IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff and Respondent,

v.

RONALD BRUCE MENDOZA,
Defendant and Appellant.

S065467

DEATH PENALTY CASE

Los Angeles County Superior Court No. KA032117
The Honorable Alfonso M. Bazan, Judge

RESPONDENT'S BRIEF

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STATEMENT OF THE CASE

On September 3, 1996, in an information filed by the District Attorney of Los Angeles County in case number KA032117, appellant was charged with one count of murder. (Pen. Code, § 187, subd. (a).)[1/] It was further alleged that the victim, Pomona Police Officer Daniel Tim Fraembs, was a peace officer who was intentionally killed while engaged in the performance of his duties, and that appellant knew and reasonably should have known this. (§ 190.2, subd. (a)(7).) It was also alleged that appellant committed the murder for the purpose of avoiding and preventing a lawful arrest and perfecting and attempting to perfect an escape from lawful custody (§ 190.2, subd. (a)(5)), and that he personally used a firearm in the commission of the murder (§ 12022.5, subd. (a)(1)). Finally, it was alleged that appellant intentionally killed the victim while lying in wait (§ 190.2, subd. (a)(15)). (2CT 506-508.)

Appellant pleaded not guilty and denied the special allegations. (2CT 510.) Jury selection commenced on July 16, 1997, and the jury was

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1. Unless otherwise noted, all further statutory references will be to the Penal Code.

empaneled on July 23, 1997. (12CT 3390-3391, 3411-3413.) On August 6, 1997, appellant's motion for judgment of acquittal pursuant to section 1118.1 was heard and denied. (13CT 3534-3535.) On August 8 and 11, 1997, appellant's renewed motions for judgment of acquittal were heard and denied. (13CT 3540, 3542-3543.) The jurors were instructed and began deliberations on August 12, 1997. (13CT 3544-3545.) On August 13, 1997, the jury found appellant guilty as charged, and found all of the special allegations to be true. (13CT 3629-3630, 3636-3637.)

The penalty phase commenced on August 18, 1997. (13CT 3642-3643.) The jurors were instructed and began deliberations on August 21, 1997. (13CT 3653.) On August 22, 1997, the jury rendered a verdict of death. (13CT 3662, 3668-3669.)

On October 24, 1997, the trial court heard and denied appellant's motion for a new trial, his motion to modify the conviction by reducing it from first degree to second degree murder or by striking all of the special circumstances, his motion to reduce the sentence to life without the possibility of parole, and his motion to continue the sentencing hearing.[2/] The trial court imposed the death sentence. As to the section 12022.5, subdivision (a), finding, the court sentenced appellant to the high term of ten years, which it stayed pending execution of the death penalty. (13CT 3711-3715, 3730-3734, 3736-3743.)

This appeal is automatic. (§ 1239; 13CT 3742.)

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2. The trial court purported to strike the lying-in-wait special circumstance pursuant to section 1385. (See 18RT 2875, 2913.) However, pursuant to section 1385.1, the court was not authorized to strike the special circumstance after it had been found true by the jury. Respondent will address this point in Argument I, and will request that this Court order that the Judgment (13CT 3711-3715), the Abstract of Judgment (13CT 3736), and the Commitment (13CT 3737-3743) be modified to reflect the lying-in-wait special circumstance, and that copies be forwarded to the Department of Corrections and Rehabilitation.

STATEMENT OF FACTS

In the early morning hours of May 11, 1996, appellant, who was on parole and was armed with a handgun, shot Pomona Police Officer Daniel Tim Fraembs once in the face, killing him. Appellant disposed of his gun and fled to Arizona.

I. Guilt Phase Evidence

A. Prosecution's Case-In-Chief

1. Significant Events Prior To The Murder Of Officer Fraembs

a. Appellant Is Released On Parole On Certain Terms And Conditions

Carl Hallberg, a parole agent for the California Youth Authority ("CYA"),[3/] had been responsible for supervising appellant on parole since January 1992. Prior to his release on parole from a CYA institution in November 1995, appellant was advised by a member of the parole board regarding his conditions of parole. The conditions of parole included, among other things, that appellant not possess any weapon or knowingly associate with gang members. Appellant signed a form prior to leaving the institution which stated that he understood the conditions of parole. (11RT 1600-1609, 1612-1615; 12CT 3455; see Peo. Exh. Nos. 34, 35.)

Within 48 hours of his release from the CYA institution, appellant met with parole agent Hallberg. Agent Hallberg conducted a 15-minute conversation with appellant regarding all the conditions of parole, including the two conditions mentioned previously. Agent Hallberg discussed with appellant

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3. The former California Youth Authority is now the Department of Corrections and Rehabilitation, Division of Juvenile Justice. (See *In re Christian G.* (2007) 153 Cal.App.4th 708, 711.)

the consequences of what would happen if he violated the conditions of parole. Appellant was specifically informed that for a violation of a condition of parole he would be returned to a CYA institution for one year and seven months, or 575 days. Appellant could also spend an additional one year in custody if found in possession of a weapon, a misdemeanor. Appellant signed a form indicating he understood the conditions of parole. (11RT 1604, 1608, 1612-1617, 1620, 1622-1623, 1628-1630; see Peo. Exh. No. 36.)

b. Appellant Purchases A Haskell .45-Caliber Handgun "To Take Care Of Business"

Approximately 15 days before the murder of Police Officer Fraembs, appellant purchased a Haskell .45-caliber handgun from Dean Coleman, a convicted felon and gun dealer who was selling firearms after his ATF license had expired. At about noon on the day of the sale, Coleman received a telephone call from appellant's mother, whom he had previously dated in the 1980's. Appellant's mother, who was aware Coleman sold firearms, put appellant on the line with Coleman. Appellant indicated that he "was having some problems" and "needed something to take care of business." Appellant wanted to know "if [Coleman] had something." The only firearm which Coleman had available was a Haskell .45-caliber handgun -- a weapon, according to Coleman, "for someone who wants to purchase a gun possibly for defense but does not want to invest a lot of money in it." They agreed to a price of $155. Approximately 60 to 90 minutes later, appellant arrived at Coleman's house in Pomona. Appellant was sitting in the passenger seat of a car. Coleman retrieved the Haskell .45-caliber handgun, which was still in the manufacturer's box, walked out to the car at the curb in front of his house, and handed the weapon to appellant through the passenger window. Appellant gave Coleman $155. There were no bullets with the weapon. (10RT 1432, 1438-1443, 1447-1450, 1453-1462; see Peo. Exh. Nos. 30, 31a [photographs

depicting the left and right sides of a similar Haskell .45-caliber handgun from the Los Angeles County Sheriff's Crime Lab].)

Jason Meyers was the person who drove appellant to Coleman's residence to pick up the gun. Meyers was not a member of appellant's Happy Town gang, but Meyers associated with members of the gang because he had grown up with them or had been in jail with them. Appellant had asked Meyers to give him a ride to go buy a gun, and Meyers had done so. (8RT 1111-1115, 1117-1119.) Appellant wanted to buy the gun for protection, because rival gang members had been driving through the Westmont neighborhood, yelling out gang names. Appellant did not have a car, and Meyers "gave rides to everybody." (8RT 1116-1117.) Meyers drove appellant to a single-family house in an area designated by appellant; appellant told him where to stop. A short, heavy Black man (Dean Coleman) came to the passenger side of the car, where appellant was sitting. They spoke and the man went into the house, came back outside, pulled a box out from underneath his shirt, and placed it on appellant's lap. On their way home, appellant told Meyers that he had paid $150 for the gun. (8RT 1119-1126.) The gun was a black .45-caliber semiautomatic pistol. (8RT 1127.)

c. Jason Meyers Buys .45-Caliber Bullets For The Firearm, As Appellant Did Not Have Proper Identification

Appellant asked Meyers to take him to buy bullets and asked Meyers how much he thought the bullets would cost. Meyers agreed to buy the bullets because appellant did not have a California driver's license or identification card with him and it was necessary to have one to purchase bullets. Meyers suggested that they go to a Big 5 Sporting Goods store to buy the bullets, as it was nearby. Meyers wanted to drop the gun off at appellant's house first because he thought that if they were pulled over by the police, it would look

bad to have a gun in the car. Meyers drove to appellant's house, where appellant went inside and quickly returned without the gun. Meyers drove to Big 5. Appellant and Meyers went inside the store and looked at the ammunition. Appellant selected one type of ammunition, but Meyers told him, "No. Those are cheap," and suggested a better brand. The bullets he suggested came in a green and yellow box; Meyers believed the brand was Remington. The bullets were .45-caliber. Appellant gave Meyers money to purchase the bullets. After buying the bullets, Meyers took appellant back to appellant's home. (8RT1129-1136.)

People's Exhibit Number 15, a green and yellow box for Remington .45-caliber bullets, looked like the box of ammunition that Meyers had purchased for appellant. (8RT 1129-1136.) People Exhibit Number 15 was a box of Remington .45-caliber "round-nose" or "ball" ammunition for an automatic handgun, of a type sold by Big 5 Sporting Goods. In May 1996, this box of ammunition cost $22.99. A person buying ammunition would have to show identification proving that he was at least 21 years old, but at that time, the store did not keep a record of who had purchased ammunition. Big 5 destroyed purchase records after six months. (8RT 1199-1206.)

Appellant sometimes left the gun at "Tank's" house.[4/] When he did so, if Meyers was there, he would make sure that the gun was put away and that no one else got it. (8RT 1174, 1177-1178.)

d. Appellant's Relationship With Johanna Flores

Johanna Flores was 19 years old at the time of trial. She was divorced and had a two-year-old daughter from this marriage. (6RT 819-820.) In February or March 2006, Flores met appellant, also known as "Boxer," when

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4. "Tank" was Raul Arvizu. (8RT 1209.) However, because he was referred to at trial almost exclusively as "Tank," respondent will use that appellation in this brief to avoid confusion.

she was at his Grier Street home with her friend Chantal Cesena. Joseph "Sparky" Cesena was Chantal's uncle or cousin.[5] (6RT 820-824; 8RT 1211, 1239.)

At that time, Flores lived in a mobile home, within walking distance of appellant's home, with her daughter, her sister, and her brother-in-law. (6RT 827-829.) Appellant lived with his mother, Delores "Lola" Delgado, his stepfather Harry Lukens, appellant's brother Angel, who was also known as "Bandit," and their dog, "Trouble."[6] (6RT 829-830, 833; 7RT 962-963; 8RT 1213.) Appellant and Angel were members of the Happy Town street gang. (6RT 830; 7RT 1077-1079; 8RT 1179, 1213.)

During this first meeting, while they were talking with other friends at appellant's home, appellant gave Flores his pager number and asked her to call him the following day. (6RT 824-825.) During the next three weeks, Flores paged appellant 50 or 60 times; he always called her in response to a page. (6RT 830-831.) After three weeks, some telephone conversations, and several visits to each other's homes, Flores and appellant began a romantic relationship. (6RT 826-827.) Flores was also having a romantic relationship with a man named Carlos who lived in Baldwin Park. (6RT 832.) While Carlos was her boyfriend, Flores's relationship with appellant was not as serious. (6RT 832-833.) Appellant referred to Flores as "Johanna" or "Goon."[7] (6RT 837; 7RT 1085.) By May 11, 1996, Flores and appellant had been together on about

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5. In order to avoid confusion, further references to Joseph "Sparky" Cesena will refer to him as "Cesena," while further references to Chantal Cesena will refer to her as "Chantal."

6. Again, to avoid confusion, further references to appellant's brother will be to "Angel."

7. Flores was not a Happy Town gang member or a member of any other gang; "Goon" was not a gang moniker, but rather a nickname given to her by an old friend. (6RT 837-838; 7RT 953-955, 961.)

40 or 50 occasions. (6RT 839; 7RT 937.) Appellant also had another relationship, with Brandy Valore, with whom he had a baby daughter. Valore lived in Lake Havasu, Arizona. (6RT 838-839; 7RT 965.)

Flores and appellant continued to see each other about three to four times a week. Flores only saw appellant without his pager on one or two occasions. (6RT 833-834.) On one of these occasions, the pager was being repaired; on the other, appellant's brother was holding the pager while in the same room at their home with appellant. (6RT 840-841.) Appellant carried the pager clipped to a pocket. (6RT 841.) The pager was clear, with a digital readout on top. A person calling the pager could leave a voice mail message. People's Exhibit Number 9 looked like appellant's pager. (6RT 841-843.) The phone number for appellant's pager was 448-4099. (6RT 844.)

2. The Murder Of Officer Fraembs And The Events Immediately Preceding The Murder

On the evening of May 10, 1996, Flores worked at Taco Bell from 4 p.m. until 11 p.m. (6RT 845-846.) Appellant called Flores twice, near the end of her shift, and asked her to meet him and bring him some food at Tank's house. Tank was another member of the Happy Town gang; he lived on 9th Street, about a block from appellant's home. (6RT 846-847; 8RT 1117, 1179, 1212.) At first, Flores told appellant that she had plans to see someone else. When her friend Chantal picked up Flores from work, they discussed whether to go to Tank's house. Flores did not want to go there, but Chantal was planning to meet someone there and wanted to go there. Flores agreed to go. (6RT 847-848.)

When Flores and Chantal arrived at Tank's home, appellant and Jasper, another Happy Town gang member, were already there. Tank was not at home; he was in Mexicali. (6RT 849-850; 8RT 1173.) Appellant wore black jeans, a white shirt, and a black bomber-style jacket with an orange lining, small

pockets, and a front zipper. He also wore Nike cross-trainer athletic shoes. (6RT 849-850.) Flores wore her Taco Bell uniform, i.e., black pants, black shoes, a purple-and-blue-striped Taco Bell shirt, and a hat. (6RT 850.)

Appellant, Flores, Jasper, and Chantal sat talking together for a while. Appellant and Flores then went into another room, where they had sex. Afterward, they dressed in the same clothing they had had on previously and rejoined Chantal and Jasper. (6RT 850-852.) Chantal received a call from Cesena, asking her to pick him up. Chantal told him that she had to do something else. Chantal left with Jasper. (6RT 852, 855-856.)

Appellant received a call on his pager. When Flores asked who it was, appellant first said, "Nobody." When Flores continued to ask who it was, appellant answered, "It's Brandy." Flores became angry and told appellant she wanted to hear Brandy's voice mail message. Although appellant had told Flores that Brandy was just his baby's mother, when appellant let her listen to the message, Flores thought it sounded as though Brandy thought she and appellant were still together. Flores was angry that Brandy was calling appellant, because appellant was going out with Flores at that time. Flores and appellant argued. During the argument, Flores hit appellant on his left side, near his waistband. Her hand hit a gun that appellant had tucked into his waistband. Although the gun had been covered by appellant's jacket, Flores saw it when appellant removed it from his waistband to check it. (6RT 852-857, 862.)

Flores had seen appellant with this gun before. The gun was big, long, and black. Appellant had told her that it was a .45-caliber gun. (6RT 857.) A Haskell .45-caliber semiautomatic pistol belonging to the Sheriff's Firearms Division looked the same as appellant's gun. (6RT 857-861.)

After things settled down between appellant and Flores, appellant received a page from Cesena. Appellant and Flores both spoke with Cesena on

Tank's telephone. Appellant told Cesena that he would meet him by the railroad tracks. Appellant told Cesena, "Hurry up, because I'm strapped. I don't want to get busted." "Strapped" meant "carrying a gun." Appellant asked Flores if she was going to accompany him. Flores left with appellant to meet Cesena. Flores was still wearing her Taco Bell uniform, and was also wearing a black, white, and gray Raiders jacket. Appellant still had his gun and his pager. (6RT 862-866, 871; 7RT 1011-1012.) Flores did not see appellant drink alcohol or take drugs that night, and he appeared to be sober throughout the evening. (7RT 941-943, 1015.)

Appellant and Flores walked on 9th Street to Westmont Avenue and turned right on Westmont Avenue, walking toward Mission Boulevard. As they walked on Westmont Avenue, they encountered Jason Meyers, Cherie Hernandez, and Elva Arambula,[8] who were coming from the opposite direction, returning to Alva's house[9] after a trip to the 7-Eleven at Mission Boulevard and Highway 71. Appellant requested a cigarette. When Meyers offered him one, appellant said, "Na, na," and asked Hernandez for a cigarette. Hernandez gave appellant a cigarette and also lit it for him. Flores was annoyed; she called appellant names and hit him. The two groups then moved on, away from each other. (6RT 866-871; 7RT 1077-1089; 8RT 1093-1102, 1158, 1208, 1210, 1213-1222; see 12RT 1873-1876, 1879-1885.)

Flores and appellant walked from Westmont Avenue to Denison Street[10] to Mission Boulevard, where they crossed the street in a crosswalk and

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8. Hernandez and Arambula were not gang members. (8RT 1119.)

9. Arambula lived on 9th Street, about four or five houses from Tank's house. (8RT 1094-1096, 1210.)

10. Although the name of this street appears as "Dennison" in the Reporter's Transcript, according to the Thomas Guide Street Guide and Directory for Los Angeles and Orange Counties, 1996 Edition, page 640, section E-3, the name of the street is actually "Denison."

continued walking, now on Humane Way. They walked toward the railroad tracks to meet Cesena. However, before they reached the tracks, Cesena appeared from a small pathway through some bushes near a large building with a big smokestack. Cesena wore gray khaki pants, a white shirt, a striped gray-and-black sweater, and Nike Cortex shoes. Cesena had a knife. (6RT 871-876, 878.)

Flores expected to walk with appellant and Cesena back to Tank's house, where the three would "hang out." As the three walked back down Humane Way toward Mission Boulevard, Flores walked next to appellant and Cesena walked behind them and a little to the side. As they walked, a bright light came on from behind them, illuminating the ground in front of them. Appellant looked back over his left shoulder; Flores and Cesena also looked back. Flores saw a police officer in a police patrol car, driving slowly down the street. (6RT 874-880.)

Appellant said, "Oh, shit, the jura." "Jura" meant "the cops." Appellant had told Flores on a prior occasion that he was on parole and that he "couldn't go back" to jail.[11/] (6RT 879-881.) The police car came to a stop, still behind appellant, Flores, and Cesena, on the same side of the street where they were walking. (6RT 880.) The officer driving the car, Pomona Police Officer Daniel Tim Fraembs, who was the car's sole occupant, got out of the patrol car, leaving the spotlight turned on and leaving the driver's door open. (5RT 696; 6RT 881.) Flores, appellant, and Cesena turned toward Officer Fraembs. Appellant stood next to Flores, shoulder-to-shoulder; Cesena was now in front of them, closer to the officer. (6RT 882.) Appellant said, "Oh, shit. I got the gun." Flores told appellant to run. She said this because she did not want

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11. Also on a prior occasion, appellant had told Flores, referring to another Pomona police officer, "He's just a fucking pig." (6RT 923; 7RT 1005-1011.)

appellant to get into trouble, "do anything stupid," or go back to jail. Cesena also told appellant, "Run, esse, run."[12] (6RT 881, 883-885.)

Officer Fraembs asked, "How are you guys doing tonight?" The officer was "real nice." Unlike some police officers, he was neither mean nor sarcastic. He seemed to Flores to be stopping the trio "for a curfew check, nothing major." (6RT 882-883.) Appellant said something like, "What the hell are you stopping us for?" or "What are you stopping us for?" Appellant "had an attitude." His manner and demeanor were not nice; he was being "rude" and "a jerk." (6RT 885-886; 7RT 1013.)

Officer Fraembs told appellant and Flores, "Why don't you have a seat right there," indicating the curb. He asked Cesena, who was closest to him, to step over to the patrol car. Cesena went to the driver's side of the car and put his hands on the hood. Officer Fraembs stood behind Cesena and patted him down. (6RT 885-889.)

Appellant and Flores were holding hands. As Officer Fraembs patted down Cesena, appellant slowly moved behind Flores and draped his left arm over her shoulder, leaving his right hand free. Appellant was very close behind Flores, with his chest against her back. Appellant and Flores walked toward the street. Appellant leaned forward, slowly pushing Flores toward the curb, forcing her to step off the curb. Flores felt appellant slide his hand down between himself and the small of Flores's back. Appellant moved Flores toward Officer Fraembs, who was still patting down Cesena. After taking one or two steps toward the officer, appellant pushed Flores aside, toward the hood of the patrol car, closer to the passenger side of the car. Flores was about six or seven feet away from Officer Fraembs. (6RT 888-893, 897-898; 7RT 1030-1035.)

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12. "Esse" was, like "home boy," a slang term for one gang member to call another member of the gang. (6RT 884.)

Flores turned to look back at appellant. Appellant was holding his gun in both hands, with his arms outstretched. He took one or two steps toward Officer Fraembs, pointing the gun at the officer's head from a distance of about two and a half feet.[13/] Appellant fired the gun one time, shooting Officer Fraembs while the officer was still patting down Cesena. Officer Fraembs put his arm out toward Flores, then fell to the ground, landing on his side near the open driver's door of the patrol car, and rolled over onto his back. (6RT 893-900, 903-904.)

During their encounter, Officer Fraembs never took any aggressive action toward appellant. (6RT 896.) Nor did appellant appear to be panicked, except when he had first seen the light from the police car and after he shot Officer Fraembs, when he appeared scared that he would be caught. (7RT 1030-1035, 1037-1038.)

