In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA, **Respondent,** **v.** **TIMOTHY JOSEPH McGHEE,** **Appellant.**	**CAPITAL CASE** Case No. S169750

Los Angeles County Superior Court Case No. BA244114
The Honorable Robert J. Perry, Judge

RESPONDENT'S BRIEF

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STATEMENT OF THE CASE

The Los Angeles County District Attorney filed an information charging appellant with three counts (counts 3, 4, and 12) of murder (Pen. Code, § 187, subd. (a))[1] and six counts (counts 1, 2, 5, 6, 13, and 14) of attempted murder (§§ 664/187, subd. (a)).[2] The information also alleged personal firearm use enhancements within the meaning of sections 12055.5 and 12022.53, gang enhancements within the meaning of section 186.22, subdivision (b)(1), and two prior "strike" convictions within the meaning of sections 1170.12, subdivisions (a)-(d), and 667, subdivisions (b)-(i). Finally, it was also alleged that the murders constituted a special circumstance of multiple murder within the meaning of section 190.2, subdivision (a)(3), and that an active gang participant special circumstance within the meaning of section 190.2, subdivision (a)(22), applied as to the murders in counts 4 and 12. (7CT 1477-1486.) appellant pleaded not guilty to the charges. (7CT 1488.)

Appellant was tried by jury. (14CT 3688.) The jury found appellant guilty on the three murder counts and four of the six attempted murder counts. The jury further found, as to those seven counts, all of the enhancements and special circumstance allegations to be true. As to counts 1 and 2, the jury found appellant not guilty of attempted murder. (15CT 3826-3835.)

The trial court declared a mistrial after appellant's first penalty phase ended with a hung jury. (29RT 5764; see also 15CT 3894-3895.) A new jury panel was sworn in, and at the conclusion of a second penalty phase trial the jury returned a verdict of death. The court denied appellant's

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

[2] Counts 7 through 11, and 15, were dismissed before trial in the furtherance of justice. (See 4CT 918-920; 7CT 1460.)

motion for a new trial and his automatic motion to modify his sentence. (16CT 4082; 22CT 5713-5714, 5807-5809; 31RT 6394-6401; 39RT 7779-7780, 7785-7789.) For the three counts of murder, the court imposed a sentence of death. As to count 3, the court imposed a consecutive term of 10 years for the firearm enhancement. As to count 4, the court imposed a consecutive term of 25 years to life for the firearm enhancement. As to count 12, the court imposed a consecutive term of 20 years for the firearm enhancement. As to each of counts 5 and 6, the court imposed a consecutive term of 45 years to life for the attempted murder and 20 years for the firearm enhancements.[3] As to each of counts 13 and 14, the court imposed a consecutive term of 25 years to life and 20 years for the firearm enhancement. (16RT 7793-7799.) The court awarded appellant presentence custody credit of 2,158 days, including 2,158 days of actual custody and zero days of conduct credit. (16RT 7800-7801.)

This appeal is automatic.

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[3] Although the abstract of judgment reflects consecutive terms of 75 years to life for counts 5 and 6 (see 22CT 5819-5820), this appears to be incorrect. The trial court, despite its later summary of these imposed sentences as terms of "75 years to life" (see 39RT 7800), imposed terms of 15 years to life, pursuant to section 664, subdivision (f), which were tripled due to appellant's two prior strike convictions. (See 39RT 7796-7797.) When there is a discrepancy between the oral pronouncement of judgment and the minute order or the abstract of judgment, the oral pronouncement controls. Thus, the abstract of judgment should be corrected to conform with the oral pronouncement. (*People v. Mitchell* (2001) 26 Cal.4th 181, 185-186.)

STATEMENT OF FACTS

Appellant was the leader of Toonerville, a violent criminal street gang based out of the Atwater Village neighborhood. For years appellant brazenly terrorized the community, attacking and executing rival gang members with no regard for collateral damage; he even organized and directed a coordinated attack on Los Angeles Police officers. To maintain the fear with which he ruled, appellant would search out people to murder, and was ruthless to those who would turn against him and cooperate with the police.

A. Guilt Phase Evidence

1. Prosecution evidence

a. Sanchez and Cardiel shooting (Counts 1 and 2)

Rascals gang member Pedro Sanchez lived in the Atwater Village area of Los Angeles. (12RT 2413-2414.) Appellant is a Toonerville gang member known as both "Eskimo" and "Huero." (13RT 2768; 15RT 3174; 20RT 3982.) Appellant was a "shot-caller" within the Toonerville gang and had a lot of power. (13RT 2788; 15RT 3178-3179.) Appellant conducted gang meetings where he would direct the gang and establish rules. (13RT 2777-2779; 15RT 3179-3182.) The Rascals gang was a rival of Toonerville. (13RT 2763; 15RT 3170-3171; 20RT 3986-3987.) Sanchez had known appellant for approximately 30 years. (12RT 2450.)

On October 10, 1997, Sanchez was drinking with Juan Cardiel, Javier Mendiola, and some other friends in a parking lot. (12RT 2419-2420, 2422.) After drinking some beer, Sanchez and his friends "dropped some acid" before proceeding to his house in Atwater Village. (12RT 2419, 2422.) The group then drank more beer at Sanchez' house before leaving on their bikes. (12RT 2423.)

While riding around on their bikes, Sanchez and Cardiel separated themselves from the others in the group. (12RT 2429-2431.) They were near a Shell gas station on Glendale Boulevard when they were approached by two cars. (12RT 2431-2433.) Sanchez prepared himself to fight when he saw what appeared to be gang members in the cars. (12RT 2434.) After someone from inside one car exposed a rifle, Sanchez and Cardiel ran toward the Shell station. (12RT 2436-2437.) A gunman chased after and fired at the two men as they ran away. (12RT 2437-2441.)

Cardiel was shot in the back and in the leg, leaving him paralyzed from the waist down. (12RT 2496, 2506-2507.) Sanchez was also shot in the back as he was running away but was able to get inside the Shell station, where he held the door closed against the pursuing gunman. (12RT 2441, 2444-2445, 2449.) Before leaving, the gunman fired into the building, shattering the glass door Sanchez was holding onto. (12RT 2447-2448.)

Bullet fragments and expended shell casings were recovered from in and around the Shell station. (12RT 2532-2533.) After comparing some of the expended casings found at the scene with some of those recovered from another murder scene in 1997, the murder of Frogtown gang member Ronald Martin, it was determined that they had been fired from the same gun. (17RT 3554-3556.) Similarly, after comparing some of the expended bullet fragments found at the Shell station with some of the fragments found at the scene of the Martin murder, it was determined that they had been fired from the same gun. (17RT 3556-3562, 3566-3568.)

On October 14, 1997, Los Angeles Police Officer Luis Rivera interviewed Cardiel. (12RT 2540-2541.) Cardiel identified appellant from a photographic lineup as someone who looked like the person who shot him. (12RT 2543-2545.) At the time, Cardiel did not have the use of his

hands so was unable to sign or circle the photograph of appellant. (12RT 2545-2547.)

On July 1, 2002, Los Angeles Police Officer James King interviewed Sanchez. (12RT 2557.) When asked if appellant was the person who had shot him, Sanchez smiled and said, "you already know it." (12RT 2561.) On July 2, 2002, Officer King interview Cardiel. (12RT 2561.) Cardiel again identified appellant as the person who shot him. (12RT 2562-2564.)

b. Daniel Medina attack

On October 12, 1997, Rascals gang member Daniel Medina was walking in Atwater Village with his girlfriend and two other Rascals members when he was approached by appellant and another Toonerville gang member. (12RT 2468- 2472, 2480-2481.) One of the men asked Medina where "Peter" was. (12RT 2474.) Medina knew Pedro Sanchez as Peter. (12RT 2469, 2471-2472.) Medina asked them where they were from, and appellant and his companion told him "Toonerville" before getting out of the car to fight Medina and his friends. (12RT 2474-2476.) The fight broke up, and appellant and the other man got back into their car and drove away. (12RT 2477.)

As the car drove away, Medina shouted at them. The car turned around, and once again appellant and his companion got out and began to fight Medina and his friends. (12RT 2477-2478.) After Medina heard someone say "get the gun," Medina and his friends ran. (12RT 2478-2479.) Appellant chased Medina into a backyard where he beat him with a steering wheel club, breaking Medina's hand and arm and causing Medina to require stitches in his head. (12RT 2479, 2482-2483.)

On October 15, 1997, Los Angeles Police Officer Luis Rivera interviewed Medina. (12RT 2547.) Medina identified appellant from a photographic lineup as the person who attacked him. (12RT 2547-2549.) Medina circled appellant's photograph, signed and dated it, and wrote that

appellant was the individual who "piped him down in the back of some lady's house." (12RT 2549.)

c. Ronald Martin murder (Count 3)

On October 13, 1997, Frogtown gang member Ronald Martin, also known as "Cloudy," left his mother's house for the Elysian Valley Recreational Center. (12RT 2575-2577.) The Frogtown gang was a rival of Toonerville. (13RT 2763; 15RT 3170-3171; 20RT 3986-3987.) Wilson Olivera lived across the street from the recreational center. (12RT 2579-2581.) A few minutes after midnight, on October 14, 1997, Olivera was in his living room when he heard approximately 20 gunshots, from what sounded like multiple guns, from across the street at the center. (12RT 2579-2582.) After the shooting stopped, Olivera looked out his window and saw a body lying on the sidewalk and a white Sport Utility Vehicle driving away. (12RT 2582-2585, 2587-2588.)

At approximately 12:05 a.m., Los Angeles Police Officer John Gomperz responded to the recreation center after a report of shots being fired. (13RT 2596-2597.) Officer Gomperz arrived in time to observe Martin lying on the ground, surrounded by a large number of expended bullet casings and fragments, taking his final breaths. (13RT 2601-2602, 2611.) At the same time that he observed Martin, Officer Gomperz heard a vehicle speeding away. (13RT 2600-2601.) It was determined that Martin was shot 27 times and the cause of death was multiple gunshot wounds. (14RT 3027-3029.) It was also determined that Martin continued to be shot after he had fallen and while he was lying on the ground. (15RT 3049-3050.)

The expended casings and fragments were recovered and booked into evidence. (13RT 2611-2612.) The casings were of two different sizes, .40 and .45 caliber, and it was determined that more than one .45 caliber firearm had been used, indicating that at least three different weapons had

been fired during the murder. (13RT 2614, 2616-2617; 17RT 3566-3567, 3569-3570.) It was also determined that some of the expended bullet fragments found at the Martin murder scene matched fragments found at the scene of the Sanchez and Cardiel shooting and had been fired from the same firearm. (17RT 3556-3562, 3566-3568.) Some of the expended .45 caliber bullet casings and fragments were matched to a firearm that was booked into evidence and recovered from an arrestee, Jason Kim, on November 5, 2000. (17RT 3564-3566.)

On November 5, 2000, Los Angeles Police Officer John Ferreria approached Jason Kim, Miguel Zamora, and a third unidentified male standing outside on Bemis Street. (19RT 3904-3905.) Kim was a Toonerville gang member known as "Chino" and appellant's friend. He was known to carry a .45 caliber firearm with a 30-round clip, which he received from Juan Serna, a Toonerville gang member known as "Panther." (13RT 2784-2786, 2792-2793.) All three men ran away after Officer Ferreria approached them. (19RT 3906-3907.) As Kim ran, he grabbed and held his waistband, indicating that he had drugs or a weapon in his possession. (19RT 3907.) As part of the pursuit of Kim, Los Angeles Police Officer Elias Villasenor helped maintain a perimeter in the area of Bemis Street and Brunswick Avenue. (19RT 3895-3896.) Officer Villasenor found Kim hiding beneath some bushes in the backyard of a house on Bemis Street. (19RT 3896-3899.) Next to Kim, officers found a black beanie with "Toonerville" on it, black gloves, a .45 caliber handgun with a high-capacity magazine attached, and small bindles of rock cocaine. (19RT 3909-3912.)

Gabriel Rivas, a former Toonerville gang member known as "Acer," had been friends with appellant for over 20 years. (13RT 2626-2627, 2632-

2634.) Rivas was interviewed by Los Angeles Police detectives on April 28, 2003, regarding the Martin murder. (13RT 2652, 2686-2687.)[4] A portion of the recorded interview was played for the jury. (13RT 2692; see Exh. A.)[5] Rivas knew Michael Quintinilla, a Toonerville gang member known as "Frosty," who owned a white Toyota 4Runner. (13RT 2634-2635; 15RT 3175; Exh. A at p. 1.) Rivas told detectives that appellant had borrowed Quintinilla's white 4Runner before Martin was murdered. (Exh. A at pp. 1-2.) After the murder, appellant told Rivas that Martin had been shot "like thirty, forty times," and also stated that the "fucking fool got smoked" and that they had "fucked him." (Exh. A at p. 2.)

A few years after the Martin murder, appellant had a conversation with his good friend Mark Gonzalez, a former Toonerville gang member. (15RT 3166, 3168, 3183-3184; 16RT 3288.) Appellant told Gonzalez that, on the night of Martin's murder, he and Quintinilla had been driving through Frogtown territory to avenge the death of a Toonerville gang member known as "Hozer." When they passed the recreational center, they saw three men standing in front near the handball courts. (15RT 3186, 3188-3191.) Appellant and Quintinilla turned around, returned to the center, and found Martin by himself. (15RT 3186-3187.) Appellant approached Martin and "hit him up," asking what neighborhood he was from. (15RT 3187.) After Martin refused to identify a neighborhood, appellant made him lift up his shirt, exposing a Frogtown tattoo. (15RT 3187.) As Martin begged for his life, appellant told him to "Die like a man, not like a bitch" before he and Quintinilla shot him to death. (15RT 3187-3188.)

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[4] At trial, Rivas largely did not recall the statements he made during this recorded interview.

[5] Exhibits A and B are attached to respondent's motion to augment the record, granted by this Court on August 9, 2016.

d. Officer Baker and Officer Langarica shooting (Counts 5 and 6)

On the night of July 3, 2000, Mark Gonzalez was in his apartment on Bemis Street with appellant and some other Toonerville gang members. (16RT 3257-3260.) Bemis Street, located near Chevy Chase Park, was a primary area of activity for the Toonerville gang. (15RT 3171.) Earlier that evening, two of the members had been at Chevy Chase Park test firing a couple guns. (16RT 3258-3260.) Although one of the guns jammed while test firing it, appellant suggested they take both guns into a rival neighborhood and "put them into use." (16RT 3261-3262.) Raymond "Chubbs" Maldonado, Mario "Little Man" or "Little Boy" Aleman,[6] and Joseph Aghazadeh, a Toonerville gang member known as "Tiny," left the apartment, got into a "gold Honda," and headed into Rascals gang territory to look for "somebody" at a house that Maldonado was familiar with. (15RT 3074-3075, 3082, 3176; 16RT 3262-3264.)

On July 4, 2000, at approximately 3:30 a.m., Elias Bonilla left his house on Larga Avenue for work. (13RT 2715-2716.) As Bonilla stepped outside, he observed two men, one of which was armed with a machine gun, across the street looking into the window of an apartment. (13RT 2717-2721.) Bonilla also saw a third man sitting in a parked and running Honda. (13RT 2718, 2720-2721.) When Bonilla attempted to alert the Honda driver to the two men across the street, the Honda driver called out and alerted the two men to Bonilla. (13RT 2721-2722.) The two men from across the street approached Bonilla and asked where he was from before taking his wallet and chain. (13RT 2723.) One of the men stated "someone

[6] Because there are two Toonerville gang members with the same last name Aleman, respondent will refer to them by their first names.

is going to die" before all three of them drove away in the Honda. (13RT 2723-2724.) Bonilla's wife called in the incident to police. (13RT 2724.)

Appellant and the remaining Toonerville members were in Gonzalez' kitchen when they heard a report of the Bonilla robbery over a police scanner.[7] (16RT 3264-3265.) Realizing that the report concerned the three Toonerville members who had left the apartment earlier, and that they were being pursued by police in the direction of Gonzalez' apartment, Juan Serna and appellant mobilized the rest of the group to "do something to help them out." (16RT 3264-3270.) Appellant was armed with a nine-millimeter handgun. (16RT 3283.) As they left the apartment, Gonzalez and another member lagged behind. (16RT 3269-3271.) When Gonzalez finally left the apartment it was just in time to hear cars screeching down his street, followed by gunshots coming from the corner of Bemis Street and Brunswick Avenue. (15RT 3271, 3275-3278.) Gonzalez saw the Honda and a police car pass his apartment with bullets striking the back of the police car. (16RT 3271-3272.) After the cars passed Gonzalez, a second set of gunshots erupted from the direction of the park at the end of Bemis Street. (16RT 3278-3279.)

At approximately 3:54 a.m., on July 4, 2000, Los Angeles Police Officers Carlos Langarica and Tom Baker responded to a report of the Bonilla robbery. (15RT 3052-3053.) After spotting a Honda that matched the robbery description, the officers activated their lights and siren and pursued the vehicle. (15RT 3054-3057.) Travelling at high rates of speed, the Honda ran several red lights and stop signs before turning onto Bemis Street. (15RT 3058-3064.) After the Honda turned, a man standing at the corner threw a bicycle into the path of the police car. (15RT 3062-3064.)

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[7] Appellant and other Toonerville gang members often utilized police scanners to learn the whereabouts of police officers. (13RT 2780.)

The police car, being driven by Officer Baker, swerved left to avoid the bicycle and a washing-machine that had also been placed in the road. (15RT 3064-3068.) As the officers swerved, they began receiving gunfire from behind. (15RT 3065, 3070.) Along with the gunfire from behind, the rear passenger of the Honda, later identified as Maldonado, began shooting at them as well. (15RT 3071, 3082, 3176.)

The Honda slowed down, and Officer Baker rammed the police car into it. (15RT 3071.) The front passenger of the Honda, later identified as Mario, jumped out of the moving car with an "Uzi-type" weapon in hand and ran toward the police car, pointing the weapon at Officer Langarica as he ran past. (15RT 3071-3072, 3074-3075, 3176; 16RT 3264.)[8] The officers exchanged gunfire with the two remaining passengers of the Honda. (15RT 3077-3078.) Mario ran toward a Volkswagen Jetta, where a female named "Patricia" and Mario's brother, Efraim Aleman, a Toonerville gang member known as "Junior," waited inside. (15RT 3176; 16RT 3279-3282, 3393.) Before Mario reached the Jetta, other police officers arrived and he laid down on the ground in surrender. (16RT 3280-3282, 3367-3368, 3370-3372, 3387-3388, 3392-3393.) Ultimately, the remaining occupants of the Honda, as well as Mario, Efraim, and Patricia, were taken into custody. (15RT 3078-3079; 16RT 3362, 3280-3282, 3374-3375, 3393.)

Expended nine-millimeter bullet casings were recovered from the northwest corner of Bemis Street and Brunswick Avenue, where the officers were first fired upon after they turned onto Bemis Street. (15RT 3122-3123, 3126; 17RT 3609.) The police car was struck by gunfire four times. One bullet entered the police car through the driver's side door,

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[8] It was later determined that Mario's weapon had jammed. (15RT 3076, 3119-3121.)

passed through Officer Baker's pant leg, and lodged below the steering wheel. (15RT 3083-3086.)

On July 4, 2000, John Perez lived at 4050 Bemis Street in a first floor apartment with a bathroom window that looked out onto the street. (13RT 2703-2704, 2889; 14RT 2894-2895.) Perez, a Police Explorer with the Los Angeles Police Department, grew up near appellant and frequently saw him around the neighborhood throughout childhood. (14RT 2886-2889.) At approximately 4:00 a.m., Perez heard sirens outside his house. (14RT 2896-2897.) Perez went to the bathroom and stood on the bathtub to look out the window. (14RT 2897-2898.)[9] Perez observed a Honda turn down Bemis Street. (14RT 2907-2908.) After seeing the Honda, Perez noticed a washing-machine or a dryer in the middle of the road and a man standing at the corner holding a bicycle. (14RT 2908-2909.) A police car following the Honda appeared and the man at the corner threw the bicycle into the street, forcing the police car to make a wide turn around both obstacles. (14RT 2909-2913.)

While the police car swerved around the obstacles, Perez saw appellant standing on the sidewalk firing what looked like a nine-millimeter handgun at the police car as it passed. (14RT 2913-2922, 2936.) After shooting at the police, appellant crossed the street and walked past Perez' bathroom window, toward the apartment of two women Perez and appellant knew, Veronica Ortega and "Rosa." (14RT 2918-2923, 3000; 16RT 3287-3288.) Perez heard more gunfire before observing the man who had thrown the bicycle get into a silver Volkswagen Jetta that had stopped to pick him up. (14RT 2923-2924.) As the Jetta began to drive away, another police car pulled up and blocked it from leaving. (14RT 2924-2925.)

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[9] Perez indicated that he had "seen many a thing out that window." (14RT 2954.)

Shortly after the shooting, appellant called Gonzalez multiple times on the telephone from Ortega's apartment. (16RT 3286-3288, 3291.) Appellant told Gonzalez that he had "dumped on the cops," meaning he had shot at them. (16RT 3291-3294.) Perez was also contacted; he was instructed to bring a police scanner to Ortega's apartment for appellant. (14RT 2928-2929.) Appellant was with Ortega when Perez arrived with the scanner. (14RT 2929-2931.)

Initially, when interviewed by police later that day, Perez denied knowing anything about the incident because he feared retaliation from Toonerville. (14RT 2931-2932.) However, on December 5, 2001, Perez was stopped by police for driving around and shooting out street lights with a B.B. gun. (14RT 2987.) A search of Perez' vehicle led to the discovery of information that suggested Perez had information about a then-current murder investigation. (14RT 2988.) Perez was taken to a police station where he was interviewed about the murder. (14RT 2988.) During this interview, Perez told officers what he knew about the events of July 4, 2000. (14RT 2988-2989.)

e. Ryan Gonzalez murder (Count 4)

In the early morning of June 3, 2000, Mark Gonzalez, along with appellant and a few other men,[10] were returning home from a party in the Baldwin Park neighborhood. (13RT 2734-2735; 15RT 3220-3222.) Gonzalez was driving, and as they passed a Rascals gang neighborhood, appellant instructed him to exit the freeway because appellant "had a lucky feeling." (15RT 3221-3224.) Gonzalez exited, and appellant directed him around and through the neighborhood. (15RT 3224-3225.) After turning

[10] Gonzalez testified that the other men were "Pee-wee," "Javitos," and "Chuckie." (15RT 3220-3221.)

off Silverlake Boulevard onto La Clede Avenue, the group spotted Ryan,[11] a Rascals gang member known as "Huero," walking alone. (13RT 2745-2746; 15RT 3225-3228.) Gonzalez drove past Ryan, turned around and drove past him again, and then made a U-turn in the intersection of Silver Lake Boulevard and La Clede Avenue to make a third pass. (15RT 3228-3229; 16RT 3255-3256.) As they passed Ryan for the third time, appellant told Gonzalez to stop the truck. (15RT 3229-3231.)

Gonzalez stopped the truck, and appellant got out and called out to Ryan. (15RT 3231, 3236.) Appellant was armed with Gonzalez' nine-millimeter handgun. (16RT 3332-3333, 3338, 3342-3344.) Ryan looked at appellant and then ran away down La Clede Avenue toward Silver Lake Boulevard as appellant gave chase. (15RT 3231-3233.) From the truck, Gonzalez watched as appellant and Ryan disappeared around the corner of Silver Lake Boulevard. (15RT 3233-3239.) Moments later, Gonzalez heard multiple gunshots. (15RT 3239.) Gonzalez put the truck into reverse and backed up far enough to see appellant hovering over Ryan lying "lifeless" on the ground. (15RT 3240-3242.) Appellant stood over Ryan with a gun in his hand, "murmuring" at Ryan as he continued to squeeze the trigger of the gun. (15RT 3243-3244.) Gonzalez shouted, "Let's go," and appellant ran back to the truck before they drove away and back to their own neighborhood. (15RT 3244-3245.)

That same morning, on June 3, 2000, Los Angeles Police Officer Julio Duarte responded to a report of shots fired at 3356 Silver Lake Boulevard. (13RT 2734-2735.) Officer Duarte arrived at the scene and found a body lying face down, with expended nine-millimeter bullet casings and bullet

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[11] Because the victim and a witness have the same last name, respondent will refer to the victim by his first name.

fragments surrounding it, on the side of the road near the intersection of Silver Lake Boulevard and Le Clede Avenue. (13RT 2735-2741, 2748.)

