alternative school, testified that Lamb had a good sense of humor, was pleasant and respectful, and was never violent in front of them when he attended their schools.[82] (38 RT 7781-7785; 8050-8056.)

Warden Vasquez described the restrictive prison conditions for defendants sentenced to life without possibility of parole. (39 RT 8011-8016.)

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[79] When she last saw Lamb, Ms. Cain noticed a large swastika on his face, and Lamb said that he usually covers it with makeup. (38 RT 7840, 7844.) White testified that she covered Lamb's tattoos when he visited her family. (40 RT 8148.)

[80] Sena previously testified that Lamb was not a racist. However, when showed a letter Lamb wrote to his mother, Sena testified that if he had said any of the things in the letter to her she would not be visiting him in jail or putting money in his jail account. (40 RT 8168-8171.)

[81] Manley lived in the same neighborhood as Lamb's family at the time, which he agreed was a fairly nice area with a lot of parks and about a mile from the beach. (38 RT 7789.) Manley had no contact with Lamb since 1992. (38 RT 7789.)

[82] Steve and Cathy did not monitor Lamb's education. (40 RT 8217.) Lamb graduated from the Horizon school. (38 RT 7786-7787.) However, Daniel never received a high school diploma because his parents would not make the requisite payments for tuition or transcripts. (40 RT 8198-8199.)

3. Rebuttal

Defense Investigator Greco testified about Steve Lamb's prior statements from January 24 and October 5, 2006, interviews. (39 RT 7898-7907.) Detective Blazek testified about prior statements made by Christina Harris (40 RT 8206-8208, 8210-8218, 8222, 8224-8230), Claudia Beeman (40 RT 8218-8220) and Noel Smith (40 RT 8220-8221) from his interviews of them, as well as further details about the murder scene (40 RT 8206-8207, 8029-8210).

The parties stipulated that Lamb, Courson and Maydon were involved in the November 1996 assault on Munding; Lamb admitted his involvement to a correctional officer the following day; and Lamb was thereafter sent to Corcoran State Prison where he was placed in administrative segregation for six days and then served the remainder of his term in the general population. (40 RT 8294-8295.)

The parties further stipulated that Miller had certain misdemeanor convictions and sentences; Rebecca Mangan was Lamb's girlfriend in 2007 and watched most of the guilt phase trial; no death penalty was sought against Rump; and Rump was sentenced to life without possibility of parole. (40 RT 8295-8297.)

Sheriff's Investigator Ken Hoffman testified that Monika Witak visited Rizzo or Lamb in the Orange County Jail on eight occasions between January 3 and February 16, 2003, by using the false last name of Hamelin; Witak tried to visit Lamb again on February 22, 2003, with the Hamelin identification and explained that she did so because she was denied visitation several months earlier using her real name; at the time, Witak had a handwritten note on her which referred to "a major manhunt" and being watched by the police; Witak explained the note as ramblings about her boyfriend having people watch her; Witak previously identified

herself as Rizzo's stepsister; and Witak denied knowing Mazza, but had his booking number in her possession. (40 RT 8298-8304.)

ARGUMENT

I. THE PENALTY PHASE RETRIAL WAS CONSTITUTIONAL

In Claim One, Lamb contends that subjecting him to a retrial of the penalty phase after the first jury deadlocked constitutes cruel and unusual punishment under the state and federal constitutions and violated his rights to a fair trial by jury, a reliable penalty determination, due process and equal protection. He therefore argues that his sentence should be reduced to life without possibility of parole. (AOB 90-104.) All of Lamb's contentions are meritless.

In the trial court, Lamb objected (in the form of a motion) to the penalty phase retrial as cruel and unusual punishment under the Eighth Amendment of the federal Constitution and article 1, section 17, of the California Constitution.[83] (9 CT 2200-2208.) The trial court denied the motion, noting that the argument had previously been made and rejected, the prosecution was entitled to one penalty phase retrial and it had no discretion in the matter.[84] (9 CT 2224; 28 RT 5678, 5703-5704.)

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[83] As stated, Lamb offers additional Eighth Amendment and due process arguments on appeal. To the extent they merely constitute "a new constitutional 'gloss' " on the objection raised below, they are not forfeited. (See *People v. Bryant, Smith & Wheeler* (2014) 60 Cal.4th 335, 364 (*Bryant*); *People v. Contreras* (2013) 58 Cal.4th 123, 139, fn. 17 [argument that "trial court's act or omission, in addition to being wrong for reasons actually presented to that court, had the legal consequence of violating the Constitution"].)

[84] Section 190.4, subdivision (b), states in relevant part:

> If the trier of fact is a jury and has been unable to reach a unanimous verdict as to what the penalty shall be, the court shall dismiss the jury and shall order a new jury impaneled to try the issue as to what the penalty shall be. If such new jury is unable

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Lamb first argues, section 190.4, subdivision (b), and penalty phase retrials in general violate the Eighth Amendment because they fail to conform to evolving community standards of decency, primarily relying on the number of states which mandate or permit penalty phase retrials. (AOB 92-98.) This Court has "consistently rejected the claim that the rarity of California's retrial statute renders it inconsistent with 'evolving standards of decency' [citation] in violation of the Eighth Amendment to the federal Constitution [citations]." (*People v. Trinh* (2014) 59 Cal.4th 216, 237-238, citing *Trop v. Dulles* (1958) 356 U.S. 86, 101 [78 S.Ct. 590, 2 L.Ed.2d 630]; see *People v. McDowell* (2012) 54 Cal.4th 395, 411-416; *People v. Gonzales and Soliz* (2011) 52 Cal.4th 254, 311; *People v. Taylor* (2010) 48 Cal.4th 574, 633-634; *People v. Gurule* (2002) 28 Cal.4th 557, 645-646.)

Indeed, in *Trinh*, this Court found a third penalty phase trial was constitutional. (*People v. Trinh, supra,* 59 Cal.4th at pp. 237-239.) Lamb provides no persuasive reason to revisit or reconsider this Court's prior holdings.

Lamb further contends penalty phase retrials following jury deadlock violate the Eighth Amendment requirement for individualized penalty determinations, arguing that "divergence of the individual jurors' conclusions [in the initial penalty phase trial] should not be dismissed as a failure to reach a verdict," but rather be viewed as " 'an objective index' of the community's values" that the death penalty was not appropriate in his case. (AOB 98-100.) Inasmuch as Lamb makes no distinction between individualized determinations made in an initial penalty phase trial and

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(...continued)

> to reach a unanimous verdict as to what the penalty shall be, the court in its discretion shall either order a new jury or impose a punishment of confinement in state prison for a term of life without the possibility of parole.

those made in a retrial (which may likewise result in a deadlocked jury), he is in effect arguing penalty phase retrials violate the constitutional guarantee against double jeopardy.

As explained by the United States Supreme Court, "the touchstone for double-jeopardy protection in capital-sentencing proceedings is whether there has been an 'acquittal.' " (*Sattazahn v. Pennsylvania* (2003) 537 U.S. 101, 109 [123 S.Ct. 732, 154 L.Ed.2d 588].) Where a jury deadlocks as to the appropriate penalty, "[t]hat result – or more appropriately, that non-result – cannot fairly be called an acquittal 'based on findings sufficient to establish legal entitlement to the life sentence.' " (*Ibid.*, quoting *Arizona v. Rumsey* (1984) 467 U.S. 203, 211 [104 S.Ct. 2305, 81 L.Ed.2d 164].) Thus, double jeopardy principles do not bar penalty phase retrials following juror deadlock. (*People v. Taylor, supra,* 48 Cal.4th at p. 634; *People v. Gurule, supra,* 28 Cal.4th at p. 646.)

Lastly, Lamb raises an as-applied due process challenge, conjecturing that the different outcomes of the two penalty phase trials mean the second jury's verdict was the result of either arbitrariness or additional evidence excluded in the first trial but erroneously admitted in the retrial. (AOB 100-103.) Lamb ostensibly omits a host of other legitimate explanations for the different results – most notably, the unique and unknowable dynamics of the deliberative process of twelve different individuals in each jury. Lamb's self-serving speculation does not does establish a due process violation. (See, e.g., *People v. Fuiava* (2012) 53 Cal.4th 622, 731 [speculation about improper racial considerations]; *People v. Castaneda* (2011) 51 Cal.4th 1292, 1342-1343 [speculation about defendant's absence from discussion about admissibility of aggravation evidence].)

Moreover, as discussed in Argument II, *infra*, the evidence upon which Lamb bases his due process argument was properly admitted in the second penalty phase trial. Thus, Lamb's as-applied due process challenge

to the penalty phase retrial fails. (See *People v. Trinh, supra,* 59 Cal.4th at p. 238 ["we reject Trinh's specific claims of penalty phase error ... and he identifies no errors beyond these that would render retrial unconstitutional"].)

There was no constitutional infirmity in subjecting Lamb to a retrial of the penalty phase after the first jury deadlocked as to the appropriate penalty. Accordingly, the penalty judgment should be affirmed.

II. LAMB FAILS TO SHOW THE ADMISSION OF EVIDENCE IN THE PENALTY PHASE RETRIAL OF A CONSPIRACY TO SMUGGLE ESCAPE TOOLS AND WEAPONS INTO THE COUNTY JAIL WAS AN ABUSE OF DISCRETION

In Claim Two, Lamb contends that the admission of evidence in the penalty phase retrial concerning a conspiracy to smuggle weapons and escape instruments into the Orange County Jail was "erroneous" and consequently violated his rights to due process, a fair trial and a reliable sentencing determination. He argues there was insufficient evidence of an agreement, an intent to smuggle items or any violence to warrant admission of the conspiracy as part of the prosecutor's case in aggravation, and the error was so prejudicial that it requires reversal of the judgment. (AOB 104-123.)

Lamb fails to recognize that admission of evidence in the penalty phase is reviewed for abuse of discretion, rather than plain error. Lamb also seems to insist on conspiracies being proved by direct evidence, dismissing anything else as "speculation." Here, there was substantial evidence of all elements of a conspiracy and an implied threat of violence. Thus, Lamb fails to show the admission of the conspiracy evidence in the penalty phase retrial was an abuse of discretion. Moreover, any alleged error in admitting the evidence was harmless in light of the balance of the prosecution's aggravation evidence which was far more compelling than the conspiracy.

Accordingly, there was no violation of Lamb's constitutional rights, and the penalty judgment should be affirmed.

Section 190.3, subdivision (b) (hereafter "factor (b)") permits juries to consider "[t]he presence or absence of criminal activity by the defendant which involved the use or attempted use of force or violence or the express or implied threat to use force or violence" when determining the appropriate penalty for a capital offense. "[E]vidence admitted under this provision must establish that the conduct was prohibited by a criminal statute and satisfied the essential elements of the crime." (*People v. Moore* (2011) 51 Cal.4th 1104, 1135; see *People v. Phillips* (1985) 41 Cal.3d 29, 72.) The requisite force or violence must be directed toward people rather than property. (*People v. Clair* (1992) 2 Cal.4th 629, 672; *People v. Boyd* (1985) 38 Cal.3d 762, 776.) The question of an express or implied threat to use force or violence " 'can only be determined by looking to the facts of the particular case.' " (*People v. Cruz* (2008) 44 Cal.4th 636, 683, quoting *People v. Mason, supra,* 44 Cal.4th at p. 955.)

The prosecution bears the burden of proving factor (b) criminal conduct beyond a reasonable doubt. (*People v. Moore, supra,* 51 Cal.4th at p. 1135.) If so proved, the significance and weight to be assigned to the evidence is for the jury to decide. (*People v. Tully* (2012) 54 Cal.4th 952, 1027.)

In the absence of an objection, trial courts are not required to conduct a preliminary inquiry into the admissibility of factor (b) evidence proffered by the prosecution. (See *People v. Boyer* (2006) 38 Cal.4th 412, 477, fn. 51; *People v. Smithey* (1999) 20 Cal.4th 936, 991.) However, when

> determining whether to admit challenged other-crimes evidence, the trial court considers whether the prosecution has adduced substantial evidence to prove each element of the other crime activity [citations.] "Substantial evidence of other violent criminal activity is evidence that would allow a rational trier of

fact to find the existence of such activity beyond a reasonable doubt."

(*People v. Edwards* (2013) 57 Cal.4th 658, 753, citing *People v. Phillips, supra,* 41 Cal.3d at p. 72, fn. 25, and citing and quoting *People v. Griffin* (2004) 33 Cal.4th 536, 584, disapproved on another point in *People v. Riccardi* (2012) 54 Cal.4th 758, 824, fn. 32; see also *People v. Clair, supra,* 2 Cal.4th at pp. 672-673.)

The trial court's admission of factor (b) evidence in the penalty phase is reviewed for abuse of discretion. (*People v. Edwards, supra,* 57 Cal.4th at p. 753; *People v. Tully, supra,* 54 Cal.4th at p. 1027; *People v. Bacon* (2010) 50 Cal.4th 1082, 1127; *People v. Smithey, supra,* 20 Cal.4th at p. 991.) Abuse of discretion is a deferential standard of review. (*People v. Williams* (1998) 17 Cal.4th 148, 162.) It typically "is established by 'a showing the trial court exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice' " (*People v. Carrington* (2009) 47 Cal.4th 145, 195, quoting *People v. Rodriguez* (1999) 20 Cal.4th 1, 9-10) or a ruling which " 'falls outside the bounds of reason' under the applicable law and the relevant facts" (*People v. Williams, supra,* 17 Cal.4th at p. 162, quoting *People v. DeSantis* (1992) 2 Cal.4th 1198, 1226). For the admission of factor (b) evidence, " 'no abuse of discretion will be found where, in fact, the evidence in question was legally sufficient.' " (*People v. Edwards, supra,* 57 Cal.4th at p. 753, quoting *People v. Boyer, supra,* 38 Cal.4th at p. 477, fn. 51; *People v. Tully, supra,* 54 Cal.4th at p. 1027, quoting *People v. Whisenhunt* (2008) 44 Cal.4th 174, 225.)

A. Rulings on Admissibility of Conspiracy as Aggravating Evidence

Prior to the first trial, the prosecutor filed an Amended Notice of Aggravation Evidence which, in relevant part, stated that he intended to

introduce evidence of a conspiracy to bring a deadly weapon into a penal institution (§§ 182/4574, subd. (a)) and a conspiracy to escape from a penal institution (§§ 182/4532, subd. (b)(1)) which occurred on or about February 19, 2003. (3 CT 641.) In a hearing on pre-penalty phase motions, the prosecutor made his offer of proof regarding the February 19, 2003, incident, defense counsel objected, the trial court found the offer of proof was sufficient to present the evidence to the jury, and defense counsel requested the opportunity to revisit the issue at a later time. (23 RT 4741-4749.)

Accordingly, the prosecutor presented the testimony of David Wolfe (24 RT 4891-4929), Monika Witak (24 RT 4929-4949) and Investigator Hoffman (24 RT 4950-4967) at the first penalty phase trial. Subsequently, the trial court reversed its ruling, finding there was not "sufficient evidence to prove beyond a reasonable doubt that [Lamb]committed the crime of conspiracy to escape" or "link[ing] him with Mr. Wolfe's possession of the items on February the 19th."[85] (25 RT 5058-5061.) Prior to the prosecution resting its penalty case-in-chief, the trial court admonished the jury to disregard the testimony of Wolfe, Witak and Hoffman, Deputy Richards' testimony about methods of escape, and related exhibits. (25 RT 5114-5115.)

Before the penalty phase retrial, the prosecutor filed a second Amended Notice of Aggravation which, in relevant part, again included the February 19, 2003, conspiracy evidence. (9 CT 2152.) The prosecutor

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[85] The trial court also excluded the conspiracy evidence under Evidence Code section 352. (25 RT 5061.) That provision states: "The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." (Evid. Code, § 352.)

requested that the trial court reconsider its ruling in the first penalty phase trial and admit the evidence. (9 CT 2189-2194.) At a hearing on pretrial motions, the trial court stated that it had reread the relevant cases and, over the defense objection, reversed its prior ruling and granted the prosecutor's motion to admit the conspiracy evidence.[86] (28 RT 5790-5797.)

The court explained:

> My thought process was that when I ruled on it before, I did not take into consideration the conspiracy aspect that *Mason*[87] and *Boyde*[88] provide for – ...[¶][¶] – I was looking more at what acts the defendant did, and I don't think I considered it properly back then. So it's not a fact of anything as much as a law-driven thing. I did not consider conspiracy to qualify, but obviously it does.

(28 RT 5892.)

During discussions regarding the penalty phase retrial jury instructions, Lamb renewed his objection to the conspiracy evidence and requested to strike the relevant testimony, which was implicitly denied. (39 RT 8118.)

B. The Trial Court Properly Exercised its Discretion in Admitting the Evidence

Lamb cannot show any abuse of discretion here since there was substantial evidence of all elements of the conspiracy for its admission under factor (b).

> A conviction of conspiracy requires proof that the defendant and another person had the specific intent to agree or conspire to

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[86] The trial court also applied Evidence Code section 352, finding the probative value of the evidence was not outweighed by any undue prejudice. (28 RT 5797.) On appeal, Lamb does not contest the court's ruling on that basis, instead challenging the penalty phase retrial ruling on substantial evidence grounds. (See AOB 104-123.)

[87] *People v. Mason* (1991) 52 Cal.3d 909.

[88] *People v. Boyde* (1988) 46 Cal.3d 212.

> commit an offense, as well as the specific intent to commit the elements of that offense, together with proof of the commission of an overt act "by one or more of the parties to such agreement" in furtherance of the conspiracy.

(*People v. Morante* (1999) 20 Cal.4th 403, 416, quoting Pen. Code, § 184.) The object of the conspiracy is either "defined in terms of proscribed conduct" or "a proscribed result under specified attendant circumstances." (*People v. Swain* (1996) 12 Cal.4th 593, 600 [internal citations and quotation marks omitted].)

The conspiracy agreement may be either express or tacit. (*People v. Johnson* (2013) 57 Cal.4th 250, 264.) " 'To prove an agreement, it is not necessary to establish the parties met and expressly agreed; rather, "a criminal conspiracy may be shown by direct or circumstantial evidence that the parties positively or tacitly came to a mutual understanding to accomplish the act and unlawful design." [Citations.]' " (*Ibid,* emphasis omitted.) For example, motive to commit the target offense with an opportunity for discussion and agreement can supply evidence of an agreement. (See, e.g., *People v. Jurado* (2006) 38 Cal.4th 72, 121; *People v. Vu* (2006) 143 Cal.App.4th 1009, 1025.)

"Other than the agreement, the only act required is an overt act by *any* of the conspirators, not necessarily the defendant, and that overt act need not itself be criminal." (*People v. Smith* (2014) 60 Cal.4th 603, 616, citing *People v. Russo* (2001) 25 Cal.4th 1124, 1135, emphasis in original.) Thus, the defendant need not personally participate in, or even be present at the time of, the overt acts in order to be liable. (*People v. Morante, supra,* 20 Cal.4th at p. 417.)

Here, there was sufficient evidence of each of the elements that would allow a rational trier of fact to find beyond a reasonable doubt the existence of a conspiracy. First, there was substantial circumstantial

evidence of an agreement between two or more persons, including Lamb, to conspire to smuggle weapons and escape tools into the county jail.

Walsh was a P.E.N.I. associate, who considered Lamb a friend. (37 RT 7469-7470.) As a P.E.N.I. associate, Walsh would have been motivated to assist Lamb and other active P.E.N.I. members in order to enhance his status in the gang.[89]

As an incarcerated person facing a capital prosecution, Lamb had a motive to possess escape tools. As an active member of the predominant gang for White prisoners in California, Lamb also had a motive to possess weapons in custody.

Witak corresponded with Lamb extensively, and began referring to herself as "Monika Lamb." (38 RT 7751, 7758.) As a committed friend, Witak had a motive to help Lamb.

Walsh and Lamb were housed in the same area of the county jail for a period of time prior to February 2003 with regular dayroom contact. (7 RT 7498.) Between September and December 2002, Wolfe wrote Lamb letters wherein he expressed his loyalty, invoked White supremacist phrases and symbols, informed Lamb of his pending release date, and stated that he would not "forget to touch" Lamb after he "hit the street." (37 RT 7503-7512, 7515.)

On February 10, 2003, Witak wrote a letter to Lamb stating that she did everything asked of her, that he should not be angry with her over something she had no control over "as if I can just tie him down, pack his ass and force him to do that," and that she did her best for him and made sure she "had the other part all ready." (38 RT 7756-7757.)

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[89] As Lieutenant Epperson testified in the guilt phase, the levels of gang affiliation are "wannabes," "hangers-on," associates and members. (16 RT 3194.) An individual can elevate his status in part by "go[ing] out and get[ting] things done" for the gang. (38 RT 7677.)

Two days later Wolfe was released from custody and immediately violated the terms of his release, resulting in a warrant for his arrest. (37 RT 7469, 7496.) By the morning of February 19, 2003, Wolfe had learned there was an outstanding warrant for his arrest by checking the Internet. (37 RT 7497-7498.)

Later that day, with knowledge of his impending arrest and return to the Orange County Jail, Wolfe possessed a syringe, some methamphetamine and a four-inch long hacksaw blade concealed on his person. (37 RT 7472, 7498-7499.) Within reach, Wolfe also had a baggie containing a small spring-loaded punch tool ("for punching glass or something of that nature") and a five-inch long steel tube containing five additional four-inch long hacksaw blades, another spring-loaded punch tool, and a tightly wrapped baggie of marijuana. (37 RT 7472-7474, 7481.) Investigator Zurborg explained how people going into custody smuggle contraband into the jail through "keister kits" placed between their buttocks.[90] (37 RT 7474-7475.)

Three days after Wolfe's arrest, Witak attempted to visit Lamb at the Orange County Jail. (38 RT 7754-7755.) Witak had in her possession a note stating there was going to be a major manhunt and that she was being watched. (38 RT 7755.)

In May of 2003, Wolfe wrote Lamb a letter explaining that he was not placed in administrative segregation because he "ratted on" him or cooperated with the police, and stating that his mother, rather than he, called "Stell" as Lamb had requested. (37 RT 7515-7520.) Witak's middle name is Izabella, and she previously corresponded with Lamb using the name "Stella." (38 RT 7748-7749, 7752-7753.)

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[90] Wolfe admitted that he intended to "cheek" the marijuana. (37 RT 7501-7502.)

This was powerful circumstantial evidence from which a rational trier of fact could find an ongoing conspiracy between Lamb, Witak, Wolfe and other individuals to smuggle weapons and escape tools such as hacksaw blades and punch tools into the Orange County Jail. One keister kit smuggling attempt on or before February 10, 2003, apparently failed, prompting Witak's letter to Lamb explaining that she did her part but could not be expected to "tie him down, pack his ass and force him to do that." (38 RT 7756-7758.)

Of course, Wolfe's effort to smuggle the hacksaw blades and punch tools was foiled as well. However, Lamb's constructive possession of a metal shank and two plastic lighters on February 19, 2003 (37 RT 7551-7553, 7556), evidence of a tool capable of cutting through metal having been used on or before June 22, 2005, in Lamb's cell (38 RT 7617-7723), and Lamb's constructive possession of a copper-colored shank on May 30, 2006 (35 RT 6919-6922) could be viewed as the ongoing conspiracy's success in smuggling weapons and escape tools into the Orange County Jail. "The elements of conspiracy may be proven with circumstantial evidence, 'particularly when those circumstances are the defendant's carrying out the agreed-upon crime.' " (*People v. Vu, supra,* 143 Cal.App.4th at pp. 1024-1025, quoting *People v. Herrera* (1999) 70 Cal.App.4th 1456, 1464.)

Moreover, as in *People v. Jurado, supra,* 38 Cal.4th at p. 121, and *People v. Vu, supra,* 143 Cal.App.4th at p. 1025, Wolfe and Witak had opportunities to communicate with Lamb and had motives to assist him. These joint motives to commit the target offense with opportunity for discussion and agreement provided further evidence of an agreement. Thus, there was substantial circumstantial evidence of an ongoing agreement between Lamb and others with the specific intent to conspire to and commit the crimes of bringing deadly weapons into a penal institution

in violation of section 4574, subd. (a), and escape from a penal institution in violation of section 4532, subd. (b)(1).

There was also substantial evidence of several overt acts by Lamb and his co-conspirators. Witak performed everything asked of her and "had the other part all ready" for one smuggling attempt (38 RT 7756-7757); Wolfe checked the Internet to determine when he could anticipate being arrested and returned to the Orange County Jail where Lamb was incarcerated at that time (37 RT 7497-7498); Wolfe gathered, prepared and had in his possession "keister kits" of various weapons and escape tools in anticipation of his arrest (37 RT 7472-7274, 7481,7498-7499); Wolfe had his mother call Witak on Lamb's behalf (37 RT 7515-7520); and a piece of metal had been cut out of the wall of Lamb's cell (38 RT 7617-7723).

Also, as previously discussed, there was circumstantial evidence of successful efforts to smuggle weapons and escape tools into the jail for Lamb. "Commission of the target offense in furtherance of the conspiracy satisfies the overt act requirement. (*People v. Jurado, supra,* 38 Cal.4th at p. 121, citing *People v. Padilla* (1995) 11 Cal.4th 891, 966.)

Thus, there was substantial evidence of all elements which would allow a rational trier of fact to find beyond a reasonable doubt the existence of all essential elements of a conspiracy. Accordingly, the trial court acted well within its discretion in admitting the conspiracy evidence in the penalty phase retrial. (*People v. Edwards, supra,* 57 Cal.4th at p. 753; *People v. Tully, supra,* 54 Cal.4th at p. 1027.)

Lamb's arguments to the contrary are unavailing. Foremost, Lamb fails to recognize that his claim is reviewed under the deferential abuse of discretion standard. Instead, he argues the trial court's ruling in the penalty phase retrial was "erroneous" and the court's ruling in the first penalty trial was "correct" and "right the first time." (AOB 104, 109 [bold face and

capital type omitted].) As discussed above, plain error is not the appropriate standard of review.

In support of his claim, Lamb cites to Wolfe's denials of any plan to smuggle items into the jail, any requests to do so from Lamb and any knowledge of Witak, as well as Witak's denial that her February letter had anything to do with smuggling. (AOB 105-106.) However, credibility of witnesses goes to the weight rather than admissibility of factor (b) testimony. (*People v. Stitely* (2005) 35 Cal.4th 514, 564, citing *People v. Catlin* (2001) 26 Cal.4th 81, 172, and *People v. Anderson* (2001) 25 Cal.4th 543, 587.)

Lamb also states that Wolfe's May 2003 "letter said nothing about him not ratting or snitching out appellant" in the first penalty phase trial. (AOB 105, citing 24 RT 4908-4909, 4914-4916.) However, Lamb's technical portrayal of the actual words used in the letter does not fully and fairly portray the evidence.

In the first penalty phase trial, the prosecutor asked Wolfe, "So you wrote [Lamb] a letter to explain to him, 'Hey, man, I want to explain to you why I'm in a segregated area, it's not because I ratted on you, it's not because I'm cooperating with the police; here's why I'm there,' Correct?," and Wolfe testified, "Well, Yeah." (24 RT 4909.) When confronted with his prior testimony at the penalty phase retrial, Wolfe acknowledged his purpose in writing the May 2003 letter was to inform Lamb that he was not in administrative segregation because he "ratted" on him, while maintaining that he "never wrote anything like that in a letter." (37 RT 7526-7518.) Whatever jargon, buzzwords or other parlance Wolfe used to convey his explanation to Lamb, instead of obvious words or phrases the meaning of which would be apparent on their face, is of no significance.

Insisting on direct evidence and dismissing the wealth of circumstantial evidence as "speculation," Lamb contends there was no

evidence whatsoever of any agreement to smuggle tools or weapons. (AOB 112-116.) In *People v. Letner & Tobin* (2010) 50 Cal.4th 99, this Court held "reliance upon circumstantial evidence and the reasonable inferences to be drawn from that evidence, in determining whether both defendants were guilty, does not demonstrate, as defendants urge, that the verdict was the result of speculation." (*Id.* at p. 164.) Lamb's argument should likewise be rejected.

Lamb's speculation argument primarily relies on *People v. Killebrew* (2002) 103 Cal.App.4th 644, disapproved on another ground in *People v. Vang* (2011) 52 Cal.4th 1038, 1049. (AOB 114.) In *Killebrew*, the prosecutor was required to show the defendant was present in one of three cars involved in a gang-related shooting in order to tie him to the conspiracy, and "[n]one of the witnesses placed Killebrew in any of the vehicles." (*Id.* at p. 660.) In contrast, the documentary and other evidence discussed above which tied Lamb to Witak's and Wolfe's smuggling efforts on his behalf was very strong. Thus, *Killebrew* does assist Lamb in his argument.

Lamb further claims the evidence was insufficient to show "any violent criminal activity took place and that appellant participated in it" or "to permit an inference of a violent escape attempt." (AOB 109, 116.) He is mistaken.

Lamb overlooks that the conspiracy also included a plan to smuggle weapons into the Orange County Jail.

> " ' "It is settled that a defendant' knowing possession of a potentially dangerous weapon in custody is admissible under [section 190.3] factor (b). Such conduct is unlawful and involves an implied threat of violence even where there is no evidence defendant used or displayed it in a provocative or threatening manner." ' "

(*People v. Edwards, supra,* 57 Cal.4th at p. 754, quoting *People v. Smithey, supra,* 20 Cal.4th at p. 1002; see also *Bryant, supra,* 60 Cal.4th at p. 453 [asserted nature of defendant's weapon possession "is a distinction without a difference"].)

A conspiracy to commit a crime involving the threat of violence is admissible under factor (b) as well the underlying offense. (See *People v. Williams* (1997) 16 Cal.4th 153, 243 [evidence of defendant's "participation in a conspiracy that was part of a continuous course of conduct" admissible]; *People v. Gallego* (1990) 52 Cal.3d 115, 155, 196 [escape conspiracy with fellow inmate admissible under factor (b)]; *People v. Boyde, supra,* 46 Cal.3d at pp. 249-250 [completed crime of conspiracy to engage in violence or threat of force or violence admissible under factor (b)].)

Insofar as escape, the conspiracy also qualified as "criminal activity" involving an attempt or implied threat to use force or violence. Deputy Richards testified that an inmate who previously attempted to effectuate an escape from the Orange County Jail through the plumbing tunnel was apprehended by custodial deputies. (37 RT 7559, 7564.) Richards further testified that an inmate attempting to escape the jail by breaking through the glass portion of his cell door would most likely be confronted by a custodial deputy as well. (37 RT 7552, 7565.)

In *People v. Mason, supra,* 52 Cal.3d 909, the testimony "showed that an escape from the administrative segregation cell would almost certainly have involved defendant in a confrontation with a guard," which was a sufficient implied threat of violence to qualify admission of the evidence under factor (b). (*Id.* at pp. 955-956.) Likewise, the testimony showing both methods of escape from the Orange County Jail would most likely result in a confrontation with custodial deputies was evidence of a sufficient implied threat of violence to satisfy factor (b).

Lamb analogizes his case to *People v. Lancaster* (2007) 41 Cal.4th 50, 91-94, where this Court found the possession of a makeshift handcuff key did not qualify as factor (b) evidence. (AOB 117.) However, there was no conspiracy in *Lancaster*. Thus, the only "criminal activity" for which the handcuff key evidence could qualify under section 190.3 was the crime of an actual attempted escape. (*Id.* at p. 187-188.) This Court found the mere presence of a handcuff key in the defendant's cell was not a direct and unequivocal act beyond preparation to satisfy the elements of an attempted escape. (*Id.* at p. 188.)

Here, the prosecutor relied on the crime of conspiracy in violation of section 186.22, rather than attempted escape, as the "criminal activity" under factor (b). Moreover, unlike Lamb's case, there was no testimony in *Lancaster* regarding the likelihood of an escape attempt in that particular institution resulting in a confrontation with custodial officials. (Compare *People v. Lancaster, supra,* 41 Cal.4th at pp. 91-92, with 37 RT 7552, 7559, 7564-7565.) Thus, *Lancaster* is inapposite.

Lamb attempts to distinguish *People v. Boyde, supra,* 46 Cal.3d 212, arguing that the conspiracy in that case contemplated the use of a gun in effecting an escape which qualified it as a threat of violence. (AOB 118-119.) Instead of a gun, the conspiracy in Lamb's case involved the smuggling of hacksaw blades which could be used as deadly weapons as well as escape tools, and deputies found a seven-inch long metal shank and another three-and-a-half-inch piece of metal concealed in Lamb's cell on the same day Wolfe was apprehended with the escape tools. (37 RT 7472-7474, 7498-7499, 7549-7553, 7556; 38 RT 7629.) Thus, the conspiracy in Lamb's case involved the threat of violence much like *Boyde*, albeit implied rather than express; and was nearly identical to *People v. Gallego, supra,* 52 Cal.3d at pp. 155, 196, where evidence of an escape agreement in

conjunction with a jail-made shank found in the co-conspirator's cell sufficed as factor (b) evidence.

Lastly, Lamb attempts to distinguish *Mason* as a case which involved an actual attempted escape rather than a conspiracy. (AOB 119-120.) Lamb misses the point. The relevance of *Mason* is that the only evidence of any implied threat of force was the testimony concerning the likelihood of an escape attempt resulting in a confrontation with a guard. (*People v. Mason, supra,* 52 Cal.3d at pp. 955-956.) Under testimony similar to that presented in Lamb's case, this Court found sufficient evidence of an implied threat of force. (*Ibid.*)

Lamb obviously prefers the trial court's ruling in the first penalty phase trial to its decision after further consideration in the penalty phase retrial. However, he fails to show there was insufficient evidence of the conspiracy to warrant its admission or that the trial court's ultimate ruling on the sufficiency of that evidence was arbitrary, capricious, patently absurd or outside the bounds of reason. Accordingly, no abuse of discretion has been demonstrated, and the trial court's admission of the conspiracy evidence in the penalty phase retrial should be affirmed on appeal.