After shooting Officer Fraembs, appellant pointed the gun at Flores's upper torso. Appellant asked Flores, "Are you going to say anything?" Flores responded, "No, I didn't see nothing, I didn't hear nothing, I don't know nothing." Appellant said, "I'm going to ask you again," and again asked if she was going to say anything. Flores took his threat seriously. She again replied that she "didn't see anything, hear anything or know anything." Appellant said, "Run." (6RT 900-901, 918-919; 7RT 943.)

Flores froze for a minute. Appellant ran down the street, toward Mission Boulevard. Flores started running on the sidewalk, in the same direction, behind appellant. She saw appellant running across the street, and lost sight of him shortly thereafter when he ran down another street. Appellant did not look back at Flores and did not wait for her to catch up with him. Cesena had already run away, back toward the bushes he had earlier emerged from, as soon as appellant shot Officer Fraembs. (6RT 901-902, 913-914.) Flores did not see

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13. Appellant was "a lot taller" than Officer Fraembs. (6RT 897.)

appellant discard the gun as he ran from the scene. (6RT 902-903.)

As she ran, Flores tripped on a raised portion of the sidewalk and fell to the ground, bruising her knees and scuffing her pants. (6RT 904-905, 910, 912, 914-915.) When Flores was running on Denison Street, she began hearing sirens and ran faster. She was scared and did not know what to do. (6RT 918-920.) When Flores reached her home, her daughter, her sister, and her sister's boyfriend were at home. Flores went to bed but could not sleep. She did not call 911 or the police to report the shooting, because she was afraid that appellant and his gang would do something to her. When the sun came up, Flores's sister got up and Flores told her what had happened. (6RT 920-921, 933; 7RT 938.)

3. The Police Respond To The Crime Scene

At approximately 1:37 a.m. on Saturday, May 11, 1996, Officer Horace Blehr was working at the dispatch center of the Pomona Police Department when he received a 911 call from a woman who said that there was "an officer down" in the vicinity of Mission Boulevard and Humane Way. Officer Blehr immediately gave this information to a dispatch officer, who broadcast the information to police units in that area.[14/] (5RT 653-660.)

Officer Michael Olivieri and his partner, Officer Jennifer Wickman, were on uniformed patrol in the area and immediately proceeded at high speed to Mission Boulevard and Humane Way in response to the police dispatch; they were the first officers to arrive at the scene, within 30 to 45 seconds of receiving the dispatch call. (5RT 689-693, 709.) When they arrived, they found a police car parked near the curb. The driver's door was open, the engine

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14. A tape recording of the 911 call and the police dispatch (Peo. Exh. No. 1) was played for the jurors, who were also provided with transcripts of the tape (Peo. Exh. No. 2). (5RT 660-664, 685-686, 704-705.) The 911 call originated from a phone located at 2207 Valley Boulevard. (5RT 665.)

was running, the headlights were turned on, and the spotlight on the driver's side was turned on, pointing at the sidewalk. The red and blue lights in the light bar on top of the car were not activated. (5RT 694-697, 733-734; 8RT 1268; 9RT 1279-1280.)

Officer Fraembs was lying on his back in the roadway just in front of the driver's side of the car. Officer Fraembs was in full police duty uniform, wearing a blue uniform, badge, and gun belt. He had a gunshot wound to his face, with a large pool of blood under his head. What appeared to be brain matter and a bone fragment were located near the back of his head. His hands were "frozen" about an inch above his duty belt. Officer Fraembs's gun was in its holster, which was snapped shut. His baton was also in its holster, secured to his belt. When Officer Olivieri tried to talk to Officer Fraembs, the downed officer did not respond. (5RT 696-698, 701-702; 9RT 1282, 1284.) Officer Olivieri found a spent .45-caliber shell casing (Peo. Exh. No. 19a) on the ground south of Officer Fraembs's body, about eight to twelve feet from Officer Fraembs's feet.[15/] (5RT 698-699, 714, 732-735, 746, 749-750; 8RT 1266, 1270; see 13RT 1843-1952.)

Numerous other police units responded quickly to the scene. The crime scene was contained and a perimeter was set up. (5RT 705-706, 723-731, 735-736, 765-768.) There was an abandoned incinerator near the crime scene, within the police perimeter. (5RT 706-708, 729.) This was an industrial area. (5RT 708.) Sergeant Dale LaFleur, the swing shift field supervisor, determined that Officer Fraembs was dead. (5RT 723, 732.)

During a search of the area, the police tightened the perimeter, working

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15. When a bullet is fired from a .45-caliber gun, the projectile shoots out of the barrel toward the target, while the shell casing ejects from the side of the gun, usually landing approximately eight to ten feet away, though it might bounce a few feet further if it lands on concrete. (5RT 742-743, 751; 9RT 1292.)

their way back in toward the location of Officer Fraembs's body. (6RT 769-772.) Officers found that the gates surrounding the abandoned incinerator were unlocked. Because of the thick foliage surrounding the incinerator, a police dog was sent in to perform a search. Officer Smith announced that the dog was being released, but no one appeared. When the dog was released, he went straight into the bushes underneath the incinerator building. A few seconds later, the dog growled and a man yelled, "Get him off, puto, get him off." The police found Cesena underneath an elevated concrete slab, wrestling with the dog. The dog handler called off the dog and the officers ordered Cesena to come out. Cesena followed their directions. (6RT 773-778.)

Cesena wore a baggy white T-shirt, baggy gray pants, and tennis shoes. There was vegetation debris on his clothing. His head was shaved and he had numerous scratches on his arms and face. He wore a knife sheath on his belt, but there was no knife in the sheath. When the officers handcuffed Cesena and moved him to a grassy area, he complained that he had difficulty walking, as he had been shot in the leg on an earlier occasion. (6RT 780-784; 9RT 1287-1290.) A knife was found in the vegetation in the vicinity of the incinerator, which fit into the sheath Cesena wore. (9RT 1288-1291.)

Los Angeles County Deputy Sheriff Lynn Reeder was a homicide investigator assigned to the crime scene investigation in this case. Deputy Reeder arrived at the crime scene at 4 a.m. The area had been cordoned off. (8RT 1245-1247.) Deputy Reeder recovered a pager (Peo. Exh. No. 9) at the crime scene and gave it to a crime lab deputy at the scene. The pager was a plastic Motorola pager; the case bore the numbers B.S.T. 1133627. When Deputy Reeder saw the pager on the sidewalk and knelt to look at it, it was active and vibrating. The words "The King of Beepers" were on the side of the pager. Deputy Reeder examined the pager for stored numbers. The number "595-4092" appeared three times. (8RT 1250-1254, 1259-1261; 9RT 1283-

1284.) This was Cesena's telephone number. (9RT 1285-1287.)

Deputy Reeder also examined the expended bullet casing found at the scene (Peo. Exh. No. 19). The head stamp on the casing showed it was a .45-caliber R.P. (Remington Peters) casing. It was a full metal jacket 230 grain which is commonly referred to as "hardball" ammunition. (8RT 1263-1268; 13RT 1852-1853.)

Blood was found on the open driver's door of Officer Fraembs's car, including the door frame; some of the blood had dripped to the ground. (9RT 1282-1283.)

After the coroner determined that the bullet had entered Officer Fraembs's head at the left side of his nose, discovered an exit wound on the back of his head, and determined that this was a "through-and-through" gunshot wound, the police requested assistance from the Prospector's Club of Southern California to use metal detectors to search for the expended projectile. An expended large-caliber bullet projectile (Peo. Exh. No. 19b) was found in the grass at the scene, across from the pool of blood under Officer Fraembs's head. (9RT 1289-1299.)

The crime scene and the area contiguous to the crime scene were extensively searched by both the Los Angeles County Sheriff's Department and the Pomona Police Department. They did not find a gun. (12RT 1834-1843, 1859-1860.)

4. Significant Events Preceding And Following The Murder

a. The Observations Of Harry Lukens

On the evening of May 10, 1996, at approximately 7:30 p.m., Harry Lukens, a self-employed welding contractor, returned to the three-bedroom residence at 1872 Grier Street (see Peo. Exh. No. 12) where he lived with Lola Delgado and her two sons, appellant ("Boxer") and Angel ("Bandit").

Appellant, Angel and Cesena (see Peo. Exh. No. 8) were in one of the bedrooms listening to music when Lukens arrived home. At approximately 8:30 p.m., appellant, Angel and Cesena left the residence. Lukens and Delgado went to bed around 10:00 p.m. Appellant had been staying at the residence for a couple of days. (10RT 1523-1525, 1535-1541.)

Lukens was awakened at 2:04 a.m. by the sounds of sirens in the neighborhood. He also heard appellant on the telephone in the living room, "speaking in a voice that he was trying to get somebody's attention on the other end of the phone." Lukens heard appellant say a couple of times, "Is Sparky there?" Appellant's voice sounded "excited." After some time, Lukens heard appellant say, "Well, turn on your scanner." (10RT 1541-1547.) Lukens, without getting out of bed, asked appellant, "Hey, what is going on?" Appellant responded, "Nothing." Delgado got out of bed and said she would find out what was going on. Delgado left the bedroom and closed the bedroom behind her. Lukens remained in bed and dozed. (10RT 1548-1550, 1560-1563, 1585-1586.)

During the next 15 to 20 minutes, Lukens heard noises. The doorbell rang and the dog started barking. Delgado brought the dog to the bedroom and started to close the door. Lukens told her, "Don't close the door." Delgado said she had to close the door to leave the dog inside the bedroom, because someone was at the door. Lukens told Delgado to put the dog somewhere else. He also asked her, "What is going on?" Delgado replied, "A policeman has been shot over by Humane Way." Lukens went back to sleep. When he awakened in the morning, appellant was at the residence. Appellant remained at the residence for the next three days, until Lukens drove him to the Greyhound Bus Station so that appellant could travel to Lake Havasu to be with his girlfriend. (10RT 1563-1565, 1591-1592.)

b. Flores's Activities

Sometime early on the morning of May 11, 1996, Flores called appellant at home; appellant's brother Angel answered. Angel said something threatening to Flores. She was very scared. Angel gave the phone to appellant. Appellant asked her how she was. Flores said, "All right, I guess," and asked appellant how he was. Appellant replied, "I'm fine. I'm a killer. I don't give a fuck. It's just another day in the hood."[16] (6RT 921-924; 7RT 943, 1007-1010.)

Flores was shocked. She was afraid to say anything because if it sounded like she intended to say something to someone, she was sure that appellant and his gang would probably kill her. Flores and appellant talked for about 15 or 20 minutes. Appellant asked Flores if she had taken his pager from him; she replied, "No." Appellant asked, "Are you sure? Because my pager is lost." Flores told him, "I am positive." Appellant said, "I think I lost it over there." Appellant said he was going to take a walk with his dog to try to find the pager. Appellant also said that he knew the streets were blocked off and that the police had already started looking for the shooter and had been to someone's house. (6RT 924-926.)

Later that day or the following day, Flores told her mother and father what had happened. Flores's father spoke with their family priest, Father Charles Gard, who said he would be happy to talk to Flores. On May 15, 1996, Flores's father took her to Saint Dennis Catholic Church in Diamond Bar, where Flores spoke with Father Gard, told him about the shooting, and also told him who shot the officer. Flores was very distraught, but appeared to Father

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16. "Hood" meant gang territory, where the gang would "kick back." (6RT 923.)

Gard to be "very confident in what she was saying."[17] (6RT 932-933; 7RT 938-940, 1018, 1041-1045, 1072, 1075-1076.)

Father Gard told Flores that she had a responsibility to go to the police. After obtaining Flores's permission, Father Gard called a parishioner, Maggie Moe, who worked at the District Attorney's Office, and asked her for advice. She put him in touch with a special task force in the District Attorney's Office, which contacted the Pomona Police Department. Within half an hour, Detectives Carrillo and Franco arrived at the church, where they interviewed Flores. (7RT 1074-1075.)

At first, Flores was too frightened to talk to the police. However, after Father Gard acted as the "middle man" between Flores and the police, she decided that she would speak to them herself. The police interviewed Flores at Father Gard's church the same day that Flores told Father Gard about the shooting. When she first spoke with the police, Flores did not tell them that Chantal and Jasper had been with her and appellant at Tank's house before the shooting. This was because Chantal was her good friend and Flores did not want anything to happen to her, and because Jasper had family members and Flores was afraid that if she said he had been there, he might "do something." (6RT 933; 7RT 940, 1014-1015, 1072, 1074.)

The day before she talked to the homicide detectives, Flores returned to the crime scene and placed flowers there. (6RT 931.) Flores testified because, despite having been threatened by both appellant and his brother, she believed that what he had done was wrong; he should have just run away, but he had not taken the opportunity to do so. At Flores's request, the Pomona Police Department had relocated her and her family. At the time of trial, Flores and

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17. Flores had spoken with Father Gard in confidence, because she feared retaliation; however, prior to trial, she gave him permission to testify regarding what she had told him. (7RT 941, 1044, 1072-1073.)

her young daughter lived by themselves. (7RT 943-945.)

Flores first met the trial prosecutor five or six days after Officer Fraembs was killed. During the numerous times they met and discussed the case, the prosecutor had told Flores that the most important thing for her to do, when she went to court to say what she had seen, would be to tell the truth. Flores had told the truth to the prosecutor, as well as to Father Gard. (7RT 945-946.) Nothing had occurred in her relationship with appellant which would cause her to falsely accuse him of shooting Officer Fraembs. Flores swore on her daughter's life that it was appellant who killed Officer Fraembs. (7RT 1004-1005, 1018-1019.)

c. Meyers, Hernandez And Arambula

After their encounter with appellant and Flores just before Officer Fraembs was killed, Meyers, Hernandez, and Arambula had returned to Arambula's house. About 15 or 20 minutes later, they heard many sirens. After a while, Meyers and two friends went outside to see what had happened. They went to Mission Boulevard, where they heard an officer tell an older gentleman, "We just had an officer shot and killed." Meyers and his friends returned to Arambula's house. They told the other people there what had happened. (8RT 1102-1106, 1225-1227.)

Hernandez and Arambula left in a car driven by another man named Jason. After a while, Meyers and others went looking for them. Meyers and his friend Joey went to Mission Boulevard, where a police officer was blocking the road and told them, "I wouldn't go down there unless you want to be arrested." Meyers and Joey asked, "What for?" The officer replied, "Murder of a police officer." Meyers found Hernandez and Arambula near Humane Way and Mission Boulevard, near Lou's Camera. Meyers realized that the crime scene was on Humane Way. (8RT 1106-1107, 1227.)

Meyers had drunk about eight beers that night in a six-hour period. He

and Hernandez and Arambula had also taken methamphetamine, which could give a person a lot of energy but could also make them paranoid. However, although he was not sober, Meyers was not "wigged out or nothing." (8RT 1107-1110, 1160; 8RT 1220.)

When Meyers had seen appellant "high," appellant was "more mellow than when he was sober," and did not act crazy. When Meyers, Hernandez, and Arambula had encountered appellant and Flores, appellant had seemed sober, "normal" and happy; he was neither irrational nor bizarre. Appellant and Flores were walking normally before and after this encounter. (8RT 1110-1111, 1148, 1160, 1181, 1243-1244.)

Meyers felt "kind of responsible" for the shooting of Officer Fraembs, and had been afraid that he might be charged with a crime because, approximately one or two weeks before the shooting, Meyers had taken appellant to buy the gun used in the crime, and Meyers had bought the bullets. (8RT 1111-1115.) Until he testified at trial, Meyers considered that he and appellant were still friends. However, after testifying against appellant, Meyers did not believe they were still friends; this troubled him. The prosecutor had told Meyers that the most important thing about going to court was to tell the truth, and Meyers had done so. (8RT 1136-1137.) He had not wanted to testify against appellant. (8RT 1196-1197.)

After Arambula testified at the preliminary hearing, she received what she perceived to be a threat, and she was frightened. The threat was not made by law enforcement personnel, and the prosecutor had told her that she should tell the truth when testifying, regardless of which party asked her the questions. Arambula still lived on 9th Street. (8RT 1229, 1236-1237.) On cross-examination, Arambula testified that the threat had been made in August 1996, and that appellant was not the person who made the threat. (8RT 1242.)

d. Appellant's Pager

The label on the pager found at the crime scene indicated that it had been purchased from the store "J&J, The King of Beepers," which had eight locations in three or four states. The only store location in California was in Riverside. This was a Motorola Lifestyle pager, which had the capacity to store 16 ten-digit phone numbers. The "cap code" on the pager was 113627. This was a number containing the frequency for the pager and its unique serial number. The letters "BST" on the pager indicated that a technician with the initial "B" had worked on the pager and its frequency channel was 293121. (9RT 1301-1309.)

The service agreement created when this pager was sold indicated that it had been sold to appellant on January 9, 1996. The phone number was 448-4099 and the account number was 15738. (9RT 1312-1317.)

The pager supplier was also the air carrier. When a pager was sold, its cap code was entered into a computer and a telephone number was assigned to the pager. The customer could request a specific telephone number, which would be assigned if it was available, or the computer would randomly assign a number. If a customer lost a pager, he could purchase a new one and ask that the same phone number be assigned to the new pager. At that time, a "swap form" is filled out. A "swap form" filled out on April 2, 1996, indicated that appellant had deactivated his original pager and activated a new Motorola Lifestyle pager, with voice mail, with the same account number and phone number. (9RT 1310-1312, 1318-1322, 1326-1329, 1332-1335.)

e. The Search Of The Grier Street Residence

On May 11, 1996, at approximately 4:30 or 4:45 p.m., police officers conducted a search of the premises at 1872 Grier Street (see Peo. Exh. No. 12a). Harry Lukens, Delores Delgado, appellant, and Angel were inside the residence

at the time of the search. Lukens and Delgado agreed to the search and signed a consent form (see Peo. Exh. No. 27) permitting the officers to search the premises. (9RT 1398-1400; 10RT 1417-1418, 1421, 1529-1530.)

During the search, documents (see Peo. Exh. No. 28) bearing appellant's name – Ronald Bruce Mendoza – were recovered from the northwest bedroom. (9RT 1398-1401, 1403.) A Remington brand .45-caliber ammunition box (Peo. Exh. No. 15) bearing a Big 5 price tag was recovered from the dresser in the bedroom occupied by Lukens and Delgado. The box was empty except for a plastic tray used to hold the ammunition and a lone .32-caliber bullet. The officers seized the box because it was a box designed to contain ammunition of the type or caliber used in the murder of Officer Fraembs. Lukens had never seen the box prior to its seizure. (8RT 1200-1202; 10RT 1423-1426, 1550-1551; 11RT 1568.)

A black nylon camera lens case (Peo. Exh. No. 29) was recovered from a city-owned trash can (see Peo. Exh. No. 12c) located at the rear of the premises, approximately two feet outside the back door, in an enclosed back yard. The trash can was about half full and the camera case, which appeared to be new, was sitting on top of the trash, "right in plain view." It appeared to be something which should not have been discarded. Inside the case were 17 shiny Remington ("R.P.") round-nose .45-caliber bullets, which is a brand of ammunition not used by the police department. No shell casings were found inside the nylon case. The camera lens case belonged to Lukens, who had not seen it for approximately one year. The last time he saw the case, it contained the lens for his camera. The camera case should not have been in the trash. Lukens had never seen the bullets prior to the search, he did not know how the case got into the trash can, and he had not told anyone to put the case in the trash can. Lukens indicated that the trash had been picked up the previous Thursday. The search occurred on Saturday. The case had somehow gotten

into the trash can following the Thursday pick-up. (9RT 1403-1411; 10RT 1413-1418, 1430, 1523-1525, 1528-1530, 1535, 1539-1540, 1550-1551.)

Police also found two 12-gauge shotgun shells in appellant's bedroom. One of the shells was a .44-caliber round and the other was a .22-caliber round. The officers did not seize these shells because they did not believe they were relevant to the case, as Officer Fraembs had been murdered with a .45-caliber bullet. (10RT 1419.) No other weapons were found inside the residence. Specifically, no .45-caliber semiautomatic pistol was found. (11RT 1565; 12RT 1871.)

Also, on May 11, 1996, the residence of Tank (Raul Arvizu) was searched. No firearms were found inside the residence during the search. Specifically, no .45-caliber semiautomatic pistol was found. (12RT 1870-1871.)

f. The Forensic Evidence

Blood was present on the extract taken from the projectile found at the crime scene. Although the criminalist was unable to determine if it was human or animal blood, she testified that "[i]t's absolutely my opinion there was blood on that bullet, yes." (10RT 1474, 1479.)

Although no latent identifiable fingerprints were detectable on the outside of the Remington box of .45-caliber ammunition (Peo. Exh. No. 15), appellant's left thumb print was found on the bullet holder inside the box. As noted by the fingerprint examiner, the thumb print on the bullet holder was made by appellant and no other human being. (10RT 1483-1485, 1493-1494, 1497-1501, 1503, 1507-1516, 1518.)

The nylon camera case (Peo. Exh. No. 29) was not examined for fingerprints because of the cloth surface. The .45-caliber bullets found inside the nylon case were examined for fingerprints, but none were detectable. According to the criminalist, the lack of a detectable fingerprints on the bullets

did not mean the bullets had never been touched by a human being. Rather, it merely indicated that no latent prints were detected. (10RT 1491-1492.)

There are between 15 and 20 different manufacturers that make ammunition for a .45-caliber automatic handgun. Each manufacturer also makes several different "bullet types" (i.e., the configuration or shape of the projectile, such as full-metal jacket or hollow point). According to Dale Higashi, a senior criminalist with the Los Angeles County Sheriff's Department assigned to the Firearms Identification Section of the Crime Lab, there are "at least 30 different manufacturers and different bullet weights and bullet configurations [of .45-caliber ammunition] that are available." (12RT 1795, 1800-1804.)