It was determined that Ryan's death was the result of a homicide and that the cause of death was multiple gunshot wounds. (17RT 3603-3604.) Ryan had eight gunshot wounds. (17RT 3605.) Los Angeles Police Detective Jose Carillo collected and booked the casings and fragments into evidence. (13RT 2747.) The recovered casings were compared, and it was determined that all of them had been fired from the same nine-millimeter handgun. (17RT 3571.) It was also determined that the casings matched those recovered from the July 4, 2000, attack on Officers Baker and Langarica, and that they had been fired from the same nine-millimeter handgun. (17RT 3572-3573, 3578.)

Wilfred Recio, a former Toonerville gang member known as "Pirate" and close friend of appellant, was released from prison sometime in August 2000. (13RT 2760-2763, 2768-2769, 2773, 2786; 15RT 3175.) Recio sold heroin and held guns for appellant. (13RT 2769-2773.) These guns consisted of a .22 caliber, a .40 caliber, a .45 caliber, a .357 caliber, a nine-millimeter, and multiple AK-47 rifles. (13RT 2774-2776.) Shortly after getting out of prison, Recio was driving around Rascals territory with appellant and another Toonerville gang member, "Hamster," when they saw "Rascals" and "Huero R.I.P." painted on a wall. (13RT 2789-2791.) Appellant saw the writing and said, "Fuck that fool, cross that shit out. I'm the only Huero from Atwater Village. I blasted that fool." (13RT 2791.) On another occasion, Recio was with appellant and several other Toonerville gang members when he heard appellant tell one of them, who was dating a girl from the Rascals gang, "You might as well leave her. Because of me killing Huero from the Rascals they're going to end up killing you, too." (13RT 2797-2798, 2800-2802.) On yet another occasion, Recio overheard appellant tell Jason Kim, "Go blast those fools from the

Rascals. You know, I got a murder under my butt already." (13RT 2796-2797.)

f. Marjorie Mendoza murder (Counts 12-14)

Duane Natividad was a Pinoy Real gang member known as "Duende," which meant "Midget." (16RT 3413-3414, 3417; 17RT 3492.) The Pinoy Real gang was friendly with the Rascals gang but a rival of Toonerville. (16RT 3415; 17RT 3493; 20RT 3986-3987.) Natividad and Marjorie Mendoza had a child together. (16RT 3418.) A few minutes after midnight on November 9, 2001, Mendoza and Erica Rhee were riding in Natividad's car. Natividad drove while Mendoza sat in the front passenger seat and Rhee sat in the rear. (16RT 3417-3419, 3456.) While driving, someone started shooting at them; both Natividad and Mendoza were shot. (16RT 3420-3421, 3423, 3425-3426.) Natividad escaped by putting the car in reverse and driving away. (16RT 3424.) When Natividad realized that Mendoza had been shot, he drove to a hospital in Glendale. (16RT 3424-3425.) Mendoza died from her injuries. It was determined that Mendoza's death was the result of a homicide and that the cause of death was multiple gunshot wounds. (17RT 3599.)

Monica Miranda lived on Hollydale Drive near Petite Court. (18RT 3638, 3641-3644; 19RT 3758.) On November 9, 2001, Miranda was on her way home when she saw a black Sport Utility Vehicle being tailgated by a silver Ford Focus with "squealing" brakes. (18RT 3645-3650, 3706, 3717.) The Ford's passenger window was rolled down as the car passed her, and Miranda saw two males inside. (18RT 3652-3654.) The passenger had a tattoo on the back of his head that depicted the emblem from the Mexican flag, an eagle and a snake.[12] (18RT 3654-3660; 19RT 3741-3747.) After

[12] Appellant has the Mexican flag emblem tattooed on the back of his head. (16RT 3252.)

the two cars passed, Miranda stayed outside to smoke a cigarette. (18RT 3660.) As she smoked, Miranda heard gunfire from the direction of Petite Court. (18RT 3662.)

Miranda went inside her house and moved her children from the front bedroom to the back of the house before returning outside to stand behind a tree, where she was able to look in the direction of Petite Court and the gunfire. (18RT 3662-3667.) From her position behind the tree, approximately a half block away, Miranda saw muzzle flashes and heard "a lot of gunfire." (18RT 3667-3668; 19RT 3783-3784.) She saw the Ford, parked with its passenger door open, and two men in the middle of the road shooting. One of the shooters, the Ford's passenger with the head tattoo she had seen earlier, was holding a handgun and moving around "in all directions" as he fired. (18RT 3668-3673, 3709-3716.)[13]

Miranda went back inside her house, and when the shooting stopped she heard the Ford and its squealing brakes approaching from down the street. (18RT 3716-3718.) Miranda turned off the lights in the house and watched through her window as the Ford slowly drove down the street toward her house, stopped momentarily in front of it, and then drove away. (18RT 3717-3719.) After the Ford drove away, Miranda left her house to see if there was anyone who had been hurt. (18RT 3719.) She walked down the street and found "a lot of bullet shell casings" laying on the ground. (18RT 3720.) As Miranda inspected the aftermath of the shooting, she heard the approaching sound of the Ford's squealing brakes. (18RT 3722.)

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[13] Although during trial Miranda did not remember seeing the tattoo or the handgun, she confirmed that she had remembered those details during the preliminary hearing. (See 18RT 3709-3713.)

Miranda hid behind a parked car as the Ford pulled up and stopped "on the exact opposite side of where [she] was." (18RT 3722-3723.) She heard two men talking about "something" they had dropped and were looking for. (18RT 3724-3725.) Miranda then heard a "chirp" from what she thought was a radio, and the car drove away. She returned to her house before the police arrived. (18RT 3725-3726.)

As police officers put up crime scene tape to close off the street, Miranda stood in her front yard and watched. (18RT 3726-3727.) While she stood there, a woman whom Miranda later identified as Cristina Duran, a Toonerville gang member known as "Dimples," approached the blockade. (13RT 2787; 18RT 3727-3728, 3730.) Duran told Miranda that she had lost "something" and was looking for it, and that her uncle or cousin named "Andy" lived in the area. (18RT 3727-3728.) Duran then spoke into a cellular telephone, stated "We got 'em" and jumped in the air as if celebrating. (18RT 3729-3730.) Duran then got into a black Sport Utility Vehicle that Miranda had seen earlier in the area that night. (18RT 3730-3732.) Miranda alerted the police to Duran's odd behavior and to the fact that Duran's vehicle had been present in the area earlier. (18RT 3730-3732.)

On November 9, 2001, Los Angeles Police Officer Claude Byfield responded to a report of shots fired near Petite Court and Silver Lake Boulevard. (18RT 3616-3617.) After arriving at the crime scene, Officer Byfield was directed to follow and detain a black Toyota 4Runner. (18RT 3617-3618.) As Officer Byfield followed the vehicle, he observed someone in the cargo area "looking out and trying to cover under a blanket." (18RT 3621-3623.) Officer Byfield initiated a traffic stop after the vehicle ran a stoplight. (18RT 3619-3621.)

Los Angeles Police Officer Alejandro Diaz also responded to a report of shots fired near Petite Court and Silver Lake Boulevard. (17RT 3472.)

While on route, Officer Diaz diverted and arrived at the intersection of Glendale Boulevard and Madera Avenue where a black Toyota 4Runner had been detained by other officers. (17RT 3472-3475.) Duran was identified as the driver, along with appellant riding behind the seats in the cargo area of the vehicle. (17RT 3475-3480; 18RT 3624-3625.)

Miranda was brought to the detained 4Runner, and a field lineup was conducted. (18RT 3628, 3732.) Miranda identified Duran as the suspicious woman who had approached her shortly after the shooting. (18RT 3732; 19RT 3741.) Miranda recognized appellant as one of the shooters she had seen earlier but did not tell that to the police at the time of the lineup. (18RT 3732-3734; 19RT 3741-3747.) Eleven days later, on November 20, 2001, Miranda informed the police that she had recognized appellant as the shooter during the field lineup. (19RT 3748-3749.) Miranda recalled meeting appellant once before, and she believed his name was "Timmy." (19RT 3749-3751.)

In November 2000, John Perez, along with Dustin Madrid, Juan Serna, and "Max," attended a party in Covina with appellant, Duran, and some other Toonerville gang members. (14RT 2937-2938.) During the party, appellant pulled Perez to the side and asked him whether a "field lineup" could be used as a defense if he was not recognized during it. (14RT 2939-2940.)

At the time of the shooting, Natividad and Rhee were under the influence of methamphetamine. (16RT 3436, 3462.) A toxicology exam conducted on Mendoza resulted in a negative finding for alcohol and drug abuse. (17RT 3601.) On February 1, 2002, in an interview with Los Angeles Police Detective Larry Burcher, Natividad described the shooters. (17RT 3507-3508.) Natividad was shown a photographic six-pack and identified appellant as one of the shooters, who had been in the passenger seat of the Ford. (17RT 3511-3514.) Natividad told Detective Burcher that

one of the shooters had been walking toward his car from the sidewalk on the passenger side, firing a rifle at the three of them. (17RT 3519-3520, 3520-3522.)

Los Angeles Police Detective Richard Ortiz was assigned the investigation of the Mendoza murder. (19RT 3877-3878.) Natividad's car was left with 29 separate bullet holes after the shooting. (18RT 3631-3634.) The position of the bullet holes indicated that the vehicle had been fired upon from the front toward the back. (18RT 3634-3636.) Expended bullet casings and bullet fragments were recovered from the scene, near the corner of Hollydale Drive and Petite Court, and it was determined that they were fired from three different weapons, a 7.62 caliber AK-47 type assault rifle and two .45 caliber handguns. (17RT 3578-3582; 19RT 3878-3880.)[14] Bullet fragments were also recovered from the inside of Natividad's vehicle and from the body of Mendoza. (17RT 3505-3506; 19RT 3880.)

In the street, near the curb, a cellular telephone with the number 213-761-9964 was recovered. (19RT 3887-3889.) The telephone number was one of two numbers registered to Lisa Mejia, appellant's girlfriend, and had been set up as an additional line on Mejia's account and denoted as "Joe." (14RT 2810-2811; 15RT 3195-3197.) The other telephone number on the account, 626-945-9602, was denoted as "Lisa." (15RT 3198.) A prior home address for appellant, on Club Drive, was listed as the billing address for the account. (15RT 3207-3208; 19RT 3871-3876.) The last call from

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[14] John Perez testified that he once watched appellant take "an AK type weapon" from the trunk of a car and fire it down Bemis Street at a building on Alger Street. (14RT 2940-2942.) On December 10, 2001, Detective Burcher recovered and booked into evidence an expended 7.62 caliber bullet from the owner of the building appellant fired at. (17RT 3500-3505, 3514, 3581-3582.) Although the bullet was of the same caliber as some of those fired in the Mendoza murder, testing was inconclusive as to whether they were fired from the same firearm. (17RT 3578-3582.)

the number assigned to "Joe" was made shortly before midnight on November 8, 2001, before the line was cancelled the next day on November 9. (15RT 3199-3200.)

On January 31, 2002, Los Angeles Police Officer Daniel Ruelas stopped a black Toyota 4Runner with three Pinoy Real gang members inside, Natividad, Edward Gatoc, and Mark Montecillo. (17RT 3488-3489, 3492.) A search of the vehicle revealed several firearms, a .380 caliber handgun and two .45 caliber handguns. (17RT 3489-3490.) After Officer Ruelas noticed Natividad's neck tattoo which referenced Mendoza, Natividad told him that Mendoza had been killed by a Toonerville gang member known as "Eskimo." (17RT 3494-3495.)

At trial, although Natividad denied telling police that Mendoza had been killed by appellant, he admitted that he picked appellant out of a photographic six-pack and identified him as one of the shooters, but testified that he was pressured to do so by police officers. (16RT 3427-3429, 3436-3439, 3449, 3451-3454.) He also denied identifying appellant to police a second time on February 1, 2002. (16RT 3428-3429.) Rhee denied telling police that she saw a green Ford Focus, with two or more people inside, tailgating them just before the shooting. (16RT 3460-3461.) She also denied telling police there was more than one shooter. (16RT 3461.)

Detective Jose Carrillo participated in a recorded interview of Christina Duran on November 9, 2001, which was played to the jury. (20RT 4050-4055; see Exh. B.) Duran was scared that the interview would jeopardize the safety of herself and her family, but she agreed to tell Detective Carrillo "everything" and "the whole truth." (Exh. B at pp. 62-

65, 67, 85-86.)[15] Duran told Detective Carrillo that earlier that morning she was on Bemis Street visiting with the family of a recently deceased friend. (Exh. B at pp. 7, 10, 38, 67.) Along with Duran, there were a few other people congregating on Bemis Street, including appellant and Eduardo Rodriguez, a Toonerville gang member known as "Limpy" who had arrived in a black Ford Focus. (15RT 3178; 20RT 4057; Exh. B at pp. 38-40, 67, 70-71.) Appellant and Rodriguez got into the Focus, with Rodriguez as the driver, and drove away. (Exh. B at pp. 67-71.) Approximately five or ten minutes later, Duran heard gunfire. (Exh. B at p. 69.) Shortly after the gunfire, appellant and Rodriguez returned to Bemis Street. (Exh. B at p. 67-68.) Appellant approached Duran and told her that he had dropped his telephone "on Atwater" during a gunfight, and that he needed her help looking for it. (Exh. B at pp. 10-11, 16-17, 41, 68, 72-73.) Appellant told Duran that he and Rodriguez had "shot at somebody" and that he was worried that if the police found his telephone he "could go down for something, for, for murder." (Exh. B at pp. 68, 72-73, 80-81.)

Duran followed appellant's directions and arrived at a location near Silver Lake Boulevard and Hollydale Drive, where she observed a "commotion" and police activity. (Exh. B at pp. 11, 17, 20-21, 37, 74-75.) Appellant told Duran to park the car, get out, and try to locate his telephone. (Exh. B at pp. 11, 20-21.) Appellant told Duran to look for the telephone "under a white van." (Exh. B at pp. 68, 73-74.) Duran got out of the car and a woman, along with a "young girl," began questioning who she was and why she was there. (Exh. B at pp. 12-13, 75.) Although Duran denied making a telephone call, she had her telephone in her hand while the woman questioned her. (Exh. B at pp. 28, 30, 43-44, 76-77.) Duran told

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[15] Exhibit B consists of 88 pages, for clarity respondent will refer to those pages sequentially as pages 1-88.

the woman that her uncle, "Andy," lived nearby on Hollydale Drive but, after getting nervous from the questions, returned to the car without finding the telephone. (Exh. B at pp. 11-13, 21, 30-31, 44-45, 75.) With appellant hiding in the back of the vehicle, Duran drove away and ran a red light before being pulled over by a police officer who had been following her. (Exh. B at pp. 22-23, 47, 75-76.) Duran and appellant were brought out of the vehicle and a field lineup was conducted. (18RT 3628, 3732; Exh. B at p. 76.) Duran was then brought to the police station for questioning. (Exh. B at p. 76.)

g. Gang evidence

Los Angeles Police Officer John Ferreria testified as a gang expert. He had training and experience in the investigation of gang crimes. He was familiar with Toonerville gang culture, custom, habit, as well as its territories and rivals. (19RT 3958-3959.) Officer Ferreria had interviewed or spoken to approximately 200 Toonerville gang members. (19RT 3959.) From 1997 to 2001, the Toonerville gang had approximately 300 members. Toonerville's name was derived from a 1930's television show about a trolley, which was used as a symbol for the gang. The letters "T" and 'V" were significant to the gang. (19RT 3960.)

The primary activities of Toonerville included vandalism, selling narcotics, robbery, assault with firearms, attempted murder, and murder. (19RT 3960-3961.) In December 2000, Toonerville gang member Sergio Cabrera was convicted of voluntary manslaughter, attempted murder, and assault with a firearm. (19RT 3961-3963.) In May 2002, Toonerville gang member Joseph Osorio was convicted on voluntary manslaughter and assault with a firearm. (19RT 3963-3964.)

Officer Ferreria was familiar with appellant as "Eskimo" or "Huero," and his involvement with Toonerville. (19RT 3967-3968, 3982.) Appellant had numerous tattoos indicating his membership in the

Toonerville gang. (20RT 3980-3982.) Officer Ferreria opined that appellant was the leader of the Toonerville gang. (20RT 3974.) Officer Ferreria was shown appellant's gang lyrics. (20RT 3975; see 7CT 1534-1563.) Officer Ferreria opined that appellant's lyrics supported the opinion that he was the leader of Toonerville. (20RT 3982-3986.) Officer Ferreria explained that appellant's use of "piggy" was slang for the police, and that "rat" referred to a snitch. (20RT 3977.) Within gang culture, when someone cooperates with the police they are labeled a "snitch." (19RT 3964-3965.) Officer Ferreria explained that snitching was not allowed within the gang culture, even if someone was snitching on someone from a rival gang. (19RT 3966-3967.)

Toonerville was rivals with the Rascals gang, the Frogtown gang, and the Pinoy Real gang. (20RT 3986-3987.) All of these gang were in close proximity to each other and would use vandalism and graffiti to mark their borders. (20RT 3987-3989.) It was considered a provocative act for one gang to cross out another gang's graffiti. (20RT 3988-3989.) A gang members' life would be at risk if he or she went into another gang's territory. (20RT 3989-3990.) Officer Ferreria opined that if a gang member entered a rival gang's territory, it would be for the purpose of committing a crime. (20RT 3990.)

When given a hypothetical based on the facts of the Sanchez and Cardiel shooting, Officer Ferreria opined that the crime was committed for the benefit of, and to promote, the Toonerville gang. (20RT 3998-4000.) When given a hypothetical based on the facts of the Martin murder, Officer Ferreria opined that the crime was committed for the benefit of, and to promote, the Toonerville gang. (20RT 4000-4002.) When given a hypothetical based on the facts of the Gonzalez murder, Officer Ferreria opined that the crime was committed for the benefit of, and to promote, the Toonerville gang. (20RT 4002-4005.) When given a hypothetical based on

the facts of the attack on Officers Baker and Langarica, Officer Ferreria opined that the attack was committed for the benefit of, and to promote, the Toonerville gang. (20RT 4008-4009.) When given a hypothetical based on the facts of the Mendoza murder, Officer Ferreria opined that the attack was committed for the benefit of, and to promote, the Toonerville gang. (20RT 4009-4012.)

h. Appellant's arrest

From November 2001, until appellant's arrest in February 2003, extensive efforts were expended by authorities to apprehend him. (19RT 3914-3915.) Approximately 500 investigators and multiple agencies were involved in the apprehension, including the United States Marshalls, the Federal Bureau of Investigation, the Bureau of Alcohol, Tobacco, Firearms and Explosives, the Social Security Administration, and the United States Department of Housing and Urban Development. (19RT 3914-3916.)

On February 12, 2003, pursuant to an arrest warrant for murder, Los Angeles Police Detective William Masterson apprehended and arrested appellant in Bullhead City, Arizona. (13RT 2725-2726.) When appellant was taken into custody, he was a passenger in a vehicle being driven by Dawn Butt, a resident of Bullhead City. (13RT 2726-2727; 16RT 3411.) Butt had met appellant in October 2002, when he introduced himself as Joe Montiel, at a casino in Laughlin, Nevada. (16RT 3399-3400.) A search of Butt's home revealed property belonging to appellant, including a notebook that contained handwritten rap lyrics. (13RT 2727-2729; 16RT 3402-3404.) Appellant's rap lyrics about being bald, tattooed, always carrying a weapon, having a high rank within the Toonerville gang, and being wanted for murder mirrored reality. (13RT 2781-2783.) Appellant's rap lyrics also paid tribute to non-fictional Toonerville gang members who had died. (13RT 2783-2784.) Appellant's home, located on Ramar Road in Bullhead City at the time of his arrest, was also searched. (13RT 2730; 19RT 3913-

3914.) The search of appellant's home revealed items that included a T-shirt with "fugitive" printed on it. (13RT 2731.)

2. Defense evidence

In December 2001, Eduardo Serna, Juan Serna's brother, was friends with John Perez. (17RT 3529-3531.) Perez told Eduardo that he was in trouble with the police for impersonating an officer and "arresting" people. (17RT 3531-3532, 3534.) Perez also told Eduardo that he had been threatened with jail if he did not "cooperate." (17RT 3532.)

Jason Kim denied that appellant told him and Wilfred Recio about killing Ryan Gonzalez. (18RT 3680-3682.) Kim testified that on November 5, 2000, he was arrested but denied having a .45 caliber firearm in his possession. (18RT 3682-3684.) Before the arrest, Kim had been standing in front of an apartment building on Bemis Street with other people. (18RT 3693-3694.) When police officers arrived, Kim ran and led the officers on a chase through several backyards before being caught and arrested. (18RT 3695-3698.)

Maria Puentes, a Toonerville gang member known as "Trouble," shared a child with Wilfredo Recio and was friends with Tanya McGhee, appellant's sister. (13RT 2787; 19RT 3815-3816, 3829-3830.) In October 2000, Puentes and Recio got into a physical altercation after Puentes accused Recio of spending too much money on drugs. (19RT 3819-3821.) The altercation was interrupted by appellant, and after that incident, it appeared that Recio resented appellant. (19RT 3823.) In December, Recio moved to Texas to live with his mother. (19RT 3823-3825.) A couple months after the move, Recio made a three-way telephone call between Puentes and someone named "Mark," telling them that he would "do anything to get out of this wreck." (19RT 3824-3827.) A couple of weeks after that telephone call, Recio mailed Puentes a letter in which he wrote that he would "point the finger in different directions" and that he would

"not go down for this." (19RT 3827-3828.) Recio did not give Puentes any explanation regarding his comments over the telephone or in the letter, and she did not know what they were in reference to. (19RT 3826-3828.)

Puentes was aware that Recio had cheated on her with other women. (19RT 3831-3832, 3842-3843.) Puentes was no longer in possession of the letter Recio sent and did not know where it was. (19RT 3840-3842.)

Melissa Orona lived at the house on Hollydale Drive where Monica Miranda was staying the night of the Mendoza murder. (19RT 3920-3923.) On November 9, 2001, Orona was in her bedroom when she heard gunfire. (19RT 3922-3924.) Minutes before the shooting, Orona saw Miranda in the house. (19RT 3926-3927.) After hearing gunfire, Orona looked outside through the front door but could not see anything past her neighbor's bushes other than muzzle flashes. Although Orona testified that she was not aware of Miranda's location during the shooting, she also testified that during the shooting Miranda "ran to the back room" where Miranda's children were. (19RT 3925-3927.) When the shooting stopped, Orona ran to the front door and noticed that Miranda was behind her. (19RT 3929-3930.) Miranda left the house to see if anyone had been injured. (19RT 3930-3931.) After the police arrived on the scene, Orona observed Miranda speak to a woman outside in the front yard. (19RT 3931-3932.) Later, Orona was taken with Miranda by police to a field lineup of a man and a woman. (19RT 3932-3933.) After the lineup, Miranda told Orona she recognized the man from elementary school, and that she recognized the man's head tattoo from a "prior period in time." (19RT 3933.)

At one time, Orona dated a Rascals gang member and knew several others. (19RT 3938.) Orona had a brother named "Ryan," whom her mother named after Ryan Gonzalez. (19RT 3938-3939.)

Javier Cruz, a former Toonerville gang member known as "Javos," played sports with appellant. (20RT 4030-4033.) Cruz worked with Mark

Gonzalez. (20RT 40032-4033.) Cruz denied attending a party with Gonzalez and appellant on June 3, 2000. (20RT 4035-4036.)

Jizette Nahapetion was friends with Mark Gonzalez and discussed the July 4, 2000, attack on Officers Baker and Langarica with him. (20RT 4065-4067.) Gonzalez told Nahapetion that he had stood outside and shot at the officers. (20RT 4068.) Gonzalez also told Nahapetion that he had killed "some guy from Frogtown," along with Ryan Gonzalez from the Rascals gang. (20RT 4068-4070.)

According to Nahapetion, Gonzalez' admissions were made over the course of three separate conversations. Nahapetion considered Gonzalez a close friend and would often visit him at his home despite the fact that he had previously attempted several times to rape her. (20RT 4078, 4084-4086.)

On July 4, 2000, Lorena Cabrera lived in an apartment building on Bemis Street with her family. (20RT 4102-4104.) Mark Gonzalez lived in another apartment within the same building. (20RT 4104.) That day, Cabrera heard gunfire outside of her apartment. (20RT 4103-4104.) Cabrera went outside and saw Gonzalez, with a "big gun" in his hand, running east on Bemis Street after turning right off Brunswick Avenue. (20RT 4105-4111.) Gonzalez ran inside his apartment. (20RT 4110.)