Where evidence is properly admitted, there is no violation of the defendant's rights to due process, a fair trial or a reliable penalty determination. (*People v. Fuiava* (2012) 53 Cal.4th 622, 670; *People v. Thornton* (2007) 41 Cal.4th 391, 464; *People v. Burgener* (2003) 29 Cal.4th 833, 873; *People v. Hart* (1999) 20 Cal.4th 546, 617, fn. 19.) Also, "[t]o the extent any constitutional claim is merely a gloss on the objection raised at trial, it is preserved but is without merit because the trial court did not abuse its discretion in admitting the evidence." (*People v. Riggs* (2008) 44 Cal.4th 248, 292.) Thus, Lamb's claim of constitutional error should be rejected as well.

C. The Alleged Error Was Harmless

Notwithstanding the propriety of the trial court's ruling, any alleged error in admitting the conspiracy evidence in the penalty phase retrial was harmless. Lamb's claim is that the trial court admitted evidence which did not qualify under section 190.3, subdivision (b), of the California Penal Code. Thus, the alleged error is a violation of state law.

State law error in the penalty phase is reviewed for harmlessness under the "reasonable possibility" standard articulated in *People v. Brown* (1988) 46 Cal.3d 432, 447.[91] (*People v. Jackson* (1996) 13 Cal.4th 1164, 1232.)

> "[A] 'mere' possibility that an error might have affected a verdict will not trigger reversal. Instead when faced with penalty phase error not amounting to a federal constitutional violation, we will affirm the judgment unless we conclude there is a reasonable (i.e., realistic) possibility that the jury would have rendered a different verdict had the error or errors not occurred.

(*Ibid.*, quoting *People v. Brown, supra,* 46 Cal.3d at p. 448; see also *People v. Gallego, supra,* 52 Cal.3d at p. 196.)

The Court has observed that erroneously admitted escape evidence may "in some cases" "weigh heavily in the jury's determination of

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[91] Lamb summarily concludes that the alleged error violated his rights to due process and a reliable sentencing determination, thus invoking the harmless error standard for federal constitutional error provided in *Chapman v. California* (1967) 386 U.S. 18, 24 [87 S.Ct. 824, 17 L.Ed.2d 705]. (AOB 121.) Lamb's "attempt 'to inflate garden-variety evidentiary questions into constitutional ones' " should be rejected. (See *People v. Bacon, supra,* 50 Cal.4th at p. 1104, fn. 4, quoting *People v. Boyette* (2002) 29 Cal.4th 381, 427.) In any event, " '*Brown's* "reasonable possibility" standard and *Chapman's* "reasonable doubt" test ... are the same in substance and effect.' " (*People v. Gonzalez* (2006) 38 Cal.4th 932, 961, quoting *People v. Ashmus* (1991) 54 Cal.3d 932, 990.)

penalty." (*People v. Gallego, supra,* 52 Cal.3d at p. 196.) This is not such a case.

The conspiracy to smuggle escape tools was relatively insignificant in light of the other aggravation evidence presented at the penalty phase retrial. The most important evidence in aggravation was the murder itself. The killing of Scott Miller was a well-planned and orchestrated execution-style murder by deeply committed members of a vicious White supremacist gang with the specific intent to benefit the gang. Lamb was the actual perpetrator of the murder, lying-in wait before mercilessly and callously firing a bullet into the back of Miller's head without forewarning or any opportunity to defend himself. Indeed, the prosecutor spent approximately half of his closing argument talking about Miller, the facts and evidence of the murder, P.E.N.I., Lamb's gang affiliation and culpability in the killing, the prior jury's first degree murder verdict and lingering doubt. (See 41 RT 8357-8431.)

In addition to the egregious facts of the murder, the evidence offered in aggravation included Lamb's attempted murder of Officer Helmick, his two violent attacks against fellow inmates, his multiple possessions of dangerous and deadly weapons in custody, his gang-related threats to an innocent tourist, and Bonnie Miller's victim impact testimony. Where improperly admitted penalty phase evidence is "relatively insignificant in light of" the entirety of the prosecution's case in aggravation, "the improperly admitted evidence could not have affected the verdict or have misled the jury in its penalty determination." (*People v. Boyde, supra,* 46 Cal.3d at p. 250.)

Moreover, the prosecutor's discussion of the smuggling conspiracy accounts for only nine pages (41 RT 8435; 42 RT 8464, 8469-8475) of Reporter's Transcript out of a 149-page long closing argument (41 RT 8355-8442; 42 RT 8454-8514). Whether or not "the escape evidence was a

principal focus of the prosecutor's argument" is another factor to consider in assessing prejudice. (*People v. Jackson, supra,* 13 Cal.4th at p. 1233.) Thus, this was not a case where the escape evidence would have "weighed heavily" in the jury's penalty determination.

Lamb argues the striking of the conspiracy evidence in the first penalty phase trial was the reason that it deadlocked. (AOB 121-122, citing *People v. Frazier* (2001) 89 Cal.App.4th 30, 38-39 [two prior deadlocked juries].) However, speculation as to a prior jury's reasons for deadlock does not demonstrate prejudice. (See *People v. Boyer* (2006) 38 Cal.4th at p. 471, fn. 42 [rejecting insinuation that "flashback issue" was reason for prior juries deadlocking as "pure speculation"].)

Lamb's reasoning is premised on the untenable assumption that the conspiracy evidence was the *only* difference between the first and second penalty phase trials. Lamb fails to appreciate that 24 different individuals served on the two juries which necessarily involved very different interpersonal dynamics and deliberation processes unique to each jury.

"Jury deliberations are a unique exercise in decision-making, in which a collective exchange among virtual strangers produces individual decisions which coalesce into a verdict." (*People v. Santamaria* (1991) 229 Cal.App.3d 269, 282.) Thus, "[t]he dynamics of deliberation are complex and delicate." (*Ibid.*) Lamb's simplistic and self-serving reasoning about the different outcomes of the first and second penalty phase trials assumes away any distinctions between the two jury panels.

Also, Lamb overlooks other differences in the evidence presented to the two juries. In the first penalty phase trial, Lamb's cousin, Erin Holmbeck (25 RT 5175-5192), his friend, Christy Wilson (25 RT 5227-5254) and his former neighbor Glen McCoy (26 RT 5279-5288) testified on behalf of the defense, but did not testify in the penalty phase retrial. (Compare 1 CT Chronological Index and Alphabetical Index.) These

defense witnesses may have proven particularly persuasive to one or more of the holdout jurors in the first trial.

Lamb further argues that the three days of deliberations and the trial court's comments about the jurors' " 'sniffles and grim faces' " was indicative of prejudice because it showed their decision was a "difficult" one. (AOB 122-123.) However, rendering a death verdict is by its very nature a sobering and difficult task in any case. (See, e.g., *People v. Lewis* (2001) 26 Cal.4th 334, 390 [referring to "the difficult decision – [of] possibly sentencing a person to death"]; *In re Hamilton* (1999) 20 Cal.4th 273, 307 (conc. opn. of Chin, J.) ["the difficult task of being jurors in a death penalty case"]; *People v. Davenport* (1995) 11 Cal.4th 1171, 1238 [finding defense counsel properly reminded jurors "that selection of the appropriate penalty was a difficult and meaningful task"], disapproved on another point in *People v. Griffin, supra,* 33 Cal.4th at p. 555, fn. 5.) Thus, Lamb's observations about the penalty phase retrial jurors are of no significance.

As in *Jackson*, "[a]lthough defendant's argument may be plausible in the abstract, it is ultimately unpersuasive under the facts of this case." (*People v. Jackson, supra,* 13 Cal.4th at p. 1233.) There is no reasonable possibility that the penalty phase error alleged by Lamb affected the verdict. Accordingly, any error was harmless and the penalty judgment should be affirmed. (*People v. Brown, supra,* 46 Cal.3d at p. 447.)

Lamb's contention that the alleged error in admitting evidence of the conspiracy contributed to a cumulative prejudicial impact in conjunction with other penalty phase retrial errors likewise fails. (AOB 123.) This Court has recognized that multiple trial errors may have a cumulative effect. (*People v. Hill* (1998) 17 Cal.4th 800, 844-848; *People v. Holt* (1984) 37 Cal.3d 436, 458-459.) However, if the reviewing court rejects all of a defendant's claims of error, it should reject the contention of

cumulative error as well. (*People v. Anderson* (2001) 25 Cal.4th 543, 606; *People v. Bolin* (1998) 18 Cal.4th 297, 335.) Even where "nearly all of [a] defendant's assignments of error" are rejected, this Court has declined to reverse based on cumulative error.[92] (*People v. Bradford* (1997) 14 Cal.4th 1005, 1057.)

As discussed above and in Arguments III through VII, *infra*, there were no errors in the penalty phase retrial. Accordingly, there can be no cumulative error, and the penalty judgment should be affirmed.

III. LAMB FAILS TO SHOW ADMISSION OF THE FOX NEWS VIDEO WAS AN ABUSE OF DISCRETION

In Claim Three, Lamb contends that admission of the Fox News video in the guilt phase and penalty phase retrial violated his rights to due process, a fair trial and a reliable penalty determination, requiring reversal of his convictions and sentence. (AOB 124-171.) This claim is meritless.

The Fox video was highly relevant to prove motive and knowledge, while it had no bearing on the primary contested issue in the case – identity. Case-neutral insofar as *which* gang member associated with P.E.N.I. might have killed Miller, the video was as consistent with Lamb's defense theory that Billy Joe Johnson was the killer as it was with the prosecution's case. Thus, the trial court properly exercised its discretion in balancing and admitting the evidence, and there was no violation of Lamb's constitutional rights. For the same reasons, even assuming error, it would be harmless.

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[92] " '[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 [93 S.Ct. 1565, 36 L.Ed.2d 208]; see also *People v. Bradford, supra*, 14 Cal.4th at p. 1057; *People v. Cooper* (1991) 53 Cal.3d 771, 839.)

A. Proceedings Regarding the Admissibility of the News Segments

During pre-guilt phase motions, the prosecutor informed the trial court of his intention to introduce the two-part Fox 11 News segments which aired on February 20 and 21, 2001. (2 RT 423.) The prosecutor stated that it was the People's position that the news segments were the main motivation behind Miller's murder. (2 RT 423.) The prosecutor represented that Rump's trial counsel had informed him of his objection to the evidence the previous day and that Lamb's trial counsel agreed to admission of the two segments.[93] (2 RT 423.)

Rump's attorney then stated his objection to the Fox video, arguing that it was "a lot of media hype," "unduly prejudicial and inflammatory," and violated Rump's rights to due process and a fair trial under the state and federal constitutions. (2 RT 424.) The trial court wanted to view the DVD of the news segments before ruling on Rump's objection. (2 RT 424-425.)

The DVD was subsequently played in court. (2 RT 446-447.) For purposes of the Evidence Code section 402 hearing, the parties stipulated to Miller's identity as the disguised person in the video. (2 RT 447-449.)

Lamb's trial counsel asked that a portions of the video be redacted, but agreed "for the most part" that "the tapes are basically coming in because that is their motive." (2 RT 449.) Counsel specifically requested that the lead-in's by the reporters with a reference to John Beard, the portion where Officer Faust is relating information about Bryan O'Leary

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[93] The prosecutor explained that there was actually a third segment aired subsequent to the murder that showed Miller's face, which he did not intend to admit. The prosecutor stated that he would have no objection to admission of the third segment if requested by defense counsel, but Lamb's trial counsel informed him that they did not want the third segment admitted. (2 RT 423-424.)

and Anthony Bailey, and Correctional Officer Wes Harris's statement that groups like P.E.N.I. were going to start popping up everywhere, should be redacted as irrelevant, inflammatory and prejudicial. (2 RT 449-450.)

In contrast, Rump requested "total exclusion" of the DVD. (2 RT 450-451.) He argued that the totality of the video was inflammatory and prejudicial, and that the prosecution's theory of motive could be accommodated through other means. (2 RT 452.)

The prosecutor responded, "It is exactly that exaggerated media hype, and I'm using his terminology, that makes it so relevant." (2 RT 452.) The prosecutor explained that the news segments were not being introduced for the truth of the matters asserted, but rather to support his theory that Mazza put out the order to kill Miller because of the timing of the broadcast in relation to Mazza's trial. (2 RT 452.) Thus, as described by the prosecutor, "It's the context – It's not just that Scott Miller went on T.V. It's when he went on T.V. and the way it was portrayed." (2 RT 453.) The prosecutor also stated that the much of the content of the news segments, including the predicate offense by Mazza and Rizzo, was going to be covered by his gang expert's testimony. (2 RT 452-453.)

The trial court initially characterized the video as inflammatory and a substitution for gang expert testimony with no opportunity for cross-examination. (2 RT 455-456.) In response, the prosecutor explained:

> I do appreciate the court's comment. That will make sense only if it wasn't the motive for the murder. If I was playing it just to talk about the gang, then you would be absolutely right. If I was offering to play this tape and telling you this has no connection with the homicide, you would be absolutely right. But this is the motive for the homicide. This is the reason why they ordered the homicide of the victim. [¶] ... [¶]
>
> I'm not asking to play this tape to substitute the testimony of the expert, but I think the jury is entitled to know, and the People are entitled, if the court permits, to be able to argue what started this whole event.

> Just telling the jury that Scott Miller went on T.V. and talked about the gang is just not painting a true picture to the jury. It's just not.

(2 RT 456.)

Balancing the relevance of the news segments against the risk of undue prejudice under Evidence Code section 352, the court indicated a concern about the degree to which the story was sensationalized. (2 RT 457-461.) The prosecutor responded:

> [Sensationalized] is exactly what created the extent of the motive. See, it's one thing – think about it this way. I can tell somebody that I don't like them. That can be a motive for them to want to do something to me. I can tell them that I don't like them and use every single cuss word in the dictionary and talk about their mom and dad. That's a different level of motive. I think that's what's relevant here.
>
> If we start putting just bits and pieces of what Scott Miller said, what – in a sense what you're doing, we're putting everything that the defense wants because it makes Scott Miller look really, really, really bad. We're keeping out everything that provides the motive for why P.E.N.I. reacted to this segment the way they reacted. I don't think that's fair.

(2 RT 461.) Thus, the prosecutor asked that the two news segments be admitted in their entirety. (2 RT 462.)

Lamb's trial counsel reiterated their requests for redaction of certain comments from the reporters and Correctional Officer Harris as well as the portion of the broadcast describing the prior stabbing by Mazza, and asked for a strong limiting instruction. (2 RT 462-463, 465.) The prosecutor stated that he would be willing and able to redact any portions of the DVD as ordered by the court. (2 RT 463-4643.) Rump renewed his objection to the entirety of the video, and the court took the matter under submission. (2 RT 464-466.)

Subsequently, the trial court found the Fox video relevant to prove both motive for the murder and knowledge of a pattern of criminal gang activity for the street terrorism charge. (3 RT 473-475.) Applying Evidence Code 352, the court found the probative value outweighed the prejudice and ruled that the evidence would be admitted. (2 RT 475.)

Thereafter, Lamb's trial counsel clarified that she would be joining in Rump's "objection to the tape in it's entirety," and offered an admonishment to be read to the jurors prior to playing the DVD in court. (2 RT 475.) The prosecutor agreed to work out "a strongly worded admonishment" for the jury. (2 RT 476.) Prior to opening statements, the court and counsel discussed and agreed upon the admonishment. (6 RT 1312-1315; 7 RT 1331-1332.)

Prior to playing the DVD during his guilt phase opening argument, the prosecutor read the admonition to the jurors as follows:

> Before I play that video to you, I want to read something to you because you're going to hear the judge read it to you about this evidence is introduced for a very limited purpose. The evidence relating to the video is being introduced for a very limited purpose, so let me read to you what the judge is going to tell you. He'll probably do it during the trial when I introduce that video.
>
> "You are about to view recorded news segments aired by Fox 11 News on February 20th and 21st, 2000 and 1. This evidence is being presented to you for limited purposes. By admitting this evidence, the court is not advising you that it actually goes towards proving an issue in this case. That determination is to be made by you. The news broadcast contains images of bigotry, opinions by certain individuals, inflammatory remarks by purported gang members, and sensationalism by newscasters.
>
> You may not consider the recorded – the recording as proof of the truth of any statements made by anyone during the recording. The information is relevant for two purposes only. Did a defendant view either broadcast, and if so, did the

broadcast serve to notify that defendant that members of P.E.N.I. engage in criminal activity? And, two, did the airing of the broadcast provide a motive for the killing of Scott Miller. []You may not consider anything contained on the recording for any other purpose.

You may not conclude from this evidence that the defendant is a person of bad character or that he has disposition to commit crime.

(7 RT 1364-1365.)

During the guilt phase, Lieutenant Epperson testified that the Fox News segments were aired days before Mazza was to stand trial and that he had talked to P.E.N.I. members and other detectives about the impact the news segments hade on the P.E.N.I. hierarchy. (16 RT 3128-3130.) When given a hypothetical of the facts of the case, including a marginalized member of the gang bringing "negative attention to the gang at a time where the leaders of the gang were facing criminal charges," Lieutenant Epperson opined that the killing of Scott Miller was consistent with it being done to promote, further and assist in the gang's criminal conduct. (16 RT 3177-3179.) At the conclusion of the prosecutor's guilt phase case-in-chief, the DVD was admitted into evidence. (20 RT 3924.)

In the defense opening statement, Lamb's trial counsel told the jurors that Johnson shot Miller, and Johnson "ends up out of the hat and a P.E.N.I. gang member" after the murder. (7 RT 1424-1426.) In the guilt phase, Johnson testified on Lamb's behalf that he knew about the Fox News segments; he knew Miller was the person disguised in the interview; the first time he saw Miller after the broadcast was at Raphoon's party; he was upset with Miller in part due to the Fox News video and in part because of

an issue regarding some girls; and he alone shot Miller.[94] (18 RT 3530-3534, 3603.)

During the guilt phase instructions, the court read the limiting instruction and admonishment concerning the Fox News segments. (21 RT 4188-4189.) The admonishment was also included in the written instructions. (7 CT 1602-1604.)

In the penalty phase retrial, the parties incorporated their prior objections and arguments regarding the Fox News segments, and the court implicitly reaffirmed its prior ruling. (28 RT 5725-5726.) The prosecutor played the DVD during his opening statement at the penalty phase retrial. (31 RT 6239.) Johnson again testified on Lamb's behalf. (35 RT 6933.)

In the penalty phase retrial, Johnson testified that he had seen and recognized Miller in the Fox News broadcast; Miller "was a dead man" after the news segments aired because he was giving up information on P.E.N.I.; he would "kill [Miller] or anyone like him that doesn't abide by the rules;" Miller was "telling secrets to the enemy;" and he shot Miller " 'cause he was telling," and "broke one of the rules, the main rules, all the rules." (35 RT 6937-6941, 6948-6949.)

The penalty phase retrial jury was given the same admonition concerning the Fox video. (40 RT 8344-8345; 10 CT 2475.) In closing argument, Lamb's trial counsel again argued Johnson "got out of the hat" because he killed Miller. (42 RT 8569-8570.)

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[94] Lieutenant Epperson explained how Johnson had fallen out of favor with the Aryan Brotherhood due to his refusal to conduct a "hit" on Guvey, conveyed his concerns about that to Lieutenant Epperson and Agent Kraus in 2001, and began identifying himself with P.E.N.I. prior to Miller's murder to redeem himself with the Aryan Brotherhood. (16 RT 3117-3121.)

B. The Trial Court Properly Exercised its Discretion in Admitting the Evidence

Evidence must be relevant to be admissible. (Evid. Code, § 350.) Relevant evidence is defined as evidence "having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (Evid. Code, § 210.) " ' "The test of relevance is whether the evidence tends 'logically, naturally, and by reasonable inference' to establish material facts such as identity, intent, or motive." [Citations.]' " (*People v. Jones* (2013) 57 Cal.4th 899, 947, quoting *People v. Bivert* (2011) 52 Cal.4th 96, 116-117.)

"[A]ll relevant evidence is admissible unless excluded under the federal or California Constitution or by statute." (*People v. Scheid* (1997) 16 Cal.4th 1, 13, citing Cal. Const., art. I, § 28, subd. (d), and Evid. Code, § 351.) One such statute is Evidence Code section 352, which allows trial courts to exclude evidence if its probative value "is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury."

Undue prejudice is that " ' "which uniquely tends to evoke an emotional bias against the defendant as an individual and which has very little effect on the issues." ' " (*People v. Alexander* (2010) 49 Cal.4th 846, 905, quoting *People v. Karis* (1988) 46 Cal.3d 612, 638.) Thus, " ' "[i]n applying section 352, 'prejudicial' is not synonymous with 'damaging.' " ' " (*Ibid.*)

> "'Prejudice' as contemplated by [Evidence Code] section 352 is not so sweeping as to include any evidence the opponent finds inconvenient. Evidence is not prejudicial, as that term is used in a section 352 context, merely because it undermines the opponent's position or shores up that of the proponent. The

> ability to do so is what makes evidence relevant. The code speaks in terms of *undue* prejudice."

(*People v. Doolin* (2009) 45 Cal.4th 390, 438-439, quoting *People v. Cudjo* (1993) 6 Cal.4th 585, 609 [emphasis in original]; see also *People v. Carter* (2005) 36 Cal.4th 1114, 1168.)

The discretion afforded trial courts in determining the relevance of evidence has been characterized as "considerable" and "broad." (See *People v. Merriman* (2014) 60 Cal.4th 1, 74; *People v. Carter, supra,* 36 Cal.4th at p. 1168; *People v. Heard* (2003) 31 Cal.4th 946, 972-973; *People v. Scheid, supra,* 16 Cal.4th 14.) Trial courts are similarly afforded "broad discretion" in weighing and determining the admissibility of evidence under Evidence Code section 352.[95] (*People v. Merriman, supra,* 60 Cal.4th at p. 74; *People v. Williams* (2013) 58 Cal.4th 197, 270.)

Accordingly, a trial court's rulings on the relevance of evidence and admissibility under Evidence Code section 352 are reviewed for abuse of discretion. (*People v. Merriman, supra,* 60 Cal.4th at p. 74.) As previously stated, abuse of discretion is a deferential standard of review. (*People v. Williams, supra,* 17 Cal.4th at p. 162.) "We will not reverse a court's ruling on such matters unless it is shown ' "the trial court exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice." [Citations]' " (*People v. Merriman, supra,* 60 Cal.4th at p. 74, quoting *People v. Brown* (2003) 31 Cal.4th 518, 534; see

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[95] The trial " 'court need not expressly weigh prejudice against probative value or even expressly state that it has done so, if the record as a whole shows the court was aware of and performed its balancing functions under Evidence Code section 352' " (*People v. Doolin, supra,* 45 Cal.4th at p. 438, quoting *People v. Taylor* (2001) 26 Cal.4th 1155, 1169) "and there is an adequate basis for appellate review" (*People v. Arias* (1996) 13 Cal.4th 92, 155).

also *People v. Montes* (2014) 58 Cal.4th 809, 868; *People v. Williams, supra,* 58 Cal.4th at pp. 270-271.)

Lamb cannot show any abuse of discretion as to the admission of the Fox video. The two-part news segments were highly relevant to prove the motive for Miller's murder. As the prosecutor explained, Miller's appearance in the news segments was "what started this whole event." (2 RT 456.) " ' " '[P]roof of the presence of motive is material as evidence tending to refute or support the presumption of innocence.' " ' " (*People v. Jones, supra,* 57 Cal.4th at p. 948, quoting *People v. Roldan* (2005) 35 Cal.4th 646, disapproved on another ground in *People v. Doolin, supra,* 45 Cal.4th at p. 421, fn. 22.)

That Miller's murder was "payback" for his public discussion of P.E.N.I.'s criminal activities just prior to Mazza's trial was the very foundation of the prosecution's case. The prosecutor was entitled to prove his theory of the case. (See *People v. Cowan* (2010) 50 Cal.4th 401, 476; *People v. Demetrulias* (2006) 39 Cal.4th 1, 30, fn. 7.)

The very sensationalism of the Fox broadcast is what gave it so much relevance. The news segments portrayed P.E.N.I. in such a bad light and divulged so much of its criminal activity on the eve of Mazza's trial that it warranted the ultimate sanction of a "green light" being placed on Miller's life as payback. Even defense counsel conceded that "the tapes are basically coming in because that is their motive." (2 RT 449.)

In the trial court, Rump's attorney argued that the prosecutor's theory of the case could be accommodated through other means. (2 RT 452.) However, "the 'persuasive power of the concrete and particular is often essential to the capacity of jurors to satisfy the obligations that the law places on them.' " (*People v. Marks* (2003) 31 Cal.4th 197, 227, quoting *Old Chief v. United States* (1997) 519 U.S. 172, 187 [117 S.Ct. 644, 136 L.Ed.2d 574].) "[T]he People were entitled to employ such

evidence to prove their case." (*Ibid.*; see also *People v. Edelbacher* (1989) 47 Cal.3d 983, 1007 [prosecution generally cannot be compelled to accept stipulation if effect would be to deprive its "case of its persuasiveness and forcefulness"].)

The Fox video was also probative of Lamb's knowledge of P.E.N.I.'s pattern of criminal activity – an element the prosecution was required to prove for the street terrorism charge. (See § 186.22, subd. (a); 7 CT 1586 [CALCRIM No. 1400].) The news segments discussed prior criminal activities by P.E.N.I. including the sale and manufacture of methamphetamine, firearm offenses and violent assaults (AOB 129-130,133, 135-137), and there was evidence that Lamb had seen the program (12 RT 2164-2166; 19 RT 3821 [Lamb's statement to Mason that "he had stripes coming" for "how he whacked" Miller in conjunction with Lamb's letter to Rizzo referring to "the famous Fox 11"]).

On appeal, Lamb essentially complains that there was no evidence of him having viewed the Fox program or Mazza issuing the order to kill Miller. (AOB 141, 143, 148-156.) As with his other claims, Lamb insists on direct evidence while ignoring the powerful circumstantial evidence in conjunction with the gang expert testimony from which a reasonable jury could conclude Lamb had knowledge of the video and Mazza issued the "green light" order.

In contrast to the exceptional relevance of the Fox video, there was no undue prejudice. Although the video provided a motive for P.E.N.I. having Miller killed, it had no bearing on which person affiliated with the gang committed the murder.

The case presented by Lamb in both guilt and penalty phases sought to portray Johnson as that person, killing Miller at least in part due to the Fox video and being rewarded for his actions on P.E.N.I.'s behalf. (18 RT 3530-3533, 3603; 35 RT 6937-6941, 6948-6949.) Thus, the Fox video was

case-neutral in terms of the main contested issue at trial – the identity of the P.E.N.I. gang member or associate who shot Miller – and any inflammatory impact of the video bolstered Lamb's defense as much as the prosecution's case.

Lamb cites to *People v. Diaz* (2014) 227 Cal.App.4th 362, in support of his prejudice argument. (ABO 144-147.) However, unlike here, the evidence at issue in *Diaz* was not case-neutral.

In *Diaz*, the defendant was convicted of vehicular manslaughter while intoxicated, driving under the influence and related offenses. (*People v. Diaz, supra,* 227 Cal.App.4th at p. 364.) The evidence which the Court of Appeal found was improperly admitted was two videos produced by Mothers Against Drunk Driving and another organization which

> include[d] numerous tearful testimonials from the families of victims of alcohol-related offenses, statements from a prosecutor and a defense attorney concerning the high rates of convictions for such offenses, and statements from a judge to the effect that punishment is needed and is effective for alcohol-related driving offenses.

(*Id.* at p. 365.) Thus, the highly inflammatory impact of the *Diaz* videos only served to unduly prejudice the defendant. (*Id.* at pp. 380-382.) In contrast, the video in Lamb's case supported the defense theory of the case as much as the prosecution.

Lamb further cites authority for the proposition that gang-related evidence "may have a highly inflammatory impact on the jury." (AOB 157-158.) Again, Lamb fails to appreciate that his defense at trial was that Johnson, a gang member, killed Miller at least in part for a gang-related purpose, consequently rendering any inflammatory impact from the gang references in the video case-neutral.

Lastly, Lamb attempts to minimize the significance of motive in the penalty phase retrial, arguing that the second jury "was obligated to accept"

his prior conviction of special circumstance murder. (AOB 159.) Lamb's argument ignores the issue of lingering doubt which was extensively litigated in the penalty phase retrial with the prosecution and defense presenting their entire guilt phase cases to the second jury. Moreover, the motive for killing Miller was a circumstance of the crime and relevant to the jury's penalty determination. (*See People v. Boyce* (2014) 59 Cal.4th 672, 721; *People v. Montes, supra,* 58 Cal.4th at p. 896; *People v. Rountree* (2013) 56 Cal.4th 823, 860; *People v. Osband* (1996) 13 Cal.4th 622, 708.)

As with his challenge to the factor (b) evidence (Argument II, *ante*), Lamb refuses to acknowledge the deferential abuse of discretion standard of review, simply arguing the court's ruling was "error" or "erroneous." (AOB 124-125, 159.) Here, the trial court scrutinized the video before its ruling, thoroughly considered the arguments of counsel and carefully weighed the video's probative value against the risk of any undue prejudice. The court's ruling was neither "arbitrary," " capricious" nor made in a "patently absurd manner." (*People v. Carrington, supra,* 47 Cal.4th at p. 195; *People v. Rodriguez, supra,* 20 Cal.4th at pp. 9-10.)

The probative value of the Fox News segments was not outweighed by *any* prejudice, much less a substantial risk of undue prejudice. Thus, the trial court's ruling did not fall "outside the bounds of reason. " (*People v. Williams, supra,* 17 Cal.4th at p. 162; *People v. DeSantis, supra,* 17 Cal.4th at p. 1226.) Since Lamb cannot show the trial court's admission of the evidence was an abuse of discretion, that court's ruling should be affirmed on appeal.

Because the video was properly admitted, there was no violation of Lamb's rights to due process, a fair trial or a reliable penalty determination. (*People v. Fuiava, supra,* 53 Cal.4th at p. 670; *People v. Riggs, supra,* 44 Cal.4th at p. 292; *People v. Thornton, supra,* 41 Cal.4th at p. 464; *People v. Burgener, supra,* 29 Cal.4th at p. 873; *People v. Hart, supra,* 20 Cal.4th at p.

617, fn. 19.) Accordingly, Lamb's claim of constitutional error should be rejected as well.

C. The Alleged Error Was Harmless

Moreover, even assuming error, admitting the Fox News video was harmless. The erroneous admission of evidence in the guilt phase of a capital trial is generally reviewed for prejudice under the standard articulated in *People v. Watson* (1956) 46 Cal.2d 818. (See *People v. Chism* (2014) 58 Cal.4th 1266, 1298, citing *People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 76; *People v. Carter, supra,* 36 Cal.4th at p. 1257.) Under *Watson*, reversal of the judgment is unwarranted unless, " 'after an examination of the entire cause, including the evidence' [citation], it appears 'reasonably probable' the defendant would have obtained a more favorable outcome had the error not occurred." (*People v. Breverman* (1998) 19 Cal.4th 142, 178, quoting Cal. Const., art. VI, § 13, and *People v. Watson, supra*, 46 Cal.2d at p. 836.)

For the penalty phase, errors of state evidentiary law are reviewed for harmlessness under the "reasonable possibility" standard of *People v. Brown, supra,* 46 Cal.3d at p. 447. (See *People v. Cowan, supra,* 50 Cal.4th at p. 503; *People v. Hamilton* (2009) 45 Cal.4th 863, 917; *People v. Page* (2008) 44 Cal.4th 1, 61-62; *People v. Michaels* (2002) 28 Cal.4th 486, 538.) As previously stated,

> "[A] 'mere' possibility that an error might have affected a verdict will not trigger reversal. Instead when faced with penalty phase error not amounting to a federal constitutional violation, we will affirm the judgment unless we conclude there is a reasonable (i.e., realistic) possibility that the jury would have rendered a different verdict had the error or errors not occurred.

(*People v. Jackson, supra,* 13 Cal.4th at p. 1232, quoting *People v. Brown, supra,* 46 Cal.3d at p. 448.)

As discussed above, the Fox News video was case-neutral and any inflammatory impact would have supported and bolstered the defense theory of the case, which was that gang member Billy Joe Johnson committed the murder on behalf of P.E.N.I. in whole or in part as payback for Miller's betrayal of the gang in the news segments. (18 RT 3530-3533, 3603; 35 RT 6937-6941, 6948-6949.) Accordingly, it is not reasonably probable that Lamb would have received more favorable verdicts in the guilt phase, there is no reasonable possibility that he would have received a different penalty verdict, and any error was harmless.

Lamb cites to the swastikas, attack dogs, methamphetamine, accusations of murder and references to the Nazi Lowriders and Aryan Brotherhood in the Fox video. (AOB 160.) However, there was independent evidence of prominent White supremacist tattoos including several swastikas on Lamb's face and body (10 RT 1959-1964;16 RT 3147-3148), expert testimony concerning Lamb's methamphetamine use (18 RT 3476-3477), and detailed expert testimony about the relationships between P.E.N.I., the Nazi Lowriders and the Aryan Brotherhood (16 RT 3082-3101), P.E.N.I.'s pattern of criminal activities including drug trafficking and violent crimes (16 RT 3130-3142) and P.E.N.I.'s "cornerstone" of violence and "blood in, blood out" philosophy (16 RT 3104-3105). Had the Fox video been excluded, the jurors would have heard much of the same evidence which Lamb claims was prejudicial.