Mr. Higashi examined the spent .45-caliber shell casing (Peo. Exh. No. 19a) found on the ground near the body of Officer Fraembs and opined that the casing was made by Remington and designed for a .45-caliber semiautomatic weapon. (12RT 1799.) Mr. Higashi also examined the expended bullet projectile (Peo. Exh. No. 19b) found in the grass at the scene and identified it as a round-nose or full-metal jacket .45-caliber bullet consistent with the Remington .45-caliber shell casing (Peo. Exh. No. 19a) found near Officer Fraembs. By weighing the expended projectile and examining the lands and grooves on the projectile and a Haskell .45-caliber weapon, Mr. Higashi was able to opine that the projectile (Peo. Exh. No. 19b) could have been fired from a Haskell .45-caliber semiautomatic weapon because both the projectile (Peo. Exh. No. 19b) and the Haskell .45-caliber semiautomatic pistol have six lands and grooves with a right-hand twist. Mr. Higashi also noted that the .45-caliber weapon uses one of the largest diameter bullets: ".45's are one of the most potent firearms or handguns we come across." (12RT 1807-1812, 1815-1817.)

Mr. Higashi also examined the .45-caliber bullets found in the nylon

case (Peo. Exh. No. 29) recovered from the trash can outside appellant's residence and determined that all the bullets were Remington Peters brand. These bullets were the same caliber, the same brand, and the same projectile type as the .45-caliber shell casing (Peo. Exh. No. 19a) found near the body of Officer Fraembs and the expended .45-caliber projectile (Peo. Exh. No. 19b) found in the grass across from Officer Fraembs's body. (12RT 1817-1819.) Also, the bullets found in the nylon case were the same caliber and bullet as that depicted on the Remington ammunition box (Peo. Exh. No. 15) found in appellant's residence. This ammunition box was also consistent with the shell casing (Peo. Exh. No. 19a) and expended bullet (Peo. Exh. No. 19b) found at the crime scene. (12RT 1818-1820.)

Mr. Higashi also explained that the fact the expended bullet (Peo. Exh. No. 19b) found at the crime scene was not perfectly rounded could be explained by the fact the projectile which killed Officer Fraembs passed through five bones in his skull. Such impact on the bullet, explained Mr. Higashi, could also explain why the projectile was found across the street in some grass, approximately 40 to 50 feet from Officer Fraembs's body. (12RT 1825-1826.)

g. The Autopsy

Dr. James Ribe, a forensic pathologist and senior deputy medical examiner with the Los Angeles County Department of Coroner, performed the autopsy on Officer Fraembs on May 12, 1996. The officer was five feet, six inches tall. The cause of his death was a single gunshot wound to the head. The entry wound was located on the left side of the bony part of the bridge of the nose. The exit wound was located on the back of the head toward the right side and fairly low. No bullet was found in Officer Fraembs's skull. (11RT 1658-1662, 1666-1668, 1676; see Peo. Exh. No. 37 [autopsy photographs depicting entry and exit wounds on head].)

The size of the entry wound was consistent with a medium- or large-

caliber bullet such as a .45-caliber projectile. The bullet entered the left nasal bone and traveled into the ethmoid sinus (air pockets). The bullet then went through the sphenoid sinus (a larger air pocket behind the center line of the skull) and thereafter slanted toward the right as it cut through the right internal carotid artery (the main artery which carries blood from the heart to the brain). The bullet exited the bone part of the skull through the back wall of the right sphenoid bone. In all, the bullet passed through five bones and came very close to the brain stem (the core or base part of the brain). (11RT 1671-1674.)

Dr. Ribe opined that the last sensations Officer Fraembs would have sustained in life were his observation of the gun being pointed at him, the sight of the muzzle flash, and the sound of the explosion of the bullet being fired into his face. (11RT 1676.) Officer Fraembs did not feel any pain as a result of the gunshot wound to his head and he "could have been dead within a very few seconds to two or three, maybe five seconds would be the least." Dr. Ribe opined that Officer Fraembs's life could not have been saved after receiving the gunshot wound in the manner it was inflicted. (11RT 1674-1677.) As Dr. Ribe noted in his autopsy report, "[t]his distant handgun wound of the face was instantly incapacitating and rapidly fatal due to passage very close to the brainstem and large area of shock contusion to the floor of the right temporal and occipital lobes of cerebrum with destruction of the cerebellum." (11RT 1678, 1680.)

h. Appellant Sells The Murder Weapon To Joseph Silva And Tells Silva, "I Killed A Cop With That Gun"

Joseph Silva, age 20, lived one block from appellant's Grier Street residence. Although not a Happy Town gang member, Silva had known appellant since he was 12 years old. (11RT 1634-1638.) On the day following the murder of Officer Fraembs, appellant, Angel and Silva had a conversation about the purchase of a .45-caliber handgun for $100. Appellant said he

wanted to sell the gun because he needed money to travel to Arizona to visit his girlfriend for the birth of his baby. Silva had seen appellant on previous occasions with a .45-caliber handgun. After appellant left the trio, Silva agreed to the purchase and gave Angel the $100. (11RT 1641-1643, 1645, 1684-1688.)

When Angel took too long to return with the gun, Silva went to appellant's residence to inquire about the weapon. When Silva asked about the gun he paid $100 for, appellant told Silva, "Hey, do you know I killed a cop?" Angel eventually gave Silva the .45-caliber weapon. Silva took it home and placed it in a Monopoly box in his closet. (11RT 1691-1695, 1701-1703.)

On May 17, 1996, at 1:04 p.m., appellant, appellant's mother Lola Delgado, and Silva engaged in a three-way, tape-recorded telephone conversation. Appellant referred to Silva a couple of times during the conversation as "homes." Referring to the gun, appellant asked Silva, "You still got that?" Appellant also said, "I found out that Bandit gave you that [the gun]" and Silva responded, "I got it." Appellant told Silva, "I'm gonna have somebody come and pick it up from you man, and crate it for you man. I can't have that in Pomona." Appellant said, "[t]he homeboys are getting mad, homes" and "so either today or tomorrow man" he needed to return the gun. Silva told appellant, "I gave you a hundred one -- a hundred bucks for that." Appellant said, "I know homes, but, hey--" and then appellant's mother interrupted and said, "Oh, he, he going give you another one." Appellant said, "I'm gonna give you another one." The following then appears in the transcript:

LOLA: But you know what, I'd like to have that one.

BOXER: Burn it?

LOLA: Yeah. Yeah.

BOXER: That's what I'm talking about.

LOLA: Yeah. I know it. Uh, –

JOSEPH: (Unint.)

LOLA: Is somebody going to do it or –

BOXER: Yeah, that's what we're going to do, but see we're going to give him another one.

LOLA: Okay. I just want to know, 'cuz if not, I'll get it, and do it myself. At least I know it's gone.

BOXER: Well you see, I, I – that's a problem. That's what I'm making sure these guys are going to do. That's why I'm telling Joseph I'm going to trade 'em for another (unint.) five.

LOLA: Okay [Obscuring the above statement]

BOXER: Joseph.

LOLA: Hey.

BOXER: Huh?

LOLA: I told you about that.

BOXER: I'm sorry. Hey.

JOSEPH: Huh?

BOXER: Joseph.

JOSEPH: Huh?

BOXER: *I need that back homes.*

JOSEPH: *Yeah. I know.*

LOLA: *He understands babe.* Not so –

BOXER: Alright.

LOLA: – you know, that's good enough.

BOXER: Alright. Hey. I talk to you later then.

(Peo. Exh. Nos. 38 [tape recording], 39a [transcript of tape recording]; 11RT 1703-1705, 1712-1720; 12RT 1899-1901; 12CT 3482-3487 [emphasis added].)

Thereafter, Silva received a telephone call from "Casper," a Happy Town gang member who had previously threatened Silva by telling him that he and his entire family would be killed if Silva testified in court that appellant admitted to killing a police officer. Arrangements were made to meet at a 7-Eleven. However, immediately after the telephone call and before Silva could go to the 7-Eleven, Angel arrived at Silva's residence to pick up the gun. Angel said, "give me that." Silva gave Angel the gun. At that point, Silva did not ask for either a replacement gun or a return of his $100. As explained by Silva, "I didn't want nothing to do with it" and "was just glad to get it [the gun] out of my hands." (11RT 1695-1697, 1721, 1724-1725.)

On June 4, 1996, Detectives Dan Kono and Greg Collins, homicide investigators with the Pomona Police Department, accompanied Silva to the District Attorney's Office, where Silva was interviewed by the deputy district attorney prosecuting the instant case. Silva said, "I have a confession to make." Silva explained how part of his previous statement of May 31, 1996, was not accurate. Specifically, Silva indicated that the portion of his May 31st statement where he said Angel had given him the gun and told him that appellant had used the gun to kill a police officer was not true. Silva modified his earlier statement and indicated it was appellant, not Angel, who had given Silva the gun in exchange for $100 and, at the time Silva received the gun from appellant, appellant told Silva words to the effect, "I killed a cop with that gun." Although Silva agreed at the conclusion of the interview to return the next day so his statement could be transcribed by a court stenographer, he refused to do so "under the advice of an attorney." (12RT 1762, 1781-1785; see 11RT 1638-1641, 1644, 1684-1685, 1691, 1695.)

During the May 31st interview with the police, Silva said, "I don't want to tell on nobody, you know." Silva also said, "I trust you guys. It's just, you know, I don't want nothing to happen to me, man. You know, I don't want my

name mentioned or nothing. You know, these are just people I grew up with, man, you know." Silva also said he did not want his name "involved in this" and have it be said that, like Angel, he had "been flapping his mouth." (12RT 1792-1793.)

i. Appellant's Telephone Conversations

The prosecution introduced the contents of four court-approved, tape-recorded telephone conversations between appellant and his mother, Lola Delgado. (See 13RT 1905-1912; 12CT 3489-3496; 13CT 3499-3525.)

During a telephone conversation on May 22, 1996, at 4:12 p.m., Ms. Delgado told appellant that "they're talking about you on the [television] news" about how appellant refused to be extradited and how he would not voluntarily return to California. Appellant responded, "Right." Ms. Delgado said that the news reports "already make it sound like you, you know, you're guilty." Appellant asked his mother if she knew what the police were looking for; she replied that the police had asked Brandy about a red and orange jacket. When appellant's mother said she had never seen a red and orange jacket, appellant said, "Put Bandit on the phone." When appellant's mother indicated that some individuals were "over at the police station right now too," appellant told her "don't answer the phone." Appellant said he would call "at least once a day to find out what's going on." The following conversation then occurred:

BOXER: . . . . Well let me talk to Bandit.

LOLA: He's not here.

BOXER: He's not there?

LOLA: No.

BOXER: Oh, okay well. Tell him about that orange jacket.

LOLA: Huh? I'll mention something about an orange—The only one I know with a black one that has a tiny –

BOXER: (unint.) Remember the one I gave you?

LOLA: Yeah.

BOXER: That's the one.

LOLA: Uh.

BOXER: *Burn that mutha fucker.* Car–

LOLA: *You shouldn't be talking on the phone.*

BOXER: *Moma I'm telling you, please get it out –*

LOLA: *I know, but you shouldn't be talking on the phone.*

BOXER: Alright. I gotta go.

(13RT 1905-1907; 12CT 3489-3496 [emphasis added]; Peo. Exh. Nos. 39c [transcript], 44 [tape recording].)

On May 23, 1996, at 12:12 p.m., appellant and his mother engaged in another telephone conversation. During this conversation, Ms. Delgado told appellant "just don't say nothing to no one . . . . Not even to your cellies or nothing." The following then appears in the transcript:

LOLA: 'Cuz, uhm, I just talked to someone.

BOXER: Who? Who?

LOLA: Who were you with–

BOXER: What do you mean?

LOLA: -- that night?

BOXER: Who?

LOLA: Uhm, –

BOXER: "G?"

LOLA: Uh-huh.

BOXER: You talked to her?

LOLA: No. Uh-uh.

BOXER: Oh.

LOLA: The other one. The other one, okay?

BOXER: Spark?

LOLA: Yeah.

BOXER: You talked to him?

LOLA: Yeah.

BOXER: Where's he at?

LOLA: Uh-huh.

BOXER: Where's he at?

LOLA: Where he suppose to be.

BOXER: In jail?

LOLA: No.

BOXER: At home?

LOLA: Uhm. Yes.

BOXER: Sparky's at home?

LOLA: Oh Ronnie. If I wanted to say all that on the phone I would have said it.

BOXER: Oh. Okay.

LOLA: I tell you not to say nothing.

BOXER: Well I said, "S," and you didn't say nothing.

LOLA: Well, yes I did say something.

BOXER: Alright. I'm sorry.

LOLA: Pay attention to what I'm telling you.

BOXER: Alright. Go ahead.

LOLA: You know. Just nothing. You know. They were trying to say the same thing that you're saying.

BOXER: All --

LOLA: I mean about you. You know. They were trying to say you were the one telling, snitching on him.

BOXER: They were telling him that?

LOLA: Yeah.

BOXER: Ah, see they're lying.

LOLA: I know that.

BOXER: He should know better than that though.

LOLA: Oh, he, he does, you know. But, I'm just saying that they're saying that, uh, you were, you know, that you guys were saying that he, you know, all this about him and him and him and him.

BOXER: They always do though. The cops always do that. (unint.) –

LOLA: I know I told-- Yeah. I know.

BOXER: -- you know Boxer is snitching you whoopty whoop whoop. so you might as well give up some information on him too.

LOLA: 'Cuz I was gonna go see him with the County and see what was going on.

BOXER: Yeah. That's what you should have done. But he's at home now so --

LOLA: Yeah.

BOXER: -- you can go see him over there. And just, you know --

LOLA: Uhm, yeah.

BOXER: -- find out what you could find out (unint.) when I get back--

LOLA: I already did. That's what I'm telling you.

BOXER: In person.

LOLA: Yes.

BOXER: Okay. Okay.

LOLA: Okay. I'll talk to you later.

BOXER: Huh?

LOLA: I'll talk to you about that later.

BOXER: Alright.

(13RT 1907-1908; 13CT 3499-3504; Peo. Exh. Nos. 39d [transcript], 45 [tape recording].)

During a May 24, 1996, telephone conversation, appellant asked his mother if the police had arrested Sparky. Appellant's mother asked, "who's this Johanna, isn't her last name Flores?" Appellant's mother told appellant there were rumors going around about Flores. Appellant's mother responded affirmatively when asked by appellant if the rumors were that Flores was a witness. Appellant stated, "*Well if she's a witness, then there is a problem.*" Appellant's mother indicated she did not know Flores. Appellant told his mother to talk to Chantal and to tell Chantal that if she speaks to "Goon" (Flores) to tell her she "*better realize what she's doing*" and "that she is not the only one who has a daughter." Appellant told his mother that Goon was "suppose to be gang" but "now she's fucking crumbling down." Appellant also told his mother that if Goon picked him out of a lineup, then "she's going to go all the way," but if she misidentified appellant in the lineup, "that would be good." Appellant also said, "*So, we gotta do something . . . 'cuz if she's a witness, I'm gonna be gone.*" Appellant told his mother to call Chantal and have Chantal contact Flores's mother and to tell her not to have her daughter testify. Appellant stated that Flores's mother needed to know that her daughter "better not testify" and to realize what "her daughter is getting into." Appellant also said, "But if you hear from her and everything, just make sure she knows what she's doing and how far she is willing to go" and "because as far as she's willing to go, the police ain't going to protect her." (13RT 1908-1910; 13CT 3507-3518; Peo. Exh. Nos. 39e [transcript], 46 [tape recording], emphasis added.)

Finally, during a May 28, 1996, telephone conversation, appellant told his mother he had spoken with his attorney. Appellant said that when the attorney asked him what type of evidence the police had against him, he

responded, "They really don't have shit." Appellant said he told the attorney that the police did not have a gun, hair samples, or blood samples. Rather, appellant said he told the attorney, the police only had a footprint of a Nike Cross Trainer and, according to the attorney, "that's nothing." Appellant stated that the attorney related that he had heard that the police had appellant's pager. Appellant responded, "Yeah." (13RT 1910-1912; 13CT 3520-3525; Peo. Exh. Nos. 39f [transcript], 47 [tape recording].)

B. Defense Evidence

Rupert Bascomb, a Pinkerton security guard, was on duty at Hughes Avacom on Humane Way in Pomona on May 11, 1996, between 1:00 and 1:30 a.m. He observed a police car pass by his location on Humane Way at a "real slow" speed and then drive out of his sight. Shortly thereafter, Bascomb heard a gunshot and then a lady's voice screaming, "Let's get out of here" or "Let's move from here." Bascomb also thought he saw two males wearing dark clothing run toward an incinerator behind a building. One of the males had something in his hand. (13RT 1931-1932, 1937-1944, 1985-1988.)

Appellant did not testify.

II. Penalty Phase Evidence

A. Aggravating Evidence

The prosecution presented evidence of a prior violent act committed by appellant as well as victim impact evidence.

1. The Prior Violent Act

On June 30, 1994, at approximately 9:00 p.m., Ryan Schultz and his then-girlfriend McGara Janelle Bautista drove to a house at 1615 Vejar Street in Pomona to smoke marijuana and "get high" with "some friends" who lived at the house. They had been to the house on previous occasions to "get high."

Schultz brought marijuana with him for himself and Ms. Bautista. They drove to the house in Schultz's "brand new" 1994 blue Ford Thunderbird. Schultz parked the car across the street from the residence, locked the car, and then proceeded across the street into the house with Ms. Bautista, who was reluctant and hesitant to enter the house because "it was different people" and "kind of changed a lot." Inside the house, the couple "smoked some weed" and methamphetamine with about ten other individuals and talked. (16RT 2479-2483, 2495-2496, 2512-2513, 2522; see 16RT 2514-2516, 2519-2525.)

After they had been in the house for approximately 15 to 20 minutes, more than ten gunshots were fired outside the house. Schultz, who did not know what was going on, looked out the window, then went outside onto the front porch. Schultz observed that "my car had been shot up, all the windows, everything" and "the whole car had been shot up." Three or four individuals, including appellant, an acquaintance with whom Schultz had used drugs with in the past, were standing around Schultz's Thunderbird. Appellant, whom Schultz knew as "Boxer," was holding an M-1 military rifle at his side. (16RT 2483-2486, 2509.) Schultz turned and ran into the house because he "fear[ed] for [his] life." Appellant and the others chased after Schultz. Inside the house, Schultz said, "Oh, my God, they are after me." Schultz ran through the living room of the house and down a hallway into the master bedroom. Schultz closed the door of the master bedroom "so no one would come in." Schultz was concerned about Boxer and whoever was with him." (16RT 2486-2490, 2524-2527.)

When appellant entered the house with the rifle,[18] he was "moving quickly" at a "fast walk." Ms. Bautista, who was in the living room, stood in front of appellant and asked him more than once in a loud voice, "please stop"

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18. Ms. Bautista described appellant's gun as a "shotgun." (16RT 2528.)

and "don't do this." Ms. Bautista said this to appellant "because, I mean, I thought he was going to kill [Schultz]." In a loud, angry, voice, appellant said to Ms. Bautista words to the effect of "get the fuck out of the way, bitch." A friend of Schultz pulled Ms. Bautista out of appellant's path and appellant proceeded to the rear of the house. The two or three individuals with appellant (identified as "Bandit" and "Hector," both members of appellant's Happy Town gang) entered the master bedroom and started fighting with Schultz while he was standing up. Appellant entered the bedroom and swung the rifle at Schultz, hitting him in the face and the side of his head. Schultz fell to the ground and appellant began fighting with him. According to Schultz, "It was me against everybody else." Appellant and his cohorts continued to hit Schultz while he was on the ground. After the beating, appellant told Schultz words to the effect of "Get the fuck out of the house before I kill you." Appellant's cohorts told Schultz the same thing. Schultz, fearing for his life, fled the house with Ms. Bautista. (16RT 2490-2495, 2525-2533, 2536, 2547-2548.)

Schultz, who had bloody hair and a "messed up" face, and Ms. Bautista returned to the Thunderbird parked on Vejar across the street from the house. The car was "full of bullet holes" "throughout the car" and "just everywhere." The car would not start at first, but after about a minute, it started and they drove off. The car stalled a short distance later, near the Humane Society in the area of Humane Way and Mission Boulevard. Schultz went to the Humane Society and the police were called. One of the responding police officers described the car as "pretty much looked like it belonged in Beirut" since it "was pretty shot up" -- the tires were flat and there were several bullet holes in the car. Schultz, who appeared distressed, had a red, swollen area on the right side of his head above the ear, a cut on the left side of his head around his mouth, a laceration on his arm, and scratches on his face. Ms. Bautista was also distressed. The police called the paramedics, and Schultz was taken to the

hospital for treatment for his injuries. (16RT 2495-2501, 2510, 2551-2556.)

Schultz lied to the police initially, telling them that he had been the victim of an attempted carjacking. He lied to the police because he was scared "for my life." Later, at the hospital, Schultz told the police the truth about what had happened earlier in the evening. Even after telling the truth, Schultz told the police he was afraid and "didn't want nothing to do with" the matter. Schultz testified, "I was afraid for my life. I didn't know what would happen if I went any further with it." Schultz told the police he did not want to prosecute appellant because he feared for his life. He feared appellant and the Happy Town gang. (16RT 2495-2501, 2510, 2538, 2551-2555, 2557-2559.)