On July 4, 2000, Patsy Vallejo lived in an apartment building on Bemis Street. (20RT 4131-4133.) Vallejo was Veronica Ortega's sister and a Toonerville gang member known as "Loca." (13RT 2786-2787; 20RT 4146.) Vallejo would frequently have Toonerville gang members over at her apartment. (20RT 4141.) Vallejo's eldest son Manuel also was a Toonerville gang member. (20RT 4138.) John Perez lived in another apartment within the same building. (20RT 4133.) Early that morning, Vallejo woke up to the sound of gunfire and sirens. (20RT 4134.) Vallejo went outside and saw Perez standing in a driveway listening to a scanner.

(20RT 4135-4137.) Perez told Vallejo that he had not seen anything. (20RT 4137.)

On July 4, 2000, Albert Montanez, Gabriel Rivas's stepfather, lived at 4062 Bemis Street, near the intersection of Bemis Street and Brunswick Avenue. (20RT 4150-4151, 4159-4160.) There was a six-foot-tall wooden fence outside of 4050 Bemis Street that had not changed since 2000. (20RT 4153.) In 2000, hedges along the fence were overgrown and reached up approximately a foot and a half beyond the top of the fence. (20RT 4153-4155.) Another six-foot-tall wooden fence, which had been installed around 1996, separated Montanez' house from the house at 4056 Bemis Street. (20RT 4155-4159.)

Desiree Mendoza was a La Mirada gang member.[16] (20RT 4167-4169.) On November 8, 2001, Desiree's friend Rudy Rodarte, who lived on Bemis Street, was killed. (20RT 4170-4171.) That evening, after learning of her friend's death, Desiree and appellant, along with several other people, gathered on Bemis Street. (20RT 4170-4171.) Christina Duran approached Desiree and asked to borrow her cellular telephone; because Desiree did not have hers with her, Duran borrowed appellant's. (20RT 4171-4173.) With appellant's telephone, Duran got into a black Toyota 4Runner with two unknown males and drove away. (20RT 4173-4174.)

After Duran left, Desiree heard gunfire. (20RT 4175.) During the gunfire, Desiree could see appellant nearby. (20RT 4176.) Approximately 15 minutes later, Duran returned to Bemis Street alone. (20RT 4176.) Appellant approached Duran and asked for his telephone back. (20RT 4176-4177.) Duran was "acting dumb" and told appellant she had left it in

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[16] Because Desiree Mendoza has the same last name as one of the victims, respondent will refer to her by first name.

her car. (20RT 4176-4177.) Appellant and Duran went over to her car and looked inside, before getting into it and driving away together. (20RT 4176-4177.)

Although Desiree knew appellant had been in her presence during the Marjorie Mendoza shooting, she did not come forward with that information out of fear of being arrested on outstanding warrants. (20RT 4211-4214, 4226.) However, for the time period between appellant's arrest in February 2003 until May 2004, Desiree was under the belief that there were no warrants for her arrest. (20RT 4226-4232.) Desiree did not tell anyone about Duran borrowing appellant's telephone until August 27, 2007. (20RT 4218-4220.)

Defense Investigator Robert Royce visited the Mendoza murder scene and took some measurements. (20RT 4233- 4237.) On October 3, 2006, Investigator Royce interviewed Jason Kim. (20RT 4237.) Kim stated that the .45 caliber weapon found near him when he was arrested on November 5, 2000, belonged to Mark Gonzalez. (20RT 4237-4240.)

B. Penalty Phase Evidence (The Retrial)[17]

In the penalty phase, considerable testimony was presented on the circumstances and manner of death of the three murders appellant had been previously convicted of: (1) the Ronald Martin murder; (2) the Ryan Gonzalez murder; and (3) the Marjorie Mendoza murder. Testimony was also presented concerning the circumstances of the four attempted murder charges appellant had been previously convicted of: (1) Officer Baker; (2) Officer Langarica; (3) Duane Natividad; and (4) Erica Rhee. Also, testimony was presented concerning the circumstances of the Daniel Medina attack, appellant's arrest, and of the content of appellant's rap lyrics

[17] As noted above, the first penalty phase ended in a mistrial.

that were recovered during his arrest.[18] Finally, the jury was presented with testimony linking appellant to the murder of Christina Duran, as well as several other violent incidents discussed below.

1. Prosecution evidence

a. Gerardo Luperico shooting

On November 11, 1989, Carlos Orozco was on the front lawn at 521 Allen Avenue with a group of people when a vehicle pulled up next to them and someone on the passenger side fired a shotgun. (32RT 6452-6458, 6461.) Gerardo Luperico, a West Side Locos gang member known as "Lalo" and one of the people on the front lawn with Orozco, was shot in the head. (32RT 6453, 6458-6461, 6468-6469.) West Side Locos were rivals of Toonerville. (32RT 6469.)

On November 11, 1989, Burbank Police Officer Edward Skvarna responded to 521 Allen Avenue. (32RT 6465-6466.) When Officer Skvarna arrived, he found Luperico lying on the ground bleeding profusely from a head wound. (32RT 6466-6467.) Luperico went into convulsions as Officer Skvarna attended to him. (32RT 6470-6471.) Several days after the incident, Officer Skvarna observed Luperico with birdshot still embedded in his face. (32RT 6468.)

On November 15, 1989, as part of the investigation into the Luperico shooting, Glendale Police Officer William Currie served appellant a search warrant at his home address of 4319 La Clede Avenue. (32RT 6532-6534.) Appellant admitted to Officer Currie that he had been involved in the attack on Luperico. (32RT 6536-6537.) Appellant stated that he had been in the vehicle that approached Luperico and his friends on Allen Avenue, and that

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[18] The testimony presented was done so through the same witnesses that testified during the guilt phase and was essentially the same as set forth above in respondent's summary of the guilt phase evidence.

he had fired two rounds from a shotgun at them from the vehicle. (32RT 6536-6538.) Appellant heard somebody scream as they drove away. (32RT 6537.) Appellant told Officer Currie that the shooting was retaliation for "someone" being chased out of the neighborhood. (32RT 6538.) Although appellant stated that he had "aimed high intentionally," Luperico was approximately five-feet eight-inches tall, and spent bird shot pellets were observed lodged in the wall of the apartment building approximately six feet off the ground. (32RT 6460, 6537-6539.)

As a result of Officer Currie's search of appellant's home, a live birdshot shotgun shell was recovered. (32RT 6539-6540.) Appellant told Officer Currie that he "got rid" of the shotgun. (32RT 6537.) Officer Currie also found a newspaper article about the Luperico shooting that appellant had cut out of a newspaper and affixed on display in his living room. (32RT 6540-6541, 6543.)

b. David Zavala attack

On June 16, 1994, California Youth Authority Group Supervisor David Zavala was escorting appellant and other wards to the transportation unit so they could be transferred to other youth facilities. (32RT 6472-6475.) While being escorted, appellant told Zavala, "You're my ticket to the pen," and then struck him in the jaw with a closed fist. After knocking Zavala to the ground, appellant began kicking him. (32RT 6475-6476.) When Zavala reached for his mace, appellant stopped and surrendered. (32RT 6478.)

California Youth Authority Group Supervisor Robert Sedillo Jr. responded to the attack on Zavala. (32RT 6484-6485.) Appellant told Sedillo to tell Zavala that the attack was "nothing personal" but that he had been writing grievances about being transferred and "didn't know what else to do." (32RT 6486.) When appellant was told that his attack on Zavala

would not get him to the penitentiary, appellant stated, "Well, then next time I'll just stab him." (32RT 6488.)

c. Christina Duran murder

Christina Duran was a Toonerville gang member known as "Dimples." (34RT 6805, 6840.) Duran was in a relationship with Juan Rodarte, a Toonerville gang member known as "Sharpy" and a friend of appellant. (34RT 6805-6806, 6886, 6889, 6900.) Sayra Martinez was friends with Duran. (34RT 6738.) Duran had two children. (33RT 6725; 34RT 6739.)

On November 9, 2001, Detective Carrillo participated in a recorded interview of Duran, which was played to the jury. (33RT 6726-6733; 34RT 6734-6736; see Exh. B.) In the interview, Duran implicated appellant and Eduardo "Limpy" Rodriguez in the murder of Marjorie Mendoza. (34RT 6736; see Exh. B.) After Duran gave her recorded statement, she was allowed to leave. (33RT 6736-6737.)

The next day, on November 10, 2001, at approximately 8:00 p.m., Martinez and her friend "Elsa" were at Duran's house. (34RT 6739-6740, 6742.) Martinez and Elsa planned to go "clubbing" while Duran attended a house party, and then the three of them planned to meet later that evening to eat together. (34RT 6740-6741.) Duran told Martinez that she was going to the party with "Sharpy" and "Huero." (34RT 6740-6741.) As Martinez and Elsa left Duran's house, "Sharpy" arrived. (34RT 6740, 6742.) Later, at approximately 1:30 a.m., Martinez spoke to Duran over the telephone, and Duran told her that she was about to leave the party with "Sharpy" and "Huero." (34RT 6742-6744.)

On November 10, 2001, Martin Villagran, a Toonerville gang member known as "Rascal," hosted a birthday party for Duran at his house in West Covina. (34RT 6803-6807.) Appellant attended the party. Sometime between 11:00 p.m. and 12:00 a.m., Villagran observed appellant

have an adverse reaction to the drug ecstasy. (34RT 6809, 6817.) Appellant was carried to a guest room. (34RT 6814-6815.) Villagran went to his bedroom and fell asleep at approximately 1:00 a.m., before all of the guests had left. (34RT 6809-6810.) Duran was still at the party when Villagran went to sleep. (34RT 6812.) Villagran did not leave his bedroom until he woke up the next morning. (34RT 6811.)

Juan "Sharpy" Rodarte and Duran travelled together to the party. (34RT 6885-6889.) Although Rodarte did not remember when he left the party, he returned to his house in Atwater Village at 5:00 a.m. the next day. (34RT 6890-6891.) Duran was not at the party when Rodarte left, and he did not know where she had gone. (34RT 6893.) Although Rodarte had planned to drive home with Duran after the party, he woke up on a couch in Villagran's house some time between 4:00 and 5:00 a.m. and Duran was gone. (34RT 6893-6895.) Rodarte was given a ride home by Alphonso Barajas, a Toonerville gang member known as "Shy Boy." (34RT 6896, 6903.)

Gabriel Rivas was friends with Rodarte. (34RT 6909-6910, 6918-6919.) Rivas denied telling former Los Angeles County Deputy District Attorney Tony Manzella that Rodarte had told him that appellant wanted Duran killed because she had spoken to the police about appellant and Eduardo "Limpy" Rodriguez. (34RT 6922-6923.) Rivas denied telling Manzella that appellant wanted Rodarte to set Duran up by bringing her to the party at Villagran's house so that "the homies could get at her." (34RT 6923-6924.) Manzella testified that on June 3, 2003, he interviewed Rivas. (34RT 6934-6935.) During that interview, Rivas told Manzella that Rodarte had spoken to him about Duran's murder. (34RT 6936-6937.) According to Rivas, appellant told Rodarte that he wanted Duran dead because she was "ratting" on appellant and Rodriguez. (34RT 6937.) At appellant's direction, Rodarte brought Duran to a party where "the homies"

kidnapped her, took her out, and killed her. (34RT 6937-6938.) Appellant was one of the people who participated in her murder. (34RT 6938.) Rodarte told Rivas that he could not stop Duran's murder. (34RT 6938.) Manzella used a "relatively minor" probation violation to induce Rivas's cooperation. (34RT 6947-6948.)

Teresa Lara and some friends attended Duran's birthday party at Villagran's house. (34RT 6754-6755, 6873.) Lara's friend "Mireya" used Lara's video camera to record their group dancing. (34RT 6754-6756.) Sometime after the party, Lara met with Los Angeles Police Detective Tom Harris. (34RT 6757-6759.) According to Lara, Detective Harris told Lara that if she did not turn over the videotape to him the "guys" from the party were going to come after her. (34RT 6759-6760.) At trial, Lara denied telling Detective Harris that "a white older guy" at the party had told her group in a menacing tone to stop filming. (34RT 6760-6761.) Lara denied identifying anyone to Detective Harris, and denied that Detective Harris showed her photographs and asked her to identify anyone. (34RT 6761-6762.)

According to Detective Harris, Lara told him that, while she was at the party, a White male named "Huero" told her group "in a very stern or direct manner" to stop filming. (34RT 6873-6874.) Detective Harris showed Lara a photograph of appellant, whom she identified as "Huero." (34RT 6874.)

Taufi Sanki also attended the party at Villagran's house. (34RT 6780-6783, 6793.) At trial, Sanki denied knowing appellant or seeing him at the party. (34RT 6782.) When he left, Sanki observed Duran picking up bottles. (34RT 6791.) Sanki left the party at approximately 2:00 or 2:30 a.m. (34RT 6784-6785, 6796.) Sanki gave Juan Serna, a Toonerville gang member known as "Panther" and appellant's brother-in-law, a ride home. Sanki estimated that he dropped Serna off at approximately 3:30 or 4:00

a.m. (34RT 6784-6786, 6807, 6840.) At trial, Sanki also denied knowing Francisco Gonzalez despite acknowledging in previous testimony that he did know him. (34RT 6787-6789.) Sanki denied stating that he saw Duran leave the party in a car with Rodarte, being followed by another car with "Panther" and "Huero" inside it. (34RT 6791-6792.)

Francisco Gonzalez, a former Toonerville gang member, had been Sanki's neighbor at one time, and had known him for approximately 13 years. (34RT 6833-6834, 6836.) Francisco was a friend of Duran's brother, Mike Duran.[19] (34RT 6841.) Mike asked Francisco for help in gathering information regarding Duran's murder. (34RT 6841-6842.) In a telephone call, Sanki told Francisco that he had attended Duran's birthday party. (34RT 6842-6843.) Sanki told Francisco that Duran had left the party in a car with "Sharpy," and that "Huero" and "Panther" had followed in a different car. (34RT 6843-6844.) On November 13, 2001, Francisco reported what Sanki told him to Detective Harris. (34RT 6844, 6853, 6874-6875.)

Los Angeles County Sheriff's Detective Tommy Harris investigated Duran's murder. (34RT 6860-6861.) Duran's body was found less than two miles from Villagran's house. (34RT 6861-6862.) At approximately 2:00 p.m., on November 11, 2001, Detective Harris arrived at the Duran crime scene. (34RT 6863, 6876-6877.) Duran's black Toyota 4Runner was parked on Robinett Street, near the corner of Fairgrove Street. (34RT 6864.) Duran's body was in the back seat, blood had dripped from the back door of the vehicle, where her head was, onto the street. (35RT 6865-6868.) Based on blood found in the driver's seat and on the front passenger

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[19] Because Mike and the victim share the same last name, and because there were other witnesses with Francisco's last name, respondent will refer to them by first names.

seat, Detective Harris determined that Duran had been moved to the backseat after being shot. (34RT 6868-6870.) There were no signs of a robbery, neither Duran's purse nor the inside of the car had been disturbed. (34RT 6872.)

On November 11, 2001, Irma Quiroz lived near the corner of Fairgrove Avenue and Robinett Avenue in Baldwin Park. (34RT 6818-6819.) At approximately 2:00 or 3:00 a.m., Quiroz heard a woman and two or three men screaming outside her house. (34RT 6820-6822.) The woman was asking to be let go while the men called her a "bitch" and told her to "shut up." (34RT 6821.) The screaming seemed to come from the area of a club behind Quiroz's house. (34RT 6823.) Following the screams, Quiroz heard several gunshots. (34RT 6821.) After the gunshots, Quiroz heard two cars drive up to the area along the side of her house, a car door slam shut, and then the sound of one of the cars driving away. (34RT 6821-6823.) Later that same day, at approximately 1:00 p.m., police officers set up crime scene tape around a car on Quiroz' street, in which Duran's dead body was found. (34RT 6820.)

Duran suffered seven gunshot wounds. Five of the wounds were from gunshots fired at close range into the right temple area of her head. It appeared that Duran's head was held in a fixed position while she was shot. (34RT 6767-6774, 6871.) One of the remaining two gunshots wounds was to Duran's hand and appeared to be a defensive wound that occurred while she attempted to shield herself, the other gunshot wound was a graze wound. (34RT 6774-6776, 6871.) It was determined that Duran's death was the result of a homicide and that the cause of death was multiple gunshot wounds. (34RT 6766-6767.)

d. Jail house incidents

On December 6, 2003, Los Angeles County Sheriff's Deputy Jesus Argueta was working at the Men's Central Jail when he learned that an

inmate, Ed Barajas, was handing out potential weapons to other inmates in the "day room." (35RT 7024-7028.) As Barajas was escorted from the day room, appellant yelled from his cell, "Hey, where the fuck are you guys taking my homeboy, muther-fuckers?" (35RT 7028-7029.) Deputy Argueta told appellant to calm down, and appellant said, "Fuck you, Argueta, I ain't no punk." (35RT 7029-7030.) Another inmate began yelling profanity, and appellant said, "Fuck these deputies, let's fuck with them." (35RT 7030.) Appellant yelled, "Fuck you, Argueta, come get us, muther-fucker, because it's going to a be a cell extract," and then, "Hey, homies, these fuckers want to play. Let's fucking play. Let's all cell extract and throw water and soap on the tier so the fuckers can slip and fall." (35RT 7030-7031.) After tying shirts around the cell gates so they could not be opened, appellant and other inmates threw apples and unidentified liquids at the deputies. (35RT 7032-7033.)

On October 18, 2004, at the Men's Central Jail, Los Angeles County Sheriff's Deputy Josue Torres conducted a search of appellant's cell and found several items that could be used as a dangerous and deadly weapon, a loose eyeglass lens, three loose razor blades, and a metal fire extinguisher pin. (35RT 7100-7101, 7104-7112.)

On January 7, 2005, at the Men's Central Jail, while Deputy Argueta and Los Angeles County Sheriff's Deputy Raul Ibarra escorted an inmate, Rudolfo Gonzalez, past appellant's cell, appellant told Gonzalez not to go with them and that he had not given Gonzalez permission to "cuff up." (35RT 7034-7038, 7044, 7130, 7135-7139.) The deputies continued to escort Gonzalez away, and appellant yelled, "Fuck you guys," and directed other inmates to attack the deputies. (35RT 7038.) Gonzalez dropped to his knees and kicked at the deputies as appellant and other inmates threw apples and "urine mixed with milk or water." (35RT 7039, 7141-7142.) Appellant and other inmates broke apart the porcelain sinks within their

cells and threw pieces of the porcelain at deputies. (35RT 7151-7154, 7164-7166, 7173-7176, 7180-7182.) Several fires were started and had to be extinguished by deputies. (35RT 7171-7173, 7176.) Deputies were eventually able to quell the riot. (35RT 7176-7180.)

On July 1, 2005, at the Men's Central Jail, Los Angeles County Sheriff's Deputy David Florence searched appellant's cell and found an item that could be used as a dangerous and deadly weapon, a cylindrical metal object that had been sharpened on one end. (35RT 7118, 7119-7122.)

On December 29, 2006, at Men's Central Jail, Los Angeles County Sheriff's Deputy Joe Medina searched appellant's cell and found an item that could be used as a dangerous and deadly weapon, a loose razor blade. (35RT 7125-7127.)

e. Victim impact testimony

Emily Martin, Ronald Martin's mother, testified that since Ronald's death she was depressed and cried "all the time." (36RT 7203, 7219.) Ronald was a "good-hearted, thoughtful" person who helped Emily with "whatever [she] asked him to do." (36RT 7205.) Before his murder, Ronald was getting involved with the family's real estate business. (36RT 7205-7206.) Ronald shared a child, "Violet," with his girlfriend, Cecelia Lopez. (36RT 7219-7222.) Since Ronald's murder, Lopez was afraid to go outside or let her children walk down the street. (36RT 7226-7227.) Violet sometimes cried as she looked at a photograph of Ronald. (36RT 7228-7229.) Ronald's nephew, Robert Chairez, testified that since Ronald's murder he felt "like something is missing," and that he did not think the feeling would ever go away. (36RT 7230-7234.)

Marilyn Mendoza, Marjorie Mendoza's aunt, testified that Marjorie aspired to become a nurse, and had worked at Kaiser Hospital as a housekeeper. (36RT 7238-7239, 7271-7242.) Marjorie was a "very good mother" to her three boys. (36RT 7239-7242.) After Marjorie's murder,

her children were split apart. (36RT 7245.) Marjorie's children would forever remind Marilyn of Marjorie's murder. (36RT 7249.) Azenith Mendoza, Marjorie's sister, felt "hurt" and "emotional" after learning of her sister's murder. (36RT 7250, 7256.)

Sylvia Gonzalez, Ryan Gonzalez' mother, testified that prior to his murder Ryan was attending school to become an engineer like his father. (36RT 7258-7261.) Ryan would help his father, Antonio Gonzalez, at work. (37RT 7295-7298.) Ryan was a shy, responsible person who loved animals and had a lot of friends. (36RT 7262-7264, 7269-7270.) Ryan shared a child, "Leila," with Isabel Alvarez, his fiancé. (36RT 7270-7271.) After learning of Ryan's murder, Leila would often get depressed and was bullied at school. (36RT 7278-7279; 37RT 7300-7301.) Alvarez thought about Ryan's murder "all the time." (36RT 7280.)

2. Defense evidence

a. Christina Duran murder

On November 10, 2001, Jessica Ortiz lived at 2241 West Doublegrove Street, across the street from Martin Villagran's house. (37RT 7303-7304.) Ortiz was familiar with appellant. (37RT 7306.) That night, Ortiz attended Duran's birthday party for approximately 20 minutes. (37RT 7305-7306.) While at the party, Ortiz interacted with appellant and believed that he was intoxicated. (37RT 7307, 7322.) Ortiz left the party at around 12:30 a.m. and went home. (37RT 7307-7308.) At around 2:30 a.m., Ortiz heard people yelling outside. (37RT 7308, 7316.) Through her living room window, Ortiz observed two women, one of which Ortiz identified as Christina Duran, in a black 4Runner yelling at a group of people on the front porch of Villagran's house. (34RT 6780-6781; 37RT 7309-7310, 7312-7313, 7324, 7332.) Appellant and Villagran were among the people standing on the porch. (37RT 7312.) The 4Runner drove away,

circled around the block, and returned a minute later before driving away a second time. (37RT 7311.) Ortiz did not observe another car following the 4Runner either time it drove away. (37RT 7311-7312.) Appellant was still on the porch when the 4Runner drove away the second time. (37RT 7312, 7316-7317.) At around 3:00 a.m., Ortiz' mother called the police to complain about the noise from the party. (37RT 7313-7314.)

On November 11, 2001, Baldwin Park Police Officer Donna Crow interviewed Irma Quiroz. (38RT 7604-7605.) Officer Crow utilized a translator, Baldwin Park Police Officer Adams, to communicate in Spanish with Quiroz. (38RT 7605.) Quiroz spoke to Officer Adams in Spanish, and Officer Adams translated her statements to English for Officer Crow. (38RT 7606.) According to Officer Adams, Quiroz heard a male and a female arguing outside of her house at around 12:30 a.m. that day. (38RT 7606.) Quiroz told Officer Adams she heard approximately two gunshots. (38RT 7606.) Quiroz was unsure about the time she heard the argument and the gunfire. (38RT 7606-7607.)

b. Jail house incidents

On January 7, 2005, Rodolfo Gonzalez was an inmate at the Los Angeles County Jail, in a cell approximately 10 cells away from appellant's cell. (37RT 7338-7339.) Gonzalez had been drinking "pruno," when he heard his name called over the loud speaker. (37RT 7340.) Believing he was being taken to see a doctor or his attorney, Gonzalez readied himself to be escorted out of his cell by deputies. (37RT 7340-7342.) When Deputy Ibarra told Gonzalez that they were taking him to an attorney visit, Gonzalez said he "refused" and attempted to walk back to his cell. (37RT 7344-7345.) Deputy Ibarra grabbed Gonzalez by the neck and put him in a "choke hold." (37RT 7345-7346.)

As Deputy Ibarra pushed Gonzalez to the ground, Gonzalez began to kick him. (37RT 7346-7347.) As Deputy Ibarra punched Gonzalez and

attempted to drag him toward the control booth, other inmates on the tier began shouting. (37RT 7347-7348.) Other deputies joined Deputy Ibarra, and together they punched and kicked Gonzalez. (37RT 7349.) Gonzalez "passed out" after being sprayed with mace. (37RT 7350.)