Moreover, the news segments' discussion of P.E.N.I. in context of the Aryan Brotherhood and Nazi Lowriders would have inured to Lamb's benefit since it helped explain the defense theory that Johnson "got out of the hat" with the Aryan Brotherhood by shooting Miller. To the extent the Fox News segments vilified P.E.N.I. and its members, it further bolstered the defense by portraying Johnson as a cold-blooded killer solely

responsible for the murder and Miller as a victim not warranting the death penalty.

In the guilt phase, Lamb's trial counsel argued,

> Did I accurately describe [Johnson] as the boogeyman? He didn't really come across as the boogeyman, but most monsters don't. I always tell my daughter that, you know, be careful at night because when you find out you're with a monster, it's usually too late. Comes across as kind of a personable guy, a little scary looking. I don't think you'd want your daughter to date anybody with SS lightening bolts on their throat. But nevertheless, Don't be fooled. This is one bad-ass, stone-cold killer.

(22 RT 4455.) In the penalty phase retrial, trial counsel likewise characterized Johnson as "an absolute, 100-percent, stone-blooded, cold killer, no conscience whatsoever." (42 RT 8542.)

In the penalty phase retrial, trial counsel argued,

> You have to consider Scott Miller was a hard-core gang member. He bragged about his gang membership. He glorified his gang membership. He glorified it. He went on television, national television, with anybody to watch and talked about how great it was to be a gang member.

(42 RT 8597.) Trial counsel further argued,

> Again, the victim involvement. You have to see – you have a factor (e) that talks about did the victim participate at all in the homicidal conduct? Did the victim create an environment in which this crime occurred? And he absolutely did.

(42 RT 8611.) Lamb's attorneys thus made good use any inflammatory effects of the Fox video to benefit the defense in both the guilt and penalty phases.

Furthermore, both juries received the strongly-worded admonishment against using the video for anything other than its limited purposes and specifically not to use it as character or disposition evidence. (7 RT 1364-1365; 40 RT 8344-8345; 7 CT 1602-1604; 10 CT 2475.) It is

presumed that the jurors understood and followed the court's instructions. (*Penry v. Johnson* (2001) 532 U.S. 782, 799 [121 S.Ct. 1910, 150 L.Ed.2d 9]; *Greer v. Miller* (1987) 483 U.S. 756, 766, fn. 8 [107 S.Ct. 3102, 97 L.Ed.2d 618]; *Richardson v. Marsh* (1987) 481 U.S. 200, 211 [107 S.Ct. 1702, 95 L.Ed.2d 176]; *People v. Sanchez* (2001) 26 Cal.4th 834, 852; *People v. Osband, supra,* 13 Cal.4th at p. 714; *People v. Pinholster* (1992) 1 Cal.4th 865, 919, disapproved on another ground in *People v. Williams* (2010) 49 Cal.4th 405, 459.) Lamb claims the admonitions were ineffective, but cites to nothing in the record to rebut this presumption. (See AOB 166-170.)

The trial court properly exercised its discretion in admitting the Fox video, and any error was harmless in light of the defense presented at the guilt and penalty phases. Accordingly, the guilt and penalty phase judgments should be affirmed.

IV. LAMB FAILS TO SHOW THE TRIAL COURT'S EXCLUSION OF TWO PIECES OF DEFENSE EVIDENCE IN THE PENALTY PHASE RETRIAL WAS AN ABUSE OF DISCRETION

In Claim Four, Lamb contends the trial court violated his rights to due process and a fair trial, his right to present a defense and the proscription against cruel and unusual punishment by "erroneously" precluding a former neighbor from opining that Lamb's parents broke his spirit and by "erroneously" excluding testimony concerning his mother's abusive childhood in the penalty phase retrial which he argues was admissible "evidence of multigenerational dysfunction." Consequently, Lamb claims his sentence must be vacated. (AOB 171-182.)

Lamb forfeited his "multigenerational dysfunction" claim by specifically excluding that as a ground for admission of the evidence in the trial court. Notwithstanding forfeiture, Lamb yet again chooses to ignore the deferential abuse of discretion standard which defeats his claim.

Neither the childhood abuse of Lamb's mother nor the neighbor's speculation about Lamb's "spirit" were admissible. Moreover, Lamb was permitted to present extensive testimony concerning the effects of Cathy's alcoholism and Steve's abusive treatment on himself and the rest of the family, and the neighbor's opinion would have conflicted with and undermined other mitigation evidence. Thus, the trial court properly exercised its discretion in excluding the testimony, any alleged error was harmless, and the penalty judgment should be affirmed.

During pre-penalty phase motions in the first trial, the defense requested to introduce evidence of the childhood backgrounds of Lamb's parents to explain why Steve was a strict and abusive father and why Cathy became an alcoholic. Such evidence would have included testimony that Steve as a child observed his mother commit suicide and that Cathy as a child was sexually molested by her father for about six years. (23 RT 4761-4763.) Trial counsel further requested to allow her "to get in the fact that [Cathy's] mother was a prescription drug addict[.]" (23 RT 4766.)

The prosecutor objected, stating, "I don't dispute that they have the ability to introduce evidence about [Lamb's] childhood and what kind of parents they were to him, but what might have caused them to be that way is irrelevant." (23 RT 4761.) Moving to exclude the evidence, the prosecutor explained:

> I'm not objecting to any evidence about how they treated Mr. Lamb, how they were for him as parents, but I think to tell the jury, "Well, that's the result of their own childhood, and now let me tell you about their childhood" is [Evidence Code section] 352, prejudicial and it's not relevant.

(23 RT 4762.)

Trial counsel responded that the evidence was "relevant to put Mr. Lamb's character and background and the experiences he had with his parents in context." (23 RT 4763.) When the court asked whether she

intended to elicit opinions of why the parents turned out the way they did, defense counsel responded in part, "This is a family on both sides – and I'm not planning on getting into multi-generational dysfunction, but this is a family who on both sides had extreme mental illness issues, suicides, institutionalizations, et cetera." (23 RT 4763-4764.)

The trial court thereafter excluded the childhood evidence concerning Cathy as follows:

> Her character is not something this jury determines. Her character as it has affected the defendant, the way he was treated, certainly is admissible. Once again, you're asking this court and this jury to speculate as to the reasons for her becoming an alcoholic, and it's irrelevant.

(23 RT 4768.)

As far the evidence of Steve's childhood, the trial court similarly ruled:

> Specifically testimony concerning him witnessing his mother's suicide falls under the same category of mother being molested. I don't see it as relevant. You're asking the trier of fact to speculate as to what caused a person to act a particular way. And the only one's character that matters is Mr. Lamb's.

(23 RT 4768-4769.)

At the penalty phase retrial, the parties incorporated their prior objections and arguments, and the trial court implicitly reaffirmed its prior rulings. (28 RT 5728-5729.)

During the testimony of Lamb's former neighbor, Bernard Cain, defense counsel asked, "As Michael Lamb entered into his sort of early to mid teens, did he still have the same sort of personality that he had had as a younger kid?" (40 RT 8136.) As Mr. Cain began to answer, "I started to watch his spirit get broke because of the fact that – ," the prosecutor objected to the testimony as speculation and nonresponsive, and requested

to strike the answer. (40 RT 8136.) The trial court struck the answer as nonresponsive. (40 RT 8136.)

A. Lamb Forfeited a Multigenerational Theory of Admissibility

The proponent of evidence is required to make clear to the trial court "the purpose and relevance of" the testimony he or she sought to present. (Evid. Code, § 354.[96]) Accordingly, a theory of admissibility not advanced in the trial court is not preserved for review, and an appellate claim based on that theory is forfeited. (See *People v. Lucas* (2014) 60 Cal.4th 153, 232; *People v. Pearson* (2013) 56 Cal.4th 393, 470, fn. 10; *People v. Souza* (2012) 54 Cal.4th 90, 137-138; *People v. Mendoza* (2011) 52 Cal.4th 1056, 1093; *People v. Ervine* (2009) 47 Cal.4th 745, 779; *People v. Panah* (2005) 35 Cal.4th 395, 481.)

Here, Lamb specifically disavowed "multi-generation dysfunction" as a ground for admitting evidence of his parents' background and childhood

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[96] Evidence Code section 354 provides:

> A verdict or finding shall not be set aside, nor shall the judgment or decision based thereon be reversed, by reason of the erroneous exclusion of evidence unless the court which passes upon the effect of the error or errors is of the opinion that the error or errors complained of resulted in a miscarriage of justice and it appears of record that:
>
> (a) The substance, purpose, and relevance of the excluded evidence was made known to the court by the questions asked, an offer of proof, or by any other means;
>
> (b) The rulings of the court made compliance with subdivision (a) futile; or
>
> (c) The evidence was sought by questions asked during cross-examination or recross-examination.

experiences in the trial court. (23 RT 4763.) Therefore, Lamb's claim on appeal that the trial court erroneously excluded testimony of his mother's childhood abuse because it was admissible as "multigenerational dysfunction" evidence has been forfeited.

B. The Trial Court Properly Exercised its Discretion in Excluding the Testimony

Like the admission of evidence, a trial court's exclusion of evidence is reviewed for abuse of discretion. (*People v. Chism, supra,* 58 Cal.4th at p. 1291; *People v. DeHoyos* (2013) 57 Cal.4th 79, 131; *People v. Fuiava, supra,* 53 Cal.4th at pp. 667-668.) Lamb cannot show the trial court's exclusion of testimony concerning Cathy's childhood or the striking of Mr. Cain's opinions constituted an abuse of discretion.

As stated in *People v. Souza, supra,* 54 Cal.4th 90,

> " 'The Eighth and Fourteenth Amendments require the jury in a capital case to hear any relevant mitigating evidence that the defendant offers, including " 'any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.' " ' " [Citation.] The court, however, has the authority to exclude as irrelevant evidence that does not bear on the defendant's character, record, or the circumstances of the offense. [Citation.] "The trial court determines relevancy of mitigating evidence and retains discretion to exclude evidence whose probative value is substantially outweighed by the probability that its admission will create substantial danger of confusing the issues or misleading the jury." [Citation.]

(*Id.* at p. 137, quoting *People v. Harris* (2005) 37 Cal.4th 310, 352-353, and *People v. Guerra* (2006) 37 Cal.4th 1067, 1145, overruled on another point in *People v. Rundle* (2008) 43 Cal.4th 76, 151, disapproved on another ground in *People v. Doolin, supra,* 45 Cal.4th at p. 421, fn. 22; see also *People v. McDowell, supra,* 54 Cal.4th at p. 434 [right to mitigation evidence does not preclude state from applying ordinary rules of evidence].)

In accordance with these principles, section 190.3, subd. (k) ("factor (k)"), permits evidence of "[a]ny other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime." However, the conditions in which a parent was raised does not mitigate the defendant's criminal conduct. (*In re Champion* (2014) 58 Cal.4th 965, 992.)

> "[T]he background of the *defendant's family* is of no consequence in and of itself ... because ... the determination of punishment in a capital case turns on the *defendant's* personal moral culpability. It is the 'defendant's character or record' that 'the sentencer ... [may] not be precluded from considering' – not his *family's*."

(*Ibid*, quoting *People v. Rowland* (1992) 4 Cal.4th 238, 279 [emphasis, brackets and ellipses in original].)

Accordingly, this Court held in *Champion*, "Evidence that petitioner's mother was a bad parent (which could evoke sympathy for petitioner) would have been admissible; but evidence of childhood experiences that might have made her a bad parent (which could only evoke sympathy for petitioner's mother) was not." (*In re Champion, supra,* 58 Cal.4th at p. 992.) This was precisely the ruling of the trial court in Lamb's case concerning evidence of his parents' childhood misfortunes. Thus, the evidence was properly excluded.[97] (See also *People v. McDowell, supra,*

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[97] Relying on *Gray v. Klauser* (9th Cir. 2002) 282 F.3d 633, Lamb argues that the exclusion of "multi-generational mitigation evidence" while permitting certain victim impact evidence constitutes an "asymmetrical application of the rules of evidence" in violation of due process and the right to present a defense. (AOB 177-179.) However, the United States Supreme Court granted certiorari and vacated the judgment in that case on December 2, 2002. (*Klauser v. Gray* (2002) 537 U.S. 1041 [123 S.Ct. 658, 154 L.Ed.2d 512].) Accordingly, *Gray v. Klauser* has no precedential value. (See *Devidian v. Automotive Service Dealers Association* (1973) 35 Cal.App.3d 979, 986, fn. 1.)

54 Cal.4th at p. 434 [abuse between defendant's parent and grandfather properly excluded where no evidence that defendant was aware of such abuse prior to trial]; *In re Crew* (2011) 52 Cal.4th 126, 152 [same].)

The trial court also properly exercised its discretion in striking Mr. Cain's speculation about Lamb's "spirit." First, the testimony was nonresponsive. Evidence Code section 766 provides, "A witness must give responsive answers to questions, and answers that are not responsive shall be stricken on motion of any party."

The question posed to Mr. Cain – "As Michael Lamb entered into his sort of early to mid teens, did he still have the same sort of personality that he had had as a younger kid?" – called for a "yes" or "no" answer. (40 RT 8136.) Instead, Mr. Cain attempted to postulate *why* there might have been a change in personality. (40 RT 8136.) The answer was thus nonresponsive. (See, e.g., *People v. Crew* (2003) 31 Cal.4th 822, 839 [answer was nonresponsive because "[t]he question was what Nordman said to Nancy, not what Nancy said to her"]; *People v. Bolden* (2002) 29 Cal.4th 515, 555 [answer was nonresponsive where question asked for an address and witness described location as a parole office]; *People v. Barnett* (1998) 17 Cal.4th 1044, 1140 & fn. 67 [testimony that "defendant 'had stopped and told somebody that he had done it' " was nonresponsive to question "What site?"]; *People v. Jennings* (1991) 53 Cal.3d 334, 373 [references to defendant having been previously arrested and in prison were nonresponsive to questioning].)

Second, Mr. Cain's response consisted of speculation. "[E]xclusion of evidence that produces only speculative inferences is not an abuse of discretion." (*People v. Babbitt* (1988) 45 Cal.3d 660, 684; see also *People v. Morrison* (2004) 34 Cal.4th 698, 711, citing *People v. Kraft* (2000) 23 Cal.4th 978, 1035 [evidence leading to only speculative inferences is irrelevant].) It is within a trial court's discretion to exclude "conjectural lay

opinion" because "[s]uch evidence would not be "[h]elpful to a clear understanding of [the witness's] testimony.' " (*People v. Thornton, supra,* 41 Cal.4th at p. 429, quoting Evid. Code, § 800, subd. (b).) Thus, Mr. Cain's answer was properly stricken.[98]

Since the proffered testimony regarding Cathy's childhood and Mr. Cain's speculative opinions were both inadmissible, Lamb fails to show an abuse of discretion. Accordingly, the trial court's rulings should be affirmed on appeal.

In light of the testimony being properly excluded, there was no violation of Lamb's rights to due process, a fair trial or the proscription against cruel and unusual punishment. The "exclusion of irrelevant evidence does not violate a defendant's due process, confrontation or 8th amend[ment] rights." (*People v. Rundle, supra,* 43 Cal.4th at p. 133, citing and explaining holding in *People v. DeSantis, supra,* 2 Cal.4th at pp. 1249-1250; see also *People v. Gonzales* (2012) 54 Cal.4th 1234, 1291-1292; *People v. Loker* (2008) 44 Cal.4th 691, 730.)

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[98] Respondent recognizes that, although the prosecutor objected to the testimony as speculation and nonresponsive, the trial court only ruled on the nonresponsive objection. (40 RT 8136.) However,

> " 'No rule of decision is better or more firmly established by authority, nor one resting upon a sounder basis of reason and propriety, than that a ruling or decision, itself correct in law, will not be disturbed on appeal merely because given for a wrong reason. If right upon any theory of the law applicable to the case, it must be sustained regardless of the considerations which may have moved the trial court to its conclusion.' [Citation.]"

(*People v. Zapien* (1993) 4 Cal.4th 929, 976, quoting *D'Amico v. Board of Medical Examiners* (1974) 11 Cal.3d 1, 19; see also *People v. Jones* (2012) 54 Cal.4th 1, 50; *People v. Smithey, supra,* 20 Cal.4th at pp. 971-972.)

There also was no violation of Lamb's due process right to present a defense. Lamb was permitted to introduce extensive evidence about Cathy's alcoholism and its effects on himself and the rest of the family. (38 RT 7824, 7836-7837, 7859-7860, 7869, 7875-7876; 39 RT 7943, 7958-7959, 7964-7966, 7987-7988, 8081-8085; 40 RT 8133, 8153-8154, 8159, 8186-8187, 8191, 8264-8266, 8269-8270, 8290-8292.) Lamb was also allowed to present non-speculative testimony concerning the effects of Steve's strict and abusive conduct on his personality. (39 RT 7979-7980, 8070-8071, 8074-8075, 8078-8080; 40 RT 8135-8136, 8183-8184, 8251-8252, 8257-8259, 8266.) For example, Claudette Cain testified that when Lamb was 16 or 17 years old, he commented in regards to his father, "If you think I'm a piece of shit, I'll show you I'm a piece of shit," and started to get in trouble shortly thereafter. (38 RT 7838-7839.)

Where the trial court rejects only "some evidence" concerning a defense there is no violation of the due process right to present a defense. (See *People v. Jones, supra,* 57 Cal.4th at p. 957; *People v. McNeal* (2009) 46 Cal.4th 1183, 1203; *People v. Thornton, supra,* 41 Cal.4th at pp. 452-453; *People v. Boyette, supra,* 29 Cal.4th at p. 428; *People v. Humphrey* (1996) 13 Cal.4th 1073, 1089; *People v. Fudge* (1994) 7 Cal.4th 1075, 1103.) Similarly, the exclusion of cumulative testimony does " 'not violate the Eight Amendment or deprive defendant of due process of law.' " (*People v. Edwards, supra,* 57 Cal.4th at p. 760, quoting *People v. Smithey, supra,* 20 Cal.4th at p. 997.) Accordingly, all of Lamb's claims of constitutional error are meritless.

C. The Alleged Errors Were Harmless

In any event, the errors alleged by Lamb were harmless. Like other penalty phase errors, the erroneous exclusion of evidence is harmless if "there is no reasonable possibility the error affected the jury's penalty

determination." (*People v. McDowell, supra,* 54 Cal.4th at p. 434; see *People v. Watson* (2008) 43 Cal.4th 652, 693.)

As discussed above, the defense was permitted to introduce extensive evidence regarding Cathy's alcoholism, Steve's abusive treatment of Lamb and others in Lamb's presence, and the effect of those issues on Lamb and the rest of the family. Where the excluded evidence is largely cumulative of other testimony admitted at the penalty phase, the error can be deemed harmless under any standard of review. (See *People v. Pearson, supra,* 56 Cal.4th at pp. 470-471; *People v. Cowan, supra,* 50 Cal.4th at p. 503; *People v. Watson, supra,* 43 Cal.4th at p. 693; *People v. Harris* (1989) 47 Cal.3d 1047, 1092-1093.) Because " '[t]he jury was allowed to hear and consider the essence of the mitigating evidence'... any error was harmless." (*People v. Souza, supra,* 54 Cal.4th at p. 138, quoting *People v. Hughes* (2002) 27 Cal.4th 287, 397.)

In addition, the stricken opinion of Mr. Cain that Lamb's spirit was broken by the time he entered his early to mid teens would have contradicted and undermined other mitigation evidence showing Lamb was very protective of his brothers. Daniel testified about an incident when he was being physically disciplined by Steve, which occurred when Lamb "was a little older." (40 RT 8193.) Lamb intervened by grabbing Steve by the throat and slamming him against the wall, and said, "Don't ever touch him again or we're going to have more problems than this." (40 RT 8193.) Daniel testified that his father never touched him again. (40 RT 8193.)

Daniel, Matthew and Cathy testified that Lamb stopped Cathy from driving drunk with his brothers in the car when they lived in Dana Point. (40 RT 8191, 8269, 8290-8291.) Lamb "would basically stand up and say, 'You're not taking 'em.' " (40 RT 8191.) Lamb also hid Cathy's car keys and threw away bottles of liquor that he and his brothers found. (40 RT 8191-8192.) Thus, Lamb stood up to his parents on behalf of his brothers in

his mid-teens, and Mr. Cain's opinions about Lamb's spirit being broken would have undermined that aspect of the defense case in mitigation.

Lamb again cites evidence that the penalty verdict "was not an easy decision" for the second jury in his prejudice argument. (AOB 181.) As previously discussed in Argument II(C), *ante*, deciding whether to return a death verdict is by its very nature a sobering and difficult task in any case. Thus, Lamb's observations about the penalty phase retrial jurors are of no significance.

Lamb further argues the prosecutor exploited the alleged evidentiary error, citing to the prosecutor's discussion of evidence *other than* Cathy's alcoholism or Steve's abuse. (AOB 182.) Contrary to Lamb's contention, the prosecutor conceded that Cathy was a recovering alcoholic and Steve "was a horrible dad in some of the things he did." (41 RT 8382, 8384.) Indeed, the prosecutor did not even cross-examine Cathy. (40 RT 8277.) Thus, Lamb's claim that the prosecutor exploited the excluded evidence is groundless.

There is no reasonable possibility that the excluded testimony affected the jury's penalty determination. Accordingly, the judgment should be affirmed as the alleged errors were harmless, forfeited, and meritless.

V. THERE WAS NO PROSECUTORIAL ERROR IN THE PENALTY PHASE RETRIAL

In Claim Five, Lamb contends the prosecutor committed misconduct during his cross-examination of Billy Joe Johnson and during his closing argument in the penalty phase retrial by accusing Johnson of colluding with defense counsel, misstating the law and facts, attacking defense counsel's integrity and injecting his personal views and opinion into argument. Lamb claims the misconduct was so egregious that it violated his due process right to a fair trial and Eighth Amendment right to a reliable sentencing determination. (AOB 183-206.)

Most of Lamb's claims of prosecutorial misconduct have been forfeited because he failed to object, make an assignment of misconduct and request a curative admonition in the trial court where the alleged errors could have been easily remedied. In addition, each of Lamb's allegations of misconduct fails when fairly viewed in its proper context. Furthermore, any prosecutorial errors were effectively cured by the trial court and there was no prejudice. Accordingly, the penalty judgment should be affirmed.

A. The Prosecutor's Cross-Examination of Johnson

1. Lamb Forfeited Every Assertion of Prosecutorial Misconduct in the Cross-Examination of Johnson

All of Lamb's claims of prosecutorial misconduct during Johnson's cross-examination in the penalty phase retrial are forfeited. "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, emphasis in original.) The defendant is also excused from requesting a curative admonition if there was no opportunity to request one due to the trial court immediately overruling the objection. (*People v. Boyette, supra,* 29 Cal.4th at p. 432.)

A defendant cannot merely object, but must "request an assignment of misconduct" to preserve the claim for appeal. (*People v. Young* (2005) 34 Cal.4th 1149, 1188; *People v. McDermott* (2002) 28 Cal.4th 946, 1001.) Thus, if a defendant fails to "object to the prosecutor's cross-examination on the ground of prosecutorial misconduct," the claim is forfeited. (*People v. Foster* (2010) 50 Cal.4th 1301, 1351.) For example, objections on relevancy or argumentative grounds do not preserve misconduct claims for appeal. (*People v. Dykes* (2009) 46 Cal.4th 731, 766 [misconduct claim forfeited where objection was relevancy without request for admonition]; *People v. Cook* (2006) 39 Cal.4th 566, 607 [argumentative objection did

not preserve misconduct claim that prosecutor attempted to shift burden of proof].)

Lamb alleges the prosecutor committed misconduct during Johnson's cross-examination by accusing Johnson of colluding with defense counsel and by offering his own testimony and opinions. (AOB 185-190, citing 35 RT 6990-6991, 7018, 7026, 7066-7069.) However, Lamb objected to the first line of questioning only as "improper impeachment," "argumentative," "no question pending" and "vague," and the latter line of questioning only as "argumentative" and a misstatement of the evidence, failing to request an assignment of misconduct or a curative admonition in either instance. (See 35 RT 6990-6991, 7018, 7026, 7066-7069.)

Telling the jurors that the prosecutor's questioning was improper in conjunction with admonitions to disregard the prosecutor's remarks would have cured any prejudice from the alleged instances of misconduct. Since a proper objection with an assignment of misconduct and admonition to the jury would not have been futile, all of Lamb's claims of prosecutorial misconduct in Johnson's cross-examination are forfeited.

Instead of objecting and requesting assignments of misconduct with curative admonitions in the trial court, Lamb has waited to raise his prosecutorial misconduct claims for the first time on appeal after receiving unfavorable verdicts.

> "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 correct the errors now alleged on appeal, Lamb has forfeited his misconduct claims.

2. There Was No Misconduct in the Cross-Examination of Johnson

" 'A prosecutor's conduct violates the Fourteenth Amendment to the federal Constitution when it infects the trial with such unfairness as to make the conviction a denial of due process.' " (*People v. Doolin, supra,* 45 Cal.4th at p. 444, quoting *People v. Morales* (2001) 25 Cal.4th 34, 44, and citing *Darden v. Wainwright* (1986) 477 U.S. 168, 181 [106 S.Ct. 2464, 91 L.Ed.2d 144], and *Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 643 [94 S.Ct. 1868, 40 L.Ed.2d 431].) "Under California law, a prosecutor who uses deceptive or reprehensible methods of persuasion commits misconduct even if such actions do not render the trial fundamentally unfair." (*Ibid.*, citing *People v. Cook, supra,* 39 Cal.4th at p. 606.)

" 'The focus of the inquiry is on the effect of the prosecutor's action on the defendant, not on the intent or bad faith of the prosecutor.' " (*People v. McKinzie* (2012) 54 Cal.4th 1302, 1326, quoting *People v. Hamilton, supra,* 45 Cal.4th at p. 920; see *People v. Bramit* (2009) 46 Cal.4th 1221, 1242 [showing of bad faith no longer required].) Thus, "[a] more apt description of the transgression is prosecutorial error.' " (*People v. Centeno* (2014) 60 Cal.4th 659, 667, quoting *People v. Hill, supra,* 17 Cal.4th at p. 823, fn. 1.)

"[W]hen the claim focuses upon comments made by the prosecutor before the jury, the question is whether there is a reasonable likelihood that the jury construed or applied any of the complained-of remarks in an objectionable fashion." (*People v. Morales, supra,* 25 Cal.4th at p. 44, citing *People v. Ayala* (2000) 23 Cal.4th 225, 283-284.) " 'In conducting this inquiry, we 'do not lightly infer" that the jury drew the most damaging rather than the least damaging meaning from the prosecutor's statements.' "

(*People v. Dykes, supra,* 46 Cal.4th at p. 772, quoting *People v. Frye* (1998) 18 Cal.4th 894, 970, disapproved on another ground in *People v. Doolin, supra,* 45 Cal.4th at p. 421, fn. 22; see also *People v. Wilson* (2005) 36 Cal.4th 309, 338; *People v. Young* (2005) 34 Cal.4th 1149, 1192.)

" ' "A prosecutor commits misconduct if he or she attacks the integrity of defense counsel, or casts aspersions on defense counsel." [Citations.]' " (*People v. Shazier* (2014) 60 Cal.4th 109, 150, quoting *People v. Edwards, supra,* 57 Cal.4th at p. 738; *People v. Redd* (2010) 48 Cal.4th 691, 734.) However, "harsh and colorful attacks on the credibility of opposing witnesses are permissible." (*People v. Arias, supra,* 13 Cal.4th at p. 162 [emphasis omitted].) "Indeed, '[cross-examination's] chief purpose is "to test the credibility, knowledge and recollection of the witness...." ' " (*People v. Vasco* (2005) 131 Cal.App.4th 137, 159, quoting *Fost v. Superior Court* (2000) 80 Cal.App.4th 724, 733.)

Here, the prosecutor was inquiring into *Johnson's* motivation to give testimony consistent with *what he believed* defense counsel "wants" – not told – him to say. (35 RT 6990.) It bears repeating that " 'we "do not lightly infer" that the jury drew the most damaging rather than the least damaging meaning from the prosecutor's statements.' " (*People v. Dykes, supra,* 46 Cal.4th at p. 772; *People v. Frye, supra,* 18 Cal.4th at p. 970.)

For example, in *People v. Valencia* (2008) 43 Cal.4th 268, the prosecutor questioned a penalty phase witness about the fact that he had spoken with a defense investigator three times and was shown a photograph of evidence which was the subject matter of his testimony. (*Id.* at p. 302.) Thereafter, the prosecutor asked the witness whether, having talked to defense counsel's office three times, he was certain of his testimony. (*Ibid.*)

On appeal, the defendant claimed the prosecutor committed misconduct by insinuating that defense counsel fabricated a defense with

the witness and the defendant. (*People v. Valencia, supra,* 43 Cal.4th at p. 302.) This Court found the prosecutor "merely asked proper questions testing the reliability of the witness's credibility" rather than casting aspersions on defense counsel. (*Ibid.*) "Asking the witness whether his current testimony, which occurred nearly two years after the crime, was based on his actual memory or on his discussions with the public defender's office was a proper way to test the witness's credibility." (*Ibid.*)

Similarly, the prosecutor in Lamb's case was challenging Johnson's credibility. "When supported by the evidence and inferences drawn therefrom, argument that testimony or a defense is 'fabricated' may not, without more, be properly characterized as an attempt to impugn the honesty and integrity of defense counsel." (*People v. Cummings* (1993) 4 Cal.4th 1233, 1303, fn. 49.) Lamb's attempt to inflate the prosecutor's question into an accusation of collusion from the following brief colloquy centered around Johnson's hair-style should be rejected.

> Q BY [PROSECUTOR]: When you came here on April 11th, 2008 your head was shaved, correct?
>
> A No, it wasn't shaved. I had a Mohawk. It was wider around the top. It was more just on the top. I had hair on the top, not on the back.
>
> Q. Do you remember Mr. Stapleton[99] telling you he likes you better with a Mohawk?
>
> A. No. He said something about the chops. I think my attorney, Mr. Molfetta, said that he liked the Mohawk.
>
> Q. So if somebody was in the courtroom and heard you in this courtroom –

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[99] At trial, Lamb was represented by Marlin G. Stapleton, Jr., who was primarily responsible for the guilt phase, and Kristin A. Erickson, who was primarily responsible for the penalty phase. (1 RT 2.)

MS. ERICKSON: Objection; improper impeachment.

THE COURT: Sustained.

Q BY [PROSECUTOR]: You're going to say whatever Mr. Stapleton wants you to say, aren't' you?

MR. STAPLETON: Objection; argumentative.

THE COURT: Sustained.

THE WITNESS: Why – why would you say something like that?

Q. BY [PROSECUTOR]: Because, Mr. Johnson –

MR. STAPLETON: Objection, no question pending.

THE COURT: Sustained.

Q: BY [PROSECUTOR]: You have a job in this courtroom, don't you?

MS. ERICKSON: Motion to strike the response.

THE COURT: The response is stricken.

Q BY [PROSECUTOR]: You have a job in this courtroom, don't you?

A No.

MR. STAPLETON: Objection; argumentative.

MS. ERICKSON: Objection; vague.

THE COURT: "No" will remain.

Q BY [PROSECUTOR]: Your job is to stand up for the gang; isn't that correct, Mr. Johnson?

A. No.

Q. Your job is to stand up for a homeboy?

A. I don't even know him.

(35 RT 6990-6991.)

The next instance of misconduct alleged by Lamb is italicized in the following exchange about P.E.N.I. member Devin Stringfellow.

BY [PROSECUTOR]:

Q He's a P.E.N.I. member?

A I'm not going to get into all that gang stuff.

Q It's not an option for you, sir. You have to answer questions.

A It is an option because I can either say no or not.

Q. *Oh, that's right, it's an option because you don't give a damn about the oath that you took –*

MS. ERICKSON: Objection; argumentative.

THE COURT: Sustained.

(35 RT 7018 [emphasis added].)

It is improper for a prosecutor to offer his or her 'personal opinions when they are based solely on their experience or on other facts outside the record." (*People v. Huggins* (2006) 38 Cal.4th 175, 207; see also *People v. Chatman* (2006) 38 Cal.4th 344, 405.) That did not occur here.

Like the defendant in *People v. Stewart* (2004) 33 Cal.4th 425, 498, what Lamb "fails to acknowledge, in this instance and many others discussed below, is the context in which the challenged phrase was uttered." (*Id.* at p. 498.) Lamb cites the prosecutor's "don't give a damn about the oath" comment out of context, attempting to portray it as a general, gratuitous attack on Johnson's credibility. (AOB 187.) However, as shown above, the prosecutor's interrupted question was in direct response to Johnson's testimony that he would refuse to answer any gang-related questions despite his oath. Thus, the prosecutor's question was based on the record.

A prosecutor is entitled to explore matters relevant to a defense witness's credibility even if those matters first arise during cross-examination. (*People v. Nunez* (2013) 57 Cal.4th 1, 27-28.) To the extent the prosecutor's question might have been "needlessly sarcastic," it was not misconduct. (See *People v. Mendoza* (2007) 42 Cal.4th 686, 701 [prosecutor's retort that defense counsel had made a "clever objection"].) The prosecutor's questioning "reveal[ed] a determined inquiry of a recalcitrant and evasive witness, not misconduct." (*People v. Garland* (1963) 215 Cal.App.2d 582, 586.)

The next instance of misconduct alleged by Lamb is the prosecutor's question, "Last year you came and testified, and it didn't work –," which was interrupted by trial counsel's "argumentative" objection. (35 RT 7025-7026.) Lamb contends the prosecutor was "just asserting his own version of the facts" instead of posing questions. (AOB 187.)