During the beating, appellant and his cohorts took from the following from Schultz: a gold bracelet, a ring, a necklace, and $10. (16RT 2488-2489, 2501, 2509, 2510; see 16RT 2523, 2539-2540.) Ms. Bautista believed the tension between appellant and Schultz arose because appellant wanted "some kind of financial help from [Schultz]." Schultz never provided the requested financial assistance. (16RT 2549-2550.)

2. Victim Impact Evidence

Dorothy Fraembs testified that her adopted son, Police Officer Daniel Fraembs, was born as Lam Tim in Hong Kong. Immediately following birth, with his umbilical cord still attached, Lam Tim was buried in the sand at a beach in Hong Kong. His cries were overheard by a Hong Kong police officer who rescued Lam Tim and rushed him to a hospital. Lam Tim was thereafter placed in an orphanage. When he was nine months old, Lam Tim was adopted by Dorothy and her husband Donald Fraembs, who lived in Cincinnati, Ohio. Lam Tim was brought to the United States the Fraembses met him in Chicago. Mrs. Fraembs stated, "I was so excited that when they put him in my arms I was walking out of the airport and I almost got hit by a car." (17RT 2670-2672.) Six months later, the Fraembses adopted a second child from Hong Kong,

Darah Fraembs, who was about one year younger than her brother. (17RT 2673, 2677.)

Mr. Fraembs died of a heart attack when Daniel was 14 years of age. Mr. Fraembs died in the living room of the family residence when both children were at home. Before his death, Mr. Fraembs had a "good relationship" with his son. When Mr. Fraembs came home from work, Daniel would stand at the front door, bouncing up and down and saying, "Daddy, Daddy, Daddy." (18RT 2672.) Officer Fraembs respected his father "because his father was a very honest decent person." Daniel also did family projects with his father such as yard work, painting, visits to museums and trips. Mr. and Mrs. Fraembs "liked to do [the] kind of things that kids could do so we were just always together." (17RT 2676-2678.)

Mrs. Fraembs did not remarry following her husband's death. She raised the children on her own. Daniel was very agile and well-coordinated while growing up. A neighbor thought Daniel was born on springs because he "was always active and able to do things." Daniel "really loved music" and played the clarinet and guitar. After high school, Daniel started college and "I think he ended up majoring in R.O.T.C." He later joined the Marine Corps, where he was the "Honor's Man" in his platoon. He also served in Beirut, where he saw action and "was one of the last people out of Beirut." (17RT 2673-2683.) After leaving the Marine Corps, Daniel commenced a career in law enforcement. He initially took a job with the Orange County Sheriff's Department and then joined the Pomona Police Department. (17RT 2684-2685.)

Mrs. Fraembs "was proud of the kind of person [her son] was." He frequently wrote letters to her which always ended, "Love Daniel." She learned of her son's death the day before Mother's Day, when a police officer and a priest arrived at her residence. As Mrs. Fraembs explained, "I knew

immediately why they were there" and "There was something that I had always hoped I would never see." (17RT 2687-2688.) Since her son's death, "There is a great big hole in my life and in my daughter's life." The pain of her son's death has not diminished and "there is no possibility that Daniel will some day be with us." Mrs. Fraembs thinks about her son "every day." (17RT 2689-2690.) When asked what she would tell her son if she could speak to him one more time, Mrs. Fraembs responded:

> I'd say, he made us very proud to be part of his life and privileged to be his mother and I always would say I hope you realize how much everybody – how much so many people loved him and how many people admired him. He was a very humble man. This is one of the things that so many people had said, he had so much humility, he could do so many tings, but he was so humble. And I am not sure he knew how much everybody admired him. How much everybody loved him.

(17RT 2691.)

Darah Fraembs, Officer Fraembs's adopted sister, also testified. Her first memory of her brother was of Daniel "giving me things" and "[h]e was always right there." (17RT 2658-2660.) Growing up with Daniel was a "very happy" time. The family did many activities together. (17RT 2660-2661.) The family was close and she was "very close" to her brother because "I always knew he was there for me." (17RT 2662-2663.) Although she wanted to become an aunt to her brother's children, she will never have that opportunity because of his death. (17RT 2663-2664.) Darah's brother "enjoyed the action" of being a police officer and "was a very intelligent quick witted person" and "[h]e was the kind of person who thought on his feet." (17RT 2664-2665.)

When she learned of her brother's death, Darah "just felt like my whole world had been shattered." The pain of her brother's death had never left, and she thought about her brother "probably every day." Her brother's death has

changed her life and "I don't think I am as happy as I was before. I don't have this person that I can count on to be there." And, as Darah noted, the pain and emptiness over her brother's death "will never go away. There is nothing . . . that will ever make it go away." She loved her brother. (17RT 2668-2669.)

Pomona Police Officers Mike Ezell and Douglas Wagaman, who worked with Officer Fraembs, testified regarding how they had become close friends with him. They trained in martial arts together in Officer Fraembs's garage and planned to go bow hunting together. (17RT 2619-2620, 2625, 2637-2639.) Officer Ezell, who got "pretty close" to Officer Fraembs, explained that Officer Fraembs was a shy man who "kept things about him to him" and "didn't brag about his accomplishments." (17RT 2618-2621.) Officer Fraembs was "always . . . helping people" and "[t]hat was just his job and that was all he was here to do." (17RT 2622.) Although Officer Fraembs kept a "gruff exterior" about not having children, he loved children and "[i]t bothered him to see kids going through any type of pain or anything out there." (17RT 2622-2625.) Officer Ezell considered himself part of Officer Fraembs's family and since his death thinks about him all the time and still dreams about the martial arts training in the garage. (17RT 2624-2626.) Officer Ezell loved Officer Fraembs and misses him every day. (17RT 2625-2626.)

Officer Wagaman noted that being a Pomona police officer was, for Officer Fraembs, "the biggest thrill of his life" and "he absolutely loved it there." (17RT 2640.) Officer Fraembs "was one of the most polite, considerate people that I personally ever met." And, Officer Fraembs "was a wonderful person and he genuinely cared. He was very considerate, very humble, very soft spoken" and "he always did his job the best he could." (17RT 2640-2641.) Officer Wagaman explained that Officer Fraembs "was just a very humble, reserved, polite person" and "he had quite an impressive resume of life experiences and things he had done." (17RT 2642.) Officer Fraembs also

treated Officer Wagaman's daughter very well and "he was always the first to do something special" for her. (17RT 2644-2645.) Officer Wagaman considered Officer Fraembs to be more of a brother than his own brothers. (17RT 2645.)

Officer Wagaman trained with Officer Fraembs at Officer Fraembs's home on the morning of the murder. Officer Wagaman was also on duty at the time of the murder, and responded to the scene when he heard the radio broadcast of an officer down on Humane Way at Mission. When Officer Wagaman learned that Officer Fraembs had been shot, "I think at that moment I died." (17RT 2647-2651.) Officer Fraembs was "a huge part" of Officer Wagaman's life and he still thought about Officer Fraembs every day. Officer Wagaman loved Officer Fraembs. (17RT 2651-2653.)

B. Mitigating Evidence

The defense presented Maria Christina Delgado, appellant's aunt, and Brandy Valore, the mother of appellant's child, as witnesses in mitigation.

Maria Delgado, appellant's aunt, testified that appellant was the second of three children born to her sister, Lola Delgado. Appellant's mother became pregnant with her first child, Michelle, when she was 15 years old. Michelle, who was mentally slow, had serious medical problems and was frequently in the hospital for surgeries to remove fluid from her brain. Michelle's father never married Lola and took no responsibility for raising Michelle. (18RT 2744-2745, 2749-2750.) Within a couple of months of Michelle's birth, Lola became pregnant with appellant. Appellant's father, Ronald Mendoza, Sr., also fathered appellant's younger brother Angel. Mr. Mendoza helped Lola raise appellant and Angel, but after he returned from Vietnam, he developed a disease which left him paralyzed. (18RT 2750-2751, 2767.) After leaving Mr. Mendoza, Lola became addicted to heroin and served time in prison. Appellant and his brother and sister were raised by appellant's grandparents in Pomona.

Thereafter, Lola lived with Harry Lukens for a number of years. He did what he could for Lola's children. (18RT 2750-2751.)

Ms. Delgado was "very surprised" when she saw on television that appellant was involved in the killing of a police officer. (18RT 2753.) Ms. Delgado asked the jury to spare appellant's life: "I hope you give my nephew a chance. Sorry for what happened and what he did, and he does have a little girl out there. And I love him with all my heart . . . . He has family out there and it really hurts me deep inside to see him in here." (18RT 2754.)

Brandy Valore met appellant on July 15, 1994. She was attracted to appellant because he had "good manners, real polite, very intelligent." They commenced a serious relationship. Ms. Valore was aware that appellant was on parole from the California Youth Authority. Approximately 18 months later, Ms. Valore became pregnant. She and appellant planned on relocating to Lake Havasu, Arizona, where Ms. Valore's mother resided, and raise a family, but appellant's parole agent refused permission for him to leave the state. (18RT 2771-2773.)

Ms. Valore traveled to Arizona to visit her mother when she was in her fifth month of pregnancy. While there, she unexpectedly went into premature labor. She was transported by air to the Good Samaritan Hospital in Phoenix, where she was joined by appellant. On April 27, 1996, the baby, Raquel, was delivered by Caesarian section. At the time of the birth, appellant "started to cry and said that he had never seen anything like that, so beautiful . . . ." (18RT 2774-2776, 2782.) Ms. Valore stated that appellant loves his daughter and "I think [being able to visit with her while he is in jail] is the only thing that gets him through the day." (18RT 2776, 2778-2779.)

Ms. Valore asked the jury to spare appellant's life because "there has been so much pain and so many lives that have changed by this that I'm concerned about my little girl. I want her to know her dad." (18RT 2779.) Ms.

Valore also stated that the death of Officer Fraembs impacted her life because "my daughter has to grow up without being with her father" and "I lost somebody I love." (18RT 2777.) Ms. Valore acknowledged that she did not become aware of appellant's ongoing sexual relationship with another woman until after he was incarcerated. (18RT 2789.)

Appellant did not testify.

ARGUMENT

I.

THE TRIAL COURT WAS NOT AUTHORIZED TO STRIKE THE LYING-IN-WAIT SPECIAL CIRCUMSTANCE, THEREFORE, THE JUDGMENT, ABSTRACT OF JUDGMENT, AND COMMITMENT ORDER SHOULD BE MODIFIED TO REFLECT IT; FURTHERMORE, SUBSTANTIAL EVIDENCE SUPPORTED BOTH THE LYING-IN-WAIT THEORY OF FIRST DEGREE MURDER AND THE LYING-IN-WAIT SPECIAL CIRCUMSTANCE, THEREFORE THE JURY'S VERDICTS AND FINDINGS SHOULD BE AFFIRMED

Appellant's first contention is that the evidence was insufficient to sustain a conviction of first degree murder based on a theory of lying-in-wait, and was also insufficient to sustain the lying-in-wait special circumstance. Appellant argues that the trial court erred by instructing the jury regarding lying-in-wait, and that both his conviction of first degree murder and the lying-in-wait special circumstance finding must, therefore, be reversed. (AOB 24-42.) Respondent contends that the trial court lacked the authority to strike the lying-in-wait special circumstance, which must be reinstated. Furthermore, the court's instructions, and the jury's verdicts, were supported by substantial evidence. Therefore, appellant's claim must be rejected.

A. The Relevant Trial Proceedings

As previously noted in the Statement of the Case, appellant was charged with murder (§ 187, subd. (a)), and three special circumstances were alleged, i.e., (1) the victim, Officer Fraembs, was a peace officer who was intentionally killed while engaged in the performance of his duties, and appellant knew and reasonably should have known this (§ 190.2, subd. (a)(7)); (2) appellant committed the murder for the purpose of avoiding and preventing a lawful arrest and perfecting and attempting to perfect an escape from lawful custody

(§ 190.2, subd. (a)(5)); and (3) appellant intentionally killed the victim while lying in wait (§ 190.2, subd. (a)(15)). (2CT 506-508.)

Following the presentation of the People's case-in-chief, pursuant to section 1118.1, the defense moved for judgment of acquittal regarding all three special circumstance allegations. With respect to the lying-in-wait special circumstance allegation, defense counsel referred to CALJIC No. 8.81.15[19] (see 13CT 3600-3601), and argued that in this case, there had been no "substantial period of watching and waiting for an opportune time to act." (13RT 1915-1916.) He further argued that this was not a "typical . . . ambush type of killing." (13RT 1917.)

The prosecutor argued that the period of lying in wait had been long enough to show a state of mind equivalent to premeditation and deliberation. He further argued that appellant had concealed his purpose and that he had maneuvered Flores in such a way as to get closer to Officer Fraembs, so that once he pushed her out of the way, he only had to take one or two more steps before shooting the officer from a distance of 24 to 30 inches. (13RT 1918-1920.) Defense counsel argued that concealment of purpose was not sufficient to support the lying-in-wait special circumstance. (13RT 1920-1921.)

The trial court quoted *People v. Edwards* (1991) 54 Cal.3d 787, 823, in which this Court discussed the jury instructions on lying in wait and stated that no minimum period of time was required, as long as the period was not insubstantial. (13RT 1921.) The court inquired whether defense counsel's argument extended to the People's theory that this was a first degree murder by lying in wait; counsel replied that it did. (13RT 1922.) The court read aloud the instructions regarding first degree murder by lying in wait and the lying-in-

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19. Respondent will refer to the jury instructions as they were set forth in CALJIC at the time of trial in 1997. As of January 1, 2006, the jury instructions, rewritten in plain English, are set forth in CALCRIM.

wait special circumstance. (13RT 1922; see CALJIC Nos. 8.25, 8.81.15; 13CT 3585, 3600-3601.) The court recounted the testimony regarding the shooting and stated that in its view, the events as related by Flores were sufficient to show premeditation and deliberation, and the time was sufficient to show a purposeful concealment for the purpose of surprising the officer, who in fact had clearly been caught completely off-guard. (13RT 1923-1924.) The court denied the section 1118.1 motion regarding both the theory of first degree murder by lying in wait and the lying-in-wait special circumstance, and also as to the other special circumstances. (13RT 1924.)

Defense counsel requested that the court review the case of *Domino v. Superior Court* (1982) 129 Cal.App.3d 1000, 1011, and *People v. Superior Court (Maciel)* (1982) 134 Cal.App.3d 893, 897, regarding the separate definitions of "lying in wait" as it related to a finding of first degree murder and to the special circumstance, as the latter required "a higher standard." (13RT 1925.) The court indicated that it would review these cases. (13RT 1925.) The prosecutor stated that intent to kill was not an element of first degree murder by lying in wait, but was an element of the lying-in-wait special circumstance. (13RT 1925-1927.) The court stated it would review the cited cases before rendering its decision. (13RT 1927.)

Following a recess, the court discussed *Domino* and *Maciel* and indicated that in order for the lying-in-wait special circumstance to apply, the murder must have occurred during the period of lying-in-wait, and not just "by means of" lying in wait. (13RT 1928.) Because the concealment and the killing in this case occurred "in rapid sequence," the court stated that its ruling denying the section 1118.1 motion remained the same. (13RT 1928-1929.)

Following the close of evidence, defense counsel objected to the giving of instructions on the lying-in-wait theory of first degree murder (CALJIC No. 8.25) and on the lying-in-wait special circumstance (CALJIC No. 8.81.15),

arguing that the prosecution had not presented sufficient evidence to warrant these instructions. The court overruled the objection. Defense counsel asked the court to strike the lying-in-wait special circumstance and to not permit the prosecution to argue a lying-in-wait theory of first degree murder, pursuant to section 1385. The court denied the request. (14RT 2046-2047.)

Later, during the conference on jury instructions, defense counsel renewed his objection to CALJIC No. 8.25. The court stated that the instruction would be given as requested. (14RT 2092.) Defense counsel also did not join in the People's request that CALJIC No. 8.81.15 be given, but agreed with the court's proposed modification of the instruction to delete definitions of premeditation and deliberation which were rendered redundant by CALJIC No. 8.20. (14RT 2104-2105.)

The court later informed counsel that, based on its reading of *People v. Edwards*, *supra*, 54 Cal.3d 787, it would not permit argument that the "substantial period of watching and waiting" required for the lying-in-wait special circumstance was a period of such duration as to show premeditation and deliberation, but rather, it required a "not insubstantial" period of time to have passed, and watching and waiting for an opportune time to act. Based on the evidence, the court determined that this was a question for the jury, and stated it would instruct the jury on the special circumstance. (15RT 2167-2169.) The court later informed the prosecutor that his arguments and chart should reflect the language used in CALJIC No. 8.81.15 when referring to the lying-in-wait special circumstance. (15RT 2174-2179, 2181-2182.)

During his summation, the prosecutor argued that this was a first degree murder because it was willful, deliberate, and premeditated (15RT 2190-2195, 2200), and also because it was committed by means of lying in wait (15RT 2195-2200). He also read CALJIC No. 8.81.15 to the jury and argued that the lying-in-wait special circumstance had been proven. (15RT 2207-

2211.)

Defense counsel argued that even if appellant were the perpetrator, this was, at most, a second degree murder, as there had been no lying in wait and no premeditation or deliberation. (15RT 2274-2294, 2305-2312.) Counsel further argued that the lying-in-wait special circumstance did not apply in this case. (15RT 2313-2316, 2340-2341.) In rebuttal, the prosecutor again argued that this was a first degree murder and that the charged special circumstances applied. (15RT 2346-2347, 2359-2364, 2365-2376, 2382-2383.)

The trial court instructed the jurors regarding deliberate and premeditated first degree murder (CALJIC No. 8.20; 13CT 3583-3584; 15RT 2403-2405), first degree murder based on a lying-in-wait theory (CALJIC No. 8.25; 13CT 3585; 15RT 2405), and on the lying-in-wait special circumstance (CALJIC No. 8.81.15; 13CT 3600-3601; 15RT 2412-2413).[20/]

On August 22, 1997, the jury found appellant guilty of first degree murder and found all three of the charged special circumstances, including the lying-in-wait special circumstance, to be true. (13CT 3629-3630, 3636-3637; 15RT 2435-2438.)

On October 9, 1997, appellant filed a motion for a new trial. Appellant argued that the evidence was insufficient to support the finding of first degree murder and that at most, this was a second degree murder. He further argued that if this was a first degree murder, there was insufficient evidence to support the true findings on all of the special circumstances. Appellant requested a new

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20. The court also instructed the jury on the two other charged special circumstances of murder to prevent arrest and murder of a peace officer (CALJIC Nos. 8.81.5, 8.81.7, 8.81.8, 9.29; 13CT 3594-3599; 15RT 2409-2412). In addition, the court instructed the jury on unpremeditated second degree murder, second degree murder as a killing resulting from an intentional unlawful act dangerous to human life, and a special finding of second degree murder of a peace officer (§ 190, subdivision (b)). (CALJIC Nos. 8.30, 8.31, 8.35; 13CT 3586-3588; 15RT 2405-2407.)

trial on the basis that the verdicts were contrary to the law or evidence (§ 1181, subd. (6)). (13CT 3674-3687.) In regard to the lying-in-wait special circumstance, appellant argued that there had been no "substantial period of watching and waiting for an opportune time to act." (13CT 3684.)

On the same day, appellant also filed a motion to modify the verdict or reduce the penalty to life without the possibility of parole, pursuant to section 190.4, subdivision (e), section 1181, subdivisions (6) and (7), and section 1385. Appellant reiterated the arguments set forth in his motion for a new trial, and requested that in the event that the trial court denied that motion, that it should instead modify the verdict or reduce the sentence to life without the possibility of parole. (13CT 3688-3701.)

On October 15, 1997, the prosecution filed an opposition to appellant's motions. The prosecutor argued that the evidence supported the jury's findings that this was a first degree murder and that all of the charged special circumstances were true. (13CT 3702-3710.) Regarding the lying-in-wait special circumstance, the prosecutor argued that in order to take Officer Fraembs by surprise, so much so that the officer never even drew a weapon, appellant had to move "slowly and unobtrusively" as he maneuvered his way to a position of advantage while holding Johanna Flores in front of himself; therefore, there had been a "substantial period of watching and waiting for an opportune time to act." (13CT 3705-3706.) The prosecutor argued that the evidence fully supported the jury's verdict of first degree murder, and therefore that verdict should not be modified to second degree murder. He further argued that section 1181, subdivision (6), did not permit the modification of a special circumstance, as there are no lesser degrees of special circumstances or lesser included special circumstances. (13RT 3706-3707.)

At the sentencing hearing held on October 24, 1997, the trial court stated it had read the moving papers. Both counsel submitted the matter based

on the written pleadings. The trial court stated that the only question it had related to the lying-in-wait special circumstance. The court stated that the period of watching and waiting, which the defense characterized as a matter of "seconds" and which the court estimated had lasted "up to a minute," was sufficient to show premeditation and deliberation. However, the court was not sure that it was substantial enough to support the special circumstance. (18RT 2867-2869.)

The prosecutor argued that appellant had moved Flores in front of him slowly, from the curb to the street, for several steps, then guided her closer to Officer Fraembs. The prosecutor argued that appellant must have been moving slowly, in order not to arouse the officer's suspicions, and that this could not have been an insubstantial amount of time. (18RT 2869-2870.)