Gonzalez admitted that, after the incident, he did not have any visible bruises. (37RT 7353-7355.) Gonzalez also admitted involvement in a previous riot at another jail facility. (37RT 7358.) Gonzalez and appellant had been friends since childhood. (37RT 7360.)

c. Mitigating testimony

Becky Katz was appellant's aunt. (36RT 7366-7367.) Katz had known appellant since his birth and lived with him and his mother until appellant was nine years old. (37RT 7366-7368, 7372-7373.) Soon after appellant was born, appellant's father moved to Alaska. (37RT 7370-7371.) Appellant's mother worked 10 or 12 hours per day at a bakery. (37RT 7372-7373, 7414.) Katz and her brothers provided appellant discipline as he grew up. (37RT 7373, 7378-7380.)

As a child, appellant was "fair skinned" with curly hair and a weight problem. (37RT 7381.) Appellant grew up in a neighborhood that was predominantly Hispanic and did not have many friends. (37RT 7381-7383.) When appellant was around 15 years old, he began to get into trouble and Katz learned that he had acquired a gun. (37RT 7383-7384.) Also around this time, appellant's mother suffered a health condition that left her with speech problems, "right-sided weakness," and "judgment problems." (37RT 7385-7386.) Appellant assisted in the care of his mother. (37RT 7386-7387.)

Steven Katz, appellant's cousin, testified that he loved appellant and that he spent a lot of time with appellant when Steven was younger. (37RT 7422-7425.) Steven told the jury that if appellant was given a life sentence, he would be able to visit appellant "as much as [he] wanted." (37RT 7427.)

In 1994, John Berge was a teacher at the California Youth Authority facility in Chino while appellant was a ward there and in one of Berge's classes. (37RT 7430, 7432.) According to Berge, appellant stood out from the other wards by how articulate and engaging he was. (37RT 7432.) Appellant expressed an interest in getting an education and away from gangs. (37RT 7432-7433.) In 1997, after being released from the youth authority, appellant attended "five or six" classes of a course taught by Berge at Mount San Antonio College. (37RT 7433-7436.)

Mark Renteria grew up with appellant. (37RT 7441-7442.) Renteria testified that appellant was picked on by other kids in the neighborhood while they were growing up. (37RT 7443.) After spending some time in juvenile hall, appellant lost weight, shaved his head, and began wearing baggy clothing. (37RT 7445.) Appellant once told other Toonerville gang members to leave Renteria alone, and they did. (37RT 7446.)

Joseph Montiel, appellant's son, testified that he had a "good" relationship with appellant. (37RT 7458-7460.) Appellant told Montiel to stay away from gangs. (37RT 7461.) Appellant taught Montiel "how to be a good and respectful person" and to have good manners. (37RT 7463-7464.) Montiel did not want to see appellant put to death because he loved him and because appellant "guides [him] through life." (37RT 7464.)

Danny Puente, appellant's stepson, testified that appellant was a "good father figure." (37RT 7468-7470.) Appellant told Puente that he should not get involved with gangs and that he needed an education and a "good career." (37RT 7471.) Puente did not want to see appellant put to death because appellant "was a good father." (37RT 7472.)

Mary Tindall, appellant's aunt and godparent, testified that appellant often came home from elementary school "beat up," with dirty clothes and a bloody nose. (37RT 7475-7476.) After appellant's grandmother became ill, appellant would help his grandmother with things she was unable to do

herself. (37RT 7477.) Tindall testified that she loved appellant and did not want to see him put to death. (37RT 7477-7478.)

Olivia McGhee, appellant's mother, testified that she loved appellant. (38RT 7492-7493.) Appellant's grandmother, Rebecca Barroso, participated in appellant's upbringing. (38RT 7495.) Appellant's father moved to Alaska when appellant was three years old. (38RT 7504-7505.) When appellant was 13 years old, he began to have "problems" at school and his mother sent him to Alaska to live with his father. (38RT 7509-7510.) Appellant returned to live with Olivia after spending one year in Alaska. (38RT 7510.) While Olivia recovered from a health condition, appellant helped feed her, washed her hands, read to her, and watched television with her. (38RT 7510-7511.) When Olivia's mother became ill, appellant helped feed her, helped with her insulin, and would tie her shoelaces. (38RT 7511-7512.) Olivia asked the jury to spare appellant's life so that he would be able to visit with her and his children. (38RT 7520-7521.)

Tanya McGhee, appellant's sister, testified that appellant had been bullied when he was younger. (38RT 7522, 7528.) Appellant spent a lot of time with Tanya's children. (38RT 7536.) Tanya did not want to see appellant put to death because he "means a lot" to her and her family. (38RT 7536.)

Olivia Langarica, appellant's sister, testified that appellant consoled her when her husband was murdered. (38RT 7539-7542.)[20] Olivia L.'s husband was Officer Carlos Langarica's cousin. (38RT 7540.) When Olivia L. was 11 years old she caught her uncle, Joel Montiel, watching her

[20] Because Olivia Langarica has the same first name as her mother, and shares a last name with one of the victims discussed above, respondent will refer to her as Olivia L.

while she bathed. (38RT 7546.) When appellant learned what Montiel had done, he chased Montiel down the street. (38RT 7546-7547.) Appellant was "like a father figure" to his mother, his grandmother, and his two sisters. (38RT 7547.)

ARGUMENT

I. THE TRIAL COURT ACTED WITHIN ITS DISCRETION IN REMOVING A JUROR WHO WAS NOT FAIRLY DELIBERATING ON THE EVIDENCE AND HAD DEMONSTRATED A BIAS AGAINST POLICE OFFICERS AND THE PROSECUTION

Appellant contends the trial court "prejudicially erred by discharging the lone holdout juror during deliberations." (AOB 50-76.) He is wrong because the record supports the trial court's ruling that Juror No. 5 was not fairly deliberating and exhibited bias against police officers and the prosecution.

A. Evidence Supporting the Trial Court's Removal of Juror No. 5

On September 26, 2007, the guilt phase of appellant's trial began with opening statements. (11RT 2303, 2323.) Almost three weeks later, on October 15, 2007, both the prosecution and defense finished their closing remarks and the jury began deliberating. (22RT 4543.) On October 17, 2007, after deliberating for approximately eight hours, two jurors sent the trial court a note. (See 23RT 4564; 15CT 3753; see also 15CT 3736-3737, 3751-3752; 22RT 4542-4543, 4546-4547; 23RT 3758-3759.) The note read:

> We, jurors [nos.] 9 [and] 11, feel that the [majority] of the jury feels as though one juror[, no. 5,] has been swayed and is not capable of making a fair decision in any of the counts against [appellant]. Juror [No. 5] is using speculation as facts and has no rational [explanation] as to why he feels the way he does, other than saying <u>every</u> prosecution witness was coached

[and] lying — Yet the defense witnesses are all telling the truth and are believable.

(15CT 3753; see 23RT 4564-4565.)

The trial court instructed the jury to continue deliberating through the afternoon and that the matter would be discussed the following morning. (23RT 4565.) On October 18, 2007, the parties discussed the note with the trial court. (See 23RT 4565.) The prosecutor directed the court's attention to *People v. Barnwell* (2007) 41 Cal.4th 1038, 1048, and *People v. Diaz* (2002) 95 Cal.App.4th 695, 699, cases in which trial court decisions to discharge deliberating jurors were upheld. (23RT 4565-4566.) The trial court recognized that, pursuant to section 1089, a juror may be discharged upon a showing of "good cause" by a "demonstrable reality." (23RT 4565.) Although the court acknowledged the importance "not to intrude on the sanctity of the jury's deliberations," the court indicated its plan to inquire of Juror Nos. 9 and 11. (23RT 4566-4567.) Over defense counsel's objection, the trial court brought out Juror Nos. 9 and 11 and conducted an inquiry. Ultimately, the trial court brought out each remaining juror to be questioned.

1. Testimony of Juror No. 9

The trial court informed Juror No. 9 that he or she had been brought out "because of the note [he or she] signed along with Juror [No.] 11." (23RT 4573.) According to Juror No. 9, Juror No. 5 believed that all the witnesses had been coached by law enforcement. (23RT 4575.) He rejected eyewitness accounts for reasons that were speculative. For example, he disbelieved Monica Miranda's testimony that she went outside during the Mendoza murder because she was a single mother. (23RT 4574-4575.) Although Juror No. 5 did not point to anything in the record for support, he explained that Miranda's testimony was based on information "passed on" to her by the police. (23RT 4576.) Similarly, he disbelieved John Perez's testimony regarding his observation of the attempted murders

of Officers Baker and Langarica because "if [Juror No. 5] heard shots, [he] would fall onto the floor and try to protect [himself]." (23RT 4575.)

Juror No. 9 opined that Juror No. 5 had formed his decisions before deliberations began. (23RT 4575.) According to Juror No. 9, Juror No. 5 was not fairly deliberating on the evidence. Juror No. 9 also sensed that Juror No. 5 was biased. Juror No. 9 indicated that Juror No. 5 had told Juror No. 10 that he believed appellant was not guilty on all charges. (23RT 4575-4576.)

2. Testimony of Juror No. 11

As with Juror No. 9, the trial court informed Juror No. 11 that they had been brought out "as a result of [their] note." (23RT 4577.) Juror No. 11 reiterated the claim that Juror No. 5 was relying on speculation to support his conclusions. For example, Juror No. 5 stated that he believed John Perez had "alternative motives" and that Perez had been arrested for impersonating an officer. Juror No. 5 stated, "I don't believe people who have convictions." (23RT 4578.) Juror No. 5 disbelieved Monica Miranda's testimony that she was outside during the Mendoza murder. (23RT 4579.) When asked why he did not believe Miranda, Juror No. 5 initially would not answer but later indicated that it was because "she was drinking and doing drugs that night." (23RT 4581; see also 23RT 4580.) According to Juror No. 11, Juror No. 5 would not explain the basis behind many of his conclusions and those he did explain were not supported by evidence. (23RT 4580-4586.)

Juror No. 5 told the other jurors that "he wasn't prone" to believe any prosecution witnesses because "everybody has convictions." However, he did not apply that same bias when considering defense witness testimony and, when confronted by the other jurors about his inconsistent treatment, Juror No. 5 denied making his initial declaration. (23RT 4579.) Similarly, regarding the prosecution witnesses, Juror No. 5 indicated that he did not

trust anybody who did not come forward immediately. Again, he would not apply that same bias to defense witnesses. (23RT 4586.) Juror No. 5 also stated that he did not believe the police officers who testified and that they had "coached the witnesses for the prosecution." (23RT 4580.)

3. Testimony of the jury foreperson (Juror No. 4)

The trial court began its inquiry by telling the foreperson about the note it had received and its concerns about the conduct of deliberations. (23RT 4587-4588.) The foreperson indicated that it appeared as if one particular juror had "an agenda." According to the foreperson, this juror would contradict the other viewpoints on the panel with "just a few words" and for reasons that were not supported by evidence. (23RT 4589.)

When asked for specific examples, the foreperson explained that the juror believed that all police officers were corrupt, and that all the witnesses had been coached. (23RT 4589-4590.) The foreperson believed that the juror was "definitely anti-police." The foreperson also indicated that this particular juror was compassionate toward gang members and disbelieved any gang member testifying against another gang member because he believed they "should support each other" and that "a gang member wouldn't do that." (23RT 4590-4591.)

The foreperson stated that the juror would not explain his conclusions and was evasive when the other jurors attempted to discuss the issues. Although the foreperson indicated that this juror had not stopped talking, he reported that the juror was not making sense and appeared to enjoy being at odds with the other jurors. (23RT 4591-4592.)[21]

[21] Although the foreperson did not expressly state that he was referring to Juror No. 5, when put into context along with the other jurors' testimony, it is clear that he was testifying about Juror No. 5's conduct.

4. Testimony of Juror No. 10

The trial court began its inquiry by telling Juror No. 10 about the note it had received. (23RT 4593.) Juror No. 10 indicated that there was one particular juror the panel was "having problems with." (23RT 4594.) Juror No. 10 confirmed Juror No. 9's claim that Juror No. 5 had stated that he believed appellant was innocent on all counts. (23RT 4595-4596; see also 23RT 4575-4576.) Juror No. 10 explained that Juror No. 5 "would bring things up that weren't discussed in the courtroom." (23RT 4595.) For example, Juror No. 5 stated that Wilfred Recio had been arrested for two murders, which was not supported by the evidence.[22] (23RT 4595; see 14RT 2827-2828.)

As with the foreperson, Juror No. 10 believed Juror No. 5 displayed "an agenda." (23RT 4596-4597.) Juror No. 10 felt that Juror No. 5 was prejudiced against police officers generally, and was now "avenging" either himself or his family. According to Juror No. 10, Juror No. 5 stated that he would not believe anybody with a prior conviction. (23RT 4597-4598.) Juror No. 10 and the other jurors joked about how it seemed as though Juror No. 5 had been paid by appellant's family. (23RT 4596.)

5. Testimony of Juror No. 1

When asked about possible misconduct, Juror No. 1 indicated that the panel had been properly deliberating. Juror No. 1 did not think anyone was improperly speculating but indicated that when someone did speculate they were immediately told that it was unacceptable. (23RT 4600-4601.)

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[22] Recio acknowledged during cross-examination that he was a suspect in two murders; however, there was nothing to indicate that he had been arrested or charged. (See 14RT 2827-2828.)

6. Testimony of Juror No. 2

When asked whether the court should be concerned about juror misconduct, Juror No. 2 indicated that one particular juror was "disregarding all witnesses and testimony" but that he "wouldn't necessarily characterize it as a bias." (23RT 4603-4605.) Juror No. 2 told the court that if jurors did not want to consider "any testimony, then [he had] to respect their opinion." (23RT 4604.) Juror No. 2 stated that he did "not necessarily" detect any anti-police bias. (23RT 4605.)

7. Testimony of Juror No. 6

When asked about deliberations, Juror No. 6 indicated that "they're going as they're supposed to go." (23RT 4607.) Juror No. 6 thought that all the jurors were engaging in an open discussion on the evidence and that everyone appeared to be "open-minded." (23RT 4607-4608.)

8. Testimony of Juror No. 3

The trial court brought out Juror No. 3 and explained that there were allegations that not all the jurors were properly deliberating. (23RT 4617-4618.) Juror No. 3 acknowledged that the panel did "have one issue." (23RT 4618.) Juror No. 3 told the court that Juror No. 5 had acknowledged that he was "throwing out all the testimony of all the witnesses" presented by the prosecution. (23RT 4619; see also 23RT 4623-4624.) When asked to explain his reasoning, Juror No. 5 would either answer the other jurors' questions with another question or give an answer based on speculation rather than the evidence. (23RT 4619-4620.)

According to Juror No. 3, Juror No. 5 believed that the prosecution witnesses had been coached; but when pressed to explain the basis of his belief, he gave irrational and nonsensical responses. (23RT 4620-4621.) Juror No. 3 told the court that Juror No. 5 was biased against the prosecution and police officers. After being asked by Juror No. 3 whether

he was taking the position that all the witnesses presented by the prosecution were liars, Juror No. 5 stated, "yeah, pretty much." (23RT 4623.) Juror No. 5 did not explain the basis of his belief, but Juror No. 3 heard from another juror that Juror No. 5 may have had an "altercation" with police officers when he was younger. (23RT 4623-4624.)

Juror No. 3 indicated that at times Juror No. 5 would simply stop deliberating. (23RT 4621.) When asked whether it appeared that Juror No. 5 had made up his mind before deliberations began, Juror No. 3 told the court, "No, just when we got there. He just kind of dropped the bomb." (23RT 4621-4622.) Juror No. 3 told the court that it had become predictable as they went through the counts that Juror No. 5 intended on discounting the prosecution evidence without explanation. (23RT 4622.) Juror No. 3 explained to the court that Juror No. 5 "doesn't want to participate" and was "not fairly deliberating." (23RT 4623-4624.)

9. Testimony of Juror No. 7

When asked whether all the jurors were properly deliberating on the evidence, Juror No. 7 indicated that "some people may not be adhering to instructions, as to the definition of the instructions." (23RT 4625.) Juror No. 7 went on say that there had been some "misinterpretation" of the law. Later, Juror No. 7 clarified that it was Juror No. 5 who was having difficulties with instructions. (23RT 4626.)

According to Juror No. 7, Juror No. 5 stated that all the prosecution witnesses had been coached and that he did not believe them. (23RT 4626.) Juror No. 5 would not have a "reasonable dialogue" as to the basis of his belief. Juror No. 7 perceived an anti-police bias with Juror No. 5. (23RT 4627.)

10. Testimony of Juror No. 8

Juror No. 8 characterized Juror No. 5 as "hardheaded." (23RT 4628-4629.) Juror No. 8 acknowledged that Juror No. 5 believed that all the prosecution witnesses had been coached. (23RT 4629-4630.) Juror No. 8 stated that Juror No. 5 had not given a basis for his belief and would "dodge" the other jurors' questions when asked about it. (23RT 4629.)

When asked by the trial court whether he believed Juror No. 5 was biased or prejudiced, Juror No. 8 responded, "he might be, yeah." (23RT 4630.) Juror No. 8 believed that all of the other jurors, except Juror No. 5, were fairly deliberating on the evidence. (23RT 4630-4631.)

11. Testimony of Juror No. 12

Juror No. 12 did not believe that all the jurors were fairly deliberating on the evidence. Juror No. 12 acknowledged that Juror No. 5 had stated that he believed all the prosecution witnesses had been coached, and that he refused to believe any of them. When Juror No. 5 was asked why he believed that, he ignored the question. Juror No. 12 told the court it appeared that Juror No. 5 was biased against police officers. (23RT 4633.)

12. Testimony of Juror No. 5

The trial court brought out Juror No. 5 and explained that there had been allegations that he had made speculative statements. Juror No. 5 denied telling the other jurors that he believed all the prosecution witnesses had been coached, or that he would not believe their testimony because of it. When asked whether he believed the prosecution witnesses were coached, he stated, "No, I have -- I have a few thoughts about some of the witnesses." (23RT 4635.)

Juror No. 5 acknowledged that he was involved in an "incident" where he was arrested when he was 13 years old.[23] (23RT 4635-4636.) However, he stated that he did not harbor residual animosity toward the police as a result of the arrest. (23RT 4636.) He denied being prejudiced against police officers. He indicated that he did not know why other jurors believed he was prejudiced in favor of gang members. (23RT 4637.)

Juror No. 5 denied telling other jurors that he would disbelieve the testimony of a person who had suffered a felony conviction. (23RT 4636.) He also denied that he had made up his mind before deliberations began. Juror No. 5 told the trial court that he had listened to what the other jurors had to say during deliberations, and that he had agreed with "a lot" of what they said. (23RT 4637.) Juror No. 5 believed that he had been fairly deliberating on the evidence. (23RT 4636.)

Juror No. 5 told the trial court that he thought the other jurors were "trying to gang up on [him]" and that it began with "one or two people" but was now "carrying over onto others." (23RT 4638.) Juror No. 5 denied the allegation that he avoided answering other jurors' questions and avoided explaining his conclusions. He also denied telling other jurors that he believed appellant was innocent on all of the counts. (23RT 4638.)

At the conclusion of the trial court's inquiry, Juror No. 5 told the court that the jury was "getting close to the end and [they were] just about ready to wrap it up." (23RT 4639-4640.)

B. The Trial Court's Ruling that Juror No. 5 was Biased and Refused to Deliberate

After listening to argument from both parties, the trial court concluded that Juror No. 5 should be excused. In making its ruling, the court found

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[23] During voir dire, Juror No. 5 informed the court that, while on vacation with his brother, he had been arrested at the age of 13 for being drunk in public. (9RT 1921-1922; see also 10RT 2159-2160.)

that Juror No. 5 "is not giving and will not give a fair trial to the prosecution." (23RT 4646-4647.) The court recognized that eight of eleven jurors had indicated that Juror No. 5 was not fairly deliberating on the evidence. The court stated that it was concerned with Juror No. 5's ability to follow the court's instructions on the law. (23RT 4647.)

The trial court specifically noted Juror No. 11's claim that Juror No. 5 had indicated that he would not believe anyone who had a prior conviction, finding that Juror No. 5 "has gone too far." (23RT 4647.) The court also specifically recognized Juror No. 4's allegation that Juror No. 5 appeared to have an agenda, and that Juror No. 5 appeared to be prejudiced in favor of gangs. (23RT 4647.)

The trial court recognized that there had been "a lot of discussion" with the other jurors regarding Juror No. 5's speculation and how that speculation was "governing his view of the evidence." (23RT 4647.) The court noted that several jurors had indicated that Juror No. 5 did not provide reasons for his conclusions, and was irrational and nonsensical. (23RT 4647-4648.)

The trial court acknowledged that a juror's faulty logic was not grounds for discharge. However, the court found that, based on "the totality of the evidence," the issue with Juror No. 5 was "much more than faulty logic or analysis." (23RT 4648.) The court found that there appeared to be a "strong anti-prosecution bias." (23RT 4648.)

Although the trial court acknowledged the "effective" strategy by the defense to attack the credibility of "various informant type witnesses," the court found the jurors credible when they reported that Juror No. 5 had taken the position that "all witnesses were coached." (23RT 4648.) Moreover, the court found that Juror No. 5 was evasive and had "backpedalled" when questioned about his position. (23RT 4648.) The trial court also found that Juror No. 5 had lied to the court when he denied

telling other jurors that he believed appellant to be innocent on all counts. (23RT 4648.)

Ultimately, the court found that it could not trust Juror No. 5's responses to the court's questions. (23RT 4648-4649.) The court ruled that Juror No. 5 would be excused on two grounds, "a demonstrated anti-police or prosecution bias and a failure to deliberate." (23RT 4649.) The court found that Juror No. 5 had not fairly deliberated on the evidence, and the court recognized that its role was to ensure that jurors were not engaged in speculation or the "blanket disregard of one side's evidence" as Juror No. 5 had done. (23RT 4649.)

The trial court denied appellant's motion for mistrial, stating "I have given a lot of thought to the action I have taken this morning. And I feel compelled to make the decision I'm making in fairness to both sides in the process of justice. So, the motion for mistrial is denied." (23RT 4651; see also 23RT 4650-4651.) Juror No. 5 was brought back before the court and discharged. (23RT 4651.) Alternate Juror No. 2 was seated in Juror No. 5's place, and the trial court re-instructed the jury. (23RT 4652-4654.) Deliberations began anew and on October 25, 2007, the jury returned with guilty verdicts on the three murder counts and four of the six attempted murder counts. The jury further found, as to those seven counts, all of the enhancements and special circumstance allegations to be true. As to counts 1 and 2, the jury found appellant not guilty of attempted murder. (23RT 4681-4696; see 15CT 3826-3835.)

C. The Applicable Law: A Juror May be Removed if it Appears as a Demonstrable Reality that the Juror is Unable Or Unwilling to Perform His Or Her Duty

Section 1089 states, in pertinent part, "If at any time, whether before or after the final submission of the case to the jury, a juror dies or becomes ill, or upon other good cause shown to the court, is found to be unable to

perform his or her duty . . . the court may order the juror to be discharged." The term "good cause" is not defined, and is determined on a case-by-case basis. (*People v. Bowers* (2001) 87 Cal.App.4th 722, 730.)

A juror who refuses to deliberate may be removed if it appears as a demonstrable reality that the juror is "unable [or unwilling] to perform his [or her] duty." (*People v. Cleveland* (2001) 25 Cal.4th 466, 475; see *People v. Thompson* (2010) 49 Cal.4th 79, 137.) When the trial court investigates an allegation of misconduct by taking live testimony, the evidence may be in conflict. "In such a case the trial court must weigh the credibility of those whose testimony it receives, taking into account the nuances attendant upon live testimony. The trial court may also draw upon the observations it has made of the jurors during voir dire and the trial itself. Naturally, in such circumstances, [the reviewing court affords] deference to the trial court's factual determinations, based, as they are, on firsthand observations unavailable to us on appeal." (*Barnwell*, *supra*, 41 Cal.4th at p. 1053.) A trial court's implicit rejection of a juror's credibility can be found even though the juror argues he or she can fairly apply the law. (*People v. Homick* (2012) 55 Cal.4th 816, 901 [upholding removal of juror in death penalty case where she gave inconsistent statements as to whether she could apply death penalty in all cases].)