Lamb again presents the remark out of context in an attempt to portray it as an assertion of the prosecutor's personal version of the facts. After the objection was sustained, the questioning continued as follows:

> BY [PROSECUTOR]: Last year you came and testified and told the jury that Mr. Lamb and Mr. Rump had nothing to do with it; that you're the one who did the murder, right?
>
> A. That's true.
>
> Q And Mr. Lamb and Mr. Rump got convicted, correct?
>
> A Yes, they did.

(35 RT 7026.)

Thus, the prosecutor's question was based on the record and not an expression of a personal opinion. (*People v. Huggins, supra,* 38 Cal.4th at p. 207; see also *People v. Chatman, supra,* 38 Cal.4th at p. 405.) Indeed, there was no further objection once the prosecutor was able to flush out his complete question. Moreover, it is not misconduct for a prosecutor to

inquire into subject matter where he or she has "the good faith belief in its foundation." (*People v. Ramos* (1997) 15 Cal.4th 1133, 1173-1174; see also *People v. Medina* (1995) 11 Cal.4th 694, 743 ["the prosecutor is entitled to remind the penalty phase jury that it is not to redetermine guilt, which is to be presumed as a matter of law because the trier of fact had so found in the guilt phase"].)

Lamb next alleges the prosecutor committed misconduct by telling Johnson, "That's not what you said last time," in response to his testimony that he had fired the gun before he gave it to Lamb. (AOB 188, citing 35 RT 7066.) Once again, Lamb portrays the quoted excerpt out of context. The prosecutor actually asked the following question: "That's not what you said when I asked you last year; is that correct?" (35 RT 7066.)

Defense counsel objected to the question as argumentative and a misstatement of the evidence, and the trial court sustained the objection on argumentative grounds. (35 RT 7066.) Subsequently, the prosecutor vindicated himself in the following line of questioning:

BY [PROSECUTOR]:

Q Sir, do you remember me asking you last year, "did you ever fire" –

MR. STAPLETON: Page, please, counsel.

[PROSECUTOR]: 3609.

BY [PROSECUTOR]:

Q (Quoting:)

"Did you ever fire that weapon?"

Do you remember me asking you that question?

A Um, yeah, I mean, I remember you asking me something about the gun, yeah.

Q Go ahead and open to page 3609.

A 3609?

Q Yes, sir.

(pause in proceedings.)

BY [PROSECUTOR]:

Q Do you see that, sir?

A Which – which line? Where are we starting at?

Q Line 24, question by me:

"Did you ever fire that weapon?"

Do you see that?

A Yes.

Q What was your answer to my question:

A I said, "No, I have never fired that weapon."

Q You said, "No, I never have," correct?

A Yes.

(35 RT 7066-7067.)

Thus, contrary to Lamb's representation that the prosecutor was testifying, the prosecutor was properly impeaching Johnson with his prior testimony. "The remedy for a litigant who believes a witness is trying to 'improve' his or her testimony is, of course, to question the witness about and, if necessary, impeach the witness with the prior testimony." (*People v. Holloway* (2004) 33 Cal.4th 96, 122, citing Evid. Code, §§ 770, 780, subd. (h), 1235.)

Finally, Lamb contends the prosecutor committed misconduct in the following exchange with Johnson about the murder weapon:

Q Where did you get that weapon from?

A From a street connection, from a connection.

Q Where? Where did that transaction take place?

A Costa Mesa.

Q And what time of the day?

A In the afternoon.

Q At what location?

A At a connection's house.

Q Inside a house?

A No. Outside.

Q You just said inside a house, didn't you?

A No. I said, "outside."

Q But then you caught yourself.

It can't be inside the house because you just told the jury that he fired it, right?

A No. It was outside in the alley.

Q So you were outside in the afternoon, and you get this gun from the connection, right?

A Yes.

Q And you said, to show you that he have [*sic*] bullet in it, he just fired it in the air?

A. Yes.

Q. Do you realize how ridiculous that sounds?

MR. STAPLETON: Objection; argumentative.

THE COURT: Sustained.

(35 RT 7068-7069.)

Lamb argues this constituted "a triple play" of the prosecutor misstating the facts, engaging in "negative vouching," and accusing defense counsel of colluding with Johnson to fabricate a defense. (AOB 189-190.) Lamb's argument fails to even make it to first base.

It is of course misconduct for a prosecutor to misstate the evidence. (*People v. Davis* (2005) 36 Cal.4th 510, 550; *People v. Boyette, supra,* 29 Cal.4th at p. 435.) However, the prosecutor did not misstate Johnson's testimony. As shown above, Johnson initially testified that he obtained the gun "[a]t" the connection's house. (35 RT 7068.) The word "at" is commonly "used as a function word to indicate presence in, on, or near: as (1) presence or occurrence in a particular place...." (Webster's 3d New Internat. Dict. (2002) p. 136.) Thus, it was reasonable for the prosecutor to interpret Johnson's initial answer as the transaction occurring within the home and to press Johnson on that description.

There was no improper vouching either. Like other expressions of personal opinion, prosecutors are prohibited from vouching about the credibility of witnesses by referring to evidence outside the record. (*People v. Turner* (2004) 34 Cal.4th 406, 432-433; *People v. Frye, supra,* 18 Cal.4th at p. 971.) Here, the prosecutor was challenging Johnson, based on the record, to explain why his prior answer was not "ridiculous." Johnson used the opportunity to clarify his testimony about firing the weapon. There was no misconduct.

Finally, Lamb argues the prosecutor's cross-examination of Johnson over his use of the word "at" somehow constituted aspersions against defense counsel. There was no reference whatsoever to defense counsel in this last exchange. (35 RT 6990.) Once again, Lamb ignores the prohibition on inferring the most damaging meaning from the prosecutor's questioning. (See *People v. Dykes, supra,* 46 Cal.4th at p. 772; *People v. Frye, supra,* 18 Cal.4th at p. 970.) There was no prosecutorial error during

Johnson's cross-examination within the meaning of either the state or federal Constitution.

3. There Was No Prejudice from Any Alleged Error in Cross-Examining Johnson

Where prosecutorial error rises to the level of a due process violation under the federal Constitution, it is reviewed for prejudice under the "beyond a reasonable doubt" standard set forth in *Chapman v. California, supra,* 386 U.S. at p. 24. (*People v. Booker* (2011) 51 Cal.4th 141, 186.) Otherwise, it is assessed for prejudice under the harmless error test for state law error articulated in *People v. Watson, supra,* 46 Cal.2d 818. (*Ibid.*)

For every instance of alleged misconduct during Johnson's cross-examination, the trial court sustained defense objections. Where "it is clear that the trial court monitored the situation and intervened when it felt it necessary to do so," the defendant must "demonstrate[] that the trial court's actions were insufficient to ameliorate any possible prejudice arising from the prosecutor's behavior." (*People v. Fuiava, supra,* 53 Cal.4th at p. 686)

Specifically, it is presumed that "prejudice was abated" where "objections to the argumentative element of the prosecutor's questioning" are sustained by the trial court. (*People v. Dykes, supra,* 46 Cal.4th at p. 764, citing *People v. Pinholster, supra,* 1 Cal.4th at p. 943, and *People v. Riggs, supra*, 44 Cal.4th at p. 299.) In *Dykes*, this Court found the prosecutor's argumentative questions which included, "The jury will be the judge of that, Mr. Dykes," and, "In other words, you're pretty good at lying with a straight face are you, Mr. Dykes [?]," were not prejudicial since defense objections to the comments were sustained. (*Ibid*; see also *People v. Fuiava, supra,* 53 Cal.4th at p. 687 [sustaining of objections precluded any prejudice]; *People v. Mayfield* (1997) 14 Cal.4th 668, 755 [party is generally not prejudiced by a question to which an objection is sustained].) Lamb fails to rebut this presumption.

In support of his claim of prejudicial misconduct, Lamb argues "the trial court described the prosecutor's cross-examination of Johnson as a 'pissing contest.' " (AOB 186, citing 36 RT 7178 [footnote omitted].) Lamb misreads the record. The court stated, "I'm going to try to say this as diplomatically as I possibly can, but this interplay *between both sides and Mr. Johnson* has disintegrated into a pissing contest that is really not necessary." (36 RT 7178, emphasis added.)

In any event, despite the contentious nature of the prosecutor's cross-examination of Johnson, Lamb "has not demonstrated that the trial court's actions to control the proceeding were inadequate to prevent any intemperate behavior by the prosecutor from prejudicing the jury against the defense case." (See *People v. Fuiava, supra,* 53 Cal.4th at p. 686.) Similarly, in *People v. Foster, supra,* 50 Cal.4th 1301, this Court in part rejected misconduct claims based on "seven questions to which objections were sustained" because the defendant did "not explain why the trial court's rulings sustaining the objections were inadequate to abate any prejudice." (*Id.* at p. 1351, citing *People v. Dykes, supra,* 46 Cal.4th at p. 764 [footnote omitted].)

The penalty phase retrial jury was instructed "[n]othing the attorneys say is evidence," "their remarks are not evidence," " [t]heir questions are not evidence," "[o]nly the witnesses' answers are evidence," "not [to] assume something is true just because one of the attorneys asked a question that suggested it was true," and to ignore any question to which an objection was sustained. (40 RT 8328;10 CT 2444-2445 [CALCRIM No. 222].)

It is presumed that the jurors understood and followed the court's instructions. (*Penry v. Johnson, supra,* 532 U.S. at p. 799; *Greer v. Miller, supra,* 483 U.S. at p. 766, fn. 8; *Richardson v. Marsh, supra,* 481 U.S. at p. 211; *People v. Sanchez, supra,* 26 Cal.4th at p. 852; *People v. Osband,*

supra, 13 Cal.4th at p. 714; *People v. Pinholster, supra,* 1 Cal.4th at p. 919.) Lamb fails to address or cite to anything in the record to rebut this presumption, instead offering generalizations about prosecutorial misconduct in the abstract and in other cases. (See AOB 203-207.)

Here, any potential prejudice from the alleged instances of misconduct was averted by the trial court's sustaining of the defense objections and the court's instructions. Accordingly, any prosecutorial error was harmless, and the penalty judgment should be affirmed.

B. The Prosecutor's Closing Argument

1. Lamb Forfeited Most of His Assertions of Prosecutorial Misconduct During Closing Argument

Prior to the guilt phase closing arguments, defense counsel agreed to wait until an appropriate break in the proceedings to lodge any objections rather than interrupt the prosecutor's argument, and the prosecutor agreed that doing so would not waive the objections. (21 RT 4220; 6 CT 1402.) It is apparent that this agreement did not extend to the penalty phase retrial since defense counsel raised a number of objections during the prosecutor's penalty phase closing argument. (See 41 RT 8364, 8367, 8371, 8377, 8395, 8425, 8426; 42 RT 8504.) However, the objections did not encompass most of the prosecutor's comments during closing arguments which Lamb now alleges were improper attacks on defense counsels' integrity (41 RT 8359, 8424, 8428-8429; 42 RT 8463, 8477-8478, 8502-8503), interjection of personal beliefs and vouching (41 RT 8357, 8360, 8377, 8442; 42 RT 8482) or other misconduct (41 RT 8380-8381, 8440).

As with any other prosecutorial misconduct claim, a defendant claiming misconduct in closing argument must give the trial court "an opportunity to attempt to alleviate the potential harm caused by the prosecutor's action." (*People v. Fuiava, supra,* 53 Cal.4th at p. 691, citing

People v. Boyette, supra, 29 Cal.4th at p. 432.) Thus, " 'a defendant must make a timely objection and ask the trial court to admonish the jury to disregard the prosecutor's improper remarks or conduct, unless an admonition would not have cured the harm.'" (*People v. Thomas* (2012) 54 Cal.4th 908, 937, quoting *People v. Davis* (2009) 46 Cal.4th 539, 612.) If no such objection, assignment of misconduct and request for admonition is made when the defendant had the opportunity to do so, the claim is forfeited. (*People v. Houston* (2012) 54 Cal.4th 1186, 1223; *People v. Dykes, supra,* 46 Cal.4th at p. 769; *People v. Hamilton, supra,* 45 Cal.4th at p. 956; *People v. Young, supra,* 34 Cal.4th at p. 1188; *People v. Brown, supra,* 31 Cal.4th at p. 553; *People v. Boyette, supra,* 29 Cal.4th at p. 432; *People v. McDermott, supra,* 28 Cal.4th at p. 1001.)

Curative admonitions to disregard the prosecutor's arguments as improper or misstatements of fact would have effectively cured any prejudice alleged by Lamb. Thus, appropriate objections to the alleged misconduct with requests for curative admonitions would not have been futile, and the aforementioned claims of prosecutorial misconduct in penalty phase closing argument are forfeited.

2. There Was No Prosecutorial Misconduct During Closing Argument

In any event, there was no misconduct. In closing argument, the " 'prosecutor is given wide latitude to vigorously argue his or her case and to make fair comment upon the evidence, including reasonable inferences or deductions that may be drawn from the evidence.' " (*People v. Dykes, supra,* 46 Cal.4th at p. 768, quoting *People v. Ledesma* (2006) 39 Cal.4th 641, 726.) This "wide range of permissible argument" applies to the penalty phase as well as the guilt phase. (*People v. Zambrano* (2007) 41 Cal.4th 1082, 1172, disapproved on another ground in *People v. Doolin, supra,* 45 Cal.4th at p. 421, fn. 5.)

"When attacking the prosecutor's remarks to the jury, the defendant must show that, '[i]n the context of the whole argument and the instructions' [citation], there was 'a reasonable likelihood the jury understood or applied the complained-of comments in an improper or erroneous manner. [Citations.]' " (*People v. Centeno, supra,* 60 Cal.4th at p. 667, quoting *People v. Marshall* (1996) 13 Cal.4th 799, 831, and *People v. Frye, supra,* 18 Cal.4th at p. 970.) As with other allegations of misconduct, " 'we "do not lightly infer" that the jury drew the most damaging rather than the least damaging meaning from the prosecutor's statements. [Citation.]' " (*Ibid.*, quoting *People v. Frye, supra,* 18 Cal.4th at p. 970.)

Out of a lengthy closing argument spanning 149 pages of Reporter's Transcript (41 RT 8355-8442; 42 RT 8454-8514), Lamb first alleges the prosecutor committed misconduct in the penalty phase retrial closing argument by attacking defense counsels' integrity. (AOB 191-195.) He bases this allegation on several statements lifted from the argument wherein the prosecutor labeled defense arguments as " 'not fair,' " " 'not right,' " " 'intellectually offensive,' " "not 'by accident,' " " 'all by design,' " " 'inappropriate based on the law,' " " 'taint[ing] [the jurors'] evaluation of the facts,' " " 'absolutely inappropriate' " to consider, and "offensive." (AOB 192-195, citing 41 RT 8359, 8424, 8428-8429; 42 RT 8463, 8477-8478, 8502-8503.)

However, in contrast to these characterizations of the defense *arguments*, the prosecutor made it clear that nothing he was going to argue should be construed "in any way, shape, or form" as saying defense counsel did anything wrong, unethical or inappropriate. (41 RT 8358, 8410-8411, 8424.) The distinction is important.

"[T]he prosecutor has wide latitude in describing the deficiencies in opposing counsel's tactics and factual account." (*People v. Bemore* (2000)

22 Cal.4th 809, 846.) For example, in *People v. Shazier, supra,* 60 Cal.4th, the prosecutor argued that "defense counsel had 'left something off one of his charts. *Frankly it was deceptive*.' " (*Id.* at p. 149 [italics in original].) This Court found "the prosecutor's fleeting claim of 'deceptive' argument by defense counsel was not an attack on counsel's personal integrity" and was a fair response to the defense charts. (*Id.* at p 150.)

In *People v. Hinton* (2006) 37 Cal.4th 839, the prosecutor argued the defense mitigation evidence was " ' "a concoction of half-truths presented by well-intentioned individuals who are caring but misguided," ' that defendant would not be entitled to mercy even if his mitigating evidence had been true, and that defense counsel had no additional mitigating evidence." (*Id.* at p. 908.) This Court found the "remarks were fair comment on the evidence, not an attack on defense counsel's integrity." (*Ibid.*)

In *People v. Linton* (2013) 56 Cal.4th 1146, the prosecutor argued: "particularly appalling is the audacity of defense counsel in calling or evoking [victim's] name in an attempt to make a plea for the lesser sentence in this case. Not only appalling, it was offensive.' " (*Id.* at p. 1206, footnote omitted.) This Court rejected the defendant's claim of prosecutorial misconduct, finding "[t]he comments did not constitute an improper argument or an attack on counsel's personal integrity." (*Ibid.*)

Similarly, the prosecutor's critiques of the defense arguments in Lamb's case – as offensive, inappropriate, unfair, not right, tainted or by design – do not constitute attacks on trial counsels' integrity. Like in *People v. Chatman, supra,* 38 Cal.4th at p. 387, the prosecutor "sometimes denigrated the defense *case* , including defense evidence, but he did not denigrate defense counsel personally." (*Id.* at p. 387, emphasis in original.)

Lamb next criticizes the prosecutor for being wrong in his prediction of one of the defense arguments. (AOB 194-195.) "Misconduct claims

also have been rejected where the prosecutor anticipates the flaws likely to appear in counsel's closing argument based on evidence that was introduced [citation][.]" (*People v. Bemore, supra,* 22 Cal.4th at p. 846, citing *People v. Thompson* (1988) 45 Cal.3d 86, 113.)

Lamb further criticizes the prosecutor for his use of the phrase "bless their hearts" when referring to defense counsel. (AOB 192 & fn. 83.) Lamb's characterization of the comment as sarcasm is unwarranted in light of the prosecutor's use of the phrase in a positive compliment of counsel (41 RT 8358-8359) as well as sincere references to Cathy's battle with alcoholism (41 RT 8382), Lamb's aunt (42 RT 8499) and the good life choices made by Lamb's brothers (42 RT 8505).

In any event, a prosecutor's use of sarcasm in closing argument is not misconduct. (See, e.g., *People v. Hamilton, supra,* 45 Cal.4th at p. 952 [sarcastic comment about defense witness "if arguably inappropriate...was not evidence, and did not constitute misconduct"]; *People v. Mendoza, supra,* 42 Cal.4th at p. 701 ["needlessly sarcastic" retort to defense objection not misconduct]; *People v. Thornton, supra,* 41 Cal.4th at p. 456 [alleged "sarcasm and snide comments" not misconduct]; *People v. Roldan, supra,* 35 Cal.4th at p. 720 ["sarcastic comments did not render defendant's trial fundamentally unfair"]; *People v. Cummings, supra* 4 Cal.4th at p. 1303, fn. 48 ["sarcastic hyperbole" did not rise to level of prosecutorial misconduct]; but see *People v. Hill, supra,* 17 Cal.4th at p. 821 ["a constant barrage" of unethical conduct including sarcastic attacks on counsel].)

Lamb also alleges the prosecutor committed misconduct through his "rule of one" argument. (AOB 196-197.) Fairly viewed in context, the argument was not misconduct. During his discussion of various defense witnesses , the prosecutor stated, "There is a rule of one in play here, and we're going to talk about that." (41 RT 8425.) Subsequently, the prosecutor argued: "Remember I told you about the rule of one. You go,

'What is that?' You might be going, 'Do they really believe that 12 people are going to buy that?' They don't want 12. You know what they want." (41 RT 8426.) Defense counsel objected as "improper argument," and the trial court overruled the objection, stating, "That's why it's called argument." (41 RT 8426.)

The prosecutor continued:

> One. If they can get one juror to take his or her focus away from the law, they can get one juror to take his or her focus away from the instructions that the judge is going to give you and gave you already, if they can get one juror to take his or her focus away from the evidence, you can't have a verdict. You can't have a verdict. They just want one.
>
> Be true to your oath to follow the law, to be reasonable, to be objective, to be fair, to be open-minded, and to do the right thing.

(41 RT 8426-8427.)

Later in his argument while discussing Andrea (Iacono) Metzger's testimony, the prosecutor stated: "But it gets better because I want to read to you the testimony that's before you to see how that rule of one that they're trying to do, rule of one, they just want one juror" (42 RT 8488) and "But see, it's that idea about, if we can let the jury think [Johnson is] the boogeyman and let somebody be left with that impression, maybe it will work, maybe we'll get one juror" (42 RT 8491).

While discussing Gordon Bridges, the prosecutor referred to defense counsel's opening statement and argued:

> He said it (indicating), he said it, because they want that one juror to get that impression and never let go of it. "Hey, Bridges was a lifelong friend of Scott Miller"; they're going to say this, maybe there is some weight to it. He met her for the first time when she's in court sitting in the murder trial of her son.

(42 RT 8497.)

During his discussion of Bernard Cain, the prosecutor stated:

> And Ms. Erickson gets up and goes, "Well, you know, he can't have your address because he's a witness." Wait a second. He lives next door to him. Like he needs his address. He lives next door to him, he's his neighbor. But see, they want one juror, they want one, they want just one, just one. Oh, he's a witness; you can't contact a witness. Curry is a witness; she visited him last Friday. Remember that, Daniel [*sic*] Curry, the lady? So don't fall for that.

(42 RT 8497-8498.)

In *People v. Boyette, supra,* 29 Cal.4th 381, the prosecutor

> argued the evidence of guilt was quite strong, "[a]nd if there is one of you who can't see what happened in this courtroom, you're [*sic*] intelligence should be absolutely insulted by all the lying that's gone on here, if one of you can't see that, you['d] better step back, take a deep breath, think about your common sense and listen to your fellow jurors, because you are not seeing the forest through the trees, if you can't see this case. It is overwhelming."

(*Id.* at pp. 436-437.)

The defendant claimed on appeal "that the prosecutor committed misconduct by encouraging holdout jurors to capitulate to the majority." (*People v. Boyette, supra,* 29 Cal.4th at p. 436.) Rejecting the misconduct claim, this Court found

> the prosecutor did not exhort holdout jurors to submit to the majority's views, but argued the evidence of guilt was so strong that if any juror had doubts, they should step back and use their common sense. The exhortation to "listen to your fellow jurors" in this context meant to listen to the arguments of one's fellow jurors.

(*Id.* at p. 437.) Here, the prosecutor's explanation of his "rule of one" was similarly that no juror should be diverted from focusing on the evidence and the law without reference to the deliberation process or capitulation to majority views. (41 RT 8426-8427.)

Also, the prosecutor did not attempt to humiliate or shame the jurors into acquiescing to a verdict. He simply asked that no juror be diverted from his or her obligation to focus on the law and evidence. Thus, this case stands in contrast to *People v. Sanchez* (2014) 228 Cal.App.4th 1517, where the prosecutor committed misconduct by characterizing the defense argument as needing one juror who was "*gullible enough*" and "*naive enough*" to "*be hoodwinked*" into believing the defendant's alibi "[*s*]*o that the defendant can go home and have a good laugh at your expense.*" (*Id.* at pp. 1522-1523, 1528, emphasis in original.)

Lamb argues the prosecutor's "rule of one" was an attack on defense counsels' integrity because it implied they had an improper motive and strategy and did not believe in Lamb's innocence or the propriety of a life sentence. (AOB 196-197.) Again, Lamb lightly infers the most damaging meaning from the prosecutor's argument in contravention of the standard of review. (See *People v. Centeno, supra,* 60 Cal.4th at p. 667; *People v. Frye, supra,* 18 Cal.4th at p. 970.)

"[T]he prosecution is entitled to argue that the facts presented by a defendant at the penalty phase of a death penalty case do not warrant sympathy." (*People v. Thornton, supra,* 41 Cal.4th at p. 456.) It is also proper for a prosecutor to implore the jurors to use common sense. (*People v. Boyette, supra,* 29 Cal.4th at p. 437.) It is not reasonably likely that the jurors would have understood the prosecutor's "rule of one" as an attack on defense counsels' integrity. (See *People v. Centeno, supra,* 60 Cal.4th at p. 667; *People v. Frye, supra,* 18 Cal.4th at p. 970.)

"Although defendant singles out particular sentences to demonstrate misconduct, we must view the statements in the context of the argument as a whole." (*People v. Cole* (2004) 33 Cal.4th 1158, 1203.) Thus, as in *Cole*, this Court should find it is "not reasonably likely that the jury understood the prosecutor' references to defense counsel as 'deceiv[ing],' 'unfair,'

'misleading,' or 'tricky' to be personal attacks on counsel's integrity." (*Ibid.*) The prosecutor's comments here which Lamb lifts out of context were not attacks on defense counsels' integrity.

Lamb next alleges the prosecutor committed misconduct by interjecting his personal beliefs about the evidence and by improperly vouching during closing argument. (AOB 197-201.) Lamb bases this claim on statements by the prosecutor that Lamb was an "evil doer," "Nazi lover," "hate-filled," "richly deserv[ing]" of a death sentence and treated his victim "like a piece of trash." (AOB 198, citing 41 RT 8357, 8377.)

The prosecutor's comments were proper.

> Argument may include opprobrious epithets warranted by the evidence. ([*People v.*] *Sandoval* [1992] 4 Cal.4th 155, 180, 14 Cal.Rptr.2d 342, 841 P.2d 862.) Where they are so supported, we have condoned a wide range of epithets to describe the egregious nature of the defendant's conduct. (E.g., [*People v.*] *Farnam* [2002] 28 Cal.4th 107, 168, 121 Cal.Rptr.2d 106, 47 P.3d 988 [defendant is "monstrous," "cold-blooded," vicious, and a "predator"; evidence is "horrifying" and "more horrifying than your worst nightmare"]; *People v. Thomas* (1992) 2 Cal.4th 489, 537, 7 Cal.Rptr.2d 199, 828 P.2d 101 (*Thomas*) [defendant is "mass murderer, rapist," "perverted murderous cancer," and "walking depraved cancer"]; [*People v.*] *Sully* [1991] 53 Cal.3d 1195, 1249, 283 Cal.Rptr. 144, 812 P.2d 163 [based on facts of crime, defendant is "human monster" and "mutation"].)

(*People v. Zambrano, supra,* 41 Cal.4th at p. 1172; see also *People v. Montes, supra,* 58 Cal.4th at p. 890 ["referring to defendant as a 'monster,' a 'sociopath,' a 'reprehensible excuse for a human being,' and an 'urban terrorist' "]; *People v. Edwards, supra,* 57 Cal.4th at p. 764 ["calling defendant a 'monster' and an 'animal' " who 'left his victim "lying there 'like so much garbage' "]; *People v. Thomas, supra,* 54 Cal.4th at p. 943 [referring to defendant "as a 'predator of the women of Alameda County,' a 'predator,' a 'depraved predator,' a 'vile, nasty predator of women,' a 'hyena,' a 'sociopath' and a 'walking cancer' that should be culled from

society by imposition of the death penalty"]; *People v. Garcia* (2011) 52 Cal.4th 706, 759-760 [referring "to defendant as an 'animal' and a 'predator' who pursued 'sadistic passion' "]; *People v. Friend* (2009) 47 Cal.4th 1, p. 84 ["characterizing defendant as an 'insidious little bastard,' with 'no redeeming social value,' and being 'without feeling' and without sensitivity' "]; *People v. McDermott, supra,* 28 Cal.4th at p. 1003 ["comparing defendant to a germ, a mad dog, and a snake"].)

Here, the prosecutor's epithets were warranted by the evidence which showed Lamb ambushed and executed a defenseless man for doing no more than violating the rules of his gang, and attempted to kill a police officer days later with the same gun. There was no misconduct.

Lamb also argues the prosecutor's statements that the penalty case "was not even close" was the interjection of personal experience and outside knowledge. (AOB 200.) However, viewed in proper context, they were clearly comments on the relative weights of the aggravating and mitigation evidence presented at trial and the applicable law. (See 41 RT 8377-8378, 8442; 42 RT 8482.) Since the prosecutor was not referring to matters outside the record, the argument was proper. (See *People v. Huggins, supra,* 38 Cal.4th at pp. 206-207.)

Lamb further cites sarcastic comments by the prosecutor that he "almost fainted" when he heard that Lamb was nice to Mr. Cain's dog, he "almost fell out of [his] chair" when defense counsel described Gordon Bridges his best witness, and defense counsel had "very expensive taste" in obtaining a defense expert who the prosecutor "moved heaven and earth" to produce for trial. (AOB 198-199, citing 41 RT 8360, 8377, 8396 [only fainting comment was interrupted by an objection which was overruled].) Such sarcasm based on the evidence was not misconduct. (See *People v. Hamilton, supra,* 45 Cal.4th at p. 952; *People v. Mendoza, supra,* 42 Cal.4th at p. 701; *People v. Thornton, supra,* 41 Cal.4th at p. 456; *People v.*

Roldan, supra, 35 Cal.4th at p. 720; *People v. Cummings, supra* 4 Cal.4th at p. 1303, fn. 48.)

Lamb next alleges the prosecutor committed misconduct by comparing him to Nazi war criminals and contrasting him with Nelson Mandela, which he claims violated the trial court's prior ruling barring "worst of the worst" arguments as inappropriate. (AOB 201-202, citing 39 RT 8119-8123, 41 RT 8381.) "It is misconduct for a prosecutor to violate a court ruling by eliciting or attempting to elicit inadmissible evidence in violation of a court order" or referring to such evidence in opening statement or closing argument. (*People v. Crew, supra,* 31 Cal.4th at p. 839.) That did not happen here.

Again considering the prosecutor's comments in their proper context, they did not violate the court's order. While discussing subdivision (d) ("factor (d)") of section 190.3 and whether or not the defendant was under extreme mental or emotional disturbance at the time of the murder, the prosecutor argued:

> You're going to say, "What about Mazza? Maybe Mazza put a lot of duress on him." No. Do you have any evidence about that?
>
> They might, I don't know if they're going to do that, but they tried to do it with Epperson. "If you get an order and you don't do it, what happens?" It's very interesting that that's kind of the quasi excuse.
>
> Remember who in the past have used – have tried to use that excuse, "I was just following orders." Right? Right? In the Nuremberg trial. "I'm just following orders." Right under his [Lamb's] eye, that swastika.
>
> Don't fall for "he was just following orders." He made choices. He could have spent his time in prison playing cards and reading. That's not what he wants.

(41 RT 8380-8381.)

Thus, contrary to Lamb's argument, the prosecutor was not referring to Nazi war criminals to portray Lamb as "the worst of the worst." Rather, the prosecutor was offering an illustration *based on the record* for rejecting certain factor (d) evidence suggested during Lieutenant Epperson's cross-examination at the penalty phase retrial. This was proper. (See *People v. Bemore, supra,* 22 Cal.4th at p. 846; *People v. Thompson* (1988) 45 Cal.3d 86, 113 [proper for prosecutor to anticipate defense argument based on evidence presented at trial].)

Contrary to Lamb's argument, the mere mention of Nazis or other infamous people in penalty phase closing argument is not misconduct. For example, in *People v. McDermott, supra,* 28 Cal.4th 946, the prosecutor compared the defendant "to a Nazi working in the crematorium by day and listening to Mozart by night." (*Id.* at p. 1003.) Rejecting the defendant's misconduct claim, this Court explained:

> The prosecutor was not comparing defendant's conduct in arranging Eldridge's murder with the genocidal actions of the Nazi regime. Rather, the prosecutor was arguing that human beings sometimes lead double lives, showing a refined sensitivity in some activities while demonstrating barbaric cruelty in others. In the context of this case, where the evidence showed defendant to be both a caring and competent nurse and a person capable of plotting a brutal murder, the argument was appropriate.

(*Ibid.*)

In *People v. Dykes, supra,* 46 Cal.4th 731, the prosecutor invoked the Jim Jones mass suicide in Guyana in closing argument. (*Id.* at p. 788.) This Court rejected the defendant's claim of prosecutorial misconduct as follows:

> The prosecutor's point was that defendant did not act under the domination of another person. The reference to other named criminals served to illustrate the very different circumstances under which section 190.3 factor (g) in mitigation might apply. The prosecutor merely argued that unlike the persons who were

> dominated by Jim Jones, for example, defendant acted alone. Contrary to defendant's claim, the prosecutor did not suggest defendant himself was a mass murderer or serial killer with followers under his domination.

(*Ibid.*)

Like in *McDermott* and *Dykes*, the prosecutor's argument about the Nuremberg trials was not to compare Lamb to infamous criminals, but rather to illustrate the weaknesses of the mitigation suggested by defense counsel's cross-examination of Lieutenant Epperson that Lamb was forced to kill Miller or committed the murder under duress. Moreover, Lamb fails to appreciate that the evidence presented at the penalty phase retrial showed him to be a White Supremacist with Nazi swastika tattoos and iron crosses who celebrated the philosophy of Friedrich Nietzsche as well as the struggles and beliefs of Adolph Hitler. (See 38 RT 7696-7700; 39 RT 8095-8098.) Thus, whereas Nazi references might be deemed inappropriate, outside the record or inflammatory in other cases, they were not here.

The prosecutor's reference to Nelson Mandela was also proper when considered in context. During his discussion of the mitigation evidence, the prosecutor argued:

> But who are you going to impose the death penalty on? Because they want you to think it's Little Mikey, they want you to think it's Little Mikey, the loving brother. No. It's Mr. Lamb, the cold-blooded murderer, Mr. Lamb who told C.D.C. in February of 2001 that P.E.N.I. was his only support system, by choice. Because you know [what] happened before. You have Mrs. Williams opened her house to him, gave him a job, fed him, helped him have his own place. It's by choice that P.E.N.I. was his only support system. And when they get up and say, "No, no, he had to do it to survive in prison," that's baloney. That's just excuses. That's just – that's just, it's always somebody else's fault, it's always somebody else's fault, it's the system's fault, Mr. Lamb who took Scott from his mother, his

> unborn son and his family, Mr. Lamb who tried to kill a peace officer, Gunderson, Walsh, Munding, and shank you later.
>
> I want to talk – they want to talk about adversity. I want to talk to you about adversity, yeah, yeah, adversity about his childhood. What does adversity breed? What about somebody like Nelson Mandela? That's okay. New Orleans, we had the big hurricane. It was amazing, you can watch it on T.V., flooding, right, horrible circumstances, and you had two different kind of people. You had the people that go on their small boats –

(42 RT 8503-8504.)