The trial court denied appellant's motion for a new trial regarding the conviction of first degree murder and the special circumstances of murder of a peace officer and murder to avoid or prevent a lawful arrest. (18RT 2871-2875.) The court also declined to exercise discretion under section 1385 to dismiss these two special circumstances. (18RT 2875.) The court then stated as follows:

> As to the special circumstances for lying in wait, I am finding that the time was insubstantial for the special circumstance, and under Penal Code section 1385 I am dismissing the special circumstance of lying in wait.

(18RT 2875.)

The court then denied appellant's motion to modify the verdict to second degree murder. (18RT 2875-2876.) Following arguments by both parties, the court also denied appellant's motion to modify the punishment to life without the possibility of parole. (18RT 2876-2897.)

When the court pronounced sentence, it indicated, "I am striking the

jury's finding concerning lying in wait because of my ruling based upon Penal Code section 1385." (18RT 2906-2907.) After the court pronounced sentence, the following exchange occurred:

> [DEFENSE COUNSEL]: Also, Your Honor, I just want to clarify one matter on the record.
>
> When you were pronouncing your rulings, I wasn't clear as to whether the lying in wait special circumstance was a matter that you had granted counsel's request for a new trial on or whether this is a matter that you had stricken pursuant to [section] 1385.
>
> THE COURT: I ordered that matter dismissed pursuant to Penal Code section 1385. I found that as a matter of law that time was insubstantial.
>
> [DEFENSE COUNSEL]: That is fine. I don't have any other matters to take up with the Court at this time.
>
> THE COURT: Mr. Arnold.
>
> [PROSECUTOR]: I have nothing, Your Honor.

(18RT 2913.)

B. The Trial Court Lacked The Authority To Strike The Lying-in-wait Special Circumstance; Therefore, This Court Should Order The Judgment And The Abstract Of Judgment Modified To Reflect This Special Circumstance

First, respondent contends that the trial court lacked the authority to strike the lying-in-wait special circumstance. Prior to June 6, 1990, this Court held that the trial court has the power to dismiss a special circumstance finding pursuant to section 1385 in order to modify a sentence of life without the possibility of parole to a sentence of life with the possibility of parole. (*People v. Williams* (1981) 30 Cal.3d 470, 490.) However, the Court expressly declined to rule on the question whether section 1385 empowers the judge to strike the special circumstances after the jury has returned a verdict of death. (*Id.* at

p. 490, fn. 11; see also *People v. Heishman* (1988) 45 Cal.3d 147, 204; *People v. Fierro* (1991) 1 Cal.4th 173, 254-255.)

The passage of Proposition 115 in 1990 added section 1385.1, which provides as follows:

> Notwithstanding Section 1385 or any other provision of law, a judge shall not strike or dismiss any special circumstance which is admitted by a plea of guilty or nolo contendere or is found by a jury or court as provided in Sections 190.1 to 190.5, inclusive.

(See *Raven v. Deukmejian* (1990) 52 Cal.3d 336, 345.)

In the instant case, appellant murdered Officer Fraembs on May 11, 1996, six years after the passage of Proposition 115. The trial took place in August 1997, and appellant was sentenced on October 24, 1997. Therefore, once the jury found the lying-in-wait special circumstance to be true, the court no longer had the authority to strike or dismiss it. (See *People v. Johnwell* (2004) 121 Cal.App.4th 1267, 1283.)[21/]

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21. In *People v. Johnwell, supra*, 121 Cal.App.4th 1267, the jury found true a special circumstance allegation that the murder occurred during the commission of an attempted robbery (§ 190.2, subd. (a)(17)). (*Id.* at p. 1281.) At the sentencing hearing, the trial court struck the special circumstance so that the defendant would be eligible for parole. (*Id.* at pp. 1281-1283.) The trial court noted that the codefendant, who drove the car in which the defendant was a passenger when the defendant shot the victim, had received a plea bargain that allowed the codefendant to be paroled, while a third person present in the car had not been prosecuted. The court found that the sentence of life without the possibility of parole did not appear to be "appropriate, fair or just," and struck the special circumstance pursuant to section 1385. (*Id.* at p. 1282.) On appeal, the Fifth Appellate District held that the conviction must be reversed based on error which occurred at the competency trial. (*Id.* at pp. 1271-1281.) The reviewing court also addressed the People's argument that the trial court had imposed an unauthorized sentence when it struck the special circumstance finding. (*Id.* at pp. 1281-1285.) The court held that because the sentence was unauthorized by law, the People were permitted to raise this issue without having first objected on the same ground in the trial court. Furthermore, the People were permitted to raise this issue on the defendant's appeal, and were

[I]n light of section 1385.1, the trial court was completely without authority to strike the special circumstance finding pursuant to section 1385. This was not an *abuse* of the trial court's discretion; the trial court had no discretion.

(*People v. Johnwell, supra*, 121 Cal.App.4th at p. 1284, emphasis in original.)

Accordingly, this Court should find that the court's order was not authorized by law.[22/] Furthermore, pursuant to section 1260, respondent requests that this Court order that the Judgment (13CT 3711-3715), the Abstract of Judgment (13CT 3736), and the Commitment (13CT 3737-3743) be modified to reflect the lying-in-wait special circumstance, and that copies reflecting the correction be forwarded to the Department of Corrections and Rehabilitation.

C. There Was Substantial Evidence To Support A Jury Verdict Of First Degree Murder Based On A Lying-In-Wait Theory, And Also To Support A True Finding On The Lying-In-Wait Special Circumstance; Therefore, The Trial Court's Instructions To The Jury Were Properly Given

Appellant contends that the evidence was insufficient to support jury instructions on first degree murder based on a theory of lying in wait and on the lying-in-wait special circumstance, and the trial court erred by instructing the

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not required to challenge it by filing a separate appeal. (*Id.* at pp. 1283-1285 & fn. 9.) In light of section 1385.1, the trial court had no discretion to strike the special circumstance finding; therefore, upon remand, the prosecution was free to pursue this allegation. (*Id.* at pp. 1283-1285.)

22. Appellant states that the trial court struck the lying-in-wait special circumstance "on its own motion." (AOB 24.) However, as set forth above, the court's ruling was made in response to appellant's motion. In any event, appellant appears to recognize that the court was not authorized to strike this special circumstance, as he cites section 1385.1 (AOB 24, fn. 27) and makes several arguments relating to the validity of the lying-in-wait special circumstance. (See AOB 24-42, 53-56, 132-141.)

jury on these concepts. (AOB 24-25, 29-30.) However, because these instructions were supported by substantial evidence, appellant's claim should be rejected.

1. The Applicable Law

In determining sufficiency of the evidence, an appellate court reviews the entire record in the light most favorable to the prosecution to determine whether it contains evidence that is reasonable, credible, and of solid value, from which a rational trier of fact could find the defendant guilty beyond a reasonable doubt. (*People v. Kipp* (2001) 26 Cal.4th 1100, 1128; *People v. Marshall* (1997) 15 Cal.4th 1, 34.) The same test applies with respect to special-circumstance findings, in which case the issue is whether any rational trier of fact could have found true the essential elements of the allegation beyond a reasonable doubt. (*People v. Chatman* (2006) 38 Cal.4th 344, 389; *People v. Lewis* (2001) 26 Cal.4th 334, 366; *People v. Mickey* (1991) 54 Cal.3d 612, 678.)

In addition, in evaluating the sufficiency of the evidence, an appellate court must presume in support of the judgment the existence of every fact the trier of fact could reasonably have deduced from the evidence. (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206; *People v. Barnes* (1986) 42 Cal.3d 284, 303; *People v. Johnson* (1980) 26 Cal.3d 557, 576-577.) The often repeated rule is that, when a verdict is attacked on the ground that there is no substantial evidence to sustain it, the power of an appellate court begins and ends with the determination as to whether, on the entire record, there is any substantial evidence, contradicted or uncontradicted, which will support it; when two or more inferences can reasonably be deduced from the facts, a reviewing court is without power to substitute its deductions for those of the trier of fact. It is of no consequence that the trier of fact, believing other evidence, or drawing different inferences, might have reached a contrary conclusion. (*People v. Ceja*,

(1993), 4 Cal.4th 1134, 1138-1139; *People v. Johnson*, *supra*, 26 Cal.3d at pp. 576-577.) The appellate court does not reweigh evidence or redetermine issues of credibility. (*People v. Ochoa*, *supra*, 6 Cal.4th at p. 1206.)

In cases in which the People rely primarily on circumstantial evidence, the standard of review is the same. (*People v. Stanley* (1995) 10 Cal.4th 764, 793; *People v. Ceja*, *supra*, 4 Cal.4th at p. 1138.) If the circumstances reasonably justify the conviction, the possibility of a reasonable contrary finding does not warrant a reversal. (*People v. Kraft* (2000) 23 Cal.4th 978, 1053-1054; *People v. Ceja*, *supra*, 4 Cal.4th at p. 1139, fn. 1.) The determination of whether the trial court properly instructed the jury regarding lying in wait, both as a theory of first degree murder and as a special circumstance, depends upon whether there was substantial evidence presented at trial to support such jury verdicts. (*People v. Ceja*, *supra*, 4 Cal.4th at p. 1139, fn. 1.)

To prove first degree murder premised on a lying-in-wait theory (§ 189), the prosecution must prove the elements of concealment of purpose together with "a substantial period of watching and waiting for an opportune time to act, and . . . immediately thereafter, a surprise attack on an unsuspecting victim from a position of advantage." (*People* v. *Stanley*, *supra*, 10 Cal.4th at pp. 795-796; see also *People v. Gurule* (2002) 28 Cal.4th 557, 630.) Murder by means of lying in wait requires only a wanton and reckless intent to inflict injury likely to cause death, whereas the lying-in-wait special circumstance requires "'*an intentional murder*, committed under circumstances which include (1) a concealment of purpose, (2) a substantial period of watching and waiting for an opportune time to attack, and (3) immediately thereafter, a surprise attack on an unsuspecting victim from a position of advantage.'" (*People v. Moon* (2005) 37 Cal.4th 1, 24, fn. 1, quoting *People v. Gutierrez* (2002) 28 Cal.4th 1083, 1148-1149.) Furthermore, the lying-in-wait special circumstance requires that the killing take place during the period of concealment and watchful waiting,

an aspect of the special circumstance distinguishable from a murder perpetrated by means of lying in wait, or following premeditation and deliberation. (*People v. Sims* (1993) 5 Cal.4th 405, 434; *People v. Edelbacher* (1989) 47 Cal.3d 983, 1022.)

2. There Was Substantial Evidence To Support The Jury's Verdicts And Findings, And The Court's Instructions, On Lying-In-Wait

In the instant case, there was substantial evidence to support the jury's verdicts and findings, and the court's instructions, on the lying-in-wait of first degree murder and on the lying-in-wait special circumstance.

a. The Evidence Showed A Substantial Period Of Watching And Waiting

First and foremost, appellant argues, as he did at trial, that the prosecution failed to prove that there was "a substantial period of watching and waiting for an opportune time to attack." (AOB 31-39.) However, viewed in the light most favorable to the prosecution, there was substantial evidence from which a rational juror could find that this element was true.

This Court has held that no particular period of time is required to prove this element; rather, the period of time must only be "substantial." (*People v. Moon*, *supra*, 37 Cal.4th at p. 23.) The precise period of time is not critical. (*Ibid.*; *People v. Ceja*, *supra*, 4 Cal.4th at p. 1145.) As the trial court noted, it only matters that the period is not *in*substantial. (13RT 1921; *People v. Moon*, *supra*, 37 Cal.4th at p. 23; *People v. Edwards*, *supra*, 54 Cal.3d at p. 823.) Moreover, the defendant need not strike at the first available opportunity, but may wait to maximize his position of advantage before taking the victim by surprise. (*People v. Hillhouse* (2002) 27 Cal.4th 469, 501.)

Here, the evidence showed that as appellant, Flores, and Cesena were walking in a commercial area late at night, Officer Fraembs drove up slowly in

his patrol car and shone a light on them. (6RT 874-880.) Appellant had previously told Flores that he was on parole and "couldn't go back" to jail, had referred to another Pomona police officer as "a fucking pig," and while arranging to meet Cesena told him, "Hurry up, because I'm strapped. I don't want to get busted." When Officer Fraembs shone his spotlight on the party, appellant looked back and said, "Oh, shit, the jura," meaning, "the cops." He also said, "Oh, shit. I got the gun." Appellant ignored Flores and Cesena's suggestions that he simply flee the scene. (6RT 862, 865, 879-885, 923; 7RT 1005-1012.)

Officer Fraembs stopped the car, got out, and asked nicely, "How are you guys doing tonight?" When appellant responded in a rude and challenging manner, the officer told him and Flores, "Why don't you have a seat right there," indicating the curb, and began to pat down Cesena, who was closest to him. (6RT 880-881, 885-889; 7RT 1013.) Appellant moved behind Flores, draping his left arm over her shoulder and leaving his right hand free. He leaned against her, moving her from the curb down onto the street. He slid his hand down to retrieve his gun. He moved Flores closer to Officer Fraembs. Then he pushed her aside, held his gun in both hands with his arms outstretched, and shot Officer Fraembs once, in the head, from a distance of about two and a half feet, while the officer was still patting down Cesena. Officer Fraembs was killed instantly. (6RT 888-900, 903-904; 7RT 1030-1035, 1037-1038.)

It is clear that a rational juror could find that from the moment that Officer Fraembs turned his spotlight on appellant and his companions until the moment appellant shot the officer, appellant, who was carrying a gun and was aware that he could be arrested and returned to custody for this parole violation, was watching and waiting for an opportune time to attack and kill the officer. Once Officer Fraembs asked appellant and Flores to sit on the curb and began

to pat down Cesena, it was apparent to appellant that he would be searched and the officer would find his hidden gun. However, appellant did not panic, draw his weapon, and shoot. Instead, he moved behind Flores, maneuvered her off the curb and into the street as though he were complying with the officer's order to sit on the curb, got close enough to the officer that he was in a position of advantage such that he literally could not miss hitting him, drew his gun, pushed Flores aside, and shot the officer once, in the face, killing him instantly. As the prosecutor argued to the jury and during the hearing on appellant's new trial motion (13CT 3705-3706; 18RT 2869-2870), it was clear that appellant had moved slowly while maneuvering Flores, or he would have caught the officer's attention before he got so close to him. It was equally clear that appellant's plan worked and that Officer Fraembs was taken by surprise, as he never even had a chance to reach for his weapon, draw it, or attempt to defend himself. (5RT 697, 701-702; 9RT 1282, 1284.) Moreover, the fact that appellant shot the officer in the head, rather than in the leg, arm, or body, shows that his intent was not to wound Officer Fraembs, but to kill him.

Appellant clearly began thinking, from the moment that Officer Fraembs approached, about what he must do to avoid being arrested and returned to custody. He did not panic, but instead very cunningly and deliberately moved himself into a position of advantage, careful not to draw the officer's attention away from Cesena, and, once he was close enough to ensure hitting his target, shot the officer directly in the face. The period of watching and waiting was "substantial," as appellant first challenged the officer for stopping them, then, when that backfired by resulting in a patdown search, moved behind Flores and slowly manipulated he until he was close enough to attack Officer Fraembs by shooting him in the head. The jurors were simply not required to find that the entire encounter was, as appellant characterizes it, "fleeting." (See AOB 34.)

Appellant cites several other lying-in-wait cases in an attempt to

demonstrate that because this incident occurred over a shorter period of time than was involved in those cases, the period of watching and waiting was necessarily "insubstantial." (See AOB 32-37, and cases cited therein.) However, as this Court has noted in another context, in deciding issues of sufficiency of the evidence, "comparison with other cases is of limited utility, since each case necessarily depends on its own facts." (*People v. Thomas* (1992) 2 Cal.4th 489, 516 [discussing comparison of the facts of different cases in the context of determining whether the evidence was sufficient to show premeditation].) So long as a rational juror could find, based on the evidence adduced in this case, that there was a substantial period of watching and waiting, it is of little consequence that this period may have been much longer in other, unrelated cases.

Moreover, despite the fact that the trial court, at the time of sentencing, stated that the time was "insubstantial for the special circumstance," "as a matter of law," and attempted to strike the lying-in-wait special circumstance (18RT 2875, 2913; see AOB 31, 34, 38-39), the court had previously *denied* appellant's motion for judgment of acquittal at the close of the prosecution's case, had expressly determined that the instructions on lying in wait were warranted by the evidence, and gave those instructions over appellant's objections. (13RT 1923-1924, 1928-1929; 14RT 2046-2047, 2092; 15RT 2167-2169, 2405, 2412-2413; CALJIC Nos. 8.25, 8.81.15.) The court's second-guessing of its earlier rulings should not be determinative, because the court plainly had considered the evidence in this issue carefully and when it was fresher in the court's mind, and found the evidence to be sufficient. The court's unauthorized attempt to strike the special circumstance certainly should neither compel nor persuade this Court to conclude that the period of watching and waiting was insubstantial as a matter of law.

In addition, appellant argues that Flores's testimony, relied upon by the

prosecution to prove the sequence of events, had been impeached with statements she made to the police and prosecution after the murder. (AOB 37-39.) Although appellant acknowledges that in general, the reviewing court "may not usurp the trier of fact's assessment of credibility," he nonetheless argues that this Court should defer to the trial court's view of the evidence. (AOB 38-39.) In this case, however, the jury and not the court was the trier of fact, and the jurors' finding that the period of watching and waiting was substantial is supported by the evidence.

Because there was substantial evidence that would allow a rational juror to find appellant guilty of first degree murder based on a theory of lying in wait, and to find that the lying-in-wait special circumstance was true, the court properly instructed the jury on those theories.

b. The Evidence Showed Concealment Of Purpose

Appellant also argues that the evidence was insufficient to show concealment of purpose. (AOB 39-41.) This claim is clearly meritless.

As appellant acknowledges (AOB 39-40), the element of concealment of purpose is met by showing that the defendant's "'true intent and purpose were concealed by his actions or conduct. It is not required that he be literally concealed from view before he attacks his victim.'" (*People v. Moon*, *supra*, 37 Cal.4th at p. 22, quoting *People v. Carpenter* (1997) 15 Cal.4th 312, 388; see also *People v. Michaels* (2002) 28 Cal.4th 486, 517.) The concealment element may manifest itself either by an ambush or by the creation of a situation in which the victim is taken unaware, even though he sees his murderer. (*People v. Hillhouse*, *supra*, 27 Cal.4th at p. 500; *People v. Morales* (1989) 48 Cal.3d 527, 555.) Furthermore, there is no requirement that the prosecution show the defendant "lured" the victim anywhere in order to prove he was lying in wait. (*People v. Superior Court (Jurado)* (1992) 4 Cal.App.4th 1217, 1228-1229.)

Here, it is clear that although Officer Fraembs was certainly aware of appellant's physical presence, appellant managed to conceal his purpose so successfully that he took the officer completely by surprise, shooting and killing him before Officer Fraembs had a chance to unsnap his holster, draw a weapon, defend himself, run, or react to appellant's lethal assault in any way at all.

Appellant argues that if he had been trying to conceal his purpose, i.e., to kill Officer Fraembs, he would not have aroused the officer's suspicions with a belligerent attitude. He further argues that he did not lure the officer to a place where he could be taken by surprise or say anything to "trick" him, and that "Officer Fraembs knew he was in a hostile environment and was taking action to protect himself . . . ." (AOB 40-41.) However, the fact that appellant's apparent attempt to make the officer back down and leave did not work does not dispel the clear inference that when appellant physically hid behind Flores so that he could move closer to the officer and draw his gun, unseen, before shooting him, appellant was concealing his purpose from Officer Fraembs. Neither is this inference dispelled by the fact that appellant did not lure the officer away from an already isolated area, where the only other persons present were appellant's friends, so that they outnumbered the officer and the officer was already distracted while patting down Cesena.

c. The Evidence Showed A Surprise Attack On The Unsuspecting Officer From A Position Of Advantage

Finally, appellant argues that the evidence was insufficient to show a surprise attack on an unsuspecting victim from a position of advantage. Appellant again argues that Officer Fraembs was not an "unsuspecting victim," and was not "in a particularly vulnerable position," as he "was not shot from behind . . . or while distracted." (AOB 41.)

However, given that appellant stealthily maneuvered himself to a position where he could shoot from a distance of only two and a half feet, that

he shot Officer Fraembs in the head while the latter was patting down Cesena for weapons, and that the officer never even drew his gun or baton to attempt to defend himself, it is simply ludicrous to suggest that appellant did not attack from a position of advantage or that he did not take the officer by surprise. Nor does the fact that Officer Fraembs thought it prudent to conduct a pat-down search, when his non-confrontational approach to three persons walking in an isolated commercial area late at night was immediately met with belligerence, suggest that he necessarily suspected that appellant was about to shoot him at close range. Had he done so, Officer Fraembs would likely have patted down appellant first despite the fact that Cesena was standing closer to him, and he would not have taken his eyes off appellant long enough for appellant to shoot him before he could react. Nothing more is needed to refute this claim than the description and photograph of Officer Fraembs's dead body, shot in the face, on the ground right where he had stood while patting down Cesena, with his gun in its snapped-shut holster, his baton still attached to his belt, and his hands still down at the level of his waist. (5RT 696-702; 9RT 1282, 1284; Peo. Exh. No. 4, photograph A.)