A trial court's ruling discharging a juror pursuant to section 1089 is reviewed for abuse of discretion. (*People v. Armstrong* (2016) 1 Cal.5th 432, 450.) However, this Court has made clear that "such review involves a 'heightened standard [that] more fully reflects an appellate court's obligation to protect a defendant's fundamental rights to due process and to a fair trial by an unbiased jury.'" (*Ibid.*, quoting *Barnwell*, *supra*, 41 Cal.4th at p. 1052; see *Cleveland*, *supra*, 25 Cal.4th at p. 488 (conc. opn. of Werdegar, J.).) The demonstrable reality standard differs from the substantial evidence standard of review in that it "entails a more

comprehensive and less deferential review. It requires a showing that the court as trier of fact *did* rely on evidence that, in light of the entire record, supports its conclusion that [good cause for removing the juror is] established. It is important to make clear that a reviewing court does not *reweigh* the evidence under either test. Under the demonstrable reality standard, however, the reviewing court must be confident that the trial court's conclusion is manifestly supported by evidence on which the court actually relied." (*Barnwell*, *supra*, 41 Cal.4th at pp. 1052-1053; accord *Armstrong*, *supra*, 1 Cal.5th at p. 450.)

D. Good Cause Supports the Removal of Juror No. 5 Because He Refused to Fairly Deliberate on the Evidence and Exhibited Bias against Police Officers and the Prosecution

Contrary to appellant's contention, the record establishes as a demonstrable reality that Juror No. 5 was not willing to perform his duties as a juror and displayed a bias against police and the prosecution.

Eight jurors indicated to the trial court that Juror No. 5 was not fairly deliberating on the evidence. (23RT 4575-4576 [Juror No. 9], 4578-4586 [Juror No. 11], 4589-4592 [Juror No. 4], 4595-4596 [Juror No. 10], 4623-4624 [Juror No. 3], 4625-4627 [Juror No. 7], 4629-4631 [Juror No. 8], 4633 [Juror No. 12].) It was repeatedly reported that Juror No. 5 was evasive when pressed to explain his conclusions and would often respond with nonsensical answers or with his own questions. (23RT 4580-4586 [Juror No. 11], 4589-4592 [Juror No. 4], 4619-4620 [Juror No. 3], 4627 [Juror No. 7], 4629 [Juror No. 8], 4633 [Juror No. 12].) The foreperson testified that Juror No. 5 appeared to enjoy being obstinate with the other jurors. (23RT 4591-4592 [Juror No. 4].) Moreover, the trial court was informed by several jurors that, when Juror No. 5 would respond to other jurors' questions, he relied on speculation and facts not in evidence to support his conclusions. (23RT 4575-4576 [Juror No. 9], 4578-4580 [Juror

No. 11], 4595 [Juror No. 10], 4619-4620 [Juror No. 3].) For example, Juror No. 5 indicated that he did not believe the testimony of Monica Miranda because he believed she was "drinking and doing drugs" the night of the Mendoza murder. (23RT 4580-4581.) However, contrary to appellant's suggestion (AOB 70), this was not supported by the record. Accordingly, the trial court properly found that Juror No. 5 was not fairly deliberating on the evidence. (See, e.g., *People Lomax* (2010) 49 Cal.4th 530, 583-584, 591 [juror refused to deliberate where after extensive conversation among the panel, he could not articulate any reasonable foundation for his decision other than referencing "a feeling," and he generally refused to participate in discussions or cooperate with other jurors]; *People v. Alexander* (2010) 49 Cal.4th 846, 926 [a juror who rebuffs other jurors' attempts to engage him in the discussion has refused to deliberate]; *Cleveland, supra*, 25 Cal.4th at p. 487 [a juror's unwillingness to engage in discussion with fellow jurors constitutes a failure to deliberate].)

The trial court also correctly found that Juror No. 5 had demonstrated bias, which was another proper ground for discharge. The same eight jurors indicated that Juror No. 5 had exhibited bias against the prosecution and police officers. (23RT 4575-4576 [Juror No. 9], 4579-4586 [Juror No. 11], 4589-4591 [Juror No. 4], 4596-4598 [Juror No. 10], 4623-4624 [Juror No. 3], 4626-4627 [Juror No. 7], 4628-4630 [Juror No. 8], 4633 [Juror No. 12].) Two jurors specifically testified that Juror No. 5 appeared to have "an agenda." (23RT 4589 [Juror No. 4], 4596-4597 [Juror No. 10.].) Juror No. 2, although unwilling to characterize Juror No. 5's position as a bias, acknowledged that Juror No. 5 was "disregarding all witnesses and testimony" put on by the prosecution. (23RT 4603-4605.) Indeed, the majority of the jurors indicated that Juror No. 5 was disregarding *all* of the testimony given by prosecution witnesses because he believed that the police officers were corrupt and that *all* the witnesses had been coached.

(23RT 4575 [Juror No. 9], 4580 [Juror No. 11], 4589-4590 [Juror No. 4], 4597-4598 [Juror No. 10], 4619 [Juror No. 3], 4626 [Juror No. 7], 4629-2630 [Juror No. 8], 4633 [Juror No. 12].) As Juror No. 3 testified, Juror No. 5 acknowledged that he was simply "throwing out all of the [prosecution] witnesses." (23RT 4619, 4623-4624.) Contrary to appellant's suggestion (AOB 72, 75), Juror No. 5 was not merely disregarding the prosecution witnesses who had been "coached" by Detective Teague, as appellant now appears to contend was the primary thrust of his defense (see AOB 69-70); rather, as the trial court noted, Juror No. 5 had clearly engaged in a "blanket disregard" of *all* the prosecution witnesses, regardless of whether they had been interviewed at one time by Detective Teague. (23RT 4649.)

When challenged by other jurors as to why he was disregarding all of the prosecution witnesses, Juror No. 5 selectively applied differing credibility standards to witnesses depending on whether they were presented by the prosecution or the defense. For example, according to other jurors, Juror No. 5 had stated that he would not believe testimony from anyone who had suffered a prior conviction. (23RT 4578 [Juror No. 11], 4597-4598 [Juror No. 10].) However, Juror No. 5 did not apply this same bias to defense witnesses who had suffered prior convictions. (23RT 4579.) Similarly, Juror No. 5 indicated that he would not believe the testimony from prosecution witnesses who delayed coming forward with their information but again declined to apply this same bias to defense witnesses. (23RT 4586.) Finally, the foreperson reported to the trial court that Juror No. 5 appeared compassionate toward gang members and had indicated that a gang member testifying against another gang member should be disbelieved because they "wouldn't do that." (23RT 4590-4591.)

Based on the jurors' testimony and note, it is clear that Juror No. 5's bias towards police officers and the prosecution was established by a

"demonstrable reality." (*Barnwell*, *supra*, 41 Cal.4th at p. 1053.) Contrary to appellant's position (AOB 72-75), Juror No. 5 was not merely adopting or accepting the defense theory of the evidence. Instead, the totality of the evidence supports the conclusion that Juror No. 5 was judging the testimony of prosecution witnesses by a different standard than that which he applied to defense witnesses due to his bias. (*Ibid.*) Accordingly, the trial court properly found that Juror No. 5's demonstrated bias was an appropriate ground for discharge. (*Lomax*, *supra*, 49 Cal.4th at p. 589; *Barnwell*, *supra*, 41 Cal.4th at pp. 1051-1053 ["Applying such different standards to the evaluation of different witnesses is, of course, contrary to the court's instructions and violative of the juror's oath of impartiality."].) This determination by the trial court must be afforded deference. (*People v. Williams* (2015) 61 Cal.4th 1244, 1262; *Barnwell*, *supra*, 41 Cal.4th at p. 1053.)

This Court recently addressed a claim of trial court error for discharging a deliberating juror in *Armstrong*, *supra*, 1 Cal.5th 432. In *Armstrong*, during deliberations, the trial court received two notes from the jury, each one accusing the author of the other of misconduct. (*Id.* at pp. 445-446.) The trial court conducted an inquiry and brought out five jurors for questioning, including the two authors of the notes. (See *id.* at p. 446.) After the inquiry, the trial court discharged the two jurors who authored the notes, Juror No. 12 on the ground of bias and Juror No. 5 for failing to deliberate. (*Id.* at p. 449.)

On review, this Court found that by failing to refer to Juror No. 12's note in its ruling the trial court had not relied upon this note in its determination to discharge Juror No. 5. (*Armstrong*, *supra*, 1 Cal.5th at p. 451.) Also, this Court found that two of the five jurors questioned by the trial court had not provided any testimony regarding Juror No. 5's alleged failure to deliberate. (*Ibid.*) After reviewing testimony from the two jurors

that the trial court *had* affirmatively relied on in reaching its decision, this Court found that the trial court had abused its discretion in discharging Juror No. 5 for failing to deliberate. (*Id.* at pp. 451, 454.) This Court recognized that the complaining jurors were simply frustrated with Juror No. 5's manner of weighing and assessing the evidence, and with the fact that Juror No. 5 had come to a conclusion about the strength of the prosecution's case early on in the deliberative process and refused to change her mind. (*Id.* at p. 453.) This Court found that neither Juror No. 5's manner of deliberating nor her failure to agree with the majority were proper grounds for discharge. (*Id.* at pp. 453-454.)

The circumstances of appellant's case are starkly different from those in *Armstrong*. Unlike in *Armstrong*, the trial court interviewed *all* of the jurors. Eight of them provided testimony that supported the conclusion that Juror No. 5 was not fairly deliberating on the evidence and that he was biased against the prosecution and police officers. Further, as the trial court's ruling expressly indicates, the court relied upon the testimony of *all* eight of those jurors in reaching its decision. (See 23RT 4647.) Also unlike in *Armstrong*, it is clear from the court's numerous references to the jury note during its questioning of the jurors that it was relying upon this note in reaching a decision. (See, e.g., 23RT 4573 ["There are a number of concerns raised by your note."], 4575 ["Your note suggests . . . ."], 4578 ["I am concerned about some of the statements in the note."].) In contrast to *Armstrong*, this was not a matter of simply one juror weighing and assessing the evidence in a manner that differed from other jurors; eight jurors testified that Juror No. 5 was completely disregarding *all* of the prosecutions witnesses *without* the type of consideration required by the jury instructions. Moreover, Juror No. 5's failure to fairly deliberate was the result of his bias against police and the prosecution. There was no

similar finding in *Armstrong*. Thus, *Armstrong* is wholly inapposite to the case at hand.

The circumstances of appellant's case are more akin to those in *Barnwell*. In *Barnwell*, this Court found that the trial court had not abused its discretion when it discharged a juror for bias. On the second day of deliberations, the trial court received three notes reporting that a juror was not deliberating and had an apparent bias against police officers. (*Barnwell, supra*, 41 Cal.4th at p. 1048.) The trial court spoke with all 12 members of the panel. The juror in question denied any such bias, but nine other jurors indicated that the juror had expressed or exhibited a general bias against police officers. (*Id.* at p. 1049.) Some of the jurors expressed concern the juror made up his mind before deliberations started, indicating nobody could change his mind. (*Id.* at pp. 1049-1050.) The trial court determined the juror was not participating in the process as instructed. On review, this Court found no abuse of discretion because the record established to a "'demonstrable reality'" the juror was biased. (*Id.* at p. 1053.)

Here, just as in *Barnwell*, the majority of the jury panel reported that another juror was biased against police officers. Nine jurors indicated that Juror No. 5 would not consider testimony from prosecution witnesses because he believed that police officers were corrupt, and that all the civilian witness had been coached by the officers. Moreover, Juror No. 5 indicated that he would not believe any prosecution witnesses who had suffered prior convictions or any prosecution witnesses who had not immediately come forward. He did not apply the same credibility standards to defense witnesses. Further, Juror No. 5 indicated that he would not believe the testimony of a gang member testifying against another gang member because they "wouldn't do that." Based on the totality of the evidence, it is clear that Juror No. 5 was judging the prosecution witness

testimony and the defense witness testimony by different standards due to bias. (*Barnwell*, *supra*, 41 Cal.4th at p. 1053.)

Considering the testimony from the jury panel, it is apparent that the trial court "*did* rely" on evidence that supported its conclusion that Juror No. 5 was biased and not fairly deliberating on the evidence. (*Barnwell*, *supra*, 41 Cal.4th at pp. 1052-1053.) The court found that the majority of jurors had reported Juror No. 5 was not fairly deliberating on the evidence. Referring to Juror No. 5's position on witnesses who had suffered a prior conviction, the trial court found that Juror No. 5 "ha[d] gone too far." (23RT 4647.) As the trial court stated, this was "much more than faulty logic or analysis." (23RT 4648.) Juror No. 5 had made it clear that he would not give "a fair trial to the prosecution." (23RT 4646-4647.) Although Juror No. 5 denied making the statements attributed to him by nine other jury members, the court found that it could not trust Juror No. 5's responses. (23RT 4648-4649.) The court further found that Juror No. 5 had lied to the court, "backpedalled," and was evasive during questioning. More importantly, the trial court found the other members of the jury credible. (23RT 4648.) As these "firsthand observations" are not available on review, the trial court's credibility determinations must be afforded deference. (*Barnwell*, *supra*, 41 Cal.4th at p. 1053.)

In sum, it is clear that the trial court's decision to discharge Juror No. 5 for "a demonstrated anti-police or prosecution bias and a failure to deliberate" (23RT 4649) is "manifestly supported by evidence on which the court actually relied." (*Barnwell*, *supra*, 41 Cal.4th at p. 1053; see also *Armstrong*, *supra*, 1 Cal.5th at p. 451.)

II. APPELLANT HAS FORFEITED ANY CLAIMS OF OUTRAGEOUS GOVERNMENT MISCONDUCT AND PROSECUTORIAL MISCONDUCT

Appellant contends that "investigating detectives," and in particular Detective Teague, engaged in outrageous government conduct by coaching witnesses and "conditioning the benefits" they received in exchange for their testimony. (AOB 76-95.) Accusing the prosecutor of misconduct, appellant speculates the prosecutor "was necessarily privy to some of the aggressive tactics used" by law enforcement to obtain incriminating statements from witnesses. (AOB 95-100.) These claims are forfeited meritless.

The defense of outrageous law enforcement conduct focuses on whether the police engaged in conduct so egregious that due process warrants a dismissal of the charges. (See *People v. Holloway* (1996) 47 Cal.App.4th 1757, 1763-1765, disapproved on another ground in *People v. Fuhrman* (1997) 16 Cal.4th 930, 947.) It is an open question whether the defense exists in California. (See 1 Witkin & Epstein, *California Criminal Law* (3rd Ed. 2000), Defenses, § 102, pp. 442-444 and Supp. at pp. 167-168 [collecting decisions of the intermediate appellate courts]; *People v. Smith* (2003) 31 Cal.4th 1207, 1227 [California Supreme Court refused to decide whether the defense exists].) Even if the defense exists, it is uncertain how it is to be asserted, although at least three justices of the California Supreme Court have stated that it is not a trial defense (like entrapment) and must be asserted in a pretrial motion to dismiss. (*Smith, supra*, 31 Cal.4th at p. 1228 (conc. opn. of Werdegar, J.).)

Regardless of whether the defense exists, what standard should be employed if it does exist, or how the defense should be asserted, appellant has forfeited the claim in this case. Appellant never made any objections or motions in the trial court on the ground of outrageous law enforcement

conduct. The issue was never litigated by the parties. The evidence regarding the claim is in conflict. The trial court never made factual findings – let alone the inferential and highly questionable finding that officers coached witnesses and manufactured evidence. This claim simply cannot be asserted on direct appeal. It was forfeited in the trial court. (See *People v. Low* (2010) 49 Cal.4th 372, 393, fn. 11; see also *People v. Williams* (1997) 16 Cal.4th 635, 661; Evid. Code, § 353.) Likewise, related claims of prosecutorial misconduct are forfeited since appellant did not object below that the prosecutor was part of the alleged outrageous conduct. (*People v. Riggs* (2008) 44 Cal.4th 248, 298; *People v. McKinzie* (2012) 54 Cal.4th 1302, 1358.)

In any event, this claim is meritless. Appellant's entire contention is based on the premise that the trial testimony of the gang member witnesses who testified for the prosecution was necessarily true when they recanted their previous statements as coached or coerced. (AOB 76-95.) While the prosecution "'cannot present evidence that it knows is false and must correct any falsity of which it is aware in the evidence it presents'" (*People v. Richardson* (2008) 43 Cal.4th 959, 1014, quoting *People v. Harrison* (2005) 35 Cal.4th 208, 242), it is not uncommon for gang members to recant their prior statements and there is no requirement on the prosecutor or anybody else to believe a witness's recantation over the witness's prior statement or testimony of a police officer regarding a previous interview. (See *In re Cox* (2003) 30 Cal.4th 974, 1004; *In re Webber* (1974) 11 Cal.3d 703, 724-725 [court may reject witness's recantation, which "is always viewed with suspicion"].) In other words, the prosecutor as well as the jury were entitled to conclude the gang members recanted their prior statements because they did not want to be labeled as snitches and not because they had been coached or coerced y police officers.

Appellant's argument ultimately amounts to nothing more than a request to reweigh the evidence. However, "it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts on which that determination depends." (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206; *People v. Jones* (1990) 51 Cal.3d 294, 314.) It is not the function of a reviewing court to reweigh the evidence, reappraise the credibility of witnesses or redetermine factual conflicts, as those functions are committed to the trier of fact. (*People v. Culver* (1973) 10 Cal.3d 542, 548; *People v. Guzman* (1996) 45 Cal.App.4th 1023, 1027.) """"Conflicts and even testimony which is subject to justifiable suspicion do not justify the reversal of the judgment, for it is the exclusive province of the trial court or jury to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends. [Citations.]""" (*People v. Lewis* (2001) 26 Cal.4th 334, 361.) Here, it was for the jury to decide whether to believe the gang members' prior statements or their recantations at trial, and this Court must defer to this credibility determination.

In sum, appellant took advantage of the opportunity to thoroughly cross-examine all the witnesses about their statements and the circumstances of their previous interviews with the police, and it is improper for appellant to invite this Court to reweigh the evidence and reappraise the credibility of the witnesses. (*Ochoa*, *supra*, 6 Cal.4th at p. 1206.) In any event, this Court should summarily reject this contention as it is forfeited for appellate purposes.

III. APPELLANT'S CLAIM THAT THE ADMISSION OF RIVAS'S PRETRIAL STATEMENT VIOLATED HIS RIGHT TO DUE PROCESS HAS BEEN FORFEITED; IN ANY EVENT, THE CLAIM IS MERITLESS

Appellant contends he was denied due process because a "coerced" third party statement of Gabriel Rivas was used against him at trial. (AOB 101-10.) This claim has been forfeited, and is meritless in any event.

A. Gabriel Rivas's Statement Incriminating Appellant in the Murder of Ronald Martin

On April 26, 2003, while on probation, Gabriel Rivas was arrested for possession of methamphetamine. (13RT 2659.) While in custody, Rivas was interviewed by Los Angeles Police Detectives Teague and Neel regarding the Ronald Martin murder. (13RT 2652, 2661, 2685-2687.) During trial, Rivas largely did not recall the statements he made during this recorded interview and denied implicating appellant in the Martin murder. (See 13RT 2647-2658.) Detective Neel also had difficulty recalling the details of the interview with Rivas, having previously suffered "an inner head injury" that had affected his memory and led to his retirement. (13RT 2686.) Detective Teague did not testify. At the time of appellant's trial, Detective Teague had been disabled in a car accident, in which he suffered brain damage, and was no longer with the police department. (13RT 2692-2693.) However, the interview was recorded and a portion of it was played for the jury. (13RT 2692; see Exh. A.) Rivas had spoken to Detective Teague prior to the recorded interview. (See 13RT 2662, 2693-2694, 2697-2699.)

During the interview, Rivas indicated that he knew Michael Quintinilla, a Toonerville gang member known as "Frosty," who owned a white Toyota 4Runner. (13RT 2634-2635; 15RT 3175; Exh. A at p. 1.) Rivas told detectives that appellant had borrowed Quintinilla's white 4Runner before Martin was murdered. (Exh. A at pp. 1-2.) After the

murder, appellant told Rivas that Martin had been shot "like thirty, forty times," and also stated that the "fucking fool got smoked" and that they had "fucked him." (Exh. A at p. 2.)

Rivas was released from custody but scheduled to appear in court for the probation violation hearing. (13RT 2659-2660.) After several continuances, Rivas appeared in court on June 2, 2003, and spoke to former Deputy District Attorney Anthony Manzella. (26RT 5130-5132; 34RT 6934-6936, 6939; see also 13RT 2660.) Rivas provided Manzella with information regarding the murder of Christina Duran. (26RT 5132; 34RT 6936-6937.) Manzella testified that he had used the probation violation "to put pressure on [Rivas] to continue cooperating." (34RT 6939; see also 26RT 5132; 34RT 6948.)

B. The Claim has been Forfeited for Appellate Purposes

As a preliminary matter, appellant did not object to the admission of the pretrial statement of Gabriel Rivas. Thus, appellant has forfeited this claim. (Evid. Code, § 353; see *People v. Williams* (2008) 43 Cal.4th 584, 620 [claims regarding the admissibility of evidence will not be reviewed in the absence of a timely and specific objection]; *People v. Waidla* (2000) 22 Cal.4th 690, 717 [same]; see also *In re Josue S.* (1999) 72 Cal.App.4th 168, 170 ["The California Supreme Court has repeatedly held that constitutional objections must be interposed in order to preserve such contentions on appeal."].) In any event, appellant's claim is meritless.

C. Admission of the Rivas's Pretrial Statement did not Violate Appellant's Right to Due Process

A defendant's Fifth Amendment right to a fair trial is violated by the admission at trial of coerced statements of a third party that results in a fundamentally unfair trial. (*People v. Jenkins* (2000) 22 Cal.4th 900, 966; *People v. Badgett* (1995) 10 Cal.4th 330, 347-348.) The primary purpose of

excluding coerced testimony of third parties is to assure that a trial is reliable. (*Jenkins*, *supra*, 22 Cal.4th at p. 966.)

A defendant bears the burden of proving coercion of a third party and that admission of the party's coerced statements deprived him of a fair trial. (*Jenkins*, *supra*, 22 Cal.4th at p. 966; *Badgett*, *supra*, 10 Cal.4th at pp. 344, 348.) The coercion must be of such a nature as to render the third party's statement actually false and not just subject to a negative interpretation. (See *People v. Lee* (2002) 95 Cal.App.4th 772, 785 [deception which produces a confession does not preclude admissibility of the confession unless the deception is of such a nature as to produce an untrue statement].) A reviewing court examines the entire record to determine whether a defendant was actually deprived of due process due to the admission of a third party's coerced statements. (*Badgett*, *supra*, 10 Cal.4th at p. 350.)

Appellant's claim rests solely on the contention that Rivas statement "was provided by a person not interested in talking, but given only after promises of significant benefits by the police." (AOB 107.) Although he couches his claim as an allegation of coercion, he appears to purely argue that Rivas was vulnerable and was improperly offered benefits in exchange for his cooperation. (See AOB 106-109.) The claim lacks merit. Although a probation violation was used by the police and the prosecutor to pressure Rivas into cooperating (see 13RT 2661; 26RT 5132), offers of benefits, either financial or in the form of reduced sentences or immunity, to witnesses or informants to secure their truthful testimony, provided those benefits are disclosed to the defense for impeachment purposes, is commonplace and is not considered coercive. (See *Badgett*, *supra*, 10 Cal.4th at pp. 354-355; *People v. Daniels* (1991) 52 Cal.3d 815, 862-863.) Indeed, as this Court has explained:

> All immunized witnesses are offered some quid pro quo, usually an offer of leniency. We have never held, nor has any authority

> been offered in support of the proposition, that an offer of leniency in return for cooperation with the police renders a third party statement involuntary or eventual trial testimony coerced.

(*Badgett*, *supra*, 10 Cal.4th at p. 354.)