After defense counsel objected to the argument as improper and the objection was overruled, the prosecutor continued:

> – got on their small boats to try to help others, and then you have people that were breaking into businesses and breaking into houses to steal. Choices. People make choices, people make choices. And there are consequences, there are consequences for the choices. People have the choice to do good.

(42 RT 8504-8505.) Subsequently, the prosecutor discussed how Lamb's brothers made choices to do good. (42 RT 8505.)

Thus, the prosecutor was discussing Nelson Mandela, Hurricane Katrina and Lamb's brothers in the context of mitigation evidence suggesting that Lamb's parents and the prison system were to blame for Lamb's criminality and arguing Lamb made his own choices in that regard. Similarly, in *People v. Edwards, supra,* 57 Cal.4th 658, the defendant testified that his drug and alcohol problems prevented him from obtaining a good job and succeeding as a father and husband. (*Id.* at p. 736.) This Court held it was not misconduct for the prosecutor to challenge the defendant on cross-examination that "he was not willing to take responsibility for his choices" and that the defendant "knew 'darn well' that individuals who wanted to get help and recover from addiction are able to do that." (*Ibid.*)

Lamb's last allegation of misconduct in penalty phase closing argument is that the prosecutor misstated the facts by arguing that Lamb was wearing contact lenses and could see Officer Helmick was a police officer at the time of the March 11 incident. (AOB 202-203.) Once again Lamb cites the prosecutor's comment out of context to create a misconduct claim.

The prosecutor's argument about the contact lenses was as follows:

> He's wearing contacts, remember that? Remember that in the record? Now, remember the date, October of 2000 and 1. Few months – and he's in custody when they're doing his eye exam. And Mr. Stapleton sits down, and I come up and say, "Were does it say here 'wears contacts'? 'Likes to wear contacts' " [¶] Don't fall for this: "He didn't have his glasses, so he couldn't see. He couldn't know those were cops."

(41 RT 8440.) Thus, precisely contrary to Lamb's representation, the prosecutor was challenging *defense counsel's position that Lamb wore contacts* rather than arguing that Lamb was wearing contacts or glasses at the time of the March 11 incident. Even assuming the prosecutor's argument was a suggestion that Lamb was wearing contacts, that would have been fair comment on the evidence presented through Dr. Augustine. There was no misconduct.

3. There Was No Prejudice from the Prosecutor's Closing Argument

Lamb fails to demonstrate any prejudice from the alleged errors.

> [A]rguments of counsel "generally carry less weight with a jury than do instructions from the court. The former are usually billed in advance to the jury as matters of argument, not evidence [citation], and are likely viewed as the statements of advocates; the latter, we have often recognized, are viewed as definitive and binding statements of the law."

(*People v. Mendoza, supra,* 42 Cal.4th at p. 703, quoting *Boyde v. California* (1990) 494 U.S. 370, 384 [110 S.Ct. 1190, 108 L.Ed.2d 316].)

As previously noted, the penalty phase retrial jury was instructed that "[n]othing the attorneys say is evidence" and that "their remarks are not evidence." (40 RT 8328;10 CT 2444-2445 [CALCRIM No. 222].) It is presumed that the jurors understood and followed the court's instructions. (*Penry v. Johnson, supra,* 532 U.S. at p. 799; *Greer v. Miller, supra,* 483 U.S. at p. 766, fn. 8; *Richardson v. Marsh, supra,* 481 U.S. at p. 211; *People v. Sanchez, supra,* 26 Cal.4th at p. 852; *People v. Osband, supra,* 13 Cal.4th at p. 714; *People v. Pinholster, supra,* 1 Cal.4th at p. 919.) Lamb again fails to address or cite to anything in the record to rebut this presumption, offering instead generalizations about prosecutorial misconduct in the abstract and in other cases. (See AOB 203-207.) Accordingly, there is no reasonable possibility of prejudice even assuming prosecutorial error.

Lamb argues the alleged misconduct, if not prejudicial standing alone, was nevertheless prejudicial when considered in context of all of the other alleged trial errors. (AOB 206-207.) Where none of the individual claims of prosecutorial misconduct have merit, the defendant's claim that he or she was prejudiced by the cumulative impact of the alleged misconduct should be rejected as well. (*People v. Collins* (2010) 49 Cal.4th 175, 208; *People v. Parson* (2008) 44 Cal.4th 332, 368; *People v. Mendoza, supra,* 42 Cal.4th at p. 706; *People v. Alfaro* (2007) 41 Cal.4th 1277, 1330.) Where each of the other claims of error are meritless, the contention of cumulative error should likewise be rejected. (*People v. Anderson, supra,* 25 Cal.4th at p. 606; *People v. Bolin, supra,* 18 Cal.4th at p. 335.) As discussed herein as well as in Arguments I through IV, *ante*, and Arguments VI through VII, *infra*, there were no errors in the penalty phase retrial. Accordingly, there can be no cumulative error, and the penalty judgment should be affirmed.

VI. LAMB FAILS TO SHOW ANY JUDICIAL MISCONDUCT

In Claim Six, Lamb contends the trial court committed judicial misconduct in the penalty phase retrial voir dire by giving incorrect and misleading statistics about death row inmates. Lamb argues the court's comment minimized the jury's responsibility in determining the proper penalty in violation of his due process right to a fair trial and was so prejudicial that it requires reversal of the penalty judgment. (AOB 207-216.)

Lamb forfeited this claim by raising no objection in the trial court where any alleged misconduct could have easily been remedied. Moreover, Lamb views the trial court's comment out of context to create a judicial misconduct claim. Furthermore, Lamb could not have been prejudiced by the court's comment. Accordingly, Lamb's judicial misconduct claim should be rejected, and the judgment affirmed.

During its introductory comments in voir dire for the penalty phase retrial, the trial court addressed some recurring responses it observed from the juror questionnaires. One of those comments was as follows:

> I did find it somewhat interesting that some aspect of the media has done a very good selling job because a few of you have decided that the death penalty is weighted against minorities. I'm not sure where that information comes from, but it is not accurate. The majority of people who have been executed since 1976 are white; the majority of people on death row in the country right now are white. *So not that that makes any difference*; I just found it curious that a lot of people have bought into that. It's not the case.

(29 RT 5831-5832 [emphasis added].)

A. Lamb Forfeited his Claim of Judicial Misconduct by Failing to Object Below

To preserve a claim of judicial misconduct for appeal, the defendant is required to make a timely objection and request a jury admonition in the

trial court unless an admonition would have not cured the alleged harm. (*People v. Abel* (2012) 53 Cal.4th 891, 914; *People v. Elliott* (2012) 53 Cal.4th 535, 554-555; *People v. Monterroso* (2004) 34 Cal.4th 743, 761; *People v. Boyette, supra,* 29 Cal.4th at p. 459.) There was no objection by defense counsel at the time of the comment or the next recess. (See 29 RT 5831-5832, 5890-5895.) Since Lamb raised no objection to the alleged judicial misconduct in the trial court, his claim is forfeited on appeal.

In *People v. Banks* (2014) 59 Cal.4th 1113, the defendant claimed on appeal that the trial court erred in voir dire in describing to the jury how to weigh aggravating and mitigating factors and by failing to explain that factor (k) evidence permits consideration of any extenuating circumstance even if it is not a legal excuse for the crime. (*Id.* at p. 1201.) In finding the lack of objection in the trial court did not forfeit the claim, this Court stated, "We have held that a defendant generally cannot forfeit a claim that the trial court erred at voir dire when describing to prospective jurors their penalty phase duties, just as other instructional errors cannot usually be forfeited by a defendant's mere failure to object." (*Ibid.*, citing *People v. Dunkle* (2005) 36 Cal.4th 861, 929, disapproved of on other grounds by *People v. Doolin, supra,* 45 Cal.4th at p. 421, fn. 22.)

Here, in contrast to *Banks*, Lamb cites no instructional-type error in voir dire. Rather, he characterizes the alleged misconduct as a general minimizing of the jurors' sense of responsibility in rendering a penalty verdict. (See AOB 207-216.)

Thus, Lamb's failure to object during the trial court's voir dire has forfeited the claim. This Court has similarly found claims of judicial misconduct in voir dire forfeited. (See *People v. Abel, supra,* 53 Cal.4th at pp. 914, 916 [joking during voir dire in addition to other alleged misconduct in trial proceedings]; *People v. Elliott, supra,* 53 Cal.4th at pp. 553-555 [discussion of punishments costs during voir dire]; *People v.*

Monterroso, supra, 34 Cal.4th at p. 761 ["court's comments, quips, and banter during voir dire and the penalty phase"].)

Here, a timely objection and admonition to the effect that (as suggested by Lamb on appeal) there is disagreement about the statistics concerning death row inmates would have easily cured any harm from the alleged misconduct. Instead of affording the trial court the opportunity to remedy the alleged error, Lamb has waited until after receiving an unfavorable penalty verdict to claim misconduct. His judicial misconduct claim should thus be deemed forfeited.

B. There Was No Judicial Misconduct During Voir Dire

Notwithstanding forfeiture, there was no judicial misconduct.

> Trial courts must of course "be evenhanded in their questions to prospective jurors...and should inquire into the jurors' attitudes both for and against the death penalty to determine whether these views will impair their ability to serve as jurors." [Citation.] But the court has "broad discretion over the number and nature of questions about the death penalty."

(*People v. Mills* (2010) 48 Cal.4th 158, 189, quoting *People v. Champion* (1995) 9 Cal.4th 879, 908-909, and *People v. Stitely, supra,* 35 Cal.4th at p. 540.) Moreover, a comment alleged to be judicial misconduct must be fairly viewed in its proper context. (See *People v. Abel, supra,* 53 Cal.4th at p. 921 ["Defendant somewhat mischaracterizes the court's comments"]; *People v. Elliot, supra,* 53 Cal.4th at p. 557 ["defendant ignores the words that we have italicized"].)

For example, in *People v. Elliott, supra,* 53 Cal.4th 535, the defendant complained that "the trial court and the prosecutor gave prospective jurors incorrect and irrelevant information about the costs incurred by the government to impose the death penalty in a particular case as compared to the costs of imposing a sentence of life imprisonment

without the possibility of parole." (*Id.* at pp. 553-554.) However, the trial court discussed the issue in the context of cautioning the prospective jurors against considering the costs of punishment in determining the appropriate penalty. (*Id.* at p. 554.)

This Court rejected the claim of judicial misconduct, finding the "trial court and the prosecutor correctly advised the prospective jurors that in deciding the penalty issue, if the case reached the penalty stage, they would not be permitted to consider the respective government costs of the death penalty and life imprisonment without parole." (*People v. Elliott, supra,* 53 Cal.4th at p. 555.) Likewise, regardless of the accuracy of its statistics for death row inmates, here the trial court referenced the matter in the context of properly cautioning the prospective jurors against considering public opinion such as whether or not the death penalty is implemented in a discriminatory manner in their penalty determination. (29 RT 5831[court discounting its statistics as "not that that makes any difference"].)

Lamb attempts to rely on *Caldwell v. Mississippi* (1985) 472 U.S. 320 [105 S.Ct. 2633, 86 L.Ed.2d 231] as support for his claim. (AOB 208-214.) However, "*Caldwell* error occurs only when the remarks to the jury concerning its role in the sentencing process are inaccurate or misleading in a way that allows the jury to feel less responsible than it should for the sentencing decision." (*People v. Elliott, supra,* 53 Cal.4th at p. 556, citing *Romano v. Oklahoma* (1994) 512 U.S. 1, 9 [114 S.Ct. 2004, 129 L.Ed.2d 1].)

No such error has been demonstrated here. First, Lamb fails to show the trial court's comment was incorrect. The court stated that "[t]he majority of people who have been executed since 1976 are white [.]" (29 RT 5831.) Lamb concedes that eight of the thirteen inmates executed in California since 1976 were White. (AOB 209.)

The court further stated on May 5, 2008, that "the majority of people on death row *in the country right now* are white." (29 RT 5831, emphasis added.) Lamb contests this by citing *current* statistics from August 6, 2014. (AOB 208.) Thus, Lamb fails to show the trial court's comment was inaccurate or misleading.[100]

Moreover, the thrust of the court's comment was to caution the prospective jurors against allowing their penalty determination to be affected by public opinion about the death penalty. Accordingly, as in *People v. Elliott, supra,* 53 Cal.4th 535, appellant "identifies nothing in these remarks that was inaccurate or misleading in a way that would allow the jury to feel less responsible than it should for the sentencing decision." (*Id.* at p. 559; see also *People v. Abel, supra,* 53 Cal.4th at p. 921 [comments "entailed no suggestion that the court favored one penalty over the other, or favored the prosecution over the defense"].) There was no *Caldwell* error or judicial misconduct.

Because there was no judicial misconduct, any claim that Lamb's due process right to a fair trial or Eighth Amendment right to a reliable penalty determination must be rejected as well. (*People v. Boyette, supra,* 29 Cal.4th at p. 461.) The judgment should be affirmed.

C. The Trial Court's Comments During Voir Dire Did Not Prejudice Lamb

In order to receive relief on a judicial misconduct claim, the defendant must establish that the misconduct was prejudicial. (*People v. Abel, supra,* 53 Cal.4th at p. 914.)

> " '[O]ur role ... is not to determine whether the trial judge's conduct left something to be desired, or even whether some

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[100] Lamb mistakenly states that "the first penalty phase jury declined to impose the death penalty" (AOB 210, fn. 86) when the first jury actually deadlocked and reached no penalty verdict (9 CT 2094-2095).

> comments would have been better left unsaid. Rather, we must determine whether the judge's behavior was so prejudicial that it denied [the defendant] a fair, as opposed to a perfect, trial.' " (*People v. Snow* (2003) 30 Cal.4th 43, 78, 132 Cal.Rptr.2d 271, 65 P.3d 749.) We make that determination on a case-by-case basis, examining the context of the court's comments and the circumstances under which they occurred. (*People v. Cash* (2002) 28 Cal.4th 703, 730, 122 Cal.Rptr.2d 545, 50 P.3d 332.) Thus, the propriety and prejudicial effect of a particular comment are judged by both its content and the circumstances surrounding it. (*People v. Melton* (1988) 44 Cal.3d 713, 735, 244 Cal.Rptr. 867, 750 P.2d 741.)

(*Ibid.*)

As discussed above, when considered in its proper context, the trial court's comment about death row inmates was to impress upon the prospective jurors that public opinion about matters such as whether the death penalty is implemented in a discriminatory manner must not affect their verdict; the comment did not favor one penalty or party over the other; and the comment made no reference to the weight of, and in no way lessened, the jury's responsibility in setting a penalty. Thus, any alleged impropriety in the remark does not warrant reversal.

Moreover, the jurors were instructed, "In making your decision about penalty, you must assume that the penalty you impose, death or life without the possibility of parole, will be carried out." (40 RT 8352;10 CT 2488 [CALCRIM No. 766].) Judicial misconduct can be cured by the jury instructions. (See *People v. Boyette, supra,* 29 Cal.4th at p. 460.)

Lamb cites to *People v. Sturm* (2006) 37 Cal.4th 1218, for his prejudice argument. (AOB 214-215.) In *Sturm*, the trial court told the prospective jurors that premeditated and deliberate murder was "*a gimme here*," and "*that is a gimme. This is premeditated, all over and done with,* so you are in the penalty phase." (*Id.* at p. 1231, emphasis in original.) This Court found

> that the trial judge made inaccurate statements that prejudiced defendant and committed misconduct by persistently making inappropriate and disparaging comments directed toward defense counsel and defense expert witnesses during the second penalty phase trial, and that these errors require reversal of the death sentence.

(*Id.* at p. 1230.)

Here, the alleged judicial misconduct consists of a single comment which was not necessarily inaccurate and was penalty-neutral, and there were no inappropriate disparaging comments against defense counsel or defense witnesses. Thus, Lamb's reliance on *Sturm* is misplaced.

Lamb argues the judicial misconduct, if not prejudicial standing alone, was prejudicial when considered in context of the other alleged trial errors. (AOB 215-216.) As discussed herein as well as in Arguments I through V, *ante*, and Argument VII, *infra*, there were no errors in the penalty phase retrial. Since none of Lamb's claims of error in the penalty phase retrial has merit, there can be no cumulative error. (See *People v. Anderson, supra,* 25 Cal.4th at p. 606; *People v. Bolin, supra,* 18 Cal.4th at p. 335.) The penalty judgment should be affirmed.

VII. THE TRIAL COURT PROPERLY EXCUSED A POTENTIAL JUROR FOR CAUSE AFTER SHE REPEATEDLY STATED THAT SHE COULD NOT IMPOSE THE DEATH PENALTY BECAUSE IT CONFLICTED WITH HER RELIGIOUS CONVICTIONS

In Claim Seven, Lamb contends the trial court erroneously excused Prospective Juror number 144 for the penalty phase retrial in violation of his rights to an impartial jury, due process, equal protection and a reliable sentencing determination, requiring reversal of the penalty judgment. (AOB 216-227.) A fair and complete reading of the record shows this claim to be completely meritless, as the trial court properly excused Potential Juror No. 144 for cause.

> "Under decisions of the United States Supreme Court, prospective jurors who express personal opposition to the death penalty are not automatically subject to excusal for cause as long as 'they state clearly that they are willing to temporarily set aside their own beliefs in deference to the rule of law.' (*Lockhart v. McCree* (1986) 476 U.S. 162, 176 [106 S.Ct. 1758, 90 L.Ed.2d 137]; see *Witherspoon v. Illinois* (1968) 391 U.S. 510, 522 [88 S.Ct. 1770, 20 L.Ed.2d 776]) To determine if a prospective juror is excusable for cause without compromising a defendant's constitutional rights, we inquire whether the prospective juror's views on the death penalty 'would "prevent or substantially impair the performance" ' of the juror's duties in accordance with the court's instructions and his or her oath. (*Wainwright v. Witt* (1985) 469 U.S. 412, 424 [105 S.Ct. 844, 83 L.Ed.2d 841] (*Witt*).)" (*People v. Riccardi* (2012) 54 Cal.4th 758, 778, 144 Cal.Rptr.3d 84, 281 P.3d 1.) "Under *Witt*, a prospective juror is 'substantially impaired' and may properly be excused for cause if he or she is unable to follow the trial court's instruction and 'conscientiously consider all of the sentencing alternatives, including the death penalty where appropriate.' " (*People v. McKinnon* (2011) 52 Cal.4th 610, 635, 130 Cal.Rptr.3d 590, 259 P.3d 1186.)

(*People v. Capistrano* (2014) 59 Cal.4th 830, 855.)

The party moving to excuse the juror for cause bears the burden of demonstrating that the *Witt* standard was satisfied. (*People v. Stewart, supra,* 33 Cal.4th at p. 445.) *Witt* error requires reversal of the penalty judgment only. (*Id.* at p. 455, citing *People v. Heard* (2003) 31 Cal.4th 946, 972-982 [not structural error].)

" '[C]ourts reviewing claims of *Witherspoon-Witt* error ... owe deference to the trial court, which is in a superior position to determine the demeanor and qualifications of a potential juror.' " (*Bryant, supra,* 60 Cal.4th at p. 400, quoting *Uttecht v. Brown* (2007) 551 U.S. 1, 22 [127 S.Ct. 2218, 167 L.Ed.2d 1014], and *People v. Thomas* (2012) 53 Cal.4th 771, 790-791, fn. 3.)

> "A finding of bias 'may be upheld even in the absence of clear statements from the juror that he or she is impaired because

> "many veniremen simply cannot be asked enough questions to reach the point where their bias has been made 'unmistakably clear'; these veniremen may not know how they will react when faced with imposing the death sentence, or may be unable to articulate, or may wish to hide their true feelings." [Citation.] Thus, when there is ambiguity in the prospective juror's statements, "the trial court, aided as it undoubtedly [is] by its assessment of [the venireman's] demeanor, is entitled to resolve it in favor of the State." [Citation.]' [Citations.]" (*People v. Bramit* (2009) 46 Cal.4th 1221, 1235, 96 Cal.Rptr.3d 574, 210 P.3d 1171.) " ' "The trial court's resolution of these factual matters is binding on the appellate court if supported by substantial evidence. [Citation.]" ' [Citations.]" (*People v. Lancaster* (2007) 41 Cal.4th 50, 79, 58 Cal.Rptr.3d 608, 158 P.3d 157.)

(*Id.* at pp. 399-400; see *People v. Capistrano, supra,* 49 Cal.4th at p. 861 [*Witt* " 'does not require that a juror's bias be proved with "unmistakable clarity" ' "].)

Question No. 24 of the juror questionnaire asked, "Is there anything about the convictions in this case that would prevent you from being fair and impartial to both the prosecution and the defense when considering what penalty should be imposed?" and "If so, what?" (10 J.Q. CT 2770.) Prospective Juror No. 144 answered in the affirmative and explained, "If sentencing may lead to execution, I would feel conflicted to proceed." (10 J.Q. CT 2770.)

Question No. 49 asked, "One of the duties of a juror is to follow the law that the Court gives you. Do you think that you would be able to set aside your personal feelings and follow the law as the Court explains it to you, even if you had strong feelings to the contrary?" (10 J.Q. CT 2776.) Prospective Juror No. 144 answered yes but placed an asterisk by her answer. (10 J.Q. CT 2776.) After the portion of the question which read, "If 'no,' please explain why not," Prospective Juror No. 144 placed another

asterisk and wrote, "Except if asked to return death penalty." (10 J.Q. 2776.)

Question No. 55 asked, "What are your general beliefs and feelings regarding the death penalty?" (10 J.Q. CT 2778.) Prospective Juror No. 144 answered, "Against it." (10 J.Q. CT 2778.)

Question No. 57 asked, "Do you believe that a sentence of life without the possibility of parole means that the person will spend the rest of his/her life in prison?" (10 J.Q. 2778, underlining apparently added by prospective juror.) Prospective Juror No. 144 answered no and wrote, "Can't governor commute sentence?" (10 J.Q. CT 2778.)

Question No. 58 asked, "Do you believe the California law which provides for the death penalty should be abolished?" (10 J.Q. CT 2778.) Prospective Juror No. 144 answered yes and explained, "Religious convictions." (10 J.Q. CT 2778.)

In answer to Question No. 59, Prospective Juror No. 144 stated her belief that the death penalty is imposed too often, and wrote, "A single occasion, too often." (10 J.Q. CT 2778-2779.)

In answer to Question No. 60, Prospective Juror No. 144 again indicated that her religion takes a position against the death penalty, she agreed with that position and that she could not render a verdict without regard to her religion's position on the death penalty. (10 J.Q. CT 2779.)

Question No. 61 asked whether the juror would have any difficulty rejecting the "eye for an eye and tooth for a tooth" principle in deliberations. (10 J.Q. CT 2779.) Prospective Juror No. 144 answered in the negative with another asterisk and wrote, "I can reject "eye for eye" but would be conflicted if asked to return death penalty based on facts of trial and law/sentencing guidelines." (10 J.Q. CT 2779.)

Question Nos. 62 and 63 asked whether the juror would automatically vote for the death penalty or life without possibility of parole knowing that

the defendant committed a special circumstance murder. (10 J.Q. CT 2779.) Prospective Juror No. 144 answered both questions in the negative with yet another asterisk. (10 J.Q. CT 2779.) In explanation, she wrote, "Don't know what sentencing guidelines are, but would be conflicted if asked to return death penalty." (10 J.Q. CT 2780.)

Question Nos. 64 and 65 asked whether the juror would want to serve on the jury just so he or she could impose the death penalty or life without possibility of parole without regard to the court's instructions. (10 J.Q. CT 2780.) Prospective Juror No. 144 answered both questions in the negative but placed an asterisk next to the question regarding life without possibility of parole and wrote, "But would be conflicted if court's instructions were to return death penalty." (10 J.Q. CT 2780.)

Question No. 66 asked, "After considering the aggravating and the mitigating factors on which the court will instruct you, would you be able to vote for the death penalty if you found that to be the appropriate punishment?" (10 J.Q. CT 2780.) Prospective Juror No. 144 answered in the negative and explained, "Religious convictions." (10 J.Q. CT 2780.) She answered a similar question regarding a life without possibility of parole verdict in the affirmative. (10 J.Q. CT 2780.)

Question No. 69 asked, "Is there any reason you cannot set aside whatever you may have heard about this case prior to this trial and vote for the appropriate penalty in this case based only on the facts and the law that are presented at this trial and from no other source? (10 J.Q. CT 2781, emphasis apparently added by prospective juror.) Prospective Juror No. 144 answered in the negative with an asterisk and explained, "But would be conflicted if asked to return death penalty." (10 J.Q. CT 2781.)

Question No. 70 asked, " Is there any reason you cannot set aside whatever preexisting feelings you may have had about the death penalty and determine the appropriate penalty in this case based on the law and the

facts presented at this trial and from no other source? (10 J.Q. CT 2781, emphasis apparently added by prospective juror.) Prospective Juror No. 144 answered in the affirmative and explained, "Religious convictions." (10 J.Q. CT 2781.)

Question No. 70 asked, "Is there any reason you cannot sit as a fair and impartial juror in this case?" (10 J.Q. CT 2781.) Prospective Juror No. 144 appears not to have checked either the yes or no box and wrote, "I would be fair and impartial but would be conflicted if asked to return death penalty." (10 J.Q. CT 2781.)

During voir dire, the trial court engaged in the following colloquy with Prospective Juror No. 144:

> Q In terms of your view of the death penalty, could you impose either penalty or not?
>
> A Well, I – it was difficult for me to answer yes or no. I think I put a little asterisk.
>
> Q Yes.
>
> A As I said, I'm conflicted about assessing the death penalty.
>
> Q I think that was because of your religious convictions.
>
> A It is, but also, again, so much of what we've been hearing is talking about placing value and weighing different factors. I just have a very high value on redemption. So it's – I'm conflicted over it.
>
> Q Can you see yourself ever voting for the death penalty?
>
> A I'm not sure, to be quite honest with you. I don't know.
>
> Q Would you consider it?
>
> A *I lean towards not being able to assess that penalty.*
>
> Q Would you consider it, though?

A I would consider hearing all of the testimony and weighing the factors, yes.

Q I know that a lot of your answers here kind of mirror what you've been saying here in court. I guess the bottom line is if you found that the circumstances in aggravation outweigh the circumstances in mitigation, could you vote for the death penalty?

A If you're making me say yes or no, I would say no, I could not.

Q *Not under any circumstances?*

A *No.*

Q Thank you. . . . [turning to question next prospective juror].

(30 RT 6067-6069 [emphasis added].)

Defense counsel attempted to rehabilitate Prospective Juror No. 144 as follows:

MS. ERICKSON: Ms. 144, I've been directed to talk to you, but I wanted to anyway. Your questionnaire is interesting. But I think obviously the biggest issue with your questionnaire is you indicate you are conflicted.

PROSPECTIVE JUROR 144: I am conflicted.

PROSPECTIVE JUROR 144,

BY MS. ERICKSON: Conflicted means that – conflicted is okay.

A I'm on the fence. I don't know which concrete answer to give, yes or no. I don't see it as a yes or no.

Q Right. Do you agree that it would depend on the circumstances?

A *It's more in terms of – I guess religious views.*

Q But when you say you're conflicted, that would at least imply that you are able to, even though you may feel very

strongly personally, that you still feel that you could go in there and consider – consider the death penalty or life without parole. In other words, even if you feel so strongly about it, you can still say, "You know what, I can still be on a jury in the State of California and make a decision."

A Can I ask? The decision does have to be unanimous, I'm assuming.

Q In a death penalty case for there to be a verdict one way or another, it would have to be unanimous. In the middle it's, you know, whatever it is. That you don't have to worry about. But the point is that we need 12 people to make a decision. If all come together and you all have the same one, great. If you don't, that's okay, too. That's what a sentencing hearing is. It's not the same as the trial.

Are you okay with that? Do you – does that sit well with you?

A *Again, it's difficult for me to answer yes or no.* What I will say is when I received my jury summons I came down here thinking maybe it will be a D.U.I. or some other not so important case, but I never really honestly truly thought about what my views were on imposing a death sentence. So, in writing that 19-page questionnaire, I just really couldn't distill down exactly if it was a yes or a no.

Q That's okay, though. I would think giving a death sentence or even life without parole, that is a very serious thing to do. As far as jury service goes, it doesn't get any more serious than that.

A I agree.

Q We don't want people to come in and say cut and dried, black and white, that is all it is. You would need to be, I would hope, somewhat conflicted and somewhat thinking about all of the issues. That's okay. If you're saying, "I just can't follow the law," that's something different. Do you understand the distinction?

A I do understand the distinction, yes.

Q Okay. *With that said, can you sit as a juror in this case?*

A *Well, Can I have you clarify exactly what the law is?* Because you have said that it's not adding up A plus B plus C equals the death penalty. But then we're supposed to come to individual judgment on mitigating factors and the aggravating factors and bringing in our emotions and our beliefs, even though it's supposed to stop at that gate. It's very difficult to do that. So if it's assessing what we hear on the witness stand, yes, I can do that, you know, unequivocally. *I just don't know if I can impose that sentence.*

Q When I say it's not adding up A, B, and C, what that means is in a regular criminal case, you have a crime that has elements. You look at the evidence, and you decide whether the elements are there or not, and you decide guilty or not, okay? That's a regular criminal case.

In a penalty phase there is no direction from the court that's going to say, "If you find this, this, and this, you must return a verdict of death." There is not going to be that.

A I understand that.

Q Okay. So that's what I mean by it. It's just a different – it's just a different hearing. It's not a regular trial. So does it mean that you don't talk to each other? Of course not. That's why there are 12 people. You talk about it. You may persuade each other, I don't know. But ultimately the law is not going to direct you to a particular verdict.

A I understand that, yes.

Q Okay. *So with that, do you think that you can sit on this jury?*

A *I – don't know. I truly don't know. I may not be the best juror for this type of case.*

MS. ERICKSON: Okay. Fair enough.

(30 RT 6082-6086 [emphasis added].)

Subsequently, the prosecutor challenged Prospective Juror No. 144 and four other prospective jurors for cause. (30 RT 6089.) Defense counsel lodged objections to two of the challenges for cause, including Prospective Juror No. 144, arguing, "I think there's some equivocation there." (30 RT 6090.) The trial court responded, "There was when Ms. Erickson was desperately trying to elicit responses from her, but her response to the court's question, she said she couldn't do it." (30 RT 6090.) Accordingly, the trial court granted the prosecutor's request to excuse Prospective Juror No 144 for cause. (30 RT 6091.)

Here, the trial court's finding that Prospective Juror No. 144's views on the death penalty prevented or substantially impaired the ability to perform her duties as a penalty phase juror was supported by substantial evidence. In her questionnaire, Potential Juror No. 144 stated that her "[r]eligious convictions" were opposed to the death penalty and she could not vote without regard to those convictions; and she repeatedly invoked that conflict between the dictates of her religious beliefs and her duties to be impartial and fair as a juror. (10 J.Q. CT 2770, 2776, 2778, 2779, 2780, 2781.) She unequivocally stated that imposition of the death penalty on even "[a] single occasion" would be "too often." (10 J.Q. CT 2778-2779.)

Prospective Juror No. 144 confirmed these strong views during voir dire. She told the court that *she could not vote for the death penalty under any circumstances*, even if she were to find the factors in aggravation outweighed those in mitigation. (30 RT 6068-6069.) Rebuffing defense counsel's efforts to rehabilitate her, Prospective Juror No. 144 could not say that she could ever impose the death penalty and admitted that she "may not be the best juror for this type of case." (30 RT 6085, 6086.)

This Court has found jurors with lesser strenuous religious opposition to the death penalty to have been properly excused for cause. (See, e.g., *Bryant, supra,* 60 Cal.4th at pp. 400-401; *People v. Rountree, supra,* 56 Cal.4th at pp. 847-848; *People v. Thompson* (2010) 49 Cal.4th 79, 104-106; *People v. Roybal* (1998) 19 Cal.4th 481, 518-519; *People v. Jones* (1997) 15 Cal.4th 119, 163-165.)

Lamb's arguments to the contrary are unavailing. Lamb fails to give any consideration whatsoever to Prospective Juror No. 144's questionnaire. (See AOB 217-220.) Yet, as discussed above, her answers on the questionnaire showed intractable religious-based opposition to the death penalty.

Lamb also misreads the record when he argues Prospective Juror No. 144 "never said that she could never vote for death – she only said only that she would say 'no' if 'forced' to give a yes or no answer prior to hearing a penalty phase presentation [.]" (AOB 220.) Prospective Juror No. 144 was not indicating a reservation about prejudging the case or the appropriate verdict. Rather, she was saying that *if forced to answer the trial court's question,* that she could not vote for the death penalty under any circumstances, even if she were to find the aggravating factors outweighed those in mitigation. (20 RT 6068-6069.)

Lamb misconstrues the conflict between Prospective Juror No. 144's religious convictions and her duties as a juror to fairly consider the death penalty as a conflict between the two possible penalty verdicts. As in *People v. Rountree, supra,* 56 Cal.4th 823, Prospective Juror No. 144

> was excused because [s]he said it would be very hard for [her] to ignore [her] belief system in order to carry out [her] duties as a juror. This internal conflict, not the inherent difficulty of sitting in judgment, is what may render a prospective juror, including this one, excusable.

(*Id.* at p. 848.)