3. No Reversal Is Required Assuming Any Deficiencies In The Lying-In-Wait Theory Of First Degree Murder, Or The Lying-In-Wait Special Circumstance

As to the theory of first degree murder, the jury was instructed on premeditated, deliberate murder as well as murder by lying-in-wait. Even if there were factual deficiencies that undermine the lying-in-wait theory, this Court should affirm the first degree murder conviction. There was ample evidence of premeditated, deliberate murder, as discussed in Argument II, *post*, to warrant affirmance. (See *People v. Guiton* (1993) 4 Cal.4th 1116, 1130 [where there is factually unsupported theory, reversal is required only if that theory was the sole basis for guilt finding].) In fact, it is clear from the jury's

actual findings that it necessarily found premeditated, deliberate murder, since it returned two special circumstance findings that appellant intentionally killed Officer Fraembs, for the purpose of avoiding and preventing a lawful arrest. Premeditation (i.e., considered beforehand) and deliberation (formed, arrived at, or determined upon as a result of careful thought and weighing of considerations for and against the proposed course of action) can occur in a brief interval, and these other findings plainly signaled that all jurors necessarily found planning activity, motive to kill, and a manner of killing that established first degree murder based upon premeditation and deliberation. (See *People v. Memro* (1995) 11 Cal.4th 786, 862-863; *People v. Perez* (1992) 2 Cal.4th 1117, 1123.) Moreover, regardless of whether the third lying-in-wait special circumstance is sustained on appeal, the jury made a factual determination that it was true, meaning it found not only an intentional killing, but found the killing was committed during a period of concealment and watchful waiting, consistent with premeditation and deliberation. Accordingly, no reversal is required. (See *People v. Aguilar* (1997) 16 Cal.4th 1023, 1034 [if erroneous instruction allowed jury to convict on factually insufficient theory, no reversal if reviewing court can conclude beyond a reasonable doubt that jury did not rely on erroneous instruction].)

If the lying-in-wait special circumstance is found deficient, no reversal of the penalty phase is required. The jury found two other special circumstances true, and in determining guilt and the appropriate penalty, properly considered all of the facts and circumstances underlying any deficient lying-in-wait special circumstance, in that they were part of the same criminal event. (*Brown v. Sanders* (2006) 546 U.S. 212, 223-225 [126 S.Ct. 884, 163 L.Ed.2d 723].)

4. Conclusion

Based on the arguments set forth *ante*, it is clear that there was

substantial evidence from which a rational juror could find appellant guilty of first degree murder based on a theory of lying in wait, and could further find the lying-in-wait special circumstance to be true. Therefore, the court's instructions to the jury were proper, and appellant's claim should be rejected.

II

SUBSTANTIAL EVIDENCE SUPPORTS THE JURY'S VERDICT REGARDING THE PREMEDITATED AND DELIBERATE MURDER OF OFFICER FRAEMBS

Relying primarily on the factors set forth by this Court in *People v. Anderson* (1968) 70 Cal.2d 15 (*Anderson*), appellant contends the evidence is insufficient as a matter of law to sustain the conviction of premeditated and deliberate first degree murder of Officer Fraembs. This is so, argues appellant, because the jury was not presented with any substantial evidence of planning activity prior to the killing, motive, or manner of killing which would support a reasonable inference that the murder of Officer Fraembs was premeditated and deliberate rather than a murder which was the result of a "'mere unconsidered or rash impulse hastily executed.'" (AOB 43-52.) This contention is utterly without merit.

A. The Applicable Law

As previously set forth in Argument I, *supra*, in evaluating the sufficiency of the evidence, the appellate court does not reweigh evidence or redetermine issues of credibility, but rather must presume in support of the judgment the existence of every fact the trier of fact could reasonably have deduced from the evidence and determine whether, on the entire record, there is any substantial evidence, contradicted or uncontradicted, which will support it. (*People v. Ceja*, *supra*, 4 Cal.4th at pp. 1138-1139; *People v. Ochoa*, *supra*, 6 Cal.4th at p. 1206; *People v. Barnes*, *supra*, 42 Cal.3d at p. 303; *People v.*

Johnson, *supra*, 26 Cal.3d at pp. 576-577.) The standard is the same in cases in which the People rely primarily on circumstantial evidence. (*People v. Stanley*, *supra*, 10 Cal.4th at p. 793; *People v. Ceja*, *supra*, 4 Cal.4th at p. 1138.) If the circumstances reasonably justify the conviction, the possibility of a reasonable contrary finding does not warrant a reversal (*People v. Kraft*, *supra*, 23 Cal.4th at pp. 1053-1054; *People v. Ceja*, *supra*, 4 Cal.4th at p. 1139).

First degree murder may be found when the prosecution proves beyond a reasonable doubt that the defendant killed with malice aforethought, intent to kill, premeditation, and deliberation. (§§ 187, 189.) This Court has defined "deliberate" as "formed or arrived at or determined upon as a result of careful thought and weighing of considerations for and against the proposed course of action." (*People v. Memro*, *supra*, 11 Cal.4th at pp. 862-863; *People v. Perez*, *supra*, 2 Cal.4th at p. 1123.) "Premeditated" has been defined as "considered beforehand." (*People v. Perez*, *supra*, 2 Cal.4th at p. 1123.) Premeditation and deliberation can occur in a brief interval, and the test is not time, but reflection, as "'[t]houghts may follow each other with great rapidity and cold, calculated judgment may be arrived at quickly.'" (*People v. Osband* (1996) 13 Cal.4th 622, 697, quoting *People v. Memro*, *supra*, 11 Cal.4th at pp. 862-863; see also *People v. Bloyd* (1987) 43 Cal.3d 333, 348.)

Where, as here, an appellate court reviews the sufficiency of the evidence to support a jury's finding of first degree murder, the reviewing court need not be convinced beyond a reasonable doubt that the defendant premeditated the murder; the relevant inquiry on appeal is whether *any* rational trier of fact could have been so persuaded. (*People v. Lucero* (1988) 44 Cal.3d 1006, 1020; see also *People v. Wharton* (1991) 53 Cal.3d 522, 546.) In addition, the length of time which must pass before a killing can be described as deliberate and premeditated is a question of fact. (*People v. Wells* (1988)

199 Cal.App.3d 535, 540; see also *People v. Bender* (1945) 27 Cal.2d 164, 184.)

In *People v. Anderson*, *supra*, 70 Cal.2d at pp. 26-27, this Court first set forth a tripartite test for analyzing the type of evidence which it had found sufficient to sustain a finding of premeditation and deliberation. There, the court said that such evidence falls into three basic categories: (1) defendant's planning activity prior to the homicide; (2) his motive to kill, as gleaned from his prior relationship with the victim; and (3) the manner of killing, from which it may be inferred that the defendant had a preconceived design to kill. An appellate court "sustains verdicts of first degree murder typically when there is evidence of all three types," the court noted, and it otherwise required "at least extremely strong evidence of (1) *or* evidence of (2) in conjunction with either (1) or (3)." (*Id.* at p. 27, emphasis added.)

While appellant relies heavily upon *People v. Anderson*, *supra*, in support of his argument that the evidence is insufficient to support his conviction for first degree murder (see AOB 43-52), this Court has held that "[u]nreflective reliance on *Anderson* for a definition of premeditation is inappropriate." (*People v. Thomas*, *supra*, 2 Cal.4th at p. 517; see also *People v. Pride* (1992) 3 Cal.4th 195, 247; *People v. Perez*, *supra*, 2 Cal.4th at p. 1125.) Rather, the *Anderson* analysis was intended as a "framework" to assist reviewing courts in assessing whether the evidence supports an inference that a homicide resulted from preexisting reflection and weighing of considerations; it did not refashion the elements of first degree murder or alter the substantive law of murder in any way. (*People v. Sanchez* (1995) 12 Cal.4th 1, 32; *People v. Thomas*, *supra*, 2 Cal.4th at p. 517; see also *People v. Daniels* (1991) 52 Cal.3d 815, 869-870.)

Thus, evidence concerning motive, planning, and manner of killing is pertinent to the determination of premeditation and deliberation, but these

factors are not exclusive, nor are they invariably determinative. (*People v. Silva* (2001) 25 Cal.4th 345, 368; see also *People v. Cole* (2004) 33 Cal.4th 1158, 1224 [the factors "are descriptive, not normative"]; *People v. Sanchez*, *supra*, 12 Cal.4th at p. 32; *People v. Perez*, *supra*, 2 Cal.4th at pp. 1125-1126.) In other words, "'*Anderson* does not require that these factors be present in some special combination or that they be accorded a special weight, nor is the list exhaustive. *Anderson* was simply intended to guide an appellate court's assessment whether the evidence supports an inference that the killing occurred as the result of preexisting reflection rather than unconsidered or rash impulse.'" (*People v. Hughes* (2002) 27 Cal.4th 287, 370, quoting *People v. Pride*, *supra*, 3 Cal.4th at p. 247.) For example, notwithstanding *Anderson*, the method of killing alone can sometimes support a conclusion that the evidence sufficed for a finding of premeditated, deliberate murder. (*People v. Memro*, *supra*, 11 Cal.4th at pp. 863-864; *People v. Hawkins* (1995) 10 Cal.4th 920, 956-957.) Again, as this Court stated in *People v. Thomas*, *supra*, 2 Cal.4th at p. 516, "comparison with other cases is of limited utility, since each case necessarily depends on its own facts."

B. There Was Substantial Evidence Of Premeditation And Deliberation In This Case

Turning to this case, using the *Anderson* analysis as a guide, as this Court suggested in *Thomas* (see *People v. Thomas*, *supra*, 2 Cal.4th at p. 517), respondent sets forth below the evidence of premeditation in this case. Respondent's discussion of the evidence will, of course, summarize the evidence in the light most favorable to the judgment. And, when viewed in that light, it is clear that the evidence presented below supports the reasonable inference that the killing of Officer Fraembs was the result of preexisting reflection rather than unconsidered or rash impulse.

1. Planning Activity

Appellant contends that "no evidence was introduced against appellant that could support a reasonable inference of a prior plan to kill Officer Fraembs." Even though appellant was carrying a gun and on parole, there is no evidence, argues appellant, that he "planned to use the gun to kill the officer" because "[n]o one planning a murder would allow himself to be seen by two witnesses actually committing the act." (AOB 47-48.) Respondent submits that based on the evidence presented below, the jury could have reasonably drawn the contrary inference, namely, that once Officer Fraembs stopped appellant and thereafter started to pat down Cesena, appellant decided he had to kill Officer Fraembs in order to avoid arrest for the possession of a gun and a return to custody as a parole violator.

The evidence of appellant's planning is manifest. Here, when Officer Fraembs asked Cesena to come forward so he could pat him down, appellant was standing next to Flores, holding hands with her. While Officer Fraembs was patting down Cesena, appellant, realizing it was just a matter of time before he was patted down, slowly moved from his position next to Flores in order to stand behind her. He draped his left arm over her shoulder, leaving his right hand free. Appellant stood very close to Flores, with his chest against her back. Appellant, using Flores as a shield, slowly guided her toward the curb, forcing her to step off the curb onto the street. While moving toward the street, Flores felt appellant slide his hand down between himself and the small of Flores's back. Flores realized that was the area of appellant's waistband where he concealed his .45-caliber handgun. Appellant guided Flores toward Officer Fraembs while the officer continued to pat down Cesena. When he was about six feet from Officer Fraembs, appellant cast Flores aside, took a couple more steps toward Officer Fraembs, and, holding the .45-caliber handgun in both hands with his arms outstretched, fired a single round into the officer's face

from a distance of approximately two and one-half feet.

This evidence clearly permitted the jury to reasonably infer that appellant planned the murder of Officer Fraembs. Although the time interval may have been brief, the test is not time, but reflection, as "'[t]houghts may follow each other with great rapidity and cold, calculated judgments may be arrived at quickly." (*People v. Osband*, *supra*, 13 Cal.4th at p. 697, quoting *People v. Memro*, *supra*, 11 Cal.4th at pp. 862-863.) That is exactly what occurred here. Appellant's plan, although cowardly, was not rash. He used Flores as a shield to stealthily maneuver himself to a position of advantage over Officer Fraembs in such a way as to make it appear that he was actually complying with the officer's direction to them to sit on the curb. He made sure he was close enough when he fired the gun so that he could not miss hitting the officer. He took a firing stance, using both hands on the gun, so that the shot would be accurate. He aimed at the officer's head, manifesting his intent to kill him. He then fired a single round directly into Officer Fraembs's face before the officer even knew that appellant had a gun and before he had a chance to draw his own weapon to defend himself.

2. Motive To Kill

The evidence of motive is compelling. Appellant was on parole and one of the conditions of parole was that he was not to possess a weapon. Appellant knew that a violation of the terms and conditions of parole could result in his being returned to a correctional institution for 575 days plus a possible additional year for the actual possession of a weapon. Thus, appellant faced approximately two years and seven months of incarceration if found in violation of parole for possession of a weapon.

Significantly, during his two- or three-month relationship with Flores, appellant had told her that he was on parole and *"that he didn't want to go back" to jail, meaning that he "couldn't go back" to jail.* On the evening of

the murder, appellant told Cesena to "hurry up" and meet him by the railroad tracks "because I'm strapped," meaning he was carrying a gun, and "*I don't want to get busted.*" When Officer Fraembs pulled up by the trio, appellant said, "*Oh, shit, the jura [police]*" and "*I got the gun.*" Cesena told appellant, "Run, esse, run." Flores also told appellant to run because she did not want appellant to get into trouble, "do anything stupid," or go back to jail. Appellant, however, decided not to run and, instead, decided to be "rude" and a "jerk" by asking Officer Fraembs, with an attitude, "What the hell you stopping us for?" (6RT 865, 879-881, 883-886; 7RT 1013.) At that point, Officer Fraembs decided to pat down Cesena for officer safety reasons.

The jury could reasonably infer from this evidence that once Cesena was being patted down, appellant believed it was just a matter of time before he would also be patted down, and the weapon in his waistband would be discovered. The jury could further reasonably infer that, rather than facing the patdown, appellant decided to kill Officer Fraembs in order to avoid the discovery of the .45-caliber handgun on his person and his return to custody as a parole violator.

The jury could reasonably infer from the evidence presented that appellant's motive for killing Officer Fraembs was to avoid arrest and being returned to custody for a violation of his terms and conditions of parole. (*People v. Vorise* (1999) 72 Cal.App.4th 312, 318-319 [jury could reasonably infer from the evidence presented that defendant's motive in shooting victim was to avoid a lawful arrest].)

3. Manner Of Killing

As mentioned previously, notwithstanding *Anderson*, "the method of killing alone can sometimes support a conclusion that the evidence sufficed for a finding of premeditated, deliberate murder." (*People v. Memro, supra,* 11 Cal.4th at pp. 863-864; *People v. Hawkins*, *supra*, 10 Cal.4th at pp. 956-957.)

For example, regarding the manner of the killing, "a close-range gunshot to the face is arguably sufficiently 'particular and exacting' to permit an inference that defendant was acting according to a preconceived design." (*People v. Caro* (1988) 46 Cal.3d 1035, 1050; *see People v. Thomas, supra,* 2 Cal.4th at p. 518 [manner of killings strongly suggested premeditation as "[b]oth victims were killed by single contact shots, to Mary's head and Greg's neck, a method sufficiently 'particular and exacting' to warrant an inference that defendant was acting according to a preconceived plan]; *People v. Bloyd*, *supra*, 43 Cal.3d at p. 348; *People v. Cruz* (1980) 26 Cal.3d 233, 245 ["Finally, the killings by blows to only the head and by a shotgun blast in his wife's face permit the jury to infer that the manner of the killing was so particular and exacting that defendant must have killed intentionally according to a preconceived design and for a reason."].)

Here, appellant used Flores as a shield and slowly positioned himself so he was very close to Officer Fraembs. At that point, appellant cast Flores aside, moved closer to Officer Fraembs, and, at a distance of approximately two and one-half feet, pointed a high-powered .45-caliber handgun at the officer's head -- the most vulnerable part of the body. Appellant held the weapon in both hands, with his arms outstretched, so as to steady his aim and not miss his target — Officer Fraembs's face. Appellant fired one shot into Officer Fraembs's head, leaving brain matter and a bone fragment on the road for his fellow officers to find when they arrived on the scene. The bullet entered the officer's head on the left side of the bony part of the bridge of his nose and exited the back of his head toward the right side and fairly low. The bullet passed through *five* bones in his skull and came very close to his brainstem. The wound was "instantly incapacitating" and "rapidly fatal." Officer Fraembs died "within a very few seconds." The manner in which the wound was inflicted was such that, as the medical examiner testified, no medical treatment could have saved

Officer Fraembs.

Respondent submits that, based on appellant's deliberate and calculated movements of slowly positioning himself to a position of advantage over Officer Fraembs, as well as the precise manner of the killing -- a single, carefully aimed gunshot in the face from a high-powered .45-caliber handgun from a short distance, the jury could reasonably infer that the murder of Officer Fraembs occurred as the result of preexisting reflection rather than unconsidered or rash impulse. The method utilized by appellant to execute Officer Fraembs was, respondent submits, sufficiently "particular and exacting" so as to support the inference that appellant acted according to a preconceived plan when he shot Officer Fraembs in the face. (See *People v. Memro, supra,* 11 Cal.4th at pp. 863-864; *People v. Thomas, supra,* 2 Cal.4th at p. 518; *People v. Caro, supra,* 46 Cal.3d at p. 1050; *People v. Bloyd, supra,* 43 Cal.3d at p. 348; *People v. Cruz, supra,* 26 Cal.3d at p. 245.)

Given the compelling evidence regarding planning, motive, and manner of killing, all of which amply demonstrate premeditation and deliberation, appellant's claim must be rejected.

If this Court disagrees, it should still affirm the first degree murder finding, if it upholds the lying-in-wait first degree theory and/or the lying-in-wait special circumstance, for the reasons stated in Argument I, *ante*. Lying-in-wait was a second theory of first degree murder, one that the jury necessarily found applicable since it returned a true finding on the lying-in-wait special circumstance. Because the special circumstance finding required unanimity, it is plain that all jurors agreed that this theory applied, and warranted a first-degree murder verdict.

III.

APPELLANT'S FIRST DEGREE MURDER CONVICTION AND THE LYING-IN-WAIT SPECIAL CIRCUMSTANCE SHOULD NOT BE REVERSED

Appellant next contends that his murder conviction and lying-in-wait special circumstance must be reversed because the jury acted unreasonably in finding the lying-in-wait special circumstance and lying-in-wait murder, which were not supported by substantial evidence. Here, the jury was instructed with two theories of first degree murder, i.e., premeditation and deliberation and lying in wait. Appellant maintains that the evidence supporting the lying-in-wait theory of first degree murder was insufficient, therefore his first degree murder conviction must be reversed under *People v. Green* (1980) 27 Cal.3d 1 (*Green*), disapproved on other grounds as noted in *People v. Morgan* (2007) 42 Cal.4th 593, 610-611; *People v. Dominguez* (2006) 39 Cal.4th 1141, 1155, fn. 8; *People v. Martinez* (1999) 20 Cal.4th 225, 233-237; *People v. Hall* (1986) 41 Cal.3d 826, 834, fn. 3, because the exception to the *Green* rule which this Court articulated in *People v. Guiton*, *supra*, 4 Cal.4th 1116, is inapplicable. And, appellant continues, even if the *Guiton* exception applies to the instant case, the murder conviction must be reversed because "the factually inadequate theory of lying-in-wait murder was the likely basis for the first degree murder verdict and, in any event, both theories of first degree murder presented to the jury were factually inadequate . . . ." Appellant also asserts that "[i]t necessarily follows that the jury acted unreasonably in finding the lying-in-wait special circumstance." (AOB 53-56.) Respondent submits that appellant's claims are meritless.

A. The Relevant Law

In *Green, supra,* 27 Cal.3d at p. 69, this Court held that "when the prosecution presents its case to the jury on alternate theories, some of which are

legally correct and others legally incorrect, and the reviewing court cannot determine from the record on which theory the ensuing general verdict of guilt rested, the conviction cannot stand." The *Green* Court continued that "[t]he same rule applies when the defect in the alternate theory is not legal but factual, i.e., when the reviewing court holds the evidence insufficient to support the conviction on that ground." (*Id.* at p. 70.)

However, in *Guiton*, *supra*, 4 Cal.4th at p. 1129, this Court adopted the holding of the United States Supreme Court in *Griffin v. United States* (1991) 502 U.S. 46 [112 S.Ct. 466, 116 L.Ed.2d 371], and construed the *Green* rule as applying only to cases of *legal*, rather than *factual*, insufficiency. As stated by this Court in *Guiton*:

> If the inadequacy of proof is purely factual, of a kind the jury is fully equipped to detect, reversal is not required whenever a valid ground for the verdict remains, absent an affirmative indication in the record that the verdict actually did rest on the inadequate ground. But if the inadequacy is legal, not merely factual, that is, when the facts do not state a crime under the applicable statute, as in *Green*, the *Green* rule requiring reversal applies, absent a basis in the record to find that the verdict was actually based on a valid ground. [Fn. omitted.]

(*Guiton*, *supra*, 4 Cal.4th at p. 1129.)