As in Argument II, *ante*, appellant's contention is premised on the assumption that Rivas's recantation was true and that his prior statement was false. Ultimately, any discrepancy between Rivas's prior statement and his testimony at trial was a credibility issue to be decided by the jury. (*Ochoa*, *supra*, 6 Cal.4th at p. 1206.) Despite appellant's suggestion that Rivas "emphasize[ed] that Teague 'coached' him" (AOB 107), Rivas was evasive and equivocal in his trial testimony and in fact indicated several times that he was *not* coached. (See 13RT 2665 ["I can't say coach either because that would be kind of unfair . . . ."], 2677 [when asked whether he was simply repeating a police scripted story, Rivas stated, "I wouldn't say like they scripted it for me . . . I'm not going to sit here and tell you that they said to say this."].) Although Rivas made vague allusions to coaching by police, he also indicated that the statement he gave to police was the product of rumors he had heard from other people "on the street." (See 13RT 2679-2683.) In any event, the jury heard Rivas's own words in the recording (Exh. A), Rivas was thoroughly cross-examined about his police interview (see 13RT 2658-2676), and the jury was instructed to consider many factors in judging a witness's believability, including whether the witness had a personal interest in how the case was decided, had been convicted of a felony, had engaged in any other conduct reflecting on his credibility, or had been offered immunity in exchange for the testimony. (See 15CT 3798-3799; 22RT 4482-4484; CALJIC No. 2.20.)[24] Thus, the jury was free to consider Rivas's credibility

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[24] CALJIC No. 2.20, as given, states:

(continued...)

in light of the recorded interview, his trial testimony, his pending probation at the time of his statement to police, as well as any benefit he might have obtained for his cooperation.

In sum, due to the failure to object at trial, appellant has forfeited his claim that Rivas's pretrial statement was coerced and inadmissible.

(...continued)

> Every person who testifies under oath is a witness. You are the sole judges of the believability of a witness and the weight to be given the testimony of each witness.
>
> In determining the believability of a witness you may consider anything that has a tendency reasonably to prove or disprove the truthfulness of the testimony of the witness, including but not limited to any of the following:
>
> The extent of the opportunity or ability of the witness to see or hear or otherwise become aware of any matter about which the witness testified;
>
> The ability of the witness to remember or to communicate any matter about which the witness has testified;
>
> The character and quality of that testimony;
>
> The demeanor and manner of the witness while testifying;
>
> The existence or nonexistence of a bias, interest, or other motive;
>
> The existence or nonexistence of any fact testified to by the witness;
>
> The attitude of the witness toward this action or toward the giving of testimony;
>
> A statement previously made by the witness that is consistent or inconsistent with his or her testimony;
>
> An admission by the witness of untruthfulness;
>
> The character of the witness for honesty or truthfulness or their opposites;
>
> The witness' prior conviction of a felony;
>
> Past criminal conduct of a witness amounting to a misdemeanor;
>
> Whether the witness is testifying under a grant of immunity.

(See 15CT 3793, 3799.)

Nevertheless, appellant's claim fails on the merits because there was nothing improper about the prosecution team using Rivas's probation violation as an incentive for Rivas to cooperate. As evidenced by the thorough cross-examination into Rivas's recollection and the circumstances of his interview by police, the alleged incentive was disclosed to the defense for impeachment purposes, cannot now be considered coercive, and was not a basis for excluding Rivas's pretrial statement. (See *Badgett, supra*, 10 Cal.4th at pp. 354-355; *Daniels, supra*, 52 Cal.3d at pp. 862-863.)

However, even if the admission of Rivas's statement was error, the error was non-prejudicial whether assessed in terms of constitutional error under *Chapman v. California* (1967) 386 U.S. 18, 24 [87 S.Ct. 824, 17 L.Ed.2d 705], or state law error under *People v. Watson* (1956) 46 Cal.2d 818, 836. Even without Rivas's statement, there was overwhelming evidence supporting the finding that appellant murdered Ronald Martin. Appellant admitted his role in the Martin murder to Mark Gonzalez. (15RT 3166, 3168, 3183-3184, 3186-3191.) Appellant spoke in detail to Gonzalez about the murder, and explained that the murder was revenge for the killing of appellant's friend "Hozer." (15RT 3186-3191.) Appellant's gang lyrics glorified "execution style murder" (see 7CT 1536) and paid homage to Hozer (see 7CT 1543). Ballistic evidence recovered from the scene matched ballistic evidence recovered from the attack on Pedro Sanchez and Juan Cardiel, both of whom identified appellant as their attacker. (12RT 2543-2545, 2561-2564; 17RT 3556-3562, 3566-3568.) Wilson Olivera observed a white Sport Utility Vehicle speed away from where Martin was shot, which corroborated appellant's admission to Gonzalez that he had murdered Martin with the help of Michael Quintinilla, who owned a white Toyota 4Runner. (12RT 2579-2585, 2587-2588; 13RT 2634-2635; 15RT 3175, 3186, 3188-3191.) Martin was a Frogtown gang member and a rival of appellant's Toonerville gang. (12RT 2575-2577; 13RT 2763; 15RT

3170-3171; 20RT 3986-3987.) Officer Ferreria opined that the murder of Martin benefitted the Toonerville gang by instilling fear and intimidating the community, as well as eliminating a potential rival. (20RT 4000-4002.)

IV. THE ADMISSION OF RIVAS'S PRETRIAL STATEMENT DID NOT VIOLATE APPELLANT'S RIGHT TO CONFRONTATION

Appellant next contends that his Sixth Amendment right to confrontation was violated when Rivas's pretrial statement was admitted. Relying on the baseless allegation that Rivas's statement was manufactured by Detective Teague, appellant appears to argue that Rivas was merely a conduit for Detective Teague's hearsay statements and thus appellant was denied his right to confront Detective Teague. (AOB 110-114.) As with his previous claim, this contention has been forfeited and is meritless in any event.

A. The Claim Has Been Forfeited

As an initial matter, this claim was forfeited when appellant failed to object below on the same ground. (Evid. Code, § 353; *People v. Riccardi* (2012) 54 Cal.4th 758, 801 [confrontation clause claims forfeited where defendant raised trial objections only on state law grounds]; *People v. Redd* (2010) 48 Cal.4th 691, 730 [failure to raise Sixth Amendment objection in the lower court forfeits that claim on appeal]; *People v. Lewis and Oliver* (2006) 39 Cal.4th 970, 1028, fn. 19; *People v. Kipp* (2001) 26 Cal.4th 1100, 1122; *People v. Williams* (1997) 16 Cal.4th 153, 250.) In any event, even assuming appellant preserved the issue for appeal, it is without merit.

B. The Admission of Rivas's Pretrial Statement did not Violate the Confrontation Clause as Rivas was Subject to Cross-Examination

The confrontation clause of the Sixth Amendment of the United States Constitution provides that "'[i]n all criminal prosecutions, the accused shall

enjoy the right . . . to be confronted with the witnesses against him.'" (*Crawford v. Washington* (2004) 541 U.S. 36, 38 [124 S.Ct. 1354, 158 L.Ed.2d 177].) The confrontation clause has traditionally barred "admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had a prior opportunity for cross-examination." (*Id.* at pp. 53-54.) Under *Crawford*, an extrajudicial testimonial statement does not violate the confrontation clause if the declarant is available and subject to cross-examination at trial. (*Id.* at p. 50.)

Respondent agrees with appellant (AOB 112) that Rivas's pretrial statement was testimonial within the meaning of *Crawford* because it was made during an interview with detectives. (*Crawford*, *supra*, 541 U.S. at p. 68.) Nevertheless, appellant's right to confrontation under the Sixth Amendment was satisfied when Rivas testified at trial. The court in *Crawford* made it plain that if a witness testifies at trial, the confrontation clause allows the witness's prior testimonial statements to be used. As the Court stated, "when the declarant appears for cross-examination at trial, the Confrontation Clause places no constraints at all on the use of his prior testimonial statements . . . . The Clause does not bar admission of a statement so long as the declarant is present at trial to defend or explain it." (*Id.* at p. 59, fn. 9.) As noted above in Argument III(C), *ante*, appellant took advantage of the opportunity to thoroughly cross-examine Rivas about his statement and the circumstances of the interview. (See 13RT 2658-2676.)

Unlike Rivas's statement, the prosecution did not introduce any testimonial statements by Detective Teague for the truth of the matter asserted. Moreover, any testimony by Rivas about the alleged coercion of his pretrial statement was not equivalent to a hearsay, testimonial statement by Detective Teague; rather, it was merely trial testimony that the jury was

entitled to accept or reject. (*Lewis*, *supra*, 26 Cal.4th at p. 361.) Needless to say, it was to appellant's benefit that Rivas attempted to recant his prior statement and claim that he was coached or coerced. Ultimately, the prosecution was allowed to present Rivas's own recorded words made during the interview and the defense had the opportunity to cross-examine him about the truth or the reliability of his pretrial statement. Nothing else was required by *Crawford*. (*Crawford*, *supra*, 541 U.S. at p. 60, fn. 9 ["The [Confrontation] Clause also does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted"]; *People v. Ledesma* (2006) 39 Cal.4th 641, 707, fn. 18; *People v. Ramirez* (2007) 153 Cal.App.4th 1422, 1427.) Appellant's claim must be rejected. And as already explained in Argument III, *ante*, any error in the admission of Rivas's statement was harmless beyond a reasonable doubt. (*Chapman*, *supra*, 386 U.S. at p. 24.)

V. THE ADMISSION OF DURAN'S PRETRIAL STATEMENT DID NOT VIOLATE APPELLANT'S RIGHT TO CONFRONTATION

Appellant contends that his Sixth Amendment right to confrontation was violated when Christina Duran's pretrial statement was admitted. (AOB 114-124.) Specifically, he argues that Duran's statement did not fall within the forfeiture by wrongdoing exception to the confrontation clause because it was unreliable and because the prosecutor failed to prove that appellant had murdered Duran with the purpose of preventing her from testifying. (AOB 121-123.) Appellant has forfeited his claim that Duran's statement was unreliable, and his contention is meritless as to this ground as well as to the sufficiency of evidence supporting the finding that he killed Duran to prevent her from testifying.

A. The Hearing on Duran's Statement

On November 20, 2006, the prosecution filed a motion to admit the pretrial statement of Christina Duran pursuant to Evidence Code 1350.[25]

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[25] Evidence Code section 1350 states, in pertinent part:

> (a) In a criminal proceeding charging a serious felony, evidence of a statement made by a declarant is not made inadmissible by the hearsay rule if the declarant is unavailable as a witness, and all of the following are true:
>
> (1) There is clear and convincing evidence that the declarant's unavailability was knowingly caused by, aided by, or solicited by the party against whom the statement is offered for the purpose of preventing the arrest or prosecution of the party and is the result of the death by homicide or the kidnapping of the declarant.
>
> (2) There is no evidence that the unavailability of the declarant was caused by, aided by, solicited by, or procured on behalf of, the party who is offering the statement.
>
> (3) The statement has been memorialized in a tape recording made by a law enforcement official, or in a written statement prepared by a law enforcement official and signed by the declarant and notarized in the presence of the law enforcement official, prior to the death or kidnapping of the declarant.
>
> (4) The statement was made under circumstances which indicate its trustworthiness and was not the result of promise, inducement, threat, or coercion.
>
> (5) The statement is relevant to the issues to be tried.
>
> (6) The statement is corroborated by other evidence which tends to connect the party against whom the statement is offered with the commission of the serious felony with which the party is charged. The

(continued...)

(See 7CT 1565-1571.) On February 23, 2007, the trial court conducted a hearing on the motion. (See 2RT 500-658; 4RT 659-778.) For purposes of the hearing, the parties stipulated to the testimony presented at appellant's preliminary hearing from the following people: Dawn Butt (see 5CT 1114-1131); Monica Miranda (see 6CT 1183-1296); Detective Rosemary Sanchez (see 6CT 1297-1303); Officer Alejandro Diaz (see 6CT 1310-1321); and Detective Richard Ortiz (see 6CT 1322-1337). (2RT 501-503.)[26]

1. Testimony from appellant's preliminary hearing

Marjorie Mendoza was murdered shortly after midnight on November 9, 2001. (See 6CT 1311.) Soon after the murder of Mendoza, as police blocked off the street to contain the crime scene, Monica Miranda witnessed Christina Duran approach the blockade. (6CT 1234-1236; see also 5CT 983; 7CT 1491.) Duran told Miranda that she was there looking for "something." (6CT 1239.) Unable to get through the blockade, Duran walked away and got into a black Sport Utility Vehicle. (6CT 1241.) Miranda alerted police officers to Duran's vehicle as it drove away. (6CT 1243.) The vehicle was stopped, and the occupants were detained. (6CT 1311-1312.) With Duran as the driver of the vehicle, appellant was found in the rear cargo area. (6CT 1313-1317.) Miranda was brought to the

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(...continued)

corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof.

[26] The stipulated-to testimony from the preliminary hearing, as well as the testimony presented at the hearing on the motion to admit Duran's statement, is largely repetitive of what was presented at trial and already summarized above in the Statement of Facts. (See Statement of Facts (A)(1)(f), (B)(1)(c), *ante*.) Thus, in setting forth the relevant facts concerning the instant claim, respondent will only summarize the pertinent facts that are not included in the summary above, along with those that require highlighting.

detained vehicle and identified Duran as the woman who had approached her at the Mendoza murder scene. (6CT 1244-1246.) Miranda recognized appellant as one of the shooters she had seen earlier but did not report the identification to police at that time. (6CT 1246-1249.) Appellant was released but Duran was brought in for questioning. (6CT 1321; see Exh. B.)

In 2002, Dawn Butt met appellant in Laughlin, Nevada. (5CT 1114, 1116-1117.) Appellant told Butt that he was wanted by the police for murder, but that the only evidence that linked him to the murder was a telephone belonging to his ex-girlfriend. (5CT 1119-1120.) Appellant recounted being stopped by police after the murder but then being released. (5CT 1122-1123.) Butt did not recall telling the police that appellant had admitted leaving the telephone at the crime scene. (5CT 1121-1122.)

2. Testimony from the hearing on the motion to admit Duran's statement

Shortly after midnight, on November 11, 2001, Irma Quiroz heard people screaming at each other outside of her house. (4RT 697-698, 701, 703.) The screams were followed by "two or three" gunshots. (4RT 699-700.) Later that same day, at approximately 1:00 p.m., police officers set up a crime scene around a car on Quiroz' street, in which Duran's dead body was found. (See 4RT 697-698.)

Appellant spoke to Dawn Butt about the Mendoza murder he was "wanted on." (2RT 503-505.) He told Butt that after the murder he was stopped by police while with "a girl," and that this girl was no longer alive. (2RT 505.) Appellant suspected that the girl had spoken to police about the murder because she had been taken in for questioning after they had been stopped, and the next day there was a warrant issued for his arrest and a search conducted of his house. (2RT 506-508.)

Juan Rodarte dated Duran and attended a party with her the night she was murdered. (2RT 528-531.) Rodarte did not see Duran leave the party,

and she left without telling him. (2RT 535-536.) Although Rodarte arrived with Duran, he could not explain why they did not leave together. (2RT 535.) Whereas Rodarte testified at the hearing that he was given a ride home by Alfonso "Sniper" Varga at around 3:00 a.m., he told the police on November 18, 2001, that he had been given a ride home by "Shy Boy" and "Frankie." (2RT 533, 537; see 2RT 540-541; 4RT 686-687.) Rodarte denied that he was approached by someone who wanted Duran dead, or that he was asked to assist in her murder. (2RT 538-539.) Rodarte denied that he told anyone that appellant wanted Duran dead and that appellant wanted Rodarte's help to murder her. (2RT 539.)

Sayra Martinez was friends with Duran, and was with her before the party. (2RT 544, 545-546.) Duran told Martinez that she planned on attending a party later that evening with Rodarte and "Huero." (2RT 546-548; see also 2RT 529.) As Martinez left Duran's house, Rodarte arrived. (2RT 549-550.) Later, at approximately 2:00 a.m., Martinez spoke to Duran over the telephone. (2RT 551-555.) Duran told Martinez that she was in the process of leaving the party. (2RT 555.)

Gabriel Rivas had known Duran for approximately 15 years. (2RT 577, 580.) Rivas denied that Rodarte had said that appellant asked for Rodarte's assistance in murdering Duran. (2RT 580-581.) Rivas also denied telling anyone that Rodarte had stated that appellant asked Rodarte to bring Duran to a party so that she could be murdered, or that Rodarte had acknowledged that Duran was taken from the party and murdered by appellant and other Toonerville gang members. (2RT 581-582.)

Former Deputy District Attorney Anthony Manzella spoke to Rivas on June 2, 2003. (2RT 590-591.) Rivas told Manzella that Rodarte had stated that appellant wanted Duran dead because she was "telling" on him and Eduardo "Limpy" Rodriguez. (2RT 591-592; see also 2RT 599.)

Appellant told Rodarte to "set it up" and to take Duran to a party so "the homies could get at her." (2RT 592.)

Teresa Lara and some friends attended the party where Duran was last seen. (2RT 562-563.) While at the party, Lara's friend used a video camera to record their group. (2RT 565-566.) Sometime after the party, Lara met with Los Angeles Police Detective Tom Harris. (2RT 569-570; 4RT 675, 569-570.) Lara denied telling Detective Harris that a "White guy" at the party had told her group in a menacing tone to stop filming. (2RT 566-567.) Lara denied identifying the person who told her to stop filming as "Huero" to Detective Harris, and denied that Detective Harris showed her photographs and asked her to identify anyone. (2RT 566-567, 570.) Detective Harris testified that Lara had indeed made the statement, and had identified appellant from a photographs he had shown her. (4RT 688-689.)

Taufi Sanki also attended the party. (2RT 602-604.) Sanki denied knowing appellant. (2RT 606-607.) Duran was still at the party when Sanki left. (2RT 608.) Sanki left the party at approximately 12:30 or 1:00 a.m. (2RT 604.) Sanki gave Juan Serna a ride home. (2RT 605-608.) Sanki denied telling Francisco Gonzalez that he saw Duran leave the party in a car with Rodarte, being followed by another car with "Panther" and "Huero" inside it. (2RT 610-612.) Sanki denied being asked by the police about his statement to Gonzalez. (2RT 611-613.)

Francisco Gonzalez, a former Toonerville gang member, testified that he knew Sanki. (2RT 617, 622.) On November 13, 2001, Gonzalez spoke to Detective Harris. (2RT 622-624; 4RT 690.) Gonzalez denied telling Detective Harris that Sanki saw Duran leave the party in car with Rodarte, followed by Huero and Panther. (2RT 625.) Detective Harris testified that Gonzalez had reported to him what Sanki observed. (4RT 690.)

Martin Villagran hosted the party where Duran was last seen. (4RT 664-665.) Appellant, Rodarte, and Serna were all in attendance. At approximately 1:00 a.m., when Villagran went to sleep, Duran was still at the party. (4RT 667.) At the time Villagran went to sleep, appellant was "about to O.D." and had to be carried to an extra bedroom. (4RT 669-670.) Detective Harris interviewed Villagran twice in 2001, and during both interviews Villagran denied that appellant attended the party. (4RT 689-690.)

John Perez attended the party that Duran was last seen at. (2RT 636, 639.) During the party, appellant asked Perez whether a person's failure to identify appellant in a field lineup could be used in his defense. (2RT 642-643.) Also at this party, Perez saw Lara and her friends filming with a video camera. (2RT 643-644; see 2RT 561-566.) At some point in the evening, Perez acquired the phone number of one of Lara's female friends. (2RT 644, 646-647.) As Perez left the party, he observed appellant lying on a bed. (2RT 653-654.) Shortly after the party, Perez was contacted by Juan Serna and Dustin Madrid and told to meet at Madrid's house. (2RT 647-649.) Serna and Madrid told Perez to contact the girls with the video camera because "[t]hey wanted the video tape back because it might have some things that they did not want to get out to the police." (2RT 650-651.) Perez recorded his conversation with Serna and Madrid and gave it to the police. (2RT 653.)

On November 10, 2001, Jessica Ortiz lived across the street from Villagran's house. (4RT 712-713.) Ortiz was familiar with appellant. (4RT 715.) That night, Ortiz attended the party at Villagran's house for approximately 15 minutes. (4RT 714-715.) While at the party, Ortiz interacted with appellant and believed that he was intoxicated. (4RT 715-716.) Ortiz left the party shortly after midnight and went home. (4RT 716-717.) At around 2:30 a.m., Ortiz heard people yelling outside. (4RT 717.)

Through her living room window, Ortiz observed two women, one of which Ortiz identified as Christina Duran, in a black 4Runner yelling at a group of people on the front porch of Villagran's house. (4RT 717-723.) Appellant and Villagran were among the people standing on the porch. (4RT 721-722.) The 4Runner drove away, circled around the block, and returned a minute later before driving away a second time. (4RT 719-720.) Ortiz did not observe another car following the 4Runner either time it drove away. (4RT 720-721.) Appellant was still on the porch when the 4Runner drove away the second time. (4RT 721-722.)

The parties made the following stipulations: Duran was interviewed by police at 8:40 a.m. on November 9, 2001 (4RT 660; see Exh. B); Eduardo "Limpy" Rodriguez was arrested for the murder of Mendoza at approximately 7:30 p.m. on November 9, 2001 (4RT 661); Los Angeles police officers served a search warrant at appellant's residence in the early morning hours of November 10, 2001 (4RT 662); and Duran's dead body was found at approximately 1:00 p.m. on November 11, 2001 (2RT 503).

3. The trial court found Duran's pretrial statement admissible pursuant to Evidence Code section 1350

On April 4, 2007, the prosecution filed a supplemental brief in support of its motion to admit Duran's pretrial statement. (See 7CT 1610.) On April 6, 2007, the trial court requested argument on the effect, if any, *People v. Giles* (2007) 40 Cal.4th 833 had on the requirements of Evidence Code section 1350. (7CT 1627.) On April 9, 2007, the prosecution filed a supplemental brief responding to the court's request. (8CT 1641-1644.) The trial court accepted an agreement by both parties that *People v. Giles* did not abrogate Evidence Code section 1350, and that the standard of proof for a forfeiture finding was clear and convincing evidence. (5RT 870-873.)

On April 12, 2007, the trial court heard argument on the motion from both parties. (5RT 873-908.) The thrust of the defense was that the prosecution had failed to demonstrate that appellant murdered Duran. The defense made no mention of the circumstances or the content of Duran's statement to the police. (See 5RT 892-903, 907-908.) The trial court ruled the requirements of Evidence Code section 1350 had been satisfied. (5RT 908-917.) The trial court found that there was no evidence the prosecution had caused the unavailability of Duran, that Duran's statement had been memorialized in a tape recording, and that the statement was relevant. (5RT 909-910.) Further, the trial court found that Duran's statement had been made under conditions which indicated it trustworthiness, and that it was not the result of promise, inducement, threat, or coercion. (5RT 910.) Although the court recognized that Duran had been threatened with arrest (see 5RT 908, 910), the court found that there had been sufficient corroboration of her statement through "other evidence" that demonstrated its trustworthiness. (5RT 910.)

In finding that Duran's unavailability had been knowingly caused by, aided by, or solicited by appellant, the trial court noted that there was "overwhelming evidence" of appellant's interest in preventing Duran from testifying and in procuring her unavailability. The court found Butt credible when she testified that appellant suspected that Duran had given the police information about him, and that appellant had learned that there was a warrant out for his arrest and that his house had been searched. The court also found that the evidence indicated that appellant was concerned about Duran and her ability to link him to the Mendoza murder. (5RT 911.) The court noted that there was also concern by appellant and others who had attended the party about the filming done by Lara. (5RT 912-913, 916.)

The court did not find Rodarte or Sanki to be credible. (5RT 912, 914.) The court did, however, find Detective Harris credible when he

testified that Gonzalez had told him about Sanki's statement that he observed Duran and Rodarte leave the party together with appellant and Serna following behind. (5RT 914, 917.) Although Gonzalez could not recall making that statement, the trial court found Gonzalez to be an "extremely reluctant witness." (5RT 914.) The trial court also found Quiroz credible and "extremely firm" in her testimony that she heard multiple men's voices and multiple cars. (5RT 914-915, 917.) In light of Ortiz' testimony regarding appellant's condition at the party, the trial court did not find Villagran or Perez credible as to appellant's drug induced "incapacitation." (5RT 915-916.)

Ultimately, the trial court ruled Duran's statement admissible pursuant to Evidence Code section 1350, finding that appellant "had the obvious motive to try and eliminate or otherwise silence Miss Duran," and that "if he did not personally kill her, he had something to with her killing. He either arranged for it or caused it." (5RT 916-917.)