Lamb attempts to build an argument on Prospective Juror No. 144's willingness to follow the court's instructions. (See AOB 220.) A similar argument was rejected in *Bryant*, where the prospective juror indicated that "he could 'follow the law' and he could vote for the death penalty 'if [he] had to' " despite his serious reservations about the death penalty. (See *Bryant, supra,* 60 Cal.4th at pp. 400-401.)

Lamb complains that the trial court did not follow-up on Prospective Juror No. 144's final answer in the court's voir dire. (AOB 222, citing *People v. Stewart, supra,* 33 Cal.4th 425.) Lamb chooses to ignore that this final summation of Prospective Juror No. 144's views was preceded by relevant questioning from the court. (See 30 RT 6066-6069.) Moreover, *Stewart* is inapposite since it addressed a situation where the trial court excused prospective jurors solely on their written questionnaire responses. (See *People v. Stewart, supra,* 33 Cal.4th at pp. 444-447.)

Lastly, Lamb premises his claim of error on allegedly disparate questioning of the potential jurors by the trial court. (AOB 222-224.) In *People v. Souza, supra,* 54 Cal.4th at p. 131, this Court construed a similar argument as a claim that the trial court used an arbitrary and capricious standard to excuse jurors for cause.

Lamb only cites to one other individual for this argument, Potential Juror No. 179 for whom a defense challenge for cause was denied. (AOB 223-226.) Neither the questionnaire answers nor the voir dire of Potential Juror No. 179 showed any religious convictions regarding the death penalty or difficulties setting aside his personal beliefs to fairly consider the alternative penalties. (See 12 J.Q. CT 3338-3356; 30 RT 6142-6152, 6156-6166.) Thus, Potential Juror No. 179 required a very different line of questioning than Potential Juror No. 144 to determine his suitability as a juror.

" ' [T]he trial court has broad discretion over the number and nature of questions about the death penalty.' " (*People v. Capistrano, supra,* 59 Cal.4th at p. 856, quoting *People v. Stitely, supra,* 35 Cal.4th at p. 540.) Thus, any disparate questioning of the two potential jurors was neither arbitrary nor capricious.

Substantial evidence in the record supports the trial court's finding that Prospective Juror No. 144's religious convictions substantially impaired her abilities to perform the duties of a juror in the penalty phase retrial. Accordingly, the penalty judgment should be affirmed.

VIII. THE GANG-MURDER SPECIAL CIRCUMSTANCE IS CONSTITUTIONAL

In Claim Eight, Lamb contends that the gang-murder special circumstance on its face and as-applied in his case is unconstitutionally vague and insufficiently narrowing in violation of his rights to due process and equal protection and the proscription against cruel and unusual punishment.[101] (AOB 227-234.) Lamb's contentions lack merit.

"To avoid the Eighth Amendment's proscription against cruel and unusual punishment, a death penalty law must provide a 'meaningful basis for distinguishing the few cases in which [the death penalty] is imposed from the many cases in which it is not.' " (*People v. Edelbacher, supra,* 47 Cal.3d at p. 1023, quoting *Furman v. Georgia* (1972) 408 U.S. 238, 313 [92 S.Ct. 2726, 33 L.Ed.2d 346] (conc. opn. of White, J.), and citing *Godfrey v. Georgia* (1980) 446 U.S. 420, 427 [100 S.Ct. 1759, 64 L.Ed.2d 398, 406] (plur. opn.).) The gang-murder special circumstance satisfies this requirement.

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[101] Lamb brought a motion to strike the special circumstance on the same grounds in the trial court. (4 CT 888-914; 2 RT 200-208.) The motion was denied. (2 RT 208.)

Lamb concedes that the gang-murder special circumstance requires an intentional killing whereas a first degree murder with a gang enhancement can be proved without an intent to kill. (AOB 228-229, citing §§ 186.22, subd. (b)(1), and 190.2, subd. (a)(22).) As such, the gang-murder special circumstance is similar to the lying-in-wait special circumstance which requires an intentional killing whereas the lying-in-wait theory of first degree murder does not require an intent to kill. (See *People v. Stevens* (2007) 41 Cal.4th 182, 204, citing *People v. Ceja* (1993) 4 Cal.4th 1134, 1140, fn. 2, and *People v. Webster* (1991) 54 Cal.3d 411, 448.)

As this Court explained in *Stevens*,

> A...narrowing distinction is discernible between the lying-in-wait special circumstance and lying-in-wait murder because the former requires an intent to kill, while the latter does not. [Citations.] Thus, any overlap between the elements of lying in wait in both contexts does not undermine the narrowing function of the special circumstance.

(*People v. Stevens, supra,* 41 Cal.4th at p. 204, citing *People v. Sims* (1993) 5 Cal.4th 405, 434, and *People v. Catlin* (2001) 26 Cal.4th 81, 158-159; see also *People v. Edelbacher, supra,* 47 Cal.3d at p. 1023, fn. 12.) Thus, the analogous gang-murder special circumstance is likewise sufficiently narrowing for constitutional purposes, and the underlying premise of Lamb's claim is erroneous.

Lamb further argues that, since the prosecutor's theory of first degree murder in his case was a premeditated, deliberate and intentional killing, there was no meaningful distinction between the first degree murder and special circumstance, thus providing no criteria for the prosecutor charging his case as a capital offense. (AOB 229-234.) This argument is unavailing.

Foremost, Lamb labors under the mistaken belief that "the prosecutor's *only* theory of first-degree murder against appellant was premeditated intentional murder." (AOB 229, emphasis in original.) The record shows the prosecutor pursued two theories of first degree murder against Lamb – premeditated, deliberate murder and lying-in-wait. (See 6 CT 1396-1398 [prosecutor's Points and Authorities In Support Of Allowing The Jury to Consider Lying In Wait As A Theory Of First Degree Murder]; 20 RT 4073-4074 [defense counsel's statement that "defendants are being prosecuted for first degree [murder] under two theories; the first willful, deliberate and premeditated murder, and the second, murder was committed by lying in wait."]; 20 RT 4074 [prosecutor's statement, "I put on the record, actually, before we started the trial that I'm putting everybody on notice that I'm going to rely on lying in wait as a theory for first-degree murder."]; 21 RT 4176 [court's instruction to jury that "defendants are being prosecuted for first-degree murder under two theories. One, the murder was willful, deliberate, and premeditated, and two, the murder was committed by lying in wait]; 21 RT 4294-4295 [prosecutor's closing argument that "there are two theories that get to a first-degree murder; premeditation and deliberation, the second one is lying in wait. Premeditation and deliberation or lying in wait, that will get us to first-degree murder."].)

Thus, the underlying premise of Lamb's constitutional claim – that "there was no meaningful difference between first degree murder with gang enhancement and the gang special circumstance murder charge" – is wrong. (See AOB 229, footnote omitted.) As Lamb's underlying premise fails, so must the claim built upon it.

Moreover, it is well-established that "[p]rosecutorial discretion whether or not to seek the death penalty does not render the law vague or arbitrary." (*People v. Harris, supra,* 37 Cal.4th at p. 366, citing *People v.*

Brown (2004) 33 Cal.4th 382, 403, and *People v. Crittenden* (1994) 9 Cal.4th 83, 152; see *People v. Lee* (2011) 51 Cal.4th 620, 654; *People v. Cook, supra,* 39 Cal.4th at p. 617.) Also, "[p]rosecutorial discretion in deciding whether to seek the death penalty does not result in a violation of equal protection, due process, or reliability in capital sentencing." (*People v. Gonzales* (2011) 51 Cal.4th 894, 958; see *People v. Dickey* (2005) 35 Cal.4th 884, 932.)

In support of his attack on the constitutionality of the gang-murder special circumstance, Lamb attempts to compare his case to other prosecutions where the death penalty was not sought for a gang-related murder. (AOB 230-233 & fn. 96.) However, as this Court observed in *People v. Keenan* (1988) 46 Cal.3d 478,

> [m]any circumstances may affect the litigation of a case chargeable under the death penalty law. These include factual nuances, strength of evidence, and in particular, the broad discretion to show leniency. Hence, one sentenced to death under a properly channeled death penalty scheme cannot prove a constitutional violation by showing that other persons whose crimes were superficially similar did not receive the death penalty.

(*Id.* at p. 506, citing *McCleskey v. Kemp* (1987) 481 U.S. 279, 306-307 & fn. 28 [107 S.Ct. 1756, 1774-1775, 95 L.Ed.2d 262], and *Pulley v. Harris* (1984) 465 U.S. 37, 50-51 [104 S.Ct. 871, 79 L.Ed.2d 29]; see also *People v. McPeters* (1992) 2 Cal.4th 1148, 1171, superseded by statute on another point as stated in *People v. Wallace* (2008) 44 Cal.4th 1032, 1087.)

Notably, in none of the cases cited by Lamb did the defendant commit *a premeditated and deliberate attempted murder of a peace officer* in addition to the gang-related murder. (See *People v. Johnson, supra,* 57 Cal.4th at pp. 255-257; *People v. Herrera* (2010) 49 Cal.4th 613, 617-620; *People v. Shabazz* (2006) 38 Cal.4th 55, 59-60; *People v. Mejia* (2012) 211 Cal.App.4th 586, 595-601; *People v. Carr* (2010) 190 Cal.App.4th 475,

478-482.) Accordingly, these cases are particularly unsupportive of Lamb's argument. Since Lamb's facial and as-applied challenges to the gang-murder special circumstance fail, the penalty judgment should be affirmed.

IX. LAMB'S CONSPIRACY TO COMMIT MURDER CONVICTION WAS SUPPORTED BY SUBSTANTIAL EVIDENCE

Lamb claims his conviction for conspiracy to commit murder must be reversed because there was insufficient proof of an agreement to kill Miller. (AOB 234-245.) Lamb fails to apply the appropriate standard of review to his claim. Viewing the evidence in the light most favorable to the prosecution and drawing all reasonable inferences from the facts in favor of the judgment, there was ample circumstantial evidence of an agreement. Accordingly, the conspiracy conviction was supported by substantial evidence and should be affirmed.

The standard for reviewing the sufficiency of the evidence in criminal cases is well-established. (*People v. Jennings* (2010) 50 Cal.4th 616, 638.)

> "When considering a challenge to the sufficiency of the evidence to support a conviction, we review the entire record in the light most favorable to the judgment to determine whether it contains substantial evidence—that is, evidence that is reasonable, credible, and of solid value—from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citation.]"

(*People v. D'Arcy* (2010) 48 Cal.4th 257, 293, quoting *People v. Lindberg* (2008) 45 Cal.4th 1, 27.) The standard is the same under the federal Constitution. (See *Jackson v. Virginia* (1979) 443 U.S. 307, 319 [99 S.Ct. 2781, 61 L.Ed.2d 560].)

When assessing a sufficiency-of-the-evidence claim, the reviewing court has a limited role. (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206.) It does " 'not retry the case' " on appeal. (*Tecklenburg v. Appellate Division*

(2009) 169 Cal.App.4th 1402, 1412, quoting *People v. Sanchez* (2003) 113 Cal.App.4th 325, 330; see also *People v. Veale* (2008) 160 Cal.App.4th 40, 46.) It "neither reweigh[s] the evidence nor reevaluate[s] the credibility of witnesses." (*People v. Lindberg, supra,* 45 Cal.4th at p. 27; see *Jackson v. Virginia, supra,* 443 U.S. at p. 324.)

"[I]t is the *jury*, not the appellate court, which must be convinced of the defendant's guilt beyond a reasonable doubt." (*People v. Ceja, supra,* 4 Cal.4th at p. 1139, emphasis in original.) "Therefore, an appellate court may not substitute its judgment for that of the jury" (*ibid*) and must defer to the jury's resolution of factual conflicts (*Cavazos v. Smith* (2011) __ U.S. __ [132 S.Ct. 2, 6, 181 L.Ed.2d 311] (*per curiam*); *Jackson v. Virginia, supra,* 443 U.S. at p. 326; *People v. Ochoa, supra,* 6 Cal.4th at p. 1206).

"[E]vidence is sufficient to support a conviction so long as 'after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.' " (*Cavazos v. Smith, supra,* 132 S.Ct. at p. 6, quoting *Jackson v. Virginia, supra,* 443 U.S. at p. 319, emphasis in original.) Accordingly, the reviewing court "must presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence." (*People v. Jones* (1990) 51 Cal.3d 294, 314; see also *Jackson v. Virginia, supra,* 443 U.S. at p. 326; *People v. Ochoa, supra,* 6 Cal.4th at p. 1206.)

Convictions may rest primarily on circumstantial evidence. (*People v. Perez* (1992) 2 Cal.4th 1117, 1124; *People v. Bean* (1988) 46 Cal.3d 919, 932.)

> Although it is the jury's duty to acquit a defendant if it finds the circumstantial evidence susceptible of two reasonable interpretations, one of which suggests guilt and the other innocence, it is the jury, not the appellate court that must be convinced of the defendant's guilt beyond a reasonable doubt.

(*People v. Kraft, supra,* 23 Cal.4th at pp. 1053-1054.)

Thus, a conviction may not be reversed merely because circumstances might support or be reconciled with a contrary finding. (*People v. Kraft, supra*, 23 Cal.4th at p. 1054; *People v. Ceja, supra,* 4 Cal.4th at pp. 1138-1139.) Reversal is only warranted where it clearly appears that " 'upon no hypothesis whatever is there sufficient substantial evidence to support' " the verdict. (*People v. Bolin, supra,* 18 Cal.4th at p. 331, quoting *People v. Redmond* (1969) 71 Cal.2d 745, 755.)

> As previously stated, a conspiracy is committed when
>
> the defendant and another person had the specific intent to agree or conspire to commit an offense, as well as the specific intent to commit the elements of that offense, together with proof of the commission of an overt act "by one or more of the parties to such agreement" in furtherance of the conspiracy.

(*People v. Morante, supra,* 20 Cal.4th 403, 416, quoting 184.) The object of the conspiracy is either "defined in terms of proscribed conduct" or "a proscribed result under specified attendant circumstances." (*People v. Swain, supra,* 12 Cal.4th at p. 600 [internal citations and quotation marks omitted].)

The conspiracy agreement may be either express or tacit. (*People v. Johnson, supra,* 57 Cal.4th at p. 264.) " 'To prove an agreement, it is not necessary to establish the parties met and expressly agreed; rather, "a criminal conspiracy may be shown by direct or circumstantial evidence that the parties positively or tacitly came to a mutual understanding to accomplish the act and unlawful design." [Citations.]' " (*Ibid,* emphasis omitted; see *People v. Robinson* (1954) 43 Cal.2d 132, 136 ["It is not often that the direct fact of a common unlawful design can be proved other than by the establishment of independent facts bearing on such design"].)

Viewing the evidence in the light most favorable to the prosecution and drawing all reasonable inferences from the facts in support of the judgment, there was substantial circumstantial evidence proving the agreement to kill Miller. Foremost, Lamb and his accomplices carried out the murder. The actual carrying-out of the target crime is particularly probative of the requisite agreement to commit that offense. (*People v. Vu, supra*, 143 Cal.App.4th at pp. 1024-1025; *People v. Herrera, supra,* 70 Cal.App.4th at p. 1464.)

Motive also supplies evidence of an express or tacit agreement. (*People v. Vu, supra*, 143 Cal.App.4th at p. 1025.) In Lamb's case, payback for Miller's exposure of P.E.N.I.'s violent activities on television just days prior to Mazza's scheduled trial date constituted a powerful motive for P.E.N.I. gang members such as Lamb, Rump and Johnson to kill Miller. After the Fox News segments aired, Miller was targeted by P.E.N.I. with an understanding about what was supposed to happen to him. (12 RT 2155-2157.) After the murder, Lamb wrote in a letter to Rump that his "ship's sails are flying high," told Mason "that he had stripes coming" for shooting Miller in the back of the head, and wrote to Rump that he has "done a lot more than anyone else in this game." (11 RT 1982, 1989; 12 RT 2164-2166; 19 RT 3758-3760, 3796-3798.) Motive to commit the target offense with an opportunity for discussion and agreement constitutes evidence of an agreement. (See, e.g., *People v. Jurado, supra,* 38 Cal.4th at p. 121; *People v. Vu, supra,* 143 Cal.App.4th at p. 1025.)

Lamb concedes, "The circumstances from which a conspiratorial agreement may be inferred include the defendants' conduct in mutually carrying out a common illegal purpose, the nature of the act, and the relationship and interests of the parties." (AOB 237, citing *People v. Superior Court* (*Quinteros*) (1993) 13 Cal.App.4th 12, 21.) Here, the evidence showed a well-coordinated plan amongst three P.E.N.I. gang

members to have Johnson lure Miller from Raphoon's party to the predesignated execution site near Harris's apartment where Lamb and Rump were waiting for Miller (with the assistance of Hinson), armed and ready with a getaway car. There was substantial and powerful circumstantial evidence of an agreement.

As stated, convictions may rest primarily on circumstantial evidence. (*People v. Perez, supra,* 2 Cal.4th at p. 1124; *People v. Bean, supra,* 46 Cal.3d at p. 932.) Yet, Lamb insists on direct evidence of a prior agreement as well as his actions upon leaving Hinson's apartment. (See AOB 237-238.)

Lamb further ignores the standard of review by refusing to draw *any* reasonable inferences from the testimony of Darryl Mason or Lieutenant Epperson as proof of an agreement. (See AOB 238-242.) Contrary to Lamb's argument, the reviewing court "must presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence." (*People v. Jones, supra,* 51 Cal.3d at p. 314; see *Jackson v. Virginia, supra,* 443 U.S. at p. 326; *People v. Ochoa, supra,* 6 Cal.4th at p. 1206.)

Lamb attempts to dismiss such inferences as well as the gang expert opinions as "speculation." (AOB 2442.) As previously stated, "reliance upon circumstantial evidence and the reasonable inferences to be drawn from that evidence, in determining" guilt "does not demonstrate, as defendant[] urge[s], that the verdict was the result of speculation." (*People v. Letner & Tobin, supra,* 50 Cal.4th at p. 164.)

Lastly, Lamb strains to extract less incriminating meanings from the Fox News segments and one of Rump's jailhouse phone calls. (AOB 243-244.) However, a conviction may not be reversed merely because circumstances might support or be reconciled with a contrary finding.

(*People v. Kraft, supra*, 23 Cal.4th at p. 1054; *People v. Ceja, supra,* 4 Cal.4th at pp. 1138-1139.)

Applying the proper standard of review, there was substantial circumstantial proof of an agreement for purposes of the conspiracy to commit murder. Lamb fails to show " 'upon no hypothesis whatever is there sufficient substantial evidence to support' " the verdict. (*People v. Bolin, supra,* 18 Cal.4th at p. 331; *People v. Redmond, supra,* 71 Cal.2d at p. 755.) Accordingly, Lamb's conviction for conspiracy to commit murder should be affirmed.

X. THERE WAS NO PROSECUTORIAL ERROR IN THE GUILT PHASE CLOSING ARGUMENT

In Claim Ten, as with the penalty phase retrial, Lamb contends the prosecutor committed misconduct in the guilt phase closing argument by attacking defense counsels' integrity and through improper vouching. (AOB 245-256.) Lamb claims the alleged misconduct violated his due process right to a fair trial and confrontation rights, requiring reversal of the judgment. (AOB 256-260.)

All of Lamb's claims of prosecutorial misconduct in the guilt phase closing arguments have been forfeited because he failed to object, make an assignment of misconduct and request a curative admonition in the trial court where the alleged errors could have been easily remedied. In addition to forfeiture, each of Lamb's allegations of misconduct fails when fairly viewed in its proper context. Furthermore, there was no prejudice. Accordingly, the guilt judgment should be affirmed.

A. Lamb Forfeited His Claim of Prosecutorial Misconduct During the Guilt Phase Closing Argument

As previously noted, defense counsel agreed to wait until an appropriate break in the proceedings to lodge any objections rather than interrupt the prosecutor's guilt phase arguments, and the prosecutor agreed

that doing so would not waive any objections. (21 RT 4220; 6 CT 1402.) Rump's counsel raised one objection to the prosecutor's argument about the glove found in the Taurus – which is not the subject of any of Lamb's misconduct allegations. (23 RT 4654; 6 CT 1413.) Otherwise, no objections to the prosecutor's arguments were raised or assignments of misconduct requested when defense counsel had the opportunity to do so pursuant to the parties' agreement. (See 21 RT 4290-4291, 4355-4356; 22 RT 4357-4363,4431-4433, 4476-4480, 4514-4515; 23 RT 4516-4518, 4599-4600, 4650-4655; 6 CT 1402-1414.)

A defendant claiming misconduct in closing argument must give the trial court "an opportunity to attempt to alleviate the potential harm caused by the prosecutor's action." (*People v. Fuiava, supra,* 53 Cal.4th at p. 691, citing *People v. Boyette, supra,* 29 Cal.4th at p. 432.) Thus, " 'a defendant must make a timely objection and ask the trial court to admonish the jury to disregard the prosecutor's improper remarks or conduct, unless an admonition would not have cured the harm.' " (*People v. Thomas, supra,* 54 Cal.4th at p. 937, quoting *People v. Davis, supra,* 46 Cal.4th at p. 612.) If no such objection, assignment of misconduct and request for admonition is made when the defendant had the opportunity to do so, the claim is forfeited. (*People v. Houston, supra,* 54 Cal.4th at 1223; *People v. Dykes, supra,* 46 Cal.4th at p. 769; *People v. Hamilton, supra,* 45 Cal.4th at p. 956; *People v. Young, supra,* 34 Cal.4th at p. 1188; *People v. Brown, supra,* 31 Cal.4th at p. 553; *People v. Boyette, supra,* 29 Cal.4th at p. 432; *People v. McDermott, supra,* 28 Cal.4th at p. 1001.)

Curative admonitions to disregard the prosecutor's arguments as improper would have effectively cured any prejudice alleged by Lamb. However, instead of objecting in the trial court where any prosecutorial error could have been easily remedied, Lamb has waited until after receiving unfavorable verdicts to first raise his allegations of misconduct.

Since appropriate objections and assignments of misconduct with curative admonitions in the trial court would not have been futile, all of Lamb's claims of prosecutorial misconduct in guilt phase closing argument are forfeited.

B. There Was No Prosecutorial Error During the Guilt Phase Closing Argument

As previously stated, a prosecutor in closing argument " 'is given wide latitude to vigorously argue his or her case and to make fair comment upon the evidence, including reasonable inferences or deductions that may be drawn from the evidence.' " (*People v. Dykes, supra,* 46 Cal.4th at p. 768, quoting *People v. Ledesma, supra,* 39 Cal.4th at p. 726.) Also, "[a]rguments by the prosecutor that otherwise might be deemed improper do not constitute misconduct if they fall within the proper limits of rebuttal to the arguments of defense counsel." (*People v. Cunningham* (2001) 25 Cal.4th 926, 1026, citing *People v. Sandoval, supra,* 4 Cal.4th at p. 193.)

When attacking the prosecutor's remarks to the jury, the defendant must show that, " '[i]n the context of the whole argument and the instructions' [citation], there was 'a reasonable likelihood the jury understood or applied the complained-of comments in an improper or erroneous manner. [Citations.]' " (*People v. Centeno, supra,* 60 Cal.4th at p. 667, quoting *People v. Marshall, supra,* 13 Cal.4th at p. 831, and *People v. Frye, supra,* 18 Cal.4th at p. 970.) " '[W]e "do not lightly infer" that the jury drew the most damaging rather than the least damaging meaning from the prosecutor's statements. [Citation.]' " (*Ibid.*, quoting *People v. Frye, supra,* 18 Cal.4th at p. 970.)

Lamb first claims the prosecutor committed misconduct by characterizing Dr. David Smith's testimony as "*not fair and not right*" and stating that "it doesn't make them less guilty." (AOB 247-248, citing 21 RT 4257 [emphasis added in AOB].) The argument was proper.

During his direct examination, Dr. Smith testified how methamphetamine use can develop into psychosis. (18 RT 3463, 3470-3471, 3476.) During cross-examination by Rump's trial counsel, Dr. Smith opined that Lamb was "in the agitation/rage" stage while Rump was "more in rage, beginning of psychosis" at the time of the post-arrest police interviews. (18 RT 3479.)

During the prosecutor's cross-examination, Dr. Smith admitted that a diagnosis of psychosis required a clinical analysis, that he did not perform such an analysis on Rump (18 RT 3483), and he did not consider his 2007 examination of Lamb in his opinions (18 RT 3489-3490). Dr. Smith further admitted that in another case in which he had recently testified that he diagnosed one hundred percent of the individuals he saw as having psychoses. (18 RT 3497-3498.)

In closing argument, the prosecutor discussed Dr. Smith's testimony as follows:

> Let me tell you something because I hope nobody got the wrong impression because let me stand here and tell you on March 11, 2000 and 2, Mr. Rump had been using meth. On March 11, 2000 and 2, Mr. Lamb had been using meth. Never, ever took a position otherwise.
>
> "Mr. Baytieh, you went pretty hard on Dr. Smith, though." Yes, I did. Because what he was trying to do is not fair and it is not right. Psychoses? Think about it. Think about it. I can spend hours talking to you about the stuff that Dr. Smith told you. I want to be polite. I'm not going to use the word that I should be using.
>
> No dispute whatsoever they're using meth, absolutely no dispute about it. It doesn't make them any less guilty. It does not.

(21 RT 4256-4257.) In his rebuttal argument, the prosecutor further criticized Dr. Smith's testimony, pointing out the money he made on the

case, critiquing his opinions regarding the defendants without the benefit of clinical analysis, and characterizing those opinions as "absolute trash" which "has no place in a courtroom in a case like this." (23 RT 4620-4624.)

"Although prosecutorial arguments may not denigrate opposing *counsel's* integrity, 'harsh and colorful attacks on the credibility of opposing *witnesses* are permissible. [Citations.]' " (*People v. Parson, supra,* 44 Cal.4th at p. 360, quoting *People v. Arias, supra,* 13 Cal.4th at p. 162, emphasis in original.) This includes defense experts. It is proper to point out weaknesses in a defense expert's testimony and conclusions based on the evidence. (*Id.* at p. 360 [arguing defense expert was "*a spin* doctor . . . like these guys you see on TV who ...just kind of spin it around so it comes out the way they want it"].) "Thus, 'counsel is free to remind the jurors that a paid witness may accordingly be biased and is also allowed to argue, from the evidence, that a witness's testimony is unbelievable, unsound, or even a patent " 'lie.' " (*People v. Arias, supra,* 13 Cal.4th at p. 162, citing *People v. Sandoval* (1992) 4 Cal.4th 155, 180; see also *People v. Earp* (1999) 20 Cal.4th 826, 863 [prosecutor may argue in colorful terms that a defense witness is not entitled to credence].)

Moreover, the prosecutor's "trash" comment was made during rebuttal argument after defense counsel discussed Dr. Smith during Lamb's closing argument. (See 22 RT 4373, 4399, 4428, 4431; 23 RT 4624.) Thus, the argument also fell within the proper limits of rebuttal. (See *People v. Cunningham, supra,* 25 Cal.4th at p. 1026; *People v. Sandoval, supra,* 4 Cal.4th at p. 193.)

Lamb next pieces together various comments lifted from various segments of the prosecutor's 135 page-long opening argument (21 RT 4220-4355) and 85 page-long rebuttal argument (23 RT 4562-4647) to claim the prosecutor was denigrating defense counsels' integrity. (AOB

248-253, citing 21 RT 4270, 4280; 23 RT 4570, 4609, 4617, 4645.) Lamb once again ignores the standard of review by presenting the prosecutor's arguments out of context in an effort to infer the most damaging meaning from them. (See *People v. Centeno, supra,* 60 Cal.4th at p. 667; *People v. Marshall, supra,* 13 Cal.4th at p. 831; *People v. Frye, supra,* 18 Cal.4th at p. 970.)

As in *People v. Cole, supra,* 33 Cal.4th at p. 1203, each of the comments from which Lamb attempts to build his misconduct claim are more fairly viewed as attacks on defense counsels' arguments rather than defense counsels' integrity when considered in their proper context. When commencing his discussion of the elements of the various counts, the prosecutor stated:

> I know you're getting tired. I know it's been a long day already. Please bear with me. You'd want me to do my job, so please bear with me. Let me just – I'll tell you what I sometimes worry about. What I worry about sometimes is somebody sitting there going, "Mr. Baytieh, I got it. I rely [*sic.*] got it. You really don't have to keep going. I got it."
>
> I have to be able to go to sleep at night, and I have to do my job. So bear with me. I'm not trying to insult anybody's intelligence. I know you got it, probably, but I need to talk about – I need to do my job. So please bear with me. I know it's hard. I know it gets tedious. I know we've been sitting for a few hours. So please bear with me.

(21 RT 4270.) Contrary to Lamb's insinuations (AOB 253), this argument made no reference whatsoever to defense counsel.

Lamb also complains of the prosecutor's comment about the defense wanting the jurors "to buy" arguments that Lamb was innocent and obtained the murder weapon from Johnson. (21 RT 4280.) This argument was not an attack on defense counsels' integrity. (See, e.g., *People v. Taylor, supra,* 26 Cal.4th at p. 1167 [referring to defense "tricks" and "moves" in cross-examination was not improper]; *People v. Medina, supra,*

11 Cal.4th at p. 759 [argument that "any experienced defense attorney can twist a little, poke a little, try to draw some speculation, try to get you to buy something" was not improper].)

Lamb next claims the prosecutor committed misconduct by reminding the jury of defense counsel's promise in opening statement that he would prove the gun was not jammed. (23 RT 4570.) This argument was proper. (See *People v. Harris, supra,* 47 Cal.3d at p. 1085, fn. 19 [rejecting claim that prosecutor committed misconduct by "refer[ring] in closing argument to defense counsel's opening statement and to note the failure of the defense to 'deliver' by presenting evidence to support the outline he had drawn of the defendant's case"].)

Lamb next alleges the prosecutor's characterization of the defense arguments as "red herrings" diverting focus from the issues was misconduct. (23 RT 4609, 4617.) Such arguments are proper. (See *People v. Gionis* (1995) 9 Cal.4th 1196, 1217-1218 [arguments that defense counsel's job was to get defendant off and referrals to counsel's stretching and lawyering "could properly be understood as a reminder to the jury that it should not be distracted from the relevant evidence"]; *People v. Mitcham* (1992) 1 Cal.4th 1027, 1081 [argument that defense was trying to "dazzle you with BS" and "baffle" jurors with red herring was not improper]; *People v. Breaux* (1991) 1 Cal.4th 281, 305 [comment about law school trial tactics class and creation of confusion to benefit the defense was not misconduct].)

Like in the penalty phase retrial, the prosecutor discussed his "rule of one." (23 RT 4645.) As discussed in Argument V(B)(2), *ante*, it is not reasonably probable that the jurors would have understood the prosecutor's analogy to be an attack on defense counsels' integrity.

Lamb also complains about the prosecutor's references to his tattoos, White supremacists and Nazis during closing argument. (AOB 251, fn.

109, citing 21 RT 4288.) As discussed in Argument III, *ante*, the Fox News segments were properly admitted in both the guilt phase and penalty phase retrial. Lamb does not claim error in the admission of any other evidence concerning White supremacists, Nazis or his tattoos at the guilt phase. (See AOB at v-xx [Topical Index].) It is proper for the prosecutor to comment on the evidence presented at trial. (*People v. Dykes, supra,* 46 Cal.4th at p. 768; *People v. Ledesma, supra,* 39 Cal.4th at p. 726.)

Lamb contends the prosecutor engaged in improper vouching based on his personal experience by arguing in rebuttal, "I've been doing this for awhile, and – and Mr. Billy Joe Johnson is not the first murderer I cross examined," and, "It's rare when the People's case gets better after the defense put their witnesses on but that happened here." (AOB 254, citing 23 RT 4593.)

> A prosecutor is prohibited from vouching for the credibility of witnesses or otherwise bolstering the veracity of their testimony by referring to evidence outside the record. [Citations.] Nor is a prosecutor permitted to place the prestige of her office behind a witness by offering the impression that she has taken steps to assure a witness's truthfulness at trial. [Citation.] However, so long as a prosecutor's assurances regarding the apparent honesty or reliability of prosecution witnesses are based on the "facts of [the] record and the inferences reasonably drawn therefrom, rather than any purported personal knowledge or belief," her comments cannot be characterized as improper vouching. [Citations.]

(*People v. Frye, supra,* 18 Cal.4th 971.) No such vouching occurred here.

First, it is not improper for prosecutors to refer to matters of common knowledge or draw illustrations from common experience which are not in evidence. (*People v. Friend, supra,* 47 Cal.4th at p. 38; *People v. Williams, supra,* 16 Cal.4th at p. 221.) That a prosecutor in a capital case had prior experience and had previously cross-examined killers should have come as

no surprise to any of the jurors. Similarly, it is common sense that a party's case rarely gets better after adverse witnesses testify.

Moreover, defense counsel earlier invoked his prior experience to bolster his argument. (See 22 RT 4412-4413 [When I was a young lawyer doing D.U.I.'s and guys would get arrested for D.U.I.'s, we used to argue..."], 4422 ["I've represented lots of people like Scott Miller."], 4443-4444 ["I've been doing this a long time, too, and what happens is, you ask the question, sometimes you don't expect the answer, and it ends up hurting you."].)

Defense counsel especially exploited his reputation and facts outside the record to bolster Johnson's testimony as follows:

> And, you know what, ladies and gentlemen? Because I had a lot of people come up to me afterwards, all these lawyers and all these policemen, and they're like, you know, "Did you really believe him?' And if all I saw was Billy Joe when I was questioning him about Scott Miller's murder, if that's all I had – first of all, I probably wouldn't have called him – but if that's all it was, and his responses to me, I'd say, "You know what, this guy is lying." I don't blame you. I absolutely agree.

(22 RT 4455-4456.)