And, if a jury has been instructed on a theory of first degree murder which does not have support in the record, an appellate court must affirm unless the unsupported theory is the *sole* basis of the guilty verdict. As this Court explained in *Guiton*:

> Furthermore, instruction on an unsupported theory is prejudicial only if that theory became the *sole* basis of the verdict of guilt; if the jury based its verdict on the valid ground, or on both the valid and the invalid ground, there would be no prejudice, for there would be a valid basis for

the verdict. We thus adopt the following test. In cases governed by *Griffin, supra*, . . . the appellate court should affirm the judgment unless a review of the entire record affirmatively demonstrates a reasonable probability that the jury in fact found the defendant guilty *solely* on the unsupported theory.

(*Guiton*, *supra*, 4 Cal.4th at p. 1130; emphasis added; see also *People v. Aguilar*, *supra*, 16 Cal.4th at p. 1034 [test is different for erroneously instructing on factually insufficient theory].)

B. Because Both The Theory Of Lying-In-Wait And The Theory Of Premeditation And Deliberation Were Legally And Factually Supported By The Evidence, The Murder Conviction And The Lying-In-Wait Special Circumstance Should Be Upheld

The issue in this case is, *if* the evidence is insufficient to support a theory of lying-in-wait first degree murder, as appellant claims, must the murder conviction be reversed because, as appellant also claims, there is "'an affirmative indication in the record that verdict actually did rest on the inadequate ground'" under *Guiton*. Appellant argues that the "affirmative indication" in the record that the jury relied on a lying-in-wait theory of murder is evidenced by the fact the jury returned a true finding on the lying-in-wait special circumstance. (AOB 55-56.) This claim lacks merit, for several different reasons.

First, as demonstrated in Argument I, *ante*, the evidence was sufficient to support appellant's murder conviction on a theory of lying-in-wait and also to support the jury's true finding on the lying-in-wait special circumstance.

Second, assuming, for the sake of argument only, that the evidence is insufficient to support a lying-in-wait theory of first degree murder, appellant's murder conviction can be upheld on the theory of deliberation and premeditation. Because appellant's claim of error is that the evidence is insufficient to support the verdict, the issue is governed by *Griffin* and *Guiton*,

not *Green.* (*People v. Guiton*, *supra*, 4 Cal.4th at p. 1128.) Accordingly, if this Court finds that *any* of the alternate theories presented to the jury is supported by substantial evidence, the judgment must be affirmed. Here, one other theory of first degree murder was presented to the jury, i.e., that it was committed with premeditation and deliberation.

As discussed in Argument II, the *uncontradicted* evidence demonstrated that appellant premeditated and deliberated the execution of Officer Fraembs. He used Flores as a shield to stealthily position himself to within approximately two and one-half feet of Officer Fraembs, ensuring his shot would hit the officer. He held the gun with both hands so that his aim would be accurate. Then, he fired a single round from a high-powered .45-caliber handgun directly into the officer's face, evidencing his intent to kill him. It is clear from the jury's findings that it necessarily found premeditated, deliberate murder, since it returned special circumstance findings that appellant intentionally killed Officer Fraembs, for the purpose of avoiding and preventing a lawful arrest. Given that there is substantial evidence to support the first degree murder conviction on a theory of premeditation and deliberation, the conviction must be affirmed.

There is nothing in the record which affirmatively demonstrates that the jury in fact found appellant guilty of the first degree murder of Officer Fraembs based *solely* on the lying-in-wait theory, rather than the theory of premeditation and deliberation. The prosecutor argued both theories to the jury (14RT 2190-2200), and Appellant's Opening Brief does not point to anywhere in the record where jurors asked questions during deliberations focusing on the lying-in-wait theory to the exclusion of a theory of first degree murder based on deliberation and premeditation.

Furthermore, the evidence supporting the theory of deliberation and premeditation was, as explained in Argument II, *ante*, truly overwhelming.

Significantly, that the jury relied upon the theory of deliberation and premeditation is evidenced by the fact the jury returned a true finding on the special circumstance of *intentionally* killing a peace officer during the lawful performance of his duties, and also necessarily found an *intentional* killing in returning a "true" finding on the lying-in-wait special circumstance. Thus, on this record, it cannot be said that the purported unsupported theory (i.e., lying-in-wait murder) was the *sole* basis of the verdict, simply because the jury found the lying-in-wait special circumstance to be true.

Even assuming the jury was erroneously instructed on a factually deficient lying-in-wait first degree murder theory and special circumstance (see *People v. Aguilar*, *supra*, 16 Cal.4th at p. 1034), appellant is not entitled to a reversal. It is clear from the jury's actual findings that it necessarily found premeditated, deliberate murder, since it returned two special circumstance findings that appellant intentionally killed Officer Fraembs, for the purpose of avoiding and preventing a lawful arrest. Premeditation (i.e., considered beforehand) and deliberation (formed, arrived at, or determined upon as a result of careful thought and weighing of considerations for and against the proposed course of action) can occur in a brief interval, and these other findings plainly signaled that all jurors necessarily found planning activity, motive to kill, and a manner of killing that established first degree murder based upon premeditation and deliberation. (See *People v. Memro, supra,* 11 Cal.4th at pp. 862-863; *People v. Perez*, *supra*, 2 Cal.4th at p. 1123.) Moreover, regardless of whether the lying-in-wait special circumstance is sustained on appeal, the jury made a factual determination that it was true. This means the jury found not only an intentional killing, but found the killing was committed during a period of concealment and watching and waiting for an opportune time to attack, establishing premeditation and deliberation. Accordingly, no reversal of appellant's first degree murder conviction is required. (See *People v. Aguilar,*

supra, 16 Cal.4th at p. 1034 [if jury erroneously instructed so that it could have convicted on factually insufficient theory, no reversal if reviewing court can conclude beyond a reasonable doubt that jury did not rely on erroneous instruction].)

If the lying-in-wait special circumstance is found deficient, no reversal of the penalty phase is required. The jury found two other special circumstances true, and in determining guilt and the appropriate penalty, properly considered all of the facts and circumstances underlying any deficient lying-in-wait special circumstance, since they were part of the same criminal event. (*Brown v. Sanders*, *supra*, 546 U.S. at pp. 223-225.)

Accordingly, appellant's claim must be rejected.

IV.

THE TRIAL COURT WAS NOT REQUIRED TO INSTRUCT THE JURORS THAT THEY HAD TO UNANIMOUSLY AGREE ON THE THEORY OF GUILT FOR FIRST DEGREE MURDER

Citing *Schad v. Arizona* (1991) 501 U.S. 624 [111 S.Ct. 2491, 115 L.Ed.2d 555], and *Richardson v. United States* (1999) 526 U.S. 813, 819 [119 S.Ct. 1707, 143 L.Ed.2d 985], appellant next contends the trial court's guilt phase instructions were erroneous because "nothing in the court's instructions required the jurors to unanimously agree on whether the homicide was premeditated and deliberate or committed by means of lying in wait." Appellant maintains that in order to comply with the state and federal Constitutions it was incumbent on the trial court to instruct the jurors that they had to unanimously agree on which form of statutory murder (deliberate and premeditated or lying-in-wait) was committed. This is so, argues appellant, because "lying-in-wait murder does not have the same elements as premeditated and deliberate murder." He candidly "acknowledges" that this Court has

rejected this claim in similar cases, but nonetheless maintains that the issue deserves reconsideration "in light of the charges and facts of this case." (AOB 57-62.)

Unfortunately for appellant, this Court has repeatedly held that even though the elements underlying the two theories differ, there is only one statutory offense of first degree murder and thus, jurors do not have to unanimously agree on the theory of guilt supporting a first degree murder conviction. And, given that there is nothing unique about either the charges or facts of the instant case, this Court should, once again, reaffirm its prior decisions and decline appellant's invitation to revisit the issue.

This Court's comments in *People v. Cole*, *supra*, 33 Cal.4th at p. 1221, are particularly instructive:

> Defendant contends the trial court erred by failing to require unanimous agreement as to which theory of guilt the jury accepted to support a first degree murder verdict, i.e., premeditated and deliberate murder, murder by torture, murder by lying in wait, or felony murder (arson). We reject the contention, as we have rejected similar ones. [Citations omitted.] *Schad v. Arizona* [citation omitted], on which defendant relies, does not hold otherwise. [Citation and footnote omitted.]

(See also *People v. Kipp*, *supra*, 26 Cal.4th at p. 1131; *People v. Seaton* (2001) 26 Cal.4th 598, 671; *People v. Box* (2000) 23 Cal.4th 1153, 1212; *People v. Carpenter*, *supra*, 15 Cal.4th at pp. 394-395.) Thus, appellant's claim is meritless and his reliance on *Schad* and *Richardson* is misplaced.

And, although appellant does not raise the issue, it must be noted that nothing in *Apprendi v. New Jersey* (2000) 530 U.S. 466 [120 S.Ct. 2348, 147 L.Ed.2d 435], requires a unanimous jury verdict as to the particular theory justifying a finding of first degree murder. As this Court recently observed in

People v. Greier (2007) 41 Cal.4th 555, 592, after reaffirming the above rule:

> This rule of state law passes federal constitutional muster. [ ] "We are not persuaded otherwise by *Apprendi v. New Jersey* (2000) 530 U.S. 466 [147 L.Ed.2d 435, 120 S.Ct. 2348]. There, the United States Supreme Court found a constitutional requirement that any *fact* that increases the maximum penalty for a crime, other than a prior conviction, must be formally charged, submitted to the fact finder, treated as a criminal element, and proved beyond a reasonable doubt. [Citation.] We see nothing in *Apprendi* that would require a unanimous jury verdict as to the particular *theory* justifying a finding of first degree murder. (See also *Ring v. Arizona* (2002) 536 U.S. 584, 610 [122 S.Ct. 2428, 2443-2444, 153 L.[Ed.] 2d 556] [requiring jury finding beyond reasonable doubt as to *facts* essential to punishment]." [Citation omitted.] Defendant's criticisms of our prior decisions do not persuade us and we see no need to reexamine them.

The same is true in the instant case. Therefore, appellant's claim must be rejected.

V.

THE TRIAL COURT PROPERLY DENIED APPELLANT'S MOTIONS FOR JUDGMENT OF ACQUITTAL AND TO STRIKE OR DISMISS THE SPECIAL CIRCUMSTANCES OF MURDER OF A PEACE OFFICER AND MURDER TO AVOID ARREST

Next, appellant contends that the record contains insufficient evidence to support a true finding on the special circumstances of killing a police officer in the lawful performance of his duties and killing to avoid a lawful arrest, and that therefore, the special circumstances should have been stricken at the close of the prosecution case. (AOB 63-78.) However, the encounter between

Officer Fraembs and appellant, Cesena, and Flores was consensual, and appellant was never detained, because he never submitted to the officer's authority. Moreover, even if a detention occurred, it could not be said that, as a matter of law and under the totality of the circumstances, the officer's actions were unlawful. Therefore, the trial court properly denied appellant's motions to strike the special circumstances.

A. The Relevant Trial Proceedings

As previously set forth, it was alleged in this case that the murder victim, Pomona Police Officer Daniel Tim Fraembs, was a peace officer who was intentionally killed while engaged in the performance of his duties, and that appellant knew and reasonably should have known this. (§ 190.2, subd. (a)(7).) It was also alleged that appellant committed the murder for the purpose of avoiding and preventing a lawful arrest and perfecting and attempting to perfect an escape from lawful custody (§ 190.2, subd. (a)(5)). (2CT 506-508.)

Johanna Flores testified that on the night of the murder, appellant wore black jeans, a white shirt, a black bomber-style jacket with an orange lining, small pockets, and a front zipper, and Nike cross-trainer athletic shoes. (6RT 849-850.) Flores wore her Taco Bell uniform, i.e., black pants, black shoes, a purple-and-blue-striped Taco Bell shirt, and a hat. (6RT 850.) When Flores and appellant met Joseph Cesena on Humane Way, Cesena was wearing gray khaki pants, a white shirt, a striped gray-and-black sweater, and Nike Cortex shoes. (6RT 875-876.) Cesena had a knife that "snapped out." (6RT 878.)

As the three walked back down Humane Way toward Mission Boulevard, Flores walked next to appellant and Cesena walked behind them. When a bright light illuminated the ground in front of them, the three looked back and saw Officer Fraembs driving down the street slowly in a patrol car. (6RT 874-880.) Appellant, who had previously told Flores that he was on

parole and "couldn't go back" to jail, said, "Oh, shit, the jura," meaning "the cops." Appellant had told Flores on a prior occasion that he was on parole and that he "couldn't go back" to jail. (6RT 879-881.)

Officer Fraembs stopped his car behind the group, on the same side of the street where they were walking, and got out, leaving the spotlight turned on and leaving the driver's door open. (6RT 880-881.) Flores, appellant, and Cesena turned toward Officer Fraembs. Appellant stood shoulder-to-shoulder next to Flores, while Cesena was in front of them, closer to the officer. (6RT 882.)

Officer Fraembs asked, "How are you guys doing tonight?" He was "real nice," and, unlike some officers, was neither mean nor sarcastic. He seemed to Flores to be stopping the trio "for a curfew check, nothing major." (6RT 882-883.) Appellant said something like, "What the hell are you stopping us for?" or "What are you stopping us for?" Appellant "had an attitude." His manner and demeanor were not nice; he was being "rude" and "a jerk." (6RT 885-886; 7RT 1013.) Appellant was "a lot taller" than Officer Fraembs. (6RT 897.)

Officer Fraembs told appellant and Flores, "Why don't you have a seat right there," indicating the curb. He called Cesena, who was closest to him, over to the patrol car. Cesena went to the driver's side of the car and put his hands on the hood. Officer Fraembs stood behind Cesena and patted him down. (6RT 885-889.) Appellant, who had been holding hands with Flores, slowly moved behind her and draped his left arm over her shoulder, leaving his right hand free. He maneuvered Flores off the curb, into the street, and closer to Officer Fraembs, hiding the fact that he was pulling a gun from his waistband, then pushed her aside, stepped even closer to the officer, extended his arms and aimed the gun with both hands, and shot him in the face from a distance of two and one-half feet, killing him while he was still patting down

Cesena. (6RT 888-900, 903-904; 7RT 1030-1035.)

During their encounter, Officer Fraembs never took any aggressive action toward appellant. (6RT 896.) Nor did appellant appear to be panicked, except when he had first seen the light from the police car and after he shot Officer Fraembs, when he appeared scared that he would be caught. (7RT 1030-1035, 1037-1038.)

Following the presentation of the People's case-in-chief, pursuant to section 1118.1, the defense moved for judgment of acquittal regarding all three special circumstance allegations. Defense counsel argued at length that there was insufficient evidence of lying in wait to support that theory of first degree murder or the special circumstance. The court and prosecutor also responded at length to the defense arguments. (13RT 1915-1929.) However, as to the other two special circumstance allegations, defense counsel submitted the matter without argument. (13RT 1915.) The trial court denied the section 1118.1 motion. (13RT 1924, 1928-1929.)

Following the close of all evidence, defense counsel stated that he wished to make a section 1118.1 motion with respect to the special circumstances alleged pursuant to section 190.2, subdivisions (a)(5) and (a)(7). Counsel argued that the allegation that appellant killed Officer Fraembs to avoid a lawful arrest, which was addressed in CALJIC No. 8.81.5, could not stand because any arrest that Officer Fraembs would have made would have been unlawful. He further argued that when Officer Fraembs got out of his patrol car and spoke with appellant and his companions, this constituted an investigative detention. Counsel argued that the officer had no right to detain the three or to "frisk" them to search for weapons; therefore, any arrest would have been unlawful. Citing *Terry v. Ohio* (1968) 392 U.S. 1 [88 S.Ct. 1868, 20 L.Ed.2d 889], *In re James D.* (1987) 43 Cal.3d 903, and *In re Tony C.* (1978) 21 Cal.3d 888, defense counsel argued that there were no specific and

articulable facts causing Officer Fraembs to suspect that criminal activity had occurred or was about to occur and that the persons he was stopping were involved in that activity. Defense counsel cited several other cases to support his argument that the circumstances of this case did not warrant such a suspicion. He further argued that appellant had a right to question the officer regarding why he was being detained, that this did not justify the pat-down search of Cesena, and that any subsequent search or arrest of appellant for carrying a concealed weapon would therefore also be unlawful. (14RT 2047-2054.)

Defense counsel went on to argue that "a similar line of reasoning" applied to the special circumstance of intentionally killing a police officer while the victim was engaged in the performance of his duties. He further argued that it was not proper for the prosecution to allege both of these special circumstances together, as they actually "merged." Counsel referred to CALJIC No. 8.81.8 and argued that, as a matter of law, Officer Fraembs's conduct had not been "lawful." Counsel conceded that the initial interaction in which the officer asked, "How are you guys doing?" had been lawful, but argued that once Officer Fraembs told Cesena to put his hands on the hood of the police car and submit to being frisked, the officer's actions were unlawful. Counsel asked the court to remove these two special circumstance allegations from the jury's consideration. (14RT 2054-2059.)

The prosecutor stated that Officer Fraembs had seen a woman and two men walking down an industrial street at 1:30 a.m. Under the circumstances, the officer might have thought that they could be stranded motorists, that the woman might not be in the company of the two men voluntarily, or that some other criminal activity was being contemplated in this area where the Humane Society, Hughes Avacom, and several trucks were located. Although these circumstances might not, by themselves, have justified the officer in ordering

the three to stop and submit to a search, this was not what Officer Fraembs had done. Instead, he simply asked how they were doing, and this had been a consensual encounter. However, once appellant became hostile, the officer was in a potentially dangerous situation, and could not reasonably be expected to simply try to leave. The prosecutor argued that the officer could lawfully pat down the three in order to ensure his own safety, and that he had begun by patting down Cesena, who was standing closest to him. (14RT 2060-2064.)

In addition, the prosecutor stated that the special circumstance of murder to avoid a lawful arrest had not been charged in order to allege multiple overlapping special circumstances, as defense counsel had suggested. Rather, this had been appellant's motive for the murder, not simply an incidental result of the murder. (14RT 2064-2066.)

Defense counsel argued that Flores's testimony had been impeached, that appellant would not have wanted to escalate the situation because he would not want the officer doing anything more than asking how they were doing, and that appellant's attitude toward Officer Fraembs had not, in fact, been hostile. Counsel reiterated that there had been no reason for the officer to believe that a crime had occurred or was about to occur; therefore, the detention was unlawful and the special circumstances did not apply. (14RT 2066-2068.)

The prosecutor responded that this had been a consensual encounter that was altered by appellant's own attitude, and that the officer had taken the most minimal action he could take to ensure his own safety. Had the officer drawn his weapon and ordered the three to lie prone in the street, his actions might have been unlawful, and he might still be alive. Instead, he chose the minimal intrusion possible, and paid for it with his life. (14RT 2068-2070.) In reply, defense counsel opined that the officer should have answered appellant's question and explained that he was curious about why they were there at that time of night, and that the three probably would have simply told him where

they were going and this "would simply have been the end of it." (14RT 2070-2071.) The court stated that it would read the cases cited by defense counsel and would give the prosecution the opportunity to cite additional cases. (14RT 2071-2072.)

The court and counsel then conferred regarding the jury instructions. (14RT 2073.) Defense counsel objected to CALJIC No. 8.81.5 on the basis that, as a matter of law, the officer had acted unlawfully. The court stated it would include the instruction, subject to its ruling on the section 1118.1 motion. (14RT 2100-2102.) The court ruled likewise regarding CALJIC Nos. 8.81.7 and 8.81.8. (14RT 2102-2104.)

Defense counsel requested that the court give a modified version of CALJIC No. 9.29 in order to instruct the jurors that the People bore the burden of proving that the officer was engaged in the performance of his duties. Following objection by the prosecutor, the court stated it would modify the proposed instruction in order to avoid confusion or duplication of other instructions, and would give this instruction as further modified.[23] (14RT 2118-2123.)

When both counsel indicated there was no further issue regarding the jury instructions to be discussed, the court returned to appellant's section 1118.1 motion. (14RT 2123.) The prosecutor argued that Officer Fraembs could lawfully search appellant, based solely on appellant's conduct, because appellant was on parole and was subject to search and seizure as a condition of

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23. The defense-proposed instruction, as modified and given to the jury, reads as follows:

> As used in these instructions, the People have the burden of proving beyond a reasonable doubt that the peace officer was engaged in the performance of his duties.
>
> A peace officer is not engaged in the performance of his duties if he makes or attempts to make an unlawful detention.

(See 13CT 3599; 15RT 2411-2412.)

parole, whether or not the officer knew of the existence of this condition. (14RT 2124.)

The court noted that there was a distinction between a parole condition and a probation condition, and stated it would do some research on this, and would also allow defense counsel to present case authority regarding whether it was necessary for the officer to be aware of the search condition. (14RT 2124-2125.) Defense counsel argued that the officer must be aware of the condition and must obtain consent from the parole officer or have the parole officer present during the search. (14RT 2125.) Citing *People v. Brown* (1989) 213 Cal.App.3d 187, 192, the prosecutor argued that it was not necessary to contact the parole officer. (14RT 2126.) The court stated that it would instruct the jury according to CALJIC No. 8.81.5.[24/] (14RT 2126.)

The court also stated that if it denied appellant's section 1118.1 motion, it would instruct the jury according to CALJIC No. 8.81.8.[25/] (14RT 2127.)

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24. CALJIC No. 8.81.5, as modified and given in this case, provides as follows:

> To find that the special circumstance, referred to in these instructions as murder to prevent arrest or to perfect an escape, is true, the following facts must be proved:
>
> 1. The murder was committed for the purpose of avoiding or preventing a lawful arrest.

(See 13CT 3594; 15RT 2409.)