Duran's statement was played to the jury during the guilt phase. (20RT 4050-4055; see Exh. B.) During the penalty phase retrial, on August 13, 2008, the defense renewed its objection to Duran's statement being played to the jury. (See 33RT 6548-6549.) The trial court recognized the then-recent decision in *Giles v. California* (2008) 554 U.S. 353 [128 S.Ct. 2678, 171 L.Ed.2d 488], which vacated *People v. Giles*, *supra*, 40 Cal.4th 833, and held that for a prior statement to be admissible pursuant to the "forfeiture by wrongdoing" exception to the confrontation clause, there must be a showing that the declarant's unavailability was procured for the purpose of preventing his or her testimony. (See 33RT 6549-6550.) The defense argued that the prosecution had failed to show that appellant murdered Duran for the *purpose* of preventing her testimony. (33RT 6551-6552.) The prosecution argued that the required element articulated in *Giles v. California* was already incorporated into Evidence Code section

1350, and had been proven. (33RT 6550-6551.) The trial court overruled the defense objection and stated, "I think in the greater scheme of things [Duran] would have been perceived as a potential witness against [appellant] of some future criminal action." (33RT 6552-6553.) Duran's statement was played to the jury during the penalty phase retrial. (33RT 6726-6733; 34RT 6734-6736; see Exh. B.)

B. Appellant Has Forfeited His Claim That Duran's Statement Was the Result of Promised Benefits; In Any Event, This Claim Is Meritless As Found by the Trial Court

Appellant partly challenges the admission of Duran's statement on the ground that it was given in exchange for leniency, thereby making it unreliable and inadmissible under Evidence Code section 1350, subdivision (a)(4). (AOB 122-123.) However, for the same reasons discussed above in response to similar claims concerning Rivas's pretrial statement (see Arg.III(B); Arg.IV(A), *ante*,), this claim was forfeited when appellant failed to object on these grounds below. (Evid. Code, § 353; *Riccardi*, *supra*, 54 Cal.4th at p. 801; *Redd*, *supra*, 48 Cal.4th at p. 730; *Lewis and Oliver*, *supra*, 39 Cal.4th at p. 1028, fn. 19.) In any event, even assuming appellant preserved the issue for appeal, it is without merit.

As discussed above in Argument III(C), *ante*, offers of benefits to witnesses or informants to secure their truthful testimony is commonplace and is not considered improper. (See *Badgett*, *supra*, 10 Cal.4th at pp. 354-355; *Daniels*, *supra*, 52 Cal.3d at pp. 862-863.) Nevertheless, contrary to appellant's suggestion, Duran was not promised anything in exchange for her testimony; rather, she was told several times by her interviewers that they would merely do their best to protect her and to keep her cooperation undisclosed for as long as they could. (See Exh. B at pp. 8 [Interviewer: "And we'll do our best."], 33-34 [Duran: "I need to insure that my name is not brought into this." Interviewer: "We can keep it out as long as we can,

allowing your family to move out slowly."], 35 [Interviewer: "We'll do what we have to do to protect you. We'll keep your name out of it as long as we can."], 65 [Interviewer: "The only thing I can, the only thing, and we can't even promise, we can't guarantee anything, the only thing we can tell you is that we will do everything we can, okay, to make sure that nothing happens to you."], 66 [Interviewer: "I can't guarantee anything, lady."], 86 [Interviewer: "We'll do everything we have to do before your name comes up, okay?"].)

Indeed, it is telling that the only support for appellant's allegation that Duran gave her statement in exchange for "great benefits" is the fact that Duran was released. (See AOB 122-123.) However, even this lone fact is unpersuasive as Duran was never told during the interview that she would be released or that her release was conditioned upon her cooperation. In fact, once the interview concluded it was still unclear whether Duran would be released. (See Exh. B at p. 86 [Duran: "You think that I'm gonna get out today?" Interviewer: "I'll talk to them." Duran: "Please." Interviewer: "I can't, I can't make promises."].) There is no showing whatsoever Duran's statement was the result of any promise or inducement.

In sum, due to the failure to object, appellant has forfeited his claim that Duran's pretrial statement was the result of promised benefits. Nevertheless, appellant's claim fails on the merits because the record supports the trial court's findings that Duran's statement was made under conditions that indicated its trustworthiness and that the statement was not the result of promise, inducements, threat, or coercion..

C. The Trial Court Did Not Abuse Its Discretion When It Found That Appellant Had Murdered Duran for the Purpose of Preventing Her from Testifying

Appellant also argues that Duran's statement should not have been admitted because the prosecution did not establish that he killed Duran for

the purpose of preventing her testimony. (AOB 121-123.) Appellant is wrong.

The United States Supreme Court has held that the doctrine of forfeiture by wrongdoing applies to a confrontation clause challenge to the admission of a witness's testimonial statements if there is evidence the defendant killed the victim with the intent of preventing her from testifying. (*Giles v. California*, *supra*, 554 U.S. at pp. 359-362.) Evidence Code section 1350 expressly requires the same showing. (See Evid. Code, § 1350, subd. (a)(1) [there must be "clear and convincing evidence that the declarant's unavailability was knowingly caused by, aided by, or solicited by the party against whom the statement is offered for the purpose of preventing the arrest or prosecution of the party and is the result of the death by homicide or the kidnapping of the declarant"].)[27] This Court reviews evidentiary rulings, including those involving hearsay issues, for abuse of discretion. (*Waidla*, *supra*, 22 Cal.4th at p. 725.)

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[27] Respondent notes that appellant characterizes his argument as a federal constitutional violation but simultaneously argues that the prosecution failed to present "clear and convincing" evidence establishing that his purpose in murdering Duran was to prevent her from testifying. (See AOB 122; see also AOB 114, 119-121, 123-124.) While Evidence Code section 1350 requires a clear and convincing showing by the prosecution as a matter of state evidentiary law, this Court has recognized the preponderance of evidence standard applies as to the federal doctrine of forfeiture by wrongdoing. (*People v. Zambrano* (2007) 41 Cal.4th 1082, 1147, fn. 21, citing *Davis v. Washington* (2006) 547 U.S. 813, 833-834 [126 S.Ct. 2266, 165 L.Ed.2d 224].) Indeed, it appears that in 2010 the California Legislature harmonized these differing standards with codification of the forfeiture by wrongdoing doctrine in Evidence Code section 1390. (See Evid. Code, § 1390 ["The party seeking to introduce a statement pursuant to subdivision (a) shall establish, by a preponderance of the evidence, that the elements of subdivision (a) have been met at a foundational hearing."].) In any event, regardless of the applicable burden, the instant trial court's finding was sufficient.

As discussed above, the trial court here found *twice* that the prosecution had shown by clear and convincing evidence that appellant murdered Duran for the purpose of preventing her testimony. (5RT 911, 916-917 [before trial]; see also 33RT 6552-6553 [during penalty phase retrial].) The record amply supports the trial court's finding and warrants application of the forfeiture by wrongdoing doctrine in this case under both *Giles v. California* and Evidence Code section 1350.

Appellant was found by the police hiding in the back seat of Duran's vehicle as they drove away from the Mendoza murder scene. Appellant was released but Duran was taken in by police for questioning. (See 5CT 1122-1123; 6CT 1321.) Appellant admitted that he suspected Duran was cooperating with the police. (See 2RT 505-508.) The same day that Duran was taken in for questioning, appellant's accomplice Rodriguez was arrested. (4RT 660-661.) The very next day, appellant's home was searched. (4RT 662.) Appellant was aware of the search and that there had been a warrant issued for his arrest. Appellant believed that the search and the arrest warrant were a result of Duran's cooperation with police. (2RT 506-508.) Appellant told Rodarte that he wanted Rodarte's help murdering Duran because she was "telling" on appellant and Rodriguez. (2RT 591-592, 599.) Appellant asked Rodarte to bring Duran to a party where "the homies could get at her." (2RT 592.) While at the party, appellant demonstrated his ongoing concern about being prosecuted for the Mendoza murder when he spoke to Perez about the implications of an unsuccessful field identification lineup. (2RT 642-643.) It was also clear that appellant did not want a videotape of him at the party with Duran. (See 2RT 646-653.) When Duran left the party with Rodarte, appellant and Serna were seen following them away in another car. (4RT 690.) Shortly after midnight on November 11, 2001, less than 48 hours after Duran began cooperating with police, she was shot to death. (See 4RT 697-703.)

Duran's body was found in her parked car just a couple of miles from the party she was last seen at. (See 2RT 503.) This reality mirrored the imagery from appellant's rap lyrics. (See 7CT 1537 ["aint no rat rollin with the pack[,] we're criminal [homicide] car jack[,] trash like that work with the laws[,] they can swallow this dick to the balls[,] they get gang raped broom fucked killed throw in a trunk[,] left in the alley until the pig smells the funk"].) Appellant's lyrics also demonstrated his intent to insure that people cooperating with the police would never "make it to the stand." (See 7CT 1555.)

As the trial court found, these facts support a finding that appellant killed Duran because he perceived her as a potential witness against him and he wanted to prevent her from testifying. (*Giles v. California*, *supra*, 554 U.S. at pp. 359-362.) Accordingly, the admission of her statement was not an abuse of discretion. (*Waidla*, *supra*, 22 Cal.4th at p. 725.)

D. Even If Duran's Statement Was Not Properly Admitted, Any Error Was Harmless

Nevertheless, even if there was error, the admission of Duran's statement was non-prejudicial whether assessed in terms of constitutional error under *Chapman*, *supra*, 386 U.S. at page 24, or state law error under *Watson*, *supra*, 46 Cal.2d at page 836. (See *People v. Streeter* (2012) 54 Cal.4th 205, 240.)

Regarding the guilt phase, even without Duran's statement, there was overwhelming evidence supporting the jury's findings that appellant murdered Marjorie Mendoza and attempted to murder Duane Natividad and Erica Rhee. Monica Miranda identified appellant as one of the shooters in the Mendoza murder. (18RT 3732-3734; 19RT 3741-3751.) Duane Natividad also identified appellant as one of the shooters. (17RT 3494-3495, 3511-3514.) At the time Mendoza was killed, she was riding in a vehicle along with Rhee and Natividad, a Pinoy Real gang member and

rival of appellant's gang. (16RT 3413-3419, 3456; 17RT 3492-3493; 20RT 3986-3987.) Appellant had been seen in the past in possession of the same type of firearm used to shoot Mendoza. (14RT 2940-2942; 17RT 3500-3505, 3514, 3578-3582; 19RT 3878-3880.) During Mendoza's murder, appellant dropped his cellular phone where it was recovered by the police. (14RT 2810-2811; 15RT 3195-3200, 3207-3208; 16RT 3399-3400; 18RT 3724-3725; 19RT 3871-3876, 3887-3889.) Christina Duran was seen at the Mendoza murder scene and told people there that she had lost something and was looking for it. (18RT 3727-3728.) When Duran left the scene, she was pulled over by the police and appellant was found hiding in the cargo area of her vehicle. (17RT 3475-3480; 18RT 3621-3625.) Shortly after the murder, appellant asked John Perez whether a field lineup could be used in a defense if he had not been recognized during it. (14RT 2939-2940.)

Accordingly, the evidence, even without Duran's statement, showed well beyond a reasonable doubt that appellant murdered Mendoza and attempted to murder Natividad and Rhee. Indeed, "unless the testimony is physically impossible or inherently improbable, testimony of a single witness is sufficient to support a conviction. [Citation.]" (*People v. Young* (2005) 34 Cal.4th 1149, 1181.) Here, the testimony of multiple eyewitnesses supported the conviction.

The same is true regarding the penalty phase retrial. Thus, to the extent that the admission of Duran's statement was in error, it was harmless beyond a reasonable doubt. Moreover, in light of other admissible evidence of appellant's numerous violent crimes, including his three murder convictions and four attempted murder convictions, there can be no reasonable possibility that Duran's statement was prejudicial. Further, along with appellant's prior convictions, the jury also heard evidence of his murder of Duran, as well as the many violent incidents appellant had been involved in while in custody. Duran's statement was, quite frankly,

inconsequential. (*People v. Medina* (1995) 11 Cal.4th 694, 767; *People v. Pinholster* (1992) 1 Cal.4th 865, 963.)

VI. THE PROSECUTOR DID NOT COMMIT MISCONDUCT BY ACKNOWLEDGING TO A REPORTER THAT APPELLANT'S RAP LYRICS WERE IN THE PUBLIC RECORD; ANY ERROR WAS HARMLESS

Appellant contends that the prosecutor improperly leaked rap lyrics authored by appellant to a newspaper reporter before the trial began. He argues that the prosecutor's actions constituted misconduct that denied him his rights to a fair trial. (AOB 124-134.) Respondent disagrees. First, the contention has been forfeited. In any event, there is nothing in the record to indicate that the prosecutor released the rap lyrics to the press. Moreover, appellant has not demonstrated that the prosecutor's alleged release of publicly available information to a reporter "comprise[d] a pattern of conduct 'so egregious that it infect[ed] the trial with such unfairness as to make the conviction a denial of due process.'" (*People v. Gionis* (1995) 9 Cal.4th 1196, 1214.) Further, appellant cannot show that he was prejudiced as the rap lyrics were admitted into evidence during trial. Accordingly, appellant's claim is meritless.

A. The Media's Awareness of Appellant's Rap Lyrics

On February 12, 2003, appellant was apprehended and arrested in Bullhead City, Arizona. (13RT 2725-2726.) At the time appellant was arrested, he was with Dawn Butt, a resident of Bullhead City. (13RT 2726-2727; 16RT 3411.) A search of Butt's home revealed property belonging to appellant, including a notebook that contained handwritten rap lyrics. (13RT 2727-2729; 16RT 3402-3404.) Appellant's rap lyrics depicted him as a high ranking Toonerville gang member who was always armed with a weapon and was on the run for murder. (13RT 2781-2783.)

On March 9, 2006, at appellant's preliminary hearing, his notebook was admitted into evidence without objection from the defense. (5CT 1123-1125; 7CT 1457, 1475.) Also without objection from the defense, passages from appellant's notebook were referred to by the prosecutor during the direct examination of the prosecution's gang expert, Los Angeles Police Officer Richard Gadsby. (7CT 1435, 1443-1444, 1453-1454.)

Prior to trial, the prosecutor filed a motion to admit appellant's notebook and to permit expert testimony interpreting the gang lyrics contained within the notebook. (7CT 1523-1564.) A photocopy of the notebook was attached to the motion. (See 7CT 1534-1563.) In the motion, the prosecutor argued that the notebook was admissible to prove appellant's gang affiliation and loyalty, as well as his motive and intent to commit the gang-related murders and attempted murders with which he was charged. (See 7CT 1532-1533.) Defense counsel was given the opportunity to be heard on the motion and, rather than object to the admission of the notebook, indicated that appellant's writings were "a matter of interpretation" that experts and other witnesses would opine on. (2RT 105.) The trial court agreed, granting the prosecution's motion and finding that the admission of appellant's notebook was "more of a question of weight rather than admissibility." (2RT 105-106.)

More than seven months later, and approximately one month before appellant's trial began, defense counsel alerted the trial court to a news article that had recently been published regarding appellant's writings. Defense counsel indicated that he had been previously contacted by a member of the press but had declined to comment. Defense counsel expressed concern that appellant's writings had been leaked to the press in an attempt to prejudice the jury. (8RT 1734.) The prosecutor acknowledged that he was contacted by a reporter regarding appellant, and

that the reporter was aware of the prosecution's motion concerning appellant's notebook and requested a copy of it, but the prosecutor denied commenting on the case. (8RT 1734-1735.) The prosecutor indicated to the court that the motion had been filed in the public domain and that "nobody asked for it to be sealed so that's probably how [the reporter] got it." (8RT 1735.) The trial court noted that it was unsure that there would have been a basis for requesting the motion be sealed. (8RT 1735.)

B. The Prosecutor's Actions Were Not So Egregious That They Infected the Trial with Unfairness As to Make the Resulting Verdict a Denial of Due Process

A prosecutor's conduct violates a defendant's constitutional rights when the behavior comprises a pattern of conduct so egregious that it infects "the trial with unfairness as to make the resulting conviction a denial of due process." (*Darden v. Wainwright* (1986) 477 U.S. 168, 181 [106 S.Ct. 2464, 91 L.Ed.2d 144].) 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. Crew* (2003) 31 Cal.4th 822, 839.) Conduct that does not render a trial fundamentally unfair is error under state law only when it involves "the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury." (*People v. Espinoza* (1992) 3 Cal.4th 806, 820.)

As an initial matter, appellant has failed to preserve this claim for appeal. It is settled that misconduct may not be asserted on appeal unless there is a showing that the appellant objected to the alleged misconduct, that he assigned the objected to issue as misconduct, and that he requested a curative instruction or admonition. (*People v. Green* (1980) 27 Cal.3d 1, 34; see also *McKinzie*, *supra*, 54 Cal.4th at p. 1358; *Gionis*, *supra*, 9 Cal.4th at p. 1215.) "'The reason for this rule . . . is that 'the trial court should be given an opportunity to correct the abuse and thus, if possible,

prevent by a suitable instruction the harmful effect upon the minds of the jury.'" (*Green*, *supra*, 27 Cal.3d at p. 27, quoting *People v. Simon* (1927) 80 Cal.App. 675, 679.)

Despite appellant's assertion that "[d]efense counsel properly alleged prosecutorial misconduct" (AOB 130), it appears that defense counsel believed that someone *other* than the prosecutor disseminated appellant's notebook to the press. When defense counsel alerted the trial court to the news article, he stated, "I don't know who [told the press about appellant's notebook]." (8RT 1734.) Defense counsel went on to say that he was "not casting any aspersions against [the prosecutor]" and indicated that he believed it had been leaked by someone "beyond [the prosecutor]." (8RT 1735.) Indeed, the trial court recognized defense counsel's comments as a mere expression of concern, which defense counsel did not dispute. (8RT 1736.) Further, defense counsel did not ask the court for any relief, nor did he request the court to prepare specific voir dire questions pertaining to the article or to delay the trial to allow any possible prejudice from the article to dissipate. Defense counsel apparently accepted the trial court's opinion that any possible prejudice created by this news article could be dealt with during voir dire by the parties. (8RT 1735-1736.) Accordingly, because defense counsel failed to object on the basis of prosecutorial misconduct or allege any wrongdoing on behalf of the prosecutor, and failed to request any curative action, he has forfeited this claim. (*Gionis*, *supra*, 9 Cal.4th at p. 1215.)

Nevertheless, even if appellant's claim is reviewable, it is without merit. As noted above, there is nothing in the record to support the allegation that the prosecutor was a source of information for the press. The prosecutor stated several times that he did not comment on the case when asked about it by the press. (8RT 1734-1736.) Although appellant repeatedly asserts that the prosecutor directed a reporter to the motion and

the attached copy of appellant's notebook (AOB 125 [arguing the prosecutor "informed the reporter" about appellant's writings], 130 [arguing the prosecutor "provided" appellant's writings to the press], 133 [arguing the prosecutor "decided to share the poisonous lyrics with the press without informing the court or defense"], 134 [arguing the prosecutor "leak[ed] the rap lyrics"]), this is simply not supported by the record. Notwithstanding the prosecutor's comment that *generally* his practice, unless directed otherwise, was to confirm the presence of documents in the public record when asked whether those documents were indeed within the public record (8RT 1736), the record does not support the conclusion that the prosecutor was expressly asked whether appellant's notebook was part of the public record or that the prosecutor told the reporter that it was. (See 8RT 1734-1736.)

Appellant cites to *McKinzie*, *supra*, 54 Cal.4th at page 1327, and *People v. Brommel* (1961) 56 Cal.2d 629, 636, in support of his claim. (See AOB 130-131.) But as explained below, these cases are distinguishable and thus fail to support his contention.

In *McKinzie*, during voir dire at the penalty phase retrial of a capital case, the defendant made several threatening comments directed at the prosecutor, including that he would "tear his head off." (*McKinzie*, *supra*, 54 Cal.4th at pp. 1322-1323.) Learning of the defendant's comments, the prosecutor asked that the defendant be shackled. (*Id.* at p. 1323.) The trial court denied the request. (*Ibid.*) The prosecutor then sought to introduce evidence of the defendant's comments as an aggravating factor at the penalty phase. (*Ibid.*) Inclined to exclude the evidence, the trial court granted the prosecutor's request for a hearing on the admissibility of the comments. (*Ibid.*)

The next day, before the hearing was conducted, a newspaper article was published reporting the comments made by the defendant and the fact

that the prosecutor intended to use them during the penalty phase retrial. (*McKinzie*, *supra*, 54 Cal.4th at pp. 1323-1324.) After an inquiry, it was learned that the prosecutor had initiated contact with a reporter and invited her to come to court where he gave her transcripts to review. (*Id.* at p. 1324.) Further, the prosecutor had directed the reporter to the specific portions of the transcripts that contained the defendant's comments, and indicated to the reporter that they would be used as aggravating factors. (*Ibid.*) The evidence was excluded and, at defense counsel's request, the trial court admonished the jurors that the article had been published and that it was their duty to disregard it. (*Id.* at p. 1325.)

On appeal, this Court found that the prosecutor's injection of questionable evidence into the media during jury selection had constituted misconduct. (*McKinzie*, *supra*, 54 Cal.4th at p. 1327.) Nevertheless, this Court held that the misconduct was not prejudicial to the defendant under either federal or state law. (*Ibid.*) This Court recognized that the trial court had acted reasonably in its handling of the misconduct by excluding the evidence, making a complete record of the circumstances, making appropriate inquiries of the jury, admonishing the jury to disregard the article, and excluding the few prospective jurors who indicated they had read the article. (*Ibid.*)

Here, unlike in *McKinzie*, it was the reporter who contacted the prosecutor. Also unlike in *McKinzie*, the prosecutor here did not provide the reporter with information about the case or input regarding the subsequently published article. Further, the prosecutor did not provide any documents for the media to review. Beyond appellant's unsubstantiated allegation, there is nothing in the record to suggest that the prosecutor injected evidence into the media. (See 8RT 1734-1736.) In fact, it appears that even defense counsel believed that someone other than the prosecutor had passed along the information to the media regarding appellant's

notebook. (8RT 1735.) The circumstances of appellant's claim are wholly distinguishable from those in *McKinzie*, and appellant has failed to show that the prosecutor committed misconduct.

Just as *McKinzie* is unsupportive, so too is *Brommel*. In *Brommel*, this Court reversed the defendant's murder conviction because the trial court erroneously admitted into evidence the defendant's involuntary confessions. (*Brommel*, *supra*, 56 Cal.2d at pp. 631-634.) The Court *did not* reverse the defendant's conviction due to the prosecution's disclosure of the defendant's statements to a reporter. (See *id.* at pp. 631-634) Rather, in dicta, the court stated that:

> During the course of the trial the district attorney released to the press copies of the confessions and admissions of defendant before they were admitted into evidence by the court, and even before they had been made available to defendant and his counsel. The obvious impropriety of this conduct is only emphasized by the fact that we have now determined that these statements were inadmissible against defendant on the trial. Prosecuting officers owe a public duty of fairness to the accused as well as to the People and they should avoid the danger of prejudicing jurors and prospective jurors by giving material to news-disseminating agencies which may be inflammatory or improperly prejudicial to defendant's rights.

(*Id.* at p. 636.)

However, this Court did *not* state that the prosecutor's actions constituted misconduct, or that the prosecutor's conduct warranted reversal. Thus, *Brommel* does not support appellant's argument that the prosecutor committed misconduct. Further, the prosecutor in *Brommel* released confessions and admissions by the defendant that were not part of the public record, and that had not been made available to the defense; whereas here, appellant's notebook was in the public record, had been made available to the defense, and was obtained by the reporter without the prosecutor's assistance.

In sum, appellant has failed to show that the prosecutor committed misconduct, or that the prosecutor's conduct so infected the trial with unfairness as to make the resulting convictions and death verdict a denial of due process. (*Wainwright, supra*, 477 U.S. at pp. 181-182.) Thus, appellant's claim must be rejected.

C. Appellant's Was Not Prejudiced in Any Event

Regardless of whether the prosecutor's conduct constituted misconduct, appellant fails to explain how he was prejudiced. The notebook had been admitted into evidence at the preliminary hearing more than a year earlier without objection from the defense, and there is nothing in the record to suggest that the preliminary hearing was closed to the public. (See 5CT 1123-1125; 7CT 1457, 1475.) Regardless, as the trial court indicated (8RT 1735-1736), any perceived issues with the recently published article were matters to be addressed during voir dire. (See *McKinzie, supra*, 54 Cal.4th at p. 1328.) Indeed, defense counsel inquired as to whether any of the jurors had "read anything in the paper that they believed concern[ed] [appellant's] case." (10RT 2032.) And Juror Number 49, the sole juror who indicated that he or she had previously read an article that mentioned the Toonerville gang, was ultimately excused. (10RT 2032, 2046, 2156.) Further, the trial court instructed the jurors to ignore anything they may see in the news. (10RT 2182; 11RT 2318-2319.) Ultimately, appellant cannot possibly show that he was prejudiced because the writings were admitted at trial.