As previously stated, "[a]rguments by the prosecutor that otherwise might be deemed improper do not constitute misconduct if they fall within the proper limits of rebuttal to the arguments of defense counsel." (*People v. Cunningham, supra,* 25 Cal.4th at p. 1026, citing *People v. Sandoval, supra,* 4 Cal.4th at p. 193.) Thus, the prosecutor's far more brief and benign reference to his experience than that previously invoked by defense counsel should not be deemed misconduct.

Lamb further complains of the prosecutor's repeated comments that the case was "great," "got better and better," and was "not even close." (AOB 254-255 & fn. 110.) Such comments do not constitute improper vouching.

For example, in *People v. Huggins, supra,* 38 Cal.4th 175, the prosecutor argued: " 'None of this can be true. Please believe me. He has lied through his teeth in trying to sell this story to you.' " (*Id.* at p. 206.) This Court found there was no improper vouching, explaining:

> It is not, however, misconduct to ask the jury to believe the prosecution's version of events as drawn from the evidence. Closing argument in a criminal trial is nothing more than a request, albeit usually lengthy and presented in narrative form, to believe each party's interpretation, proved or logically inferred from the evidence, of the events that led to the trial. It is not misconduct for a party to make explicit what is implicit in every closing argument, and that is essentially what the prosecutor did here.

(*Id.* at p. 207.)

In *People v. Fierro* (1991) 1 Cal.4th 173, disapproved on another ground in *People v. Letner & Tobin, supra,* 50 Cal.4th at p. 203-207, the prosecutor argued that it was " 'an outstanding murder case ' " and " 'an outstanding murder investigation,' " which the defendant claimed was impermissible vouching. (*Id.* at p. 211.) This Court did "not believe that the prosecutor's remarks, viewed singly or in context could reasonably have been interpreted as a personal endorsement of the state's witnesses," especially in light of the prosecutor immediately admonishing the jurors to perform their own analysis of the evidence and law. (*Ibid.*)

In *People v. Medina, supra,* 11 Cal.4th 694, the prosecutor argued, "I mean, I cannot imagine anyone in our society being more violent and more dangerous.' " (*Id.* at p. 776.) This Court found the argument was the proper expression of an opinion based on the evidence. (*Ibid.*) Similarly, prosecutorial arguments that witnesses were credible, honest and truthful were found to be proper comment on the evidence in *People v. Stewart, supra,* 33 Cal.4th at pp. 500-502, and *People v. Frye, supra,* 18 Cal.4th at pp. 971-972.)

Moreover, the prosecutor was permitted to use sarcasm based on the evidence. (See *People v. Hamilton, supra,* 45 Cal.4th at p. 952; *People v. Mendoza, supra,* 42 Cal.4th at p. 701; *People v. Thornton, supra,* 41 Cal.4th at p. 456; *People v. Roldan, supra,* 35 Cal.4th at p. 720; *People v. Cummings, supra* 4 Cal.4th at p. 1303, fn. 48.) There was no prosecutorial misconduct in the guilt phase closing arguments under either the state or federal constitutions. Accordingly, all of Lamb's convictions as well as the true findings on the enhancements and special circumstance should be affirmed.

C. There Was No Prejudice from any Alleged Misconduct in Guilt Phase Closing Argument

As previously stated,

> arguments of counsel "generally carry less weight with a jury than do instructions from the court. The former are usually billed in advance to the jury as matters of argument, not evidence [citation], and are likely viewed as the statements of advocates; the latter, we have often recognized, are viewed as definitive and binding statements of the law."

(*People v. Mendoza, supra,* 42 Cal.4th at p. 703, quoting *Boyde v. California, supra,* 494 U.S. at p. 384.)

The guilt phase jury was instructed prior to closing arguments that "[n]othing the attorneys say is evidence" and that "their remarks are not evidence." (21 RT 4156-4157; 7 CT 1449-1501 [CALCRIM No. 222].) It is presumed that the jurors understood and followed the court's instructions. (*Penry v. Johnson, supra,* 532 U.S. at p. 799; *Greer v. Miller, supra,* 483 U.S. at p. 766, fn. 8; *Richardson v. Marsh, supra,* 481 U.S. at p. 211; *People v. Sanchez, supra,* 26 Cal.4th at p. 852; *People v. Osband, supra,* 13 Cal.4th at p. 714; *People v. Pinholster, supra,* 1 Cal.4th at p. 919.) Once again, Lamb offers generalizations about prosecutorial misconduct in the abstract and in other cases instead of citing to anything in

the record rebutting this presumption. (See AOB 256-259.) Any prosecutorial error was thus harmless because the jurors would have viewed it as zealous advocacy rather than law or evidence.

Lamb argues the alleged instances of misconduct, if not prejudicial standing alone, were prejudicial when considered in context of each other and the other alleged guilt phase errors. (AOB 259-260.) Since none of the individual claims of prosecutorial misconduct has merit, Lamb's claim that he was prejudiced by the cumulative impact of the alleged misconduct should be rejected as well. (*People v. Collins, supra,* 49 Cal.4th at p. 208; *People v. Parson, supra,* 44 Cal.4th at p. 368; *People v. Mendoza, supra,* 42 Cal.4th at p. 706; *People v. Alfaro, supra,* 41 Cal.4th at p. 1330.) As discussed herein as well as in Argument III, *ante*, and Arguments XI and XII, *infra*, there were no errors in the guilt phase. Accordingly, there can be no cumulative error. (*People v. Anderson, supra,* 25 Cal.4th at p. 606; *People v. Bolin, supra,* 18 Cal.4th at p. 335.) The guilt judgment should therefore be affirmed.

XI. LAMB FAILS TO SHOW THE TRIAL COURT'S DENIAL OF HIS SEVERANCE MOTION WAS AN ABUSE OF DISCRETION

In Claim Eleven, Lamb contends the trial court erred in denying his motion to sever the counts related to the March 11 attempted murder of Officer Helmick from those related to the March 8 murder of Scott Miller for purposes of trial. (AOB 260-269.) He argues the joinder violated his rights to due process and a fair trial requiring reversal of the guilt judgment. (AOB 268-269.)

Lamb fails to show the trial court's ruling constituted an abuse of discretion. Moreover, joinder did not result in any gross unfairness in violation of Lamb's rights to due process and a fair trial. Accordingly, Lamb's claim should be rejected.

A. The Severance Motion Was Properly Denied

Consolidation or joinder of charged offenses has long been preferred under the law because it promotes efficiency and judicial economy. (*People v. Scott* (2011) 52 Cal.4th 452, 469; *People v. Soper* (2009) 45 Cal.4th 759, 771-772 (*Soper*); *Alcala v. Superior Court* (2008) 43 Cal.4th 1205, 1220 (*Alcala*); *People v. Manriquez* (2005) 37 Cal.4th 547, 574.) The state constitution specifically bars courts from construing any of its provisions "to prohibit the joining of criminal cases as prescribed by the Legislature...." (Cal. Const., art. I, § 30, subd. (a).)

Penal Code section 954 provides in relevant part:

> An accusatory pleading may charge two or more different offenses connected together in their commission, or different statements of the same offense or two or more different offenses of the same class of crimes or offenses, under separate counts, and if two or more accusatory pleadings are filed in such cases in the same court, the court may order them to be consolidated....

However, the trial court retains discretion to order offenses or counts to be tried separately in the interests of justice and for good cause shown. (§ 954; *People v. Merriman, supra,* 60 Cal.4th at p. 37.)

Where the statutory requirements for joinder under section 954 are met, the defendant " ' "must make a *clear showing of prejudice* to establish that the trial court *abused its discretion*" ' " in denying a motion to sever the charges. (*Soper, supra,* 45 Cal.4th at p. 774, quoting *Alcala, supra,* 43 Cal.4th at p. 1220, and cases cited, emphasis in original.) An abuse of discretion is only shown where denial of the severance motion " ' " ' "falls outside the bounds of reason." ' " ' " (*Ibid.*, quoting *Alcala, supra,* 43 Cal.4th at p. 1220.) Appellate review is conducted "in light of the showings made and the facts known by the trial court at the time of the court's ruling." (*People v. Merriman, supra,* 60 Cal.4th at p. 37.)

The reviewing court first considers whether evidence would have been cross-admissible in separate trials. (*Soper, supra,* 45 Cal.4th at 774, citing *Alcala, supra,* 43 Cal.4th at p. 1220.) Cross-admissibility of evidence "alone is normally sufficient to dispel any suggestion of prejudice and to justify a trial court's refusal to sever properly joined charges."[102] (*Id.* at pp. 774-775; see *People v. Merriman, supra,* 60 Cal.4th at p. 42.)

However, a lack of cross-admissible evidence does not by itself suffice to establish prejudice or an abuse of discretion. (*People v. Merriman, supra,* 60 Cal.4th at p. 38; *Soper, supra,* 45 Cal.4th. at p. 775; *Alcala, supra,* 43 Cal.4th at p. 1221.) Indeed, section 954.1 states:

> In cases in which two or more different offenses of the same class of crimes or offenses have been charged together in the same accusatory pleading, or where two or more accusatory pleadings charging offenses of the same class of crimes or offenses have been consolidated, evidence concerning one offense or offenses need not be admissible as to the other offense or offenses before the jointly charged offenses may be tried together before the same trier of fact.

Where there is no cross-admissible evidence, the reviewing court considers three additional factors in assessing whether the denial of the severance motion was an abuse of discretion:

> (1) whether some of the charges are particularly likely to inflame the jury against the defendant; (2) whether a weak case has been joined with a strong case or another weak case so that the totality of the evidence may alter the outcome as to some or all of the charges; or (3) whether one of the charges (but not another) is a capital offense, or the joinder of the charges converts the matter into a capital case.

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[102] Complete or "two-way" cross-admissibility between counts is not required. (*People v. Merriman, supra,* 60 Cal.4th at p. 38; *Alcala, supra,* 43 Cal.4th at p. 1221; *People v. Zambrano, supra,* 41 Cal.4th at p. 1129.)

(*Soper, supra,* 45 Cal.4th at p. 775, citing *People v. Arias, supra,* 13 Cal.4th at p. 127.) The "potential for prejudice to the defendant from a joint trial" is then balanced "against the countervailing benefits to the state." (*Ibid,* footnote omitted.)

This Court has cautioned against minimizing the benefits of joinder in this analysis. (*Soper, supra,* 45 Cal.4th at p. 781.) The benefits include "case-specific efficiencies" as well as judicial and systemic economies. (*Id.* at pp. 781-782.) Joinder prevents waste and duplication of limited resources in the court processing system, jury selection, trial court proceedings, and appeals. (*Id.* at p. 782.) "Manifestly, severance of properly joined charges denies the state the substantial benefits of efficiency and conservation of resources otherwise afforded by section 954." (*Ibid.*)

Prior to trial, Lamb filed a motion to sever counts 7 and 9, which charged the March 11 attempted murder of Officer Helmick and street terrorism, from the remaining counts for purposes of trial, arguing joinder would result in gross unfairness and a denial of due process.[103] (5 CT 1003-1015.) The prosecutor filed an opposition. (5 CT 1049-1050.)

At the hearing on the motion, defense counsel conceded "that there was some cross-admissibility issues with regard to the gun," but argued there were "some different issues involved" with the attempted murder such as intent and knowledge. (2 RT 210-211.) The prosecutor responded that his theory of the case was that Lamb shot at Officer Helmick in an effort to evade arrest for the murder of Scott Miller three days earlier and "[t]here is plenty of cross-admissibility here both ways." (2 RT 211-212.)

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[103] In his motion, Lamb did not request that the March 11 felon in possession of a firearm count be severed. (See 5 CT 1003.)

The trial court denied the severance motion as follows:

> Now, I mentioned at Mr. Rump's hearing for the same motion it's the court's opinion that there is a significant amount of evidence that is cross-admissible. The counts are both pretty inflammatory. The fact that Mr. Lamb is subject to being prosecuted for a capital crime does enter into it, but I don't think anything the defense has come up with has overcome the preference for consolidation. The motion's denied.

(2 RT 210; 5 CT 1143.)

The trial court's denial of the severance motion was proper. The March 8 counts charged murder and conspiracy to commit murder, whereas the March 11 counts charged attempted murder of a peace officer. (3 CT 669-672.) Murder and attempted murder are assaultive offenses in the same class of crimes for purposes of section 954. (*People v. Jones, supra,* 57 Cal.4th 899, 924; *People v. Zambrano, supra,* 41 Cal.4th at p. 1128; *People v. Stanley* (2006) 39 Cal.4th 913, 934; *People v. Jenkins* (2000) 22 Cal.4th 900, 947; *People v. Osband, supra,* 13 Cal.4th at p. 666; *People v. Miller* (1990) 50 Cal.3d 954, 987.) The other counts associated with the March 8 murder and March 11 attempted murder were identical – street terrorism and felon in possession of a firearm; and, where applicable, gang and firearm enhancements were alleged for both incidents. (3 CT 672.)

Since the statutory requirements for joinder were met, Lamb " ' "can predicate error in denying the motion only on a clear showing of potential prejudice." ' " (*People v. Jones, supra,* 57 Cal.4th at p. 924-925, quoting *People v. Vines* (2011) 51 Cal.4th 830, 855; see *Soper, supra,* 45 Cal.4th at p. 774; *Alcala, supra,* 43 Cal.4th at p. 1220.) Lamb cannot meet this burden.

First, there was significant cross-admissible evidence *under both the prosecution and defense theories of the case.* It was undisputed that the same gun was used in the March 8 murder and March 11 attempted murder. The prosecutor's theory was that Lamb fired the gun in both offenses. The

defense theory was that Johnson committed the murder with the gun and then gave it to Lamb the following evening. Thus, the facts of the two incidents were inextricably interwoven for the defense as well as the prosecution.

Moreover, the prosecutor's theory of motive for the attempted murder was that Lamb was attempting to evade arrest for the murder he had committed a few days earlier. In *People v. Merriman, supra,* 60 Cal. 4th 1,

> Evidence that defendant, thinking he was being arrested for murder, fled from police and resisted arrest by engaging in a dramatic, hours-long standoff generally would be admissible at a separate trial on the murder charge to show his consciousness of guilt for killing [the murder victim]. Likewise, evidence of the murder generally would be cross-admissible in a separate trial on the resisting arrest charges to help explain the intensity of his efforts to evade police.

(*Id.* at p. 44.)

Similarly, in *People v. Cummings, supra*, 4 Cal.4th at 1233, the trial court properly denied severance of robbery counts from the murder of a peace officer where the motive for the murder was to avoid arrest for the robberies. (*Id.* at p. 1284.) Like in *Merriman* and *Cummings*, the consciousness of guilt evidenced by Lamb's evasion, standoff and attempted murder of Officer Helmick to avoid arrest for the Miller murder would have been admissible at a separate trial for the March 8 offenses, and the evidence of the murder would have been admissible at a separate trial for the March 11 offenses to explain the reason for Lamb's extreme actions in attempting to evade arrest.[104] (See also *People v. Zambrano, supra,* 41 Cal.4th at p. 1129 [evidence of assaults would have been cross-admissible

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[104] Since the prosecutor's theory of cross-admissibility was motive, Lamb's discussion of identity and common scheme or plan is irrelevant. (See AOB 264-265.)

in a separate trial for the murder charge in order to prove motive to eliminate victim as a witness].)

Furthermore, most of the lengthy gang expert testimony was applicable to both the murder and the attempted murder to prove the attendant gang enhancements. Also, Johnson would have been required to testify for the defense at separate trials to take responsibility for the murder and explain how Lamb came to possess the murder weapon by March 11. As the trial court aptly observed in ruling on Rump's severance motion, "All of this evidence seems to be wrapped up together." (1 RT 84.)

This cross-admissibility of evidence in and of itself should be deemed "sufficient to dispel any suggestion of prejudice" and justify the trial court's denial of Lamb's severance motion. (*Soper, supra,* 43 Cal.4th at pp. 774-775; *Alcala, supra,* 43 Cal.4th at p. 1221.) In any event, the remaining three severance factors also supported the trial court's ruling.

First, neither incident was unduly inflammatory vis-a-vis the other. Each involved the firing of a single shot from a handgun at a single victim. Whereas the March 8 shooting resulted in a death, the March 11 shooting was directed at a police officer in the performance of his duties. Thus, the two incidents were "similar in nature and equally egregious" in comparison with each other, which weighed against severance. (See *Soper, supra,* 45 Cal.4th at p. 780.)

Second, neither the murder nor the attempted murder was a weak case bolstered through joinder. Lamb's culpability for the murder was proved through powerful circumstantial evidence consisting of a gang-related motive (12 RT 2155-2156, 2169; 16 RT 3087-3088, 3177-3179;18 RT 3530-3531; 20 RT 4027), his call to Harris the evening of the shooting requesting to talk to Hinson about a very important matter (14 RT 2579), his subsequent presence in the apartment adjoining the execution site and departure minutes before the murder (7 RT 1435-1436, 1441-1442; 14 RT

2584-2586, 2758-2760), and his admissions and boasting about the murder to Mason and in his correspondence (11 RT 1989, 1992-1993; 12 RT 2164-2166; 19 RT 3769-3798, 3820-3825).

Lamb's commission of the attempted murder was proved through the eyewitness testimony identifying him as the gunman aiming at Officer Helmick at the time the shot was fired (8 RT 1622-1625; 12 RT 2320-2330; 15 RT 2904, 2973-2978, 3015) as well as the requisite evidence of knowledge irrefutably established through the very loud police helicopter hovering over Lamb's head and the police radios turned up to maximum volume at the time of the shooting (8 RT 1618-1622; 12 RT 2319; 15 RT 2897-2898, 2902-2903, 2959-2960, 2969), the officers' clearly marked police vests (8 RT 1617-1618; 15 RT 2895-2897) and Mr. Pantaleon's testimony that he heard *from inside his apartment* footsteps running up the stairs and someone yelling, "Police," before the gunshot (12 RT 2298-2300). Thus, the prosecution evidence proving each of the cases was independently sufficient and strong.

Third, joinder did not make Lamb death-eligible since the murder carried its own gang-murder special circumstance. (See *Alcala, supra,* 43 Cal.4th 1228-1229; *People v. Sandoval, supra,* 4 Cal.4th at p. 173; *People v. Marquez* (1992) 1 Cal.4th 553, 573; *People v. Walker* (1988) 47 Cal.3d 605, 623.)

Considering all of the relevant factors, there was no potential prejudice which would have justified severance at the time of Lamb's motion. In contrast, the benefits of joinder were many. Joinder prevented the needless consumption of limited judicial resources in duplicating the litigation of discovery matters and pretrial motions applicable to both sets of charges. Joinder also preserved finite resources by obviating the need to summon and subject yet another sizable venire of potential jurors to the selection process. Likewise, consolidation of the two cases prevented

needless waste in resources instructing and educating two juries on the same legal principles applicable to both murder and attempted murder as well as the attendant enhancements. In addition, joinder eliminated the costs and burdens of separate appellate proceedings. (See *Soper, supra,* 45 Cal.4th at p. 782.)

Furthermore, as discussed above, there was substantial overlap of evidence and witnesses militating against severance. Like the Court of Appeal in *Soper*, Lamb errs in minimizing the benefits of joinder in the weighing process, focusing entirely on his unsubstantiated claims of prejudice. (See AOB 268-269.)

Lamb cites to *Williams v. Superior Court* (1984) 36 Cal.3d 441 (*Williams*) in support of his argument. (AOB 261-262.) However, the continued viability of that case is questionable. *Williams* held severance where one of the charges is a capital offense must be analyzed "with a higher degree of scrutiny and care than is normally applied in a noncapital case." (*Id.* at p. 454.) This Court has since held "such a heightened analysis is no longer called for." (*Alcala, supra,* 43 Cal.4th at p. 1229, fn. 19, citing § 790, subd. (b).)

In any event, *Williams* is distinguishable in that there was no cross-admissible evidence in that case. (*Williams, supra,* 36 Cal.3d at pp. 450-451.) As shown above, such is not the case here. Furthermore, the joinder in *Williams* gave rise to the only special circumstance in that case – multiple murder. (*Id.* at p. 454.) As previously stated, the Miller murder carried its own gang-murder special circumstance.

Lamb's argument is essentially is that joinder made it easier to convict him of the murder and attempted murder. (See AOB 261-268.) However,

> The benefits of joinder are not outweighed – and severance is not required – merely because properly joined charges might

> make it more difficult for a defendant to avoid conviction compared with his or her chances were the charges to be separately tried.

(*Soper, supra,* 45 Cal.4th at p. 781, citing *Zafiro v. United States* (1993) 506 U.S. 534, 540 [113 S.Ct. 933, 122 L.Ed.2d 317].)

Lamb attempts to rely on factual distinctions between the March 8 and March 11 incidents in arguing joinder "created a spillover effect in both." (AOB 267.) Lamb's argument is of no moment since

> between any two charges, it always is possible to point to individual aspects of one case and argue that one is stronger than the other. A mere imbalance in the evidence, however, will not indicate a risk of prejudicial "spillover effect," militating against the benefits of joinder and warranting severance of properly joined charges.

(*Soper, supra,* 45 Cal.4th at p. 781.)

Lamb's argument is also premised on speculation about what the jurors were "likely to conclude" due to the alleged spillover effect. (AOB 267.) Such "speculative and unconvincing contentions" are however insufficient to make the clear showing of prejudice necessary to establish an abuse of discretion. (See *People v. Manriquez, supra,* 37 Cal.4th at p. 575 [defendant argued he "probably" would have been acquitted or convicted of lesser offenses in separate trials].)

Considering all relevant factors for the properly joined charges in this case, Lamb did not meet his burden of making a clear showing of potential prejudice or an abuse of discretion. Accordingly, the trial court's denial of Lamb's pretrial severance motion should be affirmed.

B. Joinder Did Not Result in Any Gross Unfairness

Moreover, the resulting trial on the joined counts did not result in any gross unfairness in violation of Lamb's due process rights.

> "[E]ven if a trial court's ruling on a motion to sever is correct at the time it was made, a reviewing court still must determine

> whether, in the end, the joinder of counts or defendants for trial resulted in gross unfairness depriving the defendant of due process of law. [Citations.]"

(*Soper, supra,* 45 Cal.4th at p. 783, quoting *People v. Rogers* (2006) 39 Cal.4th 826, 851.) For this inquiry, the reviewing court considers the evidence which was actually introduced at trial. (*People v. Thomas, supra,* 53 Cal.4th at pp. 800-801, citing *People v. Bean, supra,* 46 Cal.3d at p. 940.) "[R]eversal is required only if it is reasonably probable the defendant would have obtained a more favorable result at a separate trial." (*People v. Burney* (2009) 47 Cal.4th 203, 237; see *People v. Merriman, supra,* 60 Cal.4th at p. 49.)

Factors to be considered in this analysis are whether the evidence for each of the joined offenses is "relatively straightforward and distinct" and "independently ample" to support the convictions, there is no great disparity in the nature of the two offenses which would unduly inflame the jury, and the evidence of one count is not significantly weaker than the other. (*Soper, supra,* 45 Cal.4th at p. 784.) As shown above, the evidence actually admitted at trial to prove the March 8 and March 11 charges met these criteria, mitigating against a finding of gross unfairness.

It is also important to consider whether the jury was instructed on the need to consider each count separately. (See *Soper, supra,* 45 Cal.4th at p. 784.) Lamb's guilt phase jury was so instructed to "decide each charge for each defendant separately." (21 RT 4155; 7 CT 1495 [CALCRIM No. 203].) It is presumed that the jurors understood and followed the court's instruction. (*Penry v. Johnson, supra,* 532 U.S. at p. 799; *Greer v. Miller, supra,* 483 U.S. at p. 766, fn. 8; *Richardson v. Marsh, supra,* 481 U.S. at p. 211; *People v. Sanchez, supra,* 26 Cal.4th at p. 852; *People v. Osband, supra,* 13 Cal.4th at p. 714; *People v. Pinholster, supra,* 1 Cal.4th at p. 919.) Lamb offers nothing to rebut this presumption. (See AOB 268-269.)

In sum, Lamb fails to show the trial court's denial of his pretrial severance motion exceeded the bounds of reason such that it constituted an abuse of discretion. Moreover, joinder of the two cases did not result in any gross unfairness amounting to a denial of due process. Accordingly, Lamb's claim of error should be rejected and the guilt judgment affirmed.

XII. LAMB'S DUE PROCESS AND CONFRONTATION RIGHTS WERE NOT VIOLATED BY THE ADMISSION OF RUMP'S JAILHOUSE STATEMENT THAT HE THOUGHT IT MIGHT HAVE BEEN A PAROLE AGENT PURSUING THEM IN THE MARCH 11 INCIDENT

In Claim Twelve, Lamb contends the admission of Rump's tape-recorded jailhouse statement that he thought it might have been a parole agent pursuing them on March 11 requires reversal of his conviction for attempted murder of a peace officer (count 7) because it violated his confrontation and due process rights under the Sixth and Fourteenth Amendments pursuant to *Crawford v. Washington* (2004) 541 U.S. 36 [124 S.Ct. 1354, 158 L.Ed.2d 177] (*Crawford*), *Estelle v. McGuire* (1991) 502 U.S. 62 [112 S.Ct. 475, 116 L.Ed.2d 385], *Bruton v. United States* (1968) 391 U.S. 123 [88 S.Ct. 1620, 20 L.Ed.2d 476] (*Bruton*), and *People v. Aranda* (1965) 63 Cal.2d 518 (*Aranda*). (AOB 269-285.) Lamb's contentions are meritless.

Since the trial court properly exercised its discretion in admitting Rump's statement under California's rules of evidence, there was no violation of Lamb's rights to due process or a fair trial. Because Rump's statement was not "testimonial," admitted for a nonhearsay purpose and only incriminating when viewed in context of other evidence, there was no violation of Lamb's confrontation rights. Moreover, in light of the overwhelming evidence proving Lamb's knowledge that Officer Helmick *was a police officer*, any error in admitting Rump's statement that he

thought the driver of the white car *might have been a parole agent* was utterly harmless.

During the March 11, 2002, recorded conversation between Lamb and Rump where they were yelling back and forth at each other in the Anaheim Police Department before their interviews, Rump asked Lamb, "Who the fuck was that dude in the white car trying to get our ass?," and Lamb replied, "I don't know." (11 CT 2724-2725 [Peo. Ex. 105A].) Subsequently, Rump stated, "Hey! I think that white car might have been a parole agent," and Lamb replied, "I'm out of here Comrade." (11 CT 2730.) When Rump attempted to continue the conversation, Lamb told him, "Buy [*sic.*] homie." (11 CT 2730.)

During pre-guilt phase motions, defense counsel objected to Rump's parole agent statement being admitted against Lamb, arguing that it was irrelevant and prejudicial. (2 RT 333-334.) The prosecutor argued the statement was relevant and admissible against Lamb as an adoptive admission or, in the alternative, a declaration against penal interest. (2 RT 335-337.) Defense counsel responded and reasserted her objections. (2 RT 338-340, 341.)

After taking Lamb's objection under submission, the trial court ruled that Rump's statement did not qualify as an adoptive admission for Lamb. (2 RT 415-417.) The prosecutor argued the statement should still be admitted against Lamb as circumstantial evidence of a shared belief by the two defendants since it was a reasonable inference from the evidence that they had the opportunity to converse during the pursuit. (2 RT 417-418.) Defense counsel responded that the offer of proof was speculative, prejudicial and should be excluded under Evidence Code section 352.[105] (2

[105] Prior to trial, defense counsel made a motion to "federalize" certain objections. (5 CT 1131-1135.) The prosecutor had no objection, (continued...)

RT 418-419.) The court reserved ruling on this alternative ground for admission of the statement until hearing the evidence presented at trial. (2 RT 419.)

During Detective Schropfer's direct testimony about the recorded jailhouse conversations, the prosecutor made a motion to admit the conversation between Lamb and Rump into evidence. (10 RT 1939.) When asked whether he had any objection, defense counsel indicated that he had no objection "other than as stated." (10 RT 1939.) Without further comment, the trial court overruled the objection, admitted the tape and permitted it to be played for the jury. (10 RT 1940.)

A. There Was No Violation of Lamb's Due Process Rights

Rump's statement was properly admitted against Lamb since it was relevant nonhearsay. The Evidence Code defines hearsay as "evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated." (Evid. Code, § 1200, subd. (a).) Absent an exception "provided by law, hearsay evidence is inadmissible." (Evid. Code, § 1200, subd. (b).)

Here, Rump's out-of-court statement was not admitted to prove the truth of the matter stated – that he and Lamb were being pursued by a parole agent. Quite the opposite, the assertion by Rump was not true since Officer Helmick was a police officer. As explained by the prosecutor, Rump's statement provided circumstantial evidence of Lamb's state of

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(...continued)
and the trial court stated that "every hearsay, relevance, or [Evidence Code section] 352 objection is deemed to have been made under the Due Process Clause of the 14th Amendment, [and/or] Confrontation Clause of the 6th and 14th amendments. (2 RT 214.) Moreover, a defendant may claim on appeal a due process violation as an additional consequence of the overruling of an Evidence Code section 352 objection in the trial court. (*People v. Partida* (2005) 3 Cal.4th 428, 437-438.)

mind since a reasonable juror could infer from the facts that Rump and Lamb would have discussed their views about their pursuers during the substantial amount of time and distance they were evading the officers. (See, e.g., *People v. Jackson* (1989) 49 Cal.3d 1170, 1187 [defendant's statement that he shot the officer was properly admitted "as circumstantial evidence of the fact that defendant had a memory of the shooting" rather than truth of the matter asserted].)

Therefore, Rump's statement had a nonhearsay purpose. Nonetheless,

> "[a] hearsay objection to an out-of-court statement may not be overruled simply by identifying a nonhearsay purpose for admitting the statement. The trial court must also find that the nonhearsay purpose is relevant to an issue in dispute." [Citation.] Relevant evidence is evidence "having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." [Citation.] We review a trial court's relevance determination under the deferential abuse of discretion standard. [Citation.]

(*People v. Jablonski* (2006) 37 Cal.4th 774, 820-821.)

Lamb's knowledge that Officer Helmick was some type of law enforcement officer in the performance of his duties was an issue in dispute. (7 CT 1636-1638 [CALCRIM No. 602]; see *People v. Steele* (2002) 27 Cal.4th 1230, 1243 [not guilty plea places all elements of the charged offense in issue]; *People v. Daniels* (1991) 52 Cal.3d 815, 857 [same].) Indeed, Lamb went to great lengths to place knowledge in dispute by calling an expert witness to testify about his need for vision correction in context of the relevant distances for the March 11 shooting. (See RT 20 RT 3853-3857 [Dr. Wynette Augustine].)

Rump's statement "had a tendency in reason to prove" the knowledge element for Lamb since the two men had ample opportunity to discuss their pursuers during the evasion and exchange with each other

their opinions and beliefs. Therefore, the nonhearsay purpose for Rump's statement was relevant and admissible.[106]

Since Rump's statement that he thought Officer Helmick was a parole agent was not the type of evidence " ' "which uniquely tends to evoke an emotional bias against the defendant as an individual and which has very little effect on the issues," ' " there was no undue prejudice to counterbalance the statement's probative value. (See *People v. Alexander, supra,* 49 Cal.4th at p. 905.) The mere fact that the statement may have helped the prosecution or damaged Lamb's case does not translate into "undue prejudice" within the meaning of Evidence Code section 352. (*Ibid.* at p. 905, quoting *People v. Karis, supra,* 46 Cal.3d at p. 638; see *People v. Doolin, supra,* 45 Cal.4th at pp. 438-439; *People v. Carter, supra,* 36 Cal.4th at p. 1168.) It follows that Lamb cannot show the trial court's ruling was arbitrary, capricious or patently absurd, or that the court abused its "broad discretion" in admitting the statement.[107] (See *People v. Merriman, supra,* 60 Cal.4th at p. 74; *People v. Montes, supra,* 58 Cal.4th at p. 868; *People v. Williams, supra,* 58 Cal.4th at pp. 270-271; *People v. Brown, supra,* 31 Cal.4th at p. 534.)

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[106] Lamb argues the trial court admitted the statement under a theory of "shared or derivative motive" which was invalid. (AOB 275-278.) Lamb's argument is of no moment since the statement was relevant and admissible to prove knowledge. (See *People v. Jones, supra,* 54 Cal.4th at p. 50; *People v. Smithey, supra,* 20 Cal.4th at pp. 971-972; *People v. Zapien, supra,* 4 Cal.4th at p. 976.)

[107] As previously stated, the trial " 'court need not expressly weigh prejudice against probative value or even expressly state that it has done so, if the record as a whole shows the court was aware of and performed its balancing functions under Evidence Code section 352' " (*People v. Doolin, supra,* 45 Cal.4th at p. 438, quoting *People v. Taylor, supra,* 26 Cal.4th at p. 1169) "and there is an adequate basis for appellate review" (*People v. Arias, supra,* 13 Cal.4th at p. 155).

"[T]he application of ordinary rules of evidence does not implicate the federal Constitution . . .." (*People v. Harris, supra,* 37 Cal.4th at p. 336.) This includes the application of Evidence Code section 352. (*People v. Marks, supra,* 31 Cal.4th at p. 227.) Thus, where "evidence was relevant to prove a fact of consequence, its admission did not violate defendant's due process rights" (*People v. Foster, supra,* 50 Cal.4th at p. 1335) or the defendant's constitutional right to a fair trial (*People v. Fuiava, supra,* 53 Cal.4th at p. 670). (See also *People v. Burgener, supra,* 29 Cal.4th at p. 873; *People v. Hart, supra,* 20 Cal.4th at p. 617, fn. 19.)