VII. APPELLANT HAS FORFEITED ANY CLAIM CONCERNING THE PRESENTATION OF EVIDENCE ABOUT PRISON CONDITIONS AT THE PENALTY PHASE; IN ANY EVENT, THERE WAS NO ERROR

Appellant appears to contend that his federal constitutional rights were violated when he was denied the opportunity at the penalty phase retrial to introduce evidence of prison conditions to rebut the prosecution's evidence demonstrating appellant's future dangerousness. (AOB 135-141.) Appellant concedes that he did not seek to introduce evidence of prison conditions for a person serving a sentence of life without the possibility of parole. (AOB 136.) However, he argues that his failure to do so should be excused because the admissibility of such evidence was only subsequently made clear under *People v. Smith* (2015) 61 Cal.4th 18.[28] (AOB 136, 138-141.) Appellant is wrong.

Appellant forfeited this claim when he failed to make an offer of proof. To preserve a contention of error regarding the exclusion of evidence, a defendant must make a sufficient offer of proof. (See *People v. Morrison* (2004) 34 Cal.4th 698, 711-712.) "An appellate court may not reverse a judgment because of the erroneous exclusion of evidence unless 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.'" (*People v. Livaditis* (1992) 2 Cal.4th 759, 778, italics

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[28] In *Smith*, this Court addressed the admissibility of prison conditions evidence at a penalty trial. Recognizing that, as a general rule, evidence concerning conditions of confinement was irrelevant and thus inadmissible, this Court found that admission of such evidence *would* be appropriate when offered to rebut an inference of future dangerousness in custody. (*Smith*, *supra*, 61 Cal.4th at pp. 58-60.) The Court recognized that a defendant has a "due process right to rebut the prosecutor's evidence and argument suggesting that he would be a dangerous life prisoner." (*Id.* at p. 60.)

omitted, quoting Evid. Code, § 354, subd. (a).) As explained in *People v. Schmies* (1996) 44 Cal.App.4th 38, 53, "[a]n offer of proof should give the trial court an opportunity to change or clarify its ruling and in the event of [an] appeal [,] would provide the reviewing court with the means of determining error and assessing prejudice. [Citation.] To accomplish these purposes an offer of proof must be specific. It must set forth the actual evidence to be produced and not merely the facts or issues to be addressed and argued." Consequently, review of appellant's contention has been forfeited. (*Morrison*, *supra*, 34 Cal.4th at p. 712.)

This Court addressed a similar argument in *People v. Davis* (1995) 10 Cal.4th 463, 502. In *Davis*, the defendant did not seek to impeach a witness with evidence of the underlying misdemeanor conduct of an inadmissible misdemeanor conviction. (*Ibid.*) The Court recognized that subsequent to the defendant's trial, under *People v. Wheeler* (1992) 4 Cal.4th 284, it was held that trial courts had the discretion to admit nonfelonious conduct. (*Davis*, *supra*, 10 Cal.4th at p. 502, fn. 2.) The Court noted that "the outcome in *Wheeler* was not readily foreseeable." (*Ibid.*) The defendant argued that his failure to make an offer of proof at trial should be excused based on the unanticipated outcome of *Wheeler*. (*Ibid.*) This Court disagreed, rejecting the defendant's hypothetical argument and finding that there was no error of which to complain. (*Ibid.*)

Here, just as in *Davis*, "[appellant] cannot claim error in excluding evidence he did not seek to introduce." (*Davis*, *supra*, 10 Cal.4th at p. 502.) "There was no exclusion and therefore no error by the trial court." As in *Davis*, appellant asks this Court "to posit that he *would have* attempted to introduce the evidence, that the prosecution *would have* objected to the evidence as irrelevant and/or inadmissible under Evidence Code section 352, and that the trial court erroneously *would have* sustained the objection." (*Ibid.*) Appellant's hypothetical goes beyond "the record on

appeal's four corners" and must be rejected. (See *Waidla*, *supra*, 22 Cal.4th at pp. 743-744.)

VIII. APPELLANT'S CLAIM OF VINDICTIVE PROSECUTION IS MISPLACED, AS IT IS ENTIRELY UNRELATED TO HIS PENALTY PHASE RETRIAL; IN ANY EVENT, THE CLAIM IS MERITLESS AS THE JAIL RIOT CONVICTIONS WERE NEVER INTRODUCED AT HIS PENALTY PHASE RETRIAL

Following appellant's convictions at the guilt phase of his trial, but prior to the penalty phase retrial, he was charged with and convicted of conspiracy to commit assault (§ 182, subd. (a)(1)), conspiracy to commit vandalism (§ 182, subd. (a)(1)), three counts of resisting an executive officer (§ 69), and two counts of assault (§ 245, subd. (a)(1)) in a separate case, Los Angeles County Superior Court case number BA331315. (Opn. in case no. B212538, at p. 1.)[29] These charges stemmed from a jail riot appellant was involved in while awaiting trial in the instant matter. (*Ibid.*)

Appellant contends that the decision to proceed on the jail riot charges by the prosecutor, only after the first penalty phase trial hung, constitutes vindictive prosecution and that it was a violation of due process to try the riot case before the retrial of the penalty phase. (AOB 142-148.) Appellant's contentions are meritless. First, the contention has been forfeited. Second, there has been no showing whatsoever of vindictiveness as to the penalty phase retrial. Third, there was nothing inappropriate about trying the jail riot case before the penalty phase retrial or introducing evidence of the jail riot as an aggravating factor during the penalty phase retrial, which the prosecutor informed defense counsel of *before* the guilt phase began.

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[29] By separate filing, respondent has requested that this Court take judicial notice of the California Court of Appeal's opinion in case number B212538.

A. The Procedural History of the Jail Riot Charges and the Introduction of This Violent Conduct in the Retrial of Appellant's Penalty Phase

Prior to the commencement of appellant's guilt phase trial on September 26, 2007 (see 11RT 2313-2314), defense counsel was notified that the prosecution would be filing charges related to a jail riot appellant had been involved in while awaiting trial. (See 30RT 5820; Supp. IV 1CT 121.) The guilt phase concluded on October 25, 2007 (see 15CT 3826-3835), and the penalty phase began the next day (see 24RT 4745-4746).

On November 9, 2007, the jury was unable to reach a verdict, and the trial court declared a mistrial. (29RT 5764-5765.) On December 12, 2007, the prosecution informed the court that it was electing to retry the penalty phase and announced itself ready to proceed. (29RT 5767-5770.) At the request of the defense, the penalty phase retrial was continued to February 7, 2008. (29RT 5770-2773.)

On February 21, 2008, again at the request of the defense, the penalty phase retrial was continued to June 4, 2008. (29RT 5789-5793.) Meanwhile, on March 24, 2008, appellant was charged by information with the jail riot charges. (See Opn. in case no. B258565, at p. 6.) The riot case trial was set for June 4, 2008. (See *Ibid.*; see also 30RT 5795.) On June 4, 2008, the trial court decided that the riot case would be tried before the penalty phase retrial, and the riot trial was continued to June 30, 2008. (30RT 5798, 5800.) On June 30, 2008, the riot trial was continued to July 14, 2008. (See Opn. in case no. B258565, at pp. 6-7.)

On July 11, 2008, in his jail riot case (BA331315), appellant filed motions to dismiss the riot charges on the grounds of discriminatory prosecution and "pre-indictment" delay, and to recuse the District Attorney. (Supp. IV 1CT 118-131.) The prosecution filed a response to appellant's motion on July 14, 2008. (Supp. IV 1CT 132-138.) On July 21, 2008, the

trial court heard the motions. In denying appellant's motions, the trial court found that the prosecution had not been vindictive and that appellant had not been "materially prejudiced by the delay in filing." (30RT 5818.) The court recognized that defense counsel had known about the riot matter "for a long time," that it had been identified by the prosecution before the guilt phase of the capital trial as an aggravating factor, and that it had been communicated to the defense that charges stemming from the riot would be filed as a separate case. (30RT 5819; see also 30RT 5821-5822.) Defense counsel conceded that he had known about the charges for a long time. (30RT 5820.)

B. Appellant's Claim of Vindictive Prosecution is Unrelated to the Instant Matter; and There Was No Due Process Violation as the Jail Riot Convictions Were Never Admitted

Petitioner appears to contend that the trial court abused its discretion when it denied his motion to dismiss the jail riot charges on the ground of vindictive prosecution. (AOB 144-145; see *People v. Bracey* (1994) 21 Cal.App.4th 1532, 1540-1541, 1546 [trial court's denial of a motion to dismiss based on a claim of vindictive prosecution reviewed for abuse of discretion].) However, as indicated above, appellant's motion to dismiss was not filed in the instant matter, nor should it have been. Rather, the motion was filed only in appellant's jail riot case (BA331315), which was *a wholly separate matter.* (See Supp. IV 1CT 118-131.) Thus, the error of which appellant now complains is entirely unrelated to the instant matter and inappropriate for inclusion in this appeal. Further, even if appellant were suggesting that the retrial of his penalty phase was the result of vindictive prosecution, he forfeited that claim as it was never raised in *this* matter. To assert a claim of vindictive prosecution on appeal, the claim must have been raised in the trial court by a pretrial motion to dismiss or other objection. (*Ledesma, supra,* 39 Cal.4th at p. 730 [defendant forfeited

vindictive prosecution claim by not making motion in the trial court]; *People v. Edwards* (1991) 54 Cal.3d 787, 827.) Finally, if appellant is suggesting that the penalty phase retrial is actually the focus of his argument, he has failed to show that the prosecution increased the charges; consequently, he has failed to make a showing of vindictiveness. (*People v. Lucas* (2014) 60 Cal.4th 153, 220, disapproved of on other grounds by *People v. Romero* (2015) 62 Cal.4th 1, 53 fn. 19; *Twiggs*, *supra*, 34 Cal.4th at p. 371.) The claim should therefore be rejected.

Regarding appellant's due process claim arising from the introduction of the jail riot charges at the penalty phase retrial, appellant did not object to the admission of the riot convictions as a violation of his due process. Thus, appellant has forfeited this claim. (Evid. Code, § 353; see *Williams*, *supra*, 43 Cal.4th at p. 620; *In re Josue S.*, *supra*, 72 Cal.App.4th at p. 170.) In any event, appellant's claim is meritless because they were not admitted.

Appellant appears to suggest that the trial on the riot charges while his penalty phase retrial was pending, and the subsequent admission of those convictions as an aggravating factor, violated due process. (AOB 147.) However, appellant has not provided support for this contention. In fact, it is well established that at the penalty phase a jury is allowed to consider evidence of the defendant's uncharged criminal activity or convictions that involved the use or attempted use of force or express or implied threats to use force or violence. Thus, the prosecution was allowed to introduce evidence of appellant's participation in the riot, regardless of whether he was separately convicted of those charges. (*People v. Russell* (2010) 50 Cal.4th 1228, 1271; *People v. Bacon* (2010) 50 Cal.4th 1082, 1127; § 190.3, factors (a)-(b).) This includes criminal activity that occurred while appellant was in jail awaiting trial. (See, e.g., *People v. Hughes* (2002) 27 Cal.4th 287, 381-383 [defendant's conduct constituted the crime of possessing a deadly weapon while in jail]; *People v. Hines* (1997) 15

Cal.4th 997, 1056-1057 [same].) Moreover, there is nothing unique or improper about the prosecution's use of appellant's convictions on charges stemming from conduct that occurred while in jail awaiting trial. (*People v. Jackson* (1996) 13 Cal.4th 1254, 1191-1192, 1234-1235 [convictions for rape, kidnapping, escape, and burglary, which arose while defendant awaited trial in his capital matter were properly admitted].) Accordingly, appellants claim must be rejected.

Finally, appellant has not cited to, nor is respondent aware of, anything in the record that shows that the prosecutor introduced the *convictions* arising from the jail riot rather than merely evidence of the underlying conduct, which the prosecutor had previously notified the defense of (see 30RT 5819, 5821-5822). In fact, the record establishes that only seven conviction verdict forms were admitted during the penalty phase retrial, and they consisted solely of the convictions appellant sustained during the underlying guilt phase trial. (See 33RT 6554-6555 [Martin murder verdict form], 6609 [Gonzalez murder verdict form], 6637 [Mendoza murder verdict form, Natividad attempted murder verdict form, Rhee attempted murder verdict form], 6991 [Officer Langarica attempted murder verdict form], 6992 [Officer Baker attempted murder verdict form]; see also 22CT 5724-5728.) Indeed, the trial court instructed the jury on the seven convictions and various related enhancements that it needed to accept the appellant's guilt of, and the riot charges were not included. (See 16CT 4066.)

In sum, despite appellant's suggestion to the contrary, there is absolutely nothing in the record to support the conclusion that the prosecutor proceeded with appellant's jail riot trial in order to secure convictions that would later be admitted during the penalty phase retrial, or that the prosecutor changed the way he planned to introduce appellant's 2005 jail conduct based on the penalty phase mistrial. In fact, it was the

trial court that decided the jail riot charges would be tried before the penalty phase retrial. (*People v. Michaels* (2002) 28 Cal.4th 486, 514-515.) Accordingly, there was no due process violation, and this claim must be rejected.

IX. CALIFORNIA'S DEATH PENALTY DOES NOT VIOLATE THE UNITED STATES CONSTITUTION

Appellant raises several constitutional challenges to California's death penalty statute. (AOB 148-164.) Appellant concedes that this Court has consistently ruled that the death penalty statute does not violate the state and federal Constitutions. (AOB 148.) Respondent respectfully requests this Court to reaffirm its previous decisions upholding the constitutionality of California's death penalty statute and related jury instructions. (See, e.g., *People v. Johnson* (2015) 60 Cal.4th 966, 997.)

A. Section 190.2 is Not Overly Broad

Appellant contends that section 190.2 is unconstitutionally overbroad because it fails to narrow the class of murderers eligible for the death penalty. (AOB 150-151.) This Court has consistently held that section 190.2 adequately narrows the class of murderers eligible for the death penalty, and is not overbroad, under the Fifth, Eighth, and Fourteenth Amendments. (*Johnson, supra*, 60 Cal.4th at p. 997; *People v. Sattiewhite* (2014) 59 Cal.4th 446, 489; *People v. Hoyos* (2007) 41 Cal.4th 872, 926, overruled on another ground by *People v. McKinnon* (2011) 52 Cal.4th 610, 637-643; see also *People v. Curl* (2009) 46 Cal.4th 339, 362; *People v. Salcido* (2008) 44 Cal.4th 93, 166; *People v. Demetrulias* (2006) 39 Cal.4th 1, 43; *People v. Harris* (2005) 37 Cal.4th 310, 365.) Appellant has not advanced any persuasive arguments why this Court should reject its prior holdings.

B. Section 190.3, Factor (a), Does Not Violate the Federal Constitution

Appellant contends that section 190.3, factor (a) is overly broad and permits arbitrary and capricious imposition of the death penalty. (AOB 151-153.) This Court has repeatedly held that section 190.3, factor (a) "does not permit arbitrary and capricious imposition of the death penalty." (*People v. Livingston* (2012) 53 Cal.4th 1145, 1179-1180; accord, *Johnson, supra*, 60 Cal.4th at p. 997.) This Court has found that factor (a) "does not foster arbitrary and capricious penalty determinations" (*People v. Bramit* (2009) 46 Cal.4th 1221, 1248), and rejected the argument that section 190.3 or CALJIC No. 8.85 "are unconstitutionally vague, arbitrary, or render the sentencing process unconstitutionally unreliable under the Eighth and Fourteenth Amendments . . . ." (*People v. Moon* (2005) 37 Cal.4th 1, 41-42; *People v. Kipp* (1998) 18 Cal.4th 349, 381.)

Because section 190.3, factor (a) requires the jury to consider the circumstances of a defendant's capital murder for the purpose of making an individualized determination whether to impose death or life without possibility of parole penalty, it is not a violation of the Eight Amendment when a defendant is already determined to be in a narrow class of death-eligible murderers. (*People v. Bacigalupo* (1993) 6 Cal.4th 457, 478-479; accord, *Johnson, supra*, 60 Cal.4th at p. 997; *Livingston, supra*, 53 Cal.4th at pp. 1179-1180; *People v. Thomas* (2011) 52 Cal.4th 336, 365; *People v. Lee* (2011) 51 Cal.4th 620, 653.) Appellant has not advanced any persuasive arguments to the contrary.

C. California's Death Penalty Statute Is Not Constitutionally Defective for Failing to Provide Proper Safeguards

Appellant contends that the California death penalty statute is unconstitutional for failing to set provide proper safeguards. (AOB 153-

162.) Appellant fails to offer any persuasive argument for this Court to review its prior decisions.

1. The fact that the penalty need not be determined beyond a reasonable doubt does not violate the state and federal constitutions

Appellant contends that any determination on the existence of aggravating circumstances or that aggravating circumstances outweigh the mitigating circumstances made by a jury must be found beyond a reasonable doubt before imposing the death penalty. (AOB 154-161.) He concedes that this Court has held to the contrary. (AOB 151.) Nevertheless, he argues that the United States Supreme Court's decisions in *Apprendi v. New Jersey* (2000) 530 U.S. 466 [120 S.Ct. 2348, 147 L.Ed.2d 435], *Blakely v. Washington* (2004) 542 U.S. 296 [124 S.Ct. 2531, 159 L.Ed.2d 403], *Ring v. Arizona* (2002) 536 U.S. 584 [122 S.Ct. 2428, 153 L.Ed.2d 556], and *Cunningham v. California* (2007) 549 U.S. 270 [127 S.Ct. 856, 166 L.Ed.2d 8560 cast doubt on this Court's prior holdings. (AOB 155.) Appellant fails to set forth any persuasive arguments for this Court to revisit its prior holdings. (*People v. Farley* (2009) 46 Cal.4th 1053, 1133; accord, *Livingston*, *supra*, 53 Cal.4th at p. 1180.)

This Court has held that the prosecution is not required to prove beyond a reasonable doubt the existence of any aggravating circumstances or that the aggravating circumstances outweigh the mitigating circumstances. (*People v. Weaver* (2012) 53 Cal.4th 1056, 1092; *Lee, supra*, 51 Cal.4th at p. 651.) The recent decisions made by the United States Supreme Court "interpreting the Sixth Amendment's jury trial guarantee do not alter these conclusions." (*Weaver*, *supra*, 53 Cal.4th at p. 1092, citations and quotation marks omitted; *Lee*, *supra*, 51 Cal.4th at pp. 651-652.) Further, this Court has rejected this claim:

> Finally, section 190.3 and the pattern instructions are not constitutionally defective for failing to assign the state the

> burden of proving beyond a reasonable doubt that an aggravating factor exists, that the aggravating factors outweigh the mitigating factors, and that death is the appropriate penalty. As defendant acknowledges, we have repeatedly rejected these arguments. [Citation.] The recent decisions of the United States Supreme Court interpreting the Sixth Amendment's jury trial guarantee [*Cunningham v. California* (2007) 549 U.S. 270; *United States v. Booker* (2005) 543 U.S. 220; *Blakely v. Washington* (2004) 542 U.S. 296; *Ring v. Arizona* (2002) 536 U.S. 584; *Apprendi v. New Jersey* (2000) 530 U.S. 466] do not compel a different result. [Citation.]

(*Bramit*, *supra*, 46 Cal.4th at pp. 1249-1250 & fn. 22.)

2. Intercase proportionality is not constitutionally required

Appellant contends that the failure to require a comparative intercase proportionality review violates the federal Constitution. (AOB 161-162.) This Court has previously held to the contrary. (*Livingston*, *supra*, 53 Cal.4th at p. 1180; *People v. Hajek and Vo* (2014) 58 Cal.4th 1144, 1230; *Farley*, *supra*, 46 Cal.4th at p. 1134.)

3. The jury is not constitutionally required to make written findings

Appellant contends that the failure to require the jury to make written specific findings deprived him of his constitutional rights. (AOB 154.) Appellant offers no persuasive argument for this Court to revisit its prior holdings.

This Court has consistently held that the Eighth and Fourteenth Amendments do not require the jury to make written findings regarding aggravating factors. (*McKinzie*, *supra*, 54 Cal.4th at p. 1364; *People v. Gonzales* (2011) 51 Cal.4th 894, 957; *Riggs*, *supra*, 44 Cal.4th at p. 329; *Hoyos*, *supra*, 41 Cal.4th at p. 926; *Harris*, *supra*, 37 Cal.4th at p. 488; *People v. Cornwell* (2005) 37 Cal.4th 50, 105; *People v. Jones* (2003) 29 Cal.4th 1229, 1267.) The failure to require written findings regarding

which aggravating factors were found and considered does not violate defendant's constitutional right to a meaningful appellate review. (*People v. Jones* (2013) 57 Cal.4th 899, 981; *McKinzie, supra*, 54 Cal.4th at p. 1364.) Pursuant to section 190.4, subdivision (e), a trial judge must ultimately justify the imposition of a death sentence and enter the findings on the Clerk's minutes; thus, meaningful appellate review of each sentence is made possible, even in the absence of written findings by the jury. (*People v. Diaz* (1992) 3 Cal.4th 495, 576, fn. 35.) Accordingly, appellant's claim must be rejected.

D. California's Imposition of the Death Penalty Does Not Violate International Law

Appellant contends that this Court should revisit the constitutionality of California's death penalty because the international community has overwhelmingly rejected the death penalty. (AOB 162-164.) This Court has repeatedly held that California's death penalty does not violate international law or the Eighth and Fourteenth Amendments to the federal Constitution. (*Johnson, supra*, 60 Cal.4th at p. 997; *Livingston, supra*, 53 Cal.4th at p. 1180.)

The death penalty as applied in California is not rendered unconstitutional through operation of international law and treaties. (*People v. Nelson* (2011) 51 Cal.4th 198, 227; *People v. Mills* (2010) 48 Cal.4th 158, 215.) Nor do international norms require the application of the death penalty to only the most extraordinary crimes. (*People v. Blacksher* (2011) 52 Cal.4th 769, 849.) As this Court noted, the western European nations that no longer have capital punishment abolished it long before the United States Supreme Court upheld capital punishment against an Eighth Amendment challenge. And the recent United States Supreme Court's decision not to impose the death penalty on defendants who committed their crimes after their 15th birthday but before their 18th birthday does not

compel this Court to find capital punishment unconstitutional per se because "no national consensus has emerged against the imposition of capital punishment in general." (*Moon*, *supra*, 37 Cal.4th at p. 48, citing *Roper v. Simmons* (2005) 543 U.S. 551, 567 [125 S.Ct. 1183, 161 L.Ed.2d 1].) Ultimately, California's death penalty does not violate international law, as international law does not prohibit a sentence of death rendered in accordance with state and federal constitutional and statutory requirements. (*People v. Hawthorne* (2009) 46 Cal.4th 67, 104; *People v. Lewis* (2008) 43 Cal.4th 415, 539; *Hoyos*, *supra*, 41 Cal.4th at p. 925.)

CONCLUSION

For the foregoing reasons, respondent respectfully requests that this Court affirm the judgment of conviction and sentence of death.

Dated: December 13, 2016

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 **33,717** words.

Dated: December 13, 2016

KAMALA D. HARRIS
Attorney General of California

SETH P. MCCUTCHEON
Deputy Attorney General
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DECLARATION OF SERVICE

Case Name: **People v. Timothy J. McGhee**

No.: **S169750**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business.

On **December 13, 2016**, I served the attached **RESPONDENT'S BRIEF** by placing a true copy thereof enclosed in a sealed envelope in the internal mail system of the Office of the Attorney General at 300 South Spring Street, Suite 1702, Los Angeles, CA 90013, addressed as follows:

The Honorable Robert J. Perry, Judge
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On **December 13, 2016**, I served the attached **RESPONDENT'S BRIEF** by transmitting a true copy via electronic mail using the email addresses as follows:

Patrick Morgan Ford, Attorney at Law
Via Email: ljlegal@sbcglobal.net

Hoon Chun, Deputy District Attorney
Via Email: Courtesy Copy

On **December 13, 2016**, I caused one **(1)** original and eight **(8)** copies of the **RESPONDENT'S BRIEF** in this case to be delivered to the California Supreme Court at 350 McAllister Street, First Floor, San Francisco, CA 94102-4797 by **FEDEX, Tracking # 805521697862**.

On **December 13, 2016**, I caused one electronic copy of the **RESPONDENT'S BRIEF** in this case to be submitted electronically to the California Supreme Court by using the Supreme Court's Electronic Document Submission system.

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 **December 13, 2016**, at Los Angeles, California.

Nora Fung	
Declarant	Signature

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