B. There Was No Violation of Lamb's Confrontation Rights

In *Bruton, supra,* 391 U.S. 123, the Supreme Court held the admission of a nontestifying codefendant's statement violates the Confrontation Clause unless the codefendant is granted a separate jury or the statement is redacted to significantly reduce or eliminate any prejudice to the defendant. (*Id.* at 126.) Thus, *Bruton* was based on the Confrontation Clause. (See *Harrington v. California* (1969) 395 U.S. 250, 251 [89 S.Ct. 1726, 23 L.Ed.2d 284]; *People v. Walkkein* (1993) 14 Cal.App.4th 1401, 1407.)

A similar rule announced a few years earlier by this Court in *Aranda* was "adopted as a judicially declared rule of procedure" rather than one of constitutional origin. (*People v. Walkkein, supra,* 14 Cal.App.4th at p. 1407, citing *Aranda, supra,* 63 Cal.2d at pp. 530-531.) However, this "*Aranda-Bruton*" rule is now commonly understood to invoke a defendant's constitutional rights under the Confrontation Clause.[108] (See,

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[108] Also, "[t]o the extent *Aranda* 'required[d] the exclusion of relevant evidence that need not be excluded under federal constitutional law, it was abrogated in 1982 by the "truth-in-evidence" provision of Proposition 8 (Cal. Const., art. 1 § 28, subd. (d)).'" (*People v. Homick*

(continued...)

e.g., *People v. Jennings, supra,* 50 Cal.4th at p. 652; *People v. Ervin* (2000) 22 Cal.4th 48, 93.)

In *Crawford, supra,* 541 U.S. 36, the Supreme Court found the admission of out-of-court "testimonial" statements violates the Sixth Amendment unless the witness is unavailable to testify and the defendant was afforded a prior opportunity to cross-examine the witness. (*Id.* at pp. 59, 68, overruling the "adequate indicia of reliability" test of *Ohio v. Roberts* (1980) 448 U.S. 56 [100 S.Ct. 2531, 65 L.Ed.2d 597].) The Court "left for another day any effort to spell out a comprehensive definition of 'testimonial.' " (*Id.* at p. 68.) However, the Court identified the "core class of "testimonial" statements as

> ex parte in-court testimony or its functional equivalent – that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially, [citation]; extrajudicial statements ... contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions, [citation]; [and] statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial, [citation].

(*Id.* at pp. 51-52 [internal quotation marks omitted].)

Thus, "[a] statement is testimonial if a reasonable person in the declarant's position would have anticipated the use of the statement in a criminal proceeding."[109] (*United States v. Boyd* (6th Cir. 2011) 640 F.3d 657, 665.) "Statements are not testimonial simply because they *might*

(...continued)
(2012) 55 Cal.4th 816, 874, fn. 34, quoting *People v. Fletcher* (1996) 13 Cal.4th 451, 465.)

[109] Lamb mistakenly views the statement from the police officers' rather than the declarant's position. (See AOB 279-280.)

reasonably be used in a later criminal trial." (*People v. Romero* (2008) 44 Cal.4th 386, 422, citing *People v. Cage* (2007) 40 Cal.4th 965, 991, emphasis added.) Rather, "[s]tatements are testimonial if the *primary purpose* was to produce evidence for possible use at a criminal trial...." (*Ibid.*, emphasis added.)

Here, Rump's statement to Lamb that he thought they were being pursued by a parole agent was not uttered for purposes of possible use at a criminal trial. "[S]tatements made to friends and acquaintances are non-testimonial" within the meaning of *Crawford.* (*United States v. Boyd, supra,* 640 F.3d at p. 665; see also *United States v. Jordan* (4th Cir. 2007) 509 F.3d 191, 201; *United States v. Franklin* (6th Cir. 2005) 415 F.3d 537, 545; *People v. Cervantes* (2004) 118 Cal.App.4th 162, 174.) Accordingly, Rump's statement was nontestimonial. As in *People v. Jefferson* (2008) 158 Cal.App.4th 830, 842, there was "[n]o government player" involved in the discussion.

Post-*Crawford*, the Confrontation Clause "has no application to" nontestimonial statements.[110] (*Whorton v. Bockting* (2007) 549 U.S. 406, 420 [127 S.Ct. 1173, 167 L.Ed.2d 1].) This includes nontestimonial statements by codefendants. (*People v. Arceo* (2011) 195 Cal.App.4th 556, 571.) Therefore, *Aranda-Bruton* has no application to nontestimonial statements by co-defendants. (*Id.* at pp. 571, 575.) "Because it is premised on the Confrontation Clause, the *Bruton* rule, like the Confrontation Clause itself, does not apply to nontestimonial statements." (*United States v. Johnson* (6th Cir. 2009) 581 F.3d 320, 326.) Accordingly, a "claim under the Confrontation Clause, whether denominated a *Crawford* challenge or a

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[110] Similarly, *Ohio v. Roberts, supra,* 448 U.S. 56, no longer applies to nontestimonial statements since the unanimous Court in *Bockting* held *Crawford* "permits their admission even if they lack indicia of reliability." (See *Whorton v. Bockting, supra,* 549 U.S. at p. 420.)

Bruton challenge, must be rejected." (*United States v. Figueroa-Cartagena* (1st Cir. 2010) 612 F.3d 69, 85 [footnote omitted].)

Moreover, as discussed above, Rump's statement was admitted against Lamb for a nonhearsay purpose. For out-of-court statements admitted for purposes other than establishing the truth of the matter asserted, there are no Confrontation Clause restrictions. (*People v. Thomas, supra,* 53 Cal.4th at p. 803; *People v. Cage, supra,* 40 Cal.4th at p. 976, fn. 6, citing *Crawford, supra,* 541 U.S. at p. 60, fn. 9.) Thus, *Aranda-Bruton* cannot bar testimony used for a nonhearsay purpose.

Even if *Aranda-Bruton* were applicable to statements which are nontestimonial or offered for nonhearsay purposes, Lamb's claim would still fail. *Bruton* held admission of a nontestifying codefendant's statement at trial which incriminates the defendant violates the Confrontation Clause, even where the jurors are instructed to disregard the statement in deciding the defendant's guilt. (*Bruton, supra,* 391 U.S. at pp. 127-128.)

However, the scope of *Bruton* was limited in *Richardson v. Marsh* (1987) 481 U.S. 200 [107 S.Ct. 1702, 95 L.Ed.2d 176]. (*People v. Lewis* (2008) 43 Cal.4th 415, 454.) There, the United States Supreme Court

> explained that *Bruton* recognized a narrow exception to the general rule that juries are presumed to follow limiting instructions, and this narrow exception should not apply to confessions that are not incriminating on their face, but become so only when linked with other evidence introduced at trial. [Citation.]

(*Ibid.*, citing *Richardson v. Marsh, supra,* 481 U.S. at pp. 206-207.) Thus, "*Richardson* placed outside the scope of *Bruton*'s rule those statements that incriminate inferentially." (*Gray v. Maryland* (1998) 523 U.S. 185, 195 [118 S.Ct. 1151, 140 L.Ed.2d 294]; see also *People v. Ardoin* (2011) 196 Cal.App.4th 102, 137-138.)

Here, Rump's parole agent statement only incriminated Lamb inferentially when linked with the other evidence presented at trial, specifically evidence of the facts and circumstances of the evasion. Therefore, Rump's out-of-court statement could not have violated Lamb's rights under *Aranda-Bruton*. (See *Gray v. Maryland, supra,* 523 U.S. at p. 195.)

C. The Alleged Error Was Harmless

Since the admission of Rump's statement did not implicate any of Lamb's constitutional rights, any alleged error in admitting the statement would be one of state law which is reviewed for prejudice under the harmless error standard of *People v. Watson, supra,* 46 Cal.2d 818. (See *People v. Lucas, supra,* 60 Cal.4th at p. 263; *People v. Gonzales* (2013) 56 Cal.4th 353, 357; *People v. Loy* (2011) 52 Cal.4th 46, 67; *People v. Harris, supra,* 37 Cal.4th at p. 336; *People v. Marks, supra,* 31 Cal.4th at p. 227.)

As discussed in Argument XI(A), *ante*, Lamb's knowledge that Officer Helmick was a police officer was proved through the very loud police helicopter hovering over Lamb's head and the police radios turned up to maximum volume at the time of the shooting (8 RT 1618-1622; 12 RT 2319; 15 RT 2897-2898, 2902-2903, 2959-2960, 2969), the officers' clearly marked police vests (8 RT 1617-1618; 15 RT 2895-2897) and Mr. Pantaleon's testimony that he heard from inside his apartment footsteps running up the stairs and someone yelling, "Police," before the gunshot (12 RT 2298-2300). Thus, it is not reasonably probable that Lamb would have received a more favorable verdict in the absence of Rump's parole agent statement, the alleged error is harmless and Lamb's conviction for premeditated and deliberate attempted murder of a peace officer should be affirmed. (*People v. Watson, supra,* 46 Cal.2d at p. 836.)

For the same reasons, even assuming Lamb's constitutional rights were implicated, he would not be entitled to relief because any error was

harmless beyond a reasonable doubt. (*Chapman v. California, supra,* 386 U.S. at p. 24.)

Lamb argues the alleged evidentiary error, if not prejudicial standing alone, was prejudicial when considered in context of other alleged guilt phase errors. (AOB 285.) As discussed herein as well as in Arguments III and XI, *ante*, there were no errors in the guilt phase. Accordingly, there can be no cumulative error. (*People v. Anderson, supra,* 25 Cal.4th at p. 606; *People v. Bolin, supra,* 18 Cal.4th at p. 335.) The guilt judgment should thus be affirmed in its entirety.

XIII. CALIFORNIA'S DEATH PENALTY STATUTE IS CONSTITUTIONAL

In Claim Thirteen, Lamb challenges the constitutionality of California's death penalty statute in general and as applied in his case, acknowledging that each of his claims has previously been rejected by this Court. (AOB 286-298.) As Lamb presents no new arguments or persuasive reasons to revisit these issues, respondent urges this Court to reaffirm its prior holdings finding California's death penalty statute, relevant instructions and sentencing scheme constitutional.[111]

Lamb claims factor (a) of section 190.3 is impermissibly overbroad because it permits the jurors to consider "the circumstance of the crime"

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[111] *People v. Schmeck* (2005) 37 Cal.4th 240, abrogated on another ground as stated in *People v. McKinnon, supra,* 52 Cal.4th at pp. 637-638, provides for an abbreviated form to present "routine or generic claims that [this Court] repeatedly [has] rejected and are presented to this [C]ourt primarily to preserve them for review by the federal courts. . . . when the defendant does no more than (i) identify the claim in the context of the facts, (ii) note that [this Court] previously [has] rejected the same or a similar claim in a prior decision, and (iii) ask [this Court] to reconsider that decision." (*Id.* at p. 304.) Pursuant to *Schmeck*, Lamb presents his challenges to California's death penalty statute in abbreviated fashion. (See AOB 286-287.)

without limitation, thus allowing arbitrary and capricious imposition of the death penalty in violation of the Constitution. (AOB 287.) Similar claims were previously rejected in *People v. Sattiewhite* (2014) 59 Cal.4th 446, 489; *People v. Foster, supra,* 50 Cal.4th at pp. 1362-1364, *People v. Russell* (2010) 50 Cal.4th 1228, 1274, *People v. Jennings, supra,* 50 Cal.4th at pp. 688-689, and *People v. Lomax* (2010) 49 Cal.4th 530, 593; and should be rejected here.

Lamb also claims factor (a) is unconstitutional because it does not require the jury to unanimously find the existence of circumstances beyond a reasonable doubt before using them as aggravating factors in violation of *Ring v. Arizona* (2002) 536 U.S. 584 [122 S.Ct. 2428, 153 L.Ed.2d 556], and its progeny. (AOB 287-288.) Such claims were previously rejected in *People v. Sattiewhite, supra,* 59 Cal.4th at pp. 489-490, *People v. Howard* (2010) 51 Cal.4th 15, 39, *People v. Foster, supra,* 50 Cal.4th at p. 1367, *People v. Russell, supra,* 50 Cal.4th at p. 1272, *People v. Verdugo* (2010) 50 Cal.4th 263, 304, and *People v. Williams, supra,* 49 Cal.4th at p. 470; and should be rejected here.

Lamb claims factor (b) is unconstitutional because, unlike factor (c) evidence, it does not require juries to unanimously find the existence of unadjudicated prior criminal acts involving the express or implied use of violence beyond a reasonable doubt. (AOB 288-289.) The penalty phase retrial jury was instructed that the factor (b) allegations had to be proved beyond a reasonable doubt. (10 CT 2437, 2441 [CALCRIM Nos. 764, 765A].) However, juror unanimity on factor (b) allegations is not required. (*People v. Watkins* (2012) 55 Cal.4th 999, 1036; *People v. Moore, supra,* 51 Cal.4th at pp. 1139-1140; *People v. Cowan, supra,* 50 Cal.4th at p. 489; *People v. Valencia, supra,* 43 Cal.4th at p. 311; *People v. Brown, supra,* 33 Cal.4th at p. 402.)

Lamb also claims factor (b) is unconstitutional because it allowed the penalty phase retrial jury to decide whether he committed unadjudicated criminal activity after having been informed that Lamb had already been convicted of first degree murder, thus depriving him of an unbiased decision-maker. (AOB 289-290.) This argument was implicitly rejected in *People v. DeSantis, supra,* 2 Cal.4th 1198, where the defendant "maintain[ed] that a jury that has convicted him of capital murder is too biased to receive evidence of the unadjudicated offenses impartially," and this Court rejected the argument because "the original jury had long been absent from the courtroom when 12 new jurors heard evidence of unadjudicated prior offenses." (*Id.* at p. 1252.) Moreover, Lamb overlooks that the penalty phase retrial jury was instructed to consider lingering doubt about his guilt as a factor in mitigation regardless of the prior jury's verdict. (See 10 CT 2433 [CALCRIM No. 763].) Thus, Lamb's claim should be rejected.

Lamb claims section 190.2, factor (i), is unconstitutionally vague in how it allows juries to consider a defendant's age. (AOB 290-291.) This argument was previously rejected in *People v. Tully, supra,* 54 Cal.4th at p. 1069, *People v. Myles* (2012) 53 Cal.4th 1181, 1223-1224, *People v. Thomas, supra,* 53 Cal.4th at p. 833, *People v. Carrington, supra,* 47 Cal.4th at pp. 201-202, and *People v. Ray* (1996) 13 Cal.4th 313, 358; and should be rejected here.

Lamb claims CALCRIM No. 763 is unconstitutional because it does not delete inapplicable sentencing factors, contains vague and ill-defined factors such as factors (a) and (k), limits factors (d) and (g) by the use of adjectives such as "extreme" and "substantial," and fails to specify a burden of proof for aggravating or mitigating factors. (AOB 291-292, 294-295.) Similar claims were previously rejected by this Court in *People v. Watkins, supra,* 55 Cal.4th at p. 1036, *People v. Tully, supra,* 54 Cal.4th at p. 1069,

People v. Streeter (2012) 54 Cal.4th 205, 268, *People v. Lomax, supra,* 49 Cal.4th at p. 595, *People v. Burney, supra,* 47 Cal.4th at pp. 260- 261, and *People v. Monterroso, supra,* 34 Cal.4th at p. 796; and should be rejected here.

Lamb claims California's death penalty scheme is unconstitutional because it fails to meaningfully narrow the types of first degree murderers eligible for the death penalty. (AOB 292.) This claim has been previously rejected in *People v. Sattiewhite, supra,* 59 Cal.4th at p. 489, *People v. Myles, supra,* 53 Cal.4th at pp. 1224-1225, *People v. Cowan, supra,* 50 Cal.4th at p. 508, *People v. Verdugo, supra,* 50 Cal.4th at p. 304, and *People v. Williams, supra,* 49 Cal.4th at p. 469. Moreover, as discussed in Argument VIII, *ante,* the gang-murder special circumstance applicable to Lamb's case is sufficiently narrowing for constitutional purposes. Lamb's claim should thus be rejected.

Lamb claims *Ring v. Arizona, supra,* 536 U.S. 584, and its progeny require proof beyond a reasonable doubt for a jury's findings that aggravating factors exist, the aggravating factors outweigh those in mitigation, and death is the appropriate penalty. (AOB 292-293.) Such arguments have been rejected in *People v. Trinh, supra,* 59 Cal.4th at p. 254, *People v. McKinzie, supra,* 54 Cal.4th at p. 1366, *People v. Vines, supra,* 51 Cal.4th at p. 891, *People v. Mills, supra,* 48 Cal.4th at p. 214, and *People v. Gutierrez* (2009) 45 Cal.4th 789, 830-831; and should be rejected here.

Lamb claims California's death penalty statute is unconstitutional because it does not require written findings from the jury. (AOB 293-294.) This claim was previously rejected by this Court in *People v. Trinh, supra,* 59 Cal.4th at p. 254, *People v. Sattiewhite, supra,* 59 Cal.4th at p. 490, *People v. Howard, supra,* 51 Cal.4th at p. 39, *People v. Foster, supra,*

50 Cal.4th at pp. 1365-1366, and *People v. Russell, supra,* 50 Cal.4th at p. 1274; and should be rejected here.

Lamb claims the jury instructions were unconstitutional because they did not inform the jurors to return a verdict of life without possibility of parole if they found the factors in mitigation outweighed those in aggravation. (AOB 294.) Similar claims were rejected in *People v. Capistrano, supra,* 59 Cal.4th at p. 882, *People v. Hajek and Vo* (2014) 58 Cal.4th 1144, 1247, *People v. Suff* (2014) 58 Cal.4th 1013, 1078, *People v. Rogers* (2013) 57 Cal.4th 296, 349, and *People v. Lopez, supra,* 56 Cal.4th at pp. 1083-1084; and should be rejected here.

Lamb claims California's capital sentencing scheme is unconstitutional because it does not allow for intercase proportionality review. (AOB 295-296.) This argument was rejected in *People v. Trinh, supra,* 59 Cal.4th at p. 255, *People v. Sattiewhite, supra,* 59 Cal.4th at p. 490, *People v. Howard, supra,* 51 Cal.4th at p. 39, *People v. Foster, supra,* 50 Cal.4th at p. 1368, and *People v. Russell, supra,* 50 Cal.4th at p. 1274; and should be rejected here.

Lamb claims California's capital sentencing scheme is unconstitutional because it does not afford capital defendants the same type of disparate sentencing review afforded to other defendants under the determinate sentencing law. (AOB 296.) Similar arguments were rejected in *People v. Hajek and Vo, supra,* 58 Cal.4th at p. 1252, *People v. Pearson, supra,* 56 Cal.4th at p. 478, *People v. McKinzie, supra,* 54 Cal.4th at p. 1365, *People v. Souza, supra,* 54 Cal.4th at p. 142, and *People v. Eubanks* (2011) 53 Cal.4th 110, 154; and should be rejected here.

Lamb claims California employs "regular" use of the death penalty which violates or falls short of international norms and evolving standards of decency. (AOB 296-297.) This argument was rejected in *People v. Adams* (2014) 60 Cal.4th 541, 581-582, *People v. McKinzie, supra,* 54

Cal.4th at p. 1365, *People v. Booker, supra,* 51 Cal.4th at p. 197, *People v. Howard, supra,* 51 Cal.4th at pp. 39-40, and *People v. Foster, supra,* 50 Cal.4th at p. 1368; and should be rejected here.

Lamb claims the death penalty is per se unconstitutional as cruel and unusual punishment in violation of the Eighth Amendment. (AOB 297.) This argument has been rejected in *People v. Thomas* (2011) 51 Cal.4th 449, 508, *People v. Jennings, supra,* 50 Cal.4th at p. 687, *People v. McWhorter* (2009) 47 Cal.4th 318, 379, *People v. Zambrano, supra,* 41 Cal.4th at p. 1187, and *People v. Manriquez, supra,* 37 Cal.4th at p. 590; and should be rejected here.

Lastly, Lamb claims "[c]umulative deficiencies" in California's death penalty scheme render it unconstitutional. (AOB 297-298.) This Court rejected similar arguments in *People v. Debose* (2014) 59 Cal.4th 177, 214; *People v. Williams* (2013) 58 Cal.4th 197, 296 and *People v. Homick, supra,* 55 Cal.4th at p. 904.) Since "California's death penalty scheme is not faulty in any of the respects described by defendant and none of the proposed safeguards for those alleged defects are constitutionally required, no constitutional violation appears even when the alleged defects are considered collectively." (*People v. Debose, supra,* 59 Cal.4th at p. 214.)

Lamb's sentence is constitutional, and the penalty judgment should be affirmed.

XIV. CALIFORNIA'S DEATH QUALIFICATION PROCESS FOR JURORS IS CONSTITUTIONAL

In Claim Fourteen, Lamb alleges that the death qualification procedures used in his jury selections violates various rights under the state and federal constitutions because it results in non-representative juries, skews juries in favor of the prosecution and makes juries more likely to convict defendants and reach death verdicts. (AOB 299-320.) Similar

claims were rejected by the United States Supreme Court in *Lockhart v. McCree* (1986) 476 U.S. 162, 176-177 [106 S.Ct. 1758, 90 L.Ed.2d 137], and this Court in *People v. Chism, supra,* 58 Cal.4th 1266, 1286, *People v. Tully, supra,* 54 Cal.4th at p. 1066, *People v. Howard, supra,* 51 Cal.4th at p. 26, *People v. Taylor, supra,* 48 Cal.4th at pp. 602-604, and *People v. Mills, supra,* 48 Cal.4th at pp. 171-172.

As in *Chism,* Lamb's recycled arguments present no reason to revisit or reconsider the issue.[112] (See *People v. Chism, supra,* 58 Cal.4th at p. 1286.) California's death qualification process for jurors is constitutional, and Lamb's guilt and penalty judgments should be affirmed.

XV. THE JUDGMENT SHOULD BE MODIFIED TO INCLUDE SEPARATE TERMS FOR THE ATTEMPTED MURDER OF A PEACE OFFICER AND FIREARM ENHANCEMENTS

For the March 8 incident, the jury convicted Lamb of conspiracy to commit murder (count 1), first degree murder (count 2), possession of a firearm by a felon (count 3), active gang member carrying a firearm (count 5) and street terrorism (count 6), found as a special circumstance that the murder was committed for a criminal street gang purpose within the meaning of section 190.2, subdivision (a)(22), and found gang enhancements under section 186.22, subdivision (b)(1)(A), true as to counts 1, 2, 3 and 5, and Lamb personally discharged a firearm causing death in

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[112] Based on a selection of law review articles, Lamb contends that *Lockhart v. McCree, supra,* 476 U.S. 162, was wrongly decided and need not be followed. (AOB 303-308.) Rejecting the same argument, this Court stated in *Howard,* " 'We may not depart from the high court ruling as to the United States Constitution, and defendant presents no good reason to reconsider our ruling[s] as to the California Constitution.' " (*People v. Howard, supra,* 51 Cal.4th at p. 26; see also *People v. Taylor, supra,* 48 Cal.4th at pp. 602-603 [rejecting argument based on "current empirical studies"] .)

the commission of the conspiracy and murder within the meaning of section 12022.53, subdivision (d). (3 CT 669-671; 8 CT 1843, 1844, 1852-1861.)

For the March 11 incident, the jury found Lamb guilty of attempted murder of a peace officer (count 7), possession of a firearm by a felon (count 8) and street terrorism (count 9), and found the attempted murder was willful, deliberate and premeditated within the meaning of section 664, subdivision (f), Lamb personally discharged a firearm in the commission of the attempted murder within the meaning of section 12022.53, subdivision (c), and gang enhancements under section 186.22, subd. (b)(1)(A), were true as to each of these counts. (3 CT 672-673; 8 CT 1845-1851.)

The trial court sentenced Lamb to death for the special circumstance first degree murder. (42 RT 8648-8649; 10 CT 2644.) Subsequently, the trial court struck "for sentencing purposes" all enhancements and all other counts. (42 RT 8649; 10 CT 2644-2645.) Beyond the striking of the gang enhancements, this latter part of the sentence was unauthorized.

Section 1385, subdivision (a), authorizes trial courts on their own or the prosecutor's motion to "order an action dismissed" in the furtherance of justice. This includes the authority to dismiss or strike enhancements. (*People v. Thomas* (1992) 4 Cal.4th 206, 209.)

A statute will not be interpreted "as eliminating courts' power under section 1385 'absent a clear legislative direction to the contrary.' " (*People v. Superior Court* (*Romero*) (1996) 13 Cal.4th 497, 518, quoting *People v. Thomas, supra,* 4 Cal.4th at p. 210.) " '[G]eneral mandatory language, such as "shall" ... is insufficient to support a finding of Legislative intent to divest trial courts of discretion under section 1385 [].' " (*People v. Meloney* (2003) 30 Cal.4th 1145, 1155, quoting *People v. Wilson* (2002) 95 Cal.App.4th 198, 202.)

Subdivisions (e) and (f) of section 664 specifying the punishment for attempted murder of a peace officer and willful, deliberate and

premeditated attempted murder, respectively, utilize "shall be punished" language and only provide for exception "[n]otwithstanding subdivision (a)" of section 664. Accordingly, section 664, subdivisions (e) and (f) remain subject to section 1385.

However, the trial court declared the attempted murder and other non-murder counts "stricken" only for sentencing purposes, evidencing a clear intent to strike only the punishment for those counts and not dismiss the underlying convictions. Such partial dismissals or strikings are only authorized for enhancements as provided in section 1385, subdivision (c). Thus, the trial court's striking of counts 1, 3, 5, 6, 7, 8 and 9 was unauthorized.

Section 186.22, subdivision (g), specifically affords trial courts discretion to strike gang enhancements in the interests of justice. (*People v. Sinclair* (2008) 166 Cal.App.4th 848, 855.) In contrast, section 12022.53 firearm enhancements are mandatory "[n]otwithstanding Section 1385" and cannot be stricken. (§ 12022.53, subd. (h); see *People v. Oates* (2004) 32 Cal.4th 1048, 1056 [noting exception under § 12022.53, subd. (f), when more than one enhancement per conviction is found true].) Therefore, the trial court's striking of the gang enhancements was authorized, but its striking of the firearm enhancements attached to the murder and attempted murder were unauthorized.

Assuming the death judgment is affirmed in this case, respondent would agree in the interests of judicial economy to modification of the judgment on appeal to add the lowest possible sentence for the improperly dismissed counts and stricken enhancements rather than remand the matter to the trial court for resentencing. (See, e.g. *People v. Barrera* (1999) 70 Cal.App.4th 541, 556 [imposing minimum restitution fine on appeal in interest of judicial economy]; *People v. Vasquez Diaz* (1991) 229 Cal.App.3d 1310, 1316 [same].)

Arguably, the trial court could stay imposition of sentence on the conspiracy, felon in possession of a firearm, active gang member in possession of a firearm and street terrorism convictions pursuant to section 654 where sentence is imposed for the March 8 murder and March 11 attempted murder of a peace officer.[113] Moreover, the street terrorism convictions would have to be stayed since section 654 bars separate punishment for a street terrorism conviction and the underlying felonious act. (*People v. Mesa* (2012) 54 Cal.4th 191, 197-198.)

Thus, affording Lamb every possible benefit he could enjoy upon remand for resentencing given the trial court's stated intent not to dismiss

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[113] Penal Code section 654, subdivision (a), provides:

> An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision. An acquittal or conviction and sentence under any one bars a prosecution for the same act or omission under any other.

Section 654 has been extended to preclude multiple punishments for "a course of conduct which violated more than one statute but nevertheless constituted an indivisible transaction." (*People v. Perez* (1979) 23 Cal.3d 545, 551.) However, where a defendant entertains multiple and independent criminal objectives, separate punishments are permitted for violations of law which would otherwise constitute an indivisible course of conduct. (*Ibid.*) As such, section 654 ensures a defendant's punishment is commensurate with his or her culpability. (*Id.* at pp. 550-551; see also *People v. Latimer* (1993) 5 Cal.4th 1203, 1211; *Neal v. State of California* (1960) 55 Cal.2d 11, 20.)

For purposes of section 654, "[i]t is [the] defendant's intent and objective, not the temporal proximity of his offenses, which determine whether the transaction is indivisible." (*People v. Harrison* (1989) 48 Cal.3d 321, 335.) "If all the offenses were incident to one objective, the defendant may be punished for any one of such offenses but not for more than one." (*People v. Perez, supra*, 23 Cal.3d at p. 551, citing *Neal v. State of California, supra*, 55 Cal.2d at p. 19.)

any of the underlying felony convictions, respondent submits that the judgment should be modified to add a consecutive term of 15 years to life for count 7 as provided under section 664, subdivision (f);[114] add consecutive terms of 25 years to life for the section 12022.53, subdivision (d), enhancement attached to count 2 and 20 years for the section 12022.53, subdivision (c), enhancement attached to count 7 as mandated by section 12022.53, subdivision (h); and stay imposition of sentence for counts 1, 3, 5, 6, 8 and 9 pursuant to section 654.

Although double jeopardy principles generally prohibit the imposition of a greater sentence following appeal,

> [t]he rule is otherwise when a trial court pronounces an unauthorized sentence. Such a sentence is subject to being set aside judicially and is no bar to the imposition of a proper judgment thereafter, even though it is more severe than the original unauthorized pronouncement.

(*People v. Serrato* (1973) 9 Cal.3d 753, 764, overruled on other grounds in *People v. Fosselman* (1983) 33 Cal.3d 572, fn. 1; see also *United States v. DiFrancesco* (1980) 449 U.S. 117, 134-135 [101 S.Ct. 426, 66 L.Ed.2d 328]; *Bozza v. United States* (1947) 330 U.S. 160, 166-167 [67 S.Ct. 645, 91 L.Ed 818] ["The Constitution does not require that sentencing should be a game in which a wrong move by the judge means immunity for the prisoner"].) Thus, the resulting increase in Lamb's total sentence is permissible.

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[114] Section 664, subdivision (e), prescribes a life sentence for the attempted murder of peace officer, which by operation of section 3046, subdivision (a)(1), carries a minimum parole eligibility date of seven years. Section 664, subdivision (f), prescribes a sentence of 15 years to life for willful, deliberate and premeditated attempted murder. As previously stated, section 654 requires that the longest potential term of imprisonment be imposed where an act is punishable in different ways.

XVI. THE SENTENCING MINUTE ORDER SHOULD BE CORRECTED

In its oral pronouncement of judgment, the trial court sentenced Lamb to death for the special circumstance first degree murder. (42 RT 8648-8649 ["for the offense of murder of Scott Miller...and for the jury having returned true findings of the special circumstance of murder for the benefit of a criminal street gang on the same date... you shall suffer the death penalty"].) (42 RT 8648-8649.) Only the remaining counts and all enhancements were stricken for sentencing purposes. (42 RT 8649.)

The abstract of judgment correctly reflects a death sentence for a special circumstance first degree murder. (10 CT 2657-2658.) However, the sentencing minute order erroneously states that the special circumstance was stricken. (10 CT 2644.)

The minutes and abstract of judgment must conform to the oral pronouncement of judgment. (See §§ 1252, 1260; *People v. Boyde, supra,* 46 Cal.3d at p. 256; *People v. Mesa* (1975) 14 Cal.3d 466, 471.) They cannot modify or add to the judgment they purport to digest. (*People v. Mitchell* (2001) 26 Cal.4th 181, 185; *People v. Mesa, supra* 14 Cal.3d at p. 471.) Thus, "a discrepancy between the judgment as orally pronounced and as entered in the minutes is presumably the result of clerical error." (*People v. Mesa, supra,* 14 Cal.3d at p. 471.)

"It is not open to question that a court has the inherent power to correct clerical errors in its records so as to make these records reflect the true facts . . . in criminal as well as in civil cases." (*In re Candelario* (1970) 3 Cal.3d 702, 705.) Such corrections may be made upon motion of the court or application of the parties in either the trial court or an appellate court having proper jurisdiction of the case. (*People v. Mitchell, supra,* 26 Cal.4th at pp. 186-187.)

Moreover, the trial court only struck enhancements and certain counts for sentencing purposes. " '[S]pecial circumstances are *sui generis*

– neither a crime, an enhancement, nor a sentencing factor.' " (*People v. Montes, supra,* 58 Cal.4th at p. 874, quoting *People v. Garcia* (1984) 36 Cal.3d 539, 552; see also *People v. Friend, supra,* 47 Cal.4th at p. 71.)

Furthermore, courts have no discretion to strike or dismiss special circumstances admitted by plea or found true by the factfinder in death penalty cases. (§ 1385.1; *People v. Mendoza, supra,* 52 Cal.4th at p. 1075; *People v. Lewis* (2004) 33 Cal.4th 214, 228-229.) Accordingly, the sentencing minute order should be corrected to accurately reflect the oral pronouncement of judgment and show that the special circumstance was not stricken by the trial court.

CONCLUSION

For the reasons stated, respondent respectfully requests that the judgment be modified to add a consecutive term of 15 years to life for count 7, add consecutive terms of 25 years to life for the firearm enhancement attached to count 2 and 20 years for the firearm enhancement attached to count 7, and stay imposition of sentence, in lieu of striking, counts 1, 3, 5, 6, 8 and 9; a new indeterminate abstract of judgment be prepared to reflect the modified judgment; the sentencing minute order be corrected to show the special circumstance was not stricken; and the judgment be affirmed in all other respects.

Dated: April 27, 2015

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached Respondent's Brief uses a 13 point Times New Roman font and contains 59,370 words.

Dated: April 27, 2015

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DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **People v. Michael Allan Lamb** **Case** No.: **S166168**

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; my business address is 110 West A Street, Suite 1100, P.O. Box 85266, San Diego, CA 92186-5266.

On April 28, 2015, I served the attached **Respondent's Brief,** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States Mail at San Diego, California, addressed as follows:

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I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on April 28, 2015, at San Diego, California.

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Declarant

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