25. CALJIC No. 8.81.8, as modified and given in this case, provides as follows:

> The phrase "in the performance of his duties," as used in these instructions means:
>
> Any lawful act or conduct while engaged in the maintenance of the peace and security of the community or in the investigation or prevention of crime.
>
> Lawfully detaining or attempting to detain a person for questioning or investigation.
>
> A lawful arrest may be made by a peace officer:
>
> Without a warrant of arrest whenever the officer has

The prosecutor argued that in light of the circumstances, the officer acted lawfully by doing a pat-down search to ensure his own safety. The prosecutor further argued that in addition, the officer could have searched appellant based on appellant's parole condition, as the officer would have had a reasonable suspicion to justify the search under the circumstances, given that he was faced with three individuals, late at night, on a dark, industrial street, and that

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> reasonable cause to believe that the person arrested has committed a misdemeanor in the officer's presence.
>
> The term "reasonable cause" as used in this instruction means such a state of facts or circumstances confronting the officer at the time of the arrest as would lead a peace officer of ordinary caution or prudence to believe and conscientiously entertain a strong suspicion that the person arrested had committed a misdemeanor.
>
> A peace officer may lawfully detain and question a person when the circumstances are such as would indicate to a reasonable peace officer in a like position that such a course of conduct is within the proper discharge of his duties.
>
> Temporary detention for questioning permits reasonable investigation, without the necessity of making an arrest. Although peace officers have the power to detain and question, there must be reasonable cause to detain.
>
> Probable or reasonable cause to detain requires that there be some unusual or suspicious circumstance, or other demonstrable reason, warranting the investigation. Time, location, number of people, demeanor, and conduct of a suspect, a recently reported crime and the gravity of the crime, are among the factors that you may consider.
>
> In order for a peace officer to have reasonable cause to detain:
>
> 1. There must be a rational suspicion by the peace officer that some activity out of the ordinary has taken place, is occurring or is about to occur;
>
> 2. Some indication must exist to connect the person under suspicion with that activity; and
>
> 3. There must be some suggestion that the activity is related to a crime.

(See 13CT 3596-3598; 15RT 2409-2411.)

appellant had a hostile attitude. The prosecutor contended that because the officer would have been acting lawfully in searching appellant, it would also have been lawful for him to arrest appellant when he found that appellant was carrying a concealed handgun. (14RT 2127-2130.)

The trial court read the *Brown* case and discussed its facts. (14RT 2130-2132.) Defense counsel argued that the officer must know that the person being searched is on parole. (14RT 2132.) The prosecutor acknowledged that in the instant case, it was not known what Officer Fraembs knew. The prosecutor cited *In re Tony C.* (1978) 21 Cal.3d 888, and argued that aside from the parole condition, the circumstances justified a detention and pat-down search for weapons to ensure the officer's safety. The prosecutor argued that the question of the lawfulness of the officer's actions was one that should be resolved by the jury. (14RT 2132-2135.) The court noted, and defense counsel affirmed, that the defense position was that, as a matter of law, the court should find the officer's actions to be unlawful. (14RT 2135-2136.)

Citing *People v. Rosales* (1989) 211 Cal.App.3d 325, the prosecutor argued that appellant had escalated what had initially been merely a consensual encounter into a situation which might prove dangerous to the officer. (14RT 2136-2139.) Defense counsel responded that there was nothing to support a suspicion of criminal activity and that appellant had not, in fact, been hostile to the officer. (14RT 2139-2141.)

Following a short recess to review the case law, the trial court found that the officer's initial approach to appellant's group had been a consensual encounter. Flores had clearly described a hostile attitude by appellant toward the officer. The officer was faced with three persons dressed in mostly dark clothing, on a dark street in an industrial area at 1:30 a.m. Cesena was carrying

a knife in a sheath.[26] (14RT 2141-2144.) The court stated as follows:

> Under those circumstances, the officer takes what I describe to be self-protective – the self-protective measure of patting down Mr. Cesena. So in that sequence we have a consensual encounter and the officer taking what appears to me to be a self-protection measure of conducting a pat-down search of a person that we know had a knife and a sheath on him. He was faced with a hostile attitude by one of the three individuals. The other individual closest to him, we know by Johanna Flores's testimony, which I don't believe is in conflict as to this particular issue, or matter, had a knife and a sheath on.
>
> And under those circumstances, it appears to me that what the officer did was reasonable. Taking into consideration time, location, number of people, demeanor, conduct, that under those circumstances what the officer did was appropriate to conduct a pat-down search. And we don't know what else would have happened, but because nothing else developed.
>
> What developed was a consensual encounter, I am using "consensual encounter" from *People v. Rosales* [*supra*, 211 Cal.App.3d 325] which cites [*Wilson v. Superior Court* (1983) 34 Cal.3d 777, 784]. It also cites

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26. The court stated, " . . . with one of them having a sheath, a knife sheath and a knife, query whether the officer made that observation of a knife and a knife sheath. But we know based upon Johanna Flores' description of what [Cesena] was wearing that this is what he was wearing and this is what he had. And we know that when [Cesena] was found by the police, this is what he was wearing and this is what he had, namely, a sheath." (14RT 2143-2144.) The court later stated, "The officer apparently was looking to see what weapons, if any, [Cesena] had, in addition to a knife that might hurt him . . . ." (14RT 2148.) The court also found that the People had justified the pat-down search of Cesena based on his possession of a knife. (15RT 2162.) It is clear that the court found that Officer Fraembs, like Flores, was aware that Cesena was carrying a knife.

[*Florida* v. *Royer* (1983) 460 U.S. 491 [103 S.Ct. 1319, 75 L.Ed.2d 229]] . . . which is our basis of the concept of consensual encounter. Under those circumstances it appears to me that the officer acted in an appropriate manner and if he took measures to safeguard himself, that he acted in compliance with lawful, with the lawful police response.

For that reason, your motion, Mr. Fountain, that the Court as a matter of law determine that the officer was not acting in the proper course of his lawful duties as a peace officer and that the Court dismiss the two special circumstances dealing with a peace officer acting in the performance of his duties, that motion is denied. And I'm going to allow those special circumstances to go to the trier of fact and to determine the issues.

One of the special circumstances is 190.2(a)(5), whether the murder was committed for purpose of avoiding or preventing a lawful arrest. The other special circumstance is under Penal Code section 190.2(a)(7), murder of a peace officer engaged in the performance of his duties.

I believe that is what you were asking me to do, Mr. Fountain, to make a finding as a matter of law that the officer was not acting in the lawful performance of his duties and therefore that these special circumstances should not go to the trier of fact. And for the reasons that I have stated, your motion is denied.

(14RT 2144-2145.)

Defense counsel stated that in order to make a complete record, he was also requesting that the court not give CALJIC No. 8.81.7,[27] on the basis that

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27. CALJIC No. 8.81.7, as modified and given in this case, provides as follows:

> To find that the special circumstance referred to in these instructions as murder of a peace officer is true, each of the following facts must be proved:

there was "a lack of factual proof to support that instruction." (14RT 2146.) The court stated that Officer Fraembs had been in full uniform, driving a marked police car with spotlights. For the purposes of appellant's motion, based on the previously mentioned circumstances, the court again found that the initial encounter was consensual, that the officer then feared for his safety, and that his actions constituted a lawful exercise of his duties as a police officer. (14RT 2146.)

Defense counsel then requested that the court exercise its discretion pursuant to section 1385 to strike the special circumstance allegation regarding a murder committed to avoid a lawful arrest, as the circumstances here fell within the purview of a killing of a peace officer in the lawful performance of his duties, and only one of the two special circumstances should be allowed. The court found that the testimony would support a finding that appellant killed Officer Fraembs in order to avoid arrest. The prosecutor agreed, and argued that it was clear that the officer would have conducted a pat-down search of appellant, that he would have arrested him when he found appellant's gun, and that this would have been a lawful arrest. The court stated that although it had previously considered striking the language in CALJIC No. 8.81.8 referring to lawful arrest, it now believed it should include this language. The court stated that it would continue ruminating on these matters over the weekend and reserved the right to change its rulings if it became convinced they had been erroneous. (14RT 2146-2154.)

When court reconvened the following week, defense counsel argued that

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1. The person murdered was a peace officer; and
2. The person murdered was intentionally killed while engaged in the performance of his duties; and
3. The defendant knew or reasonably should have known that the person killed was a peace officer engaged in the performance of his duties.

(See 13CT 3595; 15RT 2409.)

although Cesena had been armed with a knife, there was no evidence to show that Officer Fraembs had seen the knife, any more than he had seen appellant's gun hidden in his waistband. Counsel argued that the photographs taken of Cesena following his arrest (Peo. Exh. No. 8) showed that the sheath would not have been visible. Defense counsel asked the court to reconsider its ruling. (15RT 2157-2159.)

The prosecutor reiterated his earlier arguments regarding the nature of the encounter between the officer and appellant and his companions, and argued that at each point, Officer Fraembs had taken the most minimal approach possible, first by simply asking the three people how they were doing, and then by conducting a pat-down search to ensure his own safety following appellant's aggressive attitude. (15RT 2159-2161.) The prosecutor further argued that the photographs of Cesena showed that his knife sheath "hangs quite low." It was, of course, impossible to know whether the murdered officer had seen the knife, but whether he did or not, his actions had been reasonable under the circumstances. (15RT 2161.) The prosecutor noted that in order to remove this matter from the jury's consideration, the court would have to find that the officer's actions had been so egregious as to be indisputably unlawful. The prosecutor asked the court to affirm its earlier ruling and allow the jury to consider the special circumstances. (15RT 2161-2162.)

The court stated as follows:

> Mr. Fountain, I've looked closely at [People's Exhibit] Number 8, and you are correct, we can't tell what the officer observed. My statement was based upon my review of Johanna Flores's testimony concerning what they were wearing and the fact that Mr. Cesena had a knife. And we didn't have any inquiry as to whether or not the T-shirt was in, whether the T-shirt was out, whether the knife was visible. This picture was obviously taken after the chase and after he was brought out

from under the foundation of a building. So to that extent, there is no evidence.

The evidence is that Johanna Flores knew that Mr. Cesena had a knife. I guess he could have told her he had a knife, he could have lifted his T-shirt if his T-shirt was out. So to that extent, the People have justified the pat-down, based upon the fact that Mr. Cesena had a knife.

(15RT 2162.) The court disagreed that in order to grant appellant's motion, it would have to find that the officer's actions were "egregious." However, under the totality of the circumstances, the officer could reasonably have concluded, during the consensual encounter, that his safety was endangered, and "he was justified in taking the minimal action of patting down the one closest to him to see whether there were any weapons that could subject him to danger or harm." Therefore, there was sufficient evidence for the question of the lawfulness of the officer's actions to be submitted to the jury as part of the special circumstance allegations. (15RT 2162-2164.)

The court stated it had included the language involving "lawful arrest" in CALJIC No. 8.81.8, and noted that it was clearly unlawful to carry a loaded, concealed firearm in public. Defense counsel agreed that "lawful arrest" should be included in the instruction if it was to be given over his original objection to the instruction being given at all. (15RT 2164-2166.)

Defense counsel stated that before the parties argued the case, he wanted to clarify that, in his view, the prosecutor would be limited to trying to establish that any arrest would have been lawful, while defense counsel would be arguing that it would be unlawful. (15RT 2169-2170.) The court stated that there had been no arrest, but that if the jury found the detention was unlawful, it would follow that an arrest would also have been unlawful. However, the prosecutor could certainly argue that appellant believed he was about to be arrested for carrying a concealed and loaded firearm. (15RT 2170.) The prosecutor stated

that his position was that this had always been a consensual encounter, that the pat-down search was lawful, and that an arrest would also have been lawful. (15RT 2170-2171.)

The court stated that the initial encounter had been consensual, that a pat-down search constituted a detention, and that if an officer had reasonable cause to believe he was in danger, then he had reasonable cause to believe that a crime was about to be committed, and the detention would be lawful. The court found that whether or not there had been a detention, if the jurors found the officer's actions to be lawful, they could find the special circumstance to be true; they could also find there had been an unlawful detention and that the special circumstance was not true; this was an issue of fact for the jury to decide. (15RT 2171-2173.)

During his opening argument to the jury, the prosecutor argued that Officer Fraembs had reason to believe that something might be amiss as appellant and his companions walked through a dark industrial area late at night, wearing dark clothing. The prosecutor argued that the officer initially kept his contact with the group low-key, but that when appellant reacted with hostility, the officer was entitled to take precautions to ensure his own safety. Even in doing so, Officer Fraembs had taken a minimalist approach, calling over to the police car the person closest to him, Cesena, and patting him down, while asking appellant and Flores to simply sit on the curb, rather than ordering them to lie prone on the ground. The prosecutor argued that Officer Fraembs had acted to protect the people he had stopped and the community. Furthermore, it was clear that appellant knew the victim was a police officer, as Officer Fraembs was in full uniform and appellant had said, "Oh shit, the jura." (15RT 2201-2207.)

The prosecutor also argued that appellant killed Officer Fraembs in order to avoid a lawful arrest. Appellant saw Cesena being searched, and knew he

had "mouthed off" to the officer; therefore, he knew he would be searched. He also knew he was carrying a loaded, concealed gun, that this was illegal and a violation of his parole conditions, and that if he was arrested, he faced spending another two and a half years in custody. Appellant had no other reason to kill Officer Fraembs, and it was apparent that he thought he could get away with it because they were in a deserted area and the only eyewitnesses were his friends, who would not "roll over" on him. (15RT 2211-2213.)

Defense counsel argued that Officer Fraembs had not used good judgment in the manner in which he had approached appellant, Flores, and Cesena. He further argued that appellant had not, in fact, been hostile toward the officer, and that if he had been, Officer Fraembs would have searched appellant first, rather than Cesena. (15RT 2289-2290.) Counsel argued that the special circumstances of killing a peace officer in the lawful performance of his duties and killing to avoid a lawful arrest did not apply here, because this was an unlawful detention and was not justified by a concern for the officer's safety. (15RT 2316-2329, 2338-2340.) In rebuttal, the prosecutor again argued that Officer Fraembs had acted lawfully and that the charged special circumstances applied. (15RT 2353-2354, 2376-2383.)

As previously set forth, the trial court instructed the jurors according to CALJIC Numbers 8.81.5, 8.81.7, and 8.81.8, as well as with the modified burden of proof instruction requested by the defense. (13CT 3594-3599; 15RT 2409-2412.) The jury found the special circumstances of killing a police officer in the lawful performance of his duties and killing to avoid a lawful arrest to be true. (13CT 3629-3630, 3636-3637; 15RT 2437-2438.)

In his motion for a new trial (13CT 3674-3687), appellant argued that the evidence was insufficient to support the true findings on these special circumstances. Specifically, he referred to his arguments during trial and reiterated that Officer Fraembs had not been engaged in the lawful performance

of his duties and that an arrest would not have been lawful. (13CT 3684-3685.) In his motion to modify the verdict or reduce the penalty to life without the possibility of parole (13CT 3688-3701), appellant reiterated these arguments (13CT 3692-3693). In its opposition to appellant's motions (13CT 3702-3710) , the prosecution argued that Officer Fraembs had acted lawfully and the jury had properly rejected appellant's contrary claim (13CT 3706).

At the sentencing hearing, the trial court stated it had read the moving papers; both counsel submitted the matter based on the written pleadings. (18RT 2867.) Following the discussion regarding the lying-in-wait special circumstance set forth previously in Argument I, the trial court denied appellant's motion for a new trial regarding the conviction of first degree murder and the special circumstances of murder of a peace officer and murder to avoid or prevent a lawful arrest. (18RT 2871-2875.) The court stated that the initial encounter had been consensual, until appellant became hostile. At that point, Officer Fraembs, faced with three persons dressed in gang-style clothing, in an area known for gang activity, late at night in an industrial area, became concerned for his safety based on appellant's hostile attitude, and therefore acted lawfully when he detained the three. (18RT 2872-2875.) The court also declined to exercise discretion under section 1385 to dismiss these two special circumstances. (18RT 2875.)

B. The Applicable Law

"'The purpose of a motion under section 1118.1 is to weed out as soon as possible those few instances in which the prosecution fails to make even a prima facie case.'" (*People v. Stevens* (2007) 41 Cal.4th 182, 200, quoting *People v. Shirley* (1982) 31 Cal.3d 18, 70.) The question "'is simply whether the prosecution has presented sufficient evidence to present the matter to the jury for its determination.'" (*People v. Stevens*, *supra*, 41 Cal.4th at p. 200, quoting *People v. Ainsworth* (1988) 45 Cal.3d 984, 1024.) The sufficiency of

the evidence is tested at the point in time when the motion is made. (§ 1118.1; *People v. Stevens*, *supra*, 41 Cal.4th at p. 200; *People v. Shirley*, *supra*, 31 Cal.3d at pp. 70-71.)

In ruling on a motion for judgment of acquittal pursuant to section 1118.1, the standard applied by the trial court is the same as the standard applied by an appellate court in reviewing the sufficiency of the evidence to support a conviction, i.e., whether, drawing all reasonable inferences from the evidence, there is any substantial evidence of the existence of each element of the offense charged. (*People v. Stevens*, *supra*, 41 Cal.4th at p. 200; *People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 89; *People v. Cuevas* (1995) 12 Cal.4th 252, 261; *People v. Crittenden* (1994) 9 Cal.4th 83, 139, fn. 13; *People v. Dalerio* (2006) 144 Cal.App.4th 775, 780.) "This inquiry does not require the reviewing court to ask itself whether *it* believes the evidence established guilt beyond a reasonable doubt but whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." (*Ibid.*; *People v. Cuevas*, *supra*, 12 Cal.4th at pp. 260-261.) "The question is one of law, subject to independent review." (*People v. Stevens*, *supra*, 41 Cal.4th at p. 200; *People v. Cole*, *supra*, 33 Cal.4th at p. 1213.)

Section 190.2, subdivision (a)(5) provides as follows:

> The murder was committed for the purpose of avoiding or preventing a lawful arrest, or perfecting or attempting to perfect, an escape from lawful custody.

The special circumstance of murder to avoid arrest only applies where arrest is imminent. (*People v. Coleman* (1989) 48 Cal.3d 112, 145-146; *People v. Bigelow* (1984) 37 Cal.3d 731, 752.) For the purposes of this special circumstance, an arrest is, or appears to be, "imminent" where a defendant is detained by a police officer under circumstances which would lead the

defendant and any objective observer to believe that an arrest was highly likely. (*People v. Cummings* (1993) 4 Cal.4th 1233, 1299-1301.)

Section 190.2, subdivision (a)(7), provides, in relevant part, as follows:

> The victim was a peace officer . . ., who, while engaged in the course of the performance of his or her duties, was intentionally killed, and the defendant knew, or reasonably should have known, that the victim was a peace officer engaged in the performance of his or her duties . . . .

The purpose of this special circumstance is "to afford special protection to officers who risk their lives to protect the community . . . ." (*People v. Jenkins* (2000) 22 Cal.4th 900, 1021.) As this Court observed when it considered the constitutionality of this special circumstance:

> The provision in question gives effect to the special outrage that characteristically arises from the intentional murder of persons acting in certain official public safety capacities. Society considers such killings especially serious for several reasons. The community abhors the human cost to these especially endangered officers and their families, "who regularly must risk their lives in order to guard the safety of other persons and property." (*Roberts v. Louisiana* (1976) 431 U.S. 633, 636 [97 S.Ct. 1993, 52 L.Ed.2d 637].) Murders of this kind threaten the community at large by hindering the completion of vital public safety tasks; they evince a particular contempt for law and government, and they strike at the heart of a system of ordered liberty. Applying longstanding values, the electorate may reasonably conclude that an intentional murderer increases his culpability, already great, when he kills one whom he knew or should have known was a police officer performing his duties.

(*People v. Rodriguez* (1986) 42 Cal.3d 730, 781.) The statute "immeasurably advances both retribution and deterrence goals . . . ." (*People v. Brown* (1988)

46 Cal.3d 432, 444.)

As used in this special circumstance, the phrase "engaged in the course of the performance of his or her duties" means that the officer must have been acting lawfully at the time the offense was committed. (*People v. Jenkins*, *supra*, 22 Cal.4th at p. 1020; *People v. Mayfield* (1997) 14 Cal.4th 668, 791; *People v. Gonzalez* (1990) 51 Cal.3d 1179, 1217.) The defendant's subjective understanding that the officer's conduct was lawful is *not* an element of proof. (*People v. Jenkins*, *supra*, 22 Cal.4th at p. 1021.) "Disputed facts relating to the question whether the officer was acting lawfully are for the jury to determine when such an offense is charged." (*Id.* at p. 1020; *People v. Gonzalez*, *supra*, 51 Cal.3d at p. 1217.)

C. Because Officer Fraembs's Actions Were Lawful, The Trial Court Properly Denied Appellant's Section 1118.1 Motion As To The Special Circumstances Of Murder Of A Peace Officer And Murder To Avoid Arrest

In the instant case, appellant argues that the special circumstances alleged pursuant to section 190.2, subdivisions (a)(5) (murder to avoid arrest) and (a)(7) (murder of a peace officer), should have been stricken because Officer Fraembs's actions during their encounter were not lawful, and therefore he was not engaged in the lawful performance of his duties, as required under subdivision (a)(7), nor would an arrest of appellant have been lawful, as required under subdivision (a)(5). Specifically, appellant contends that the murder occurred during an unlawful detention.[28/] (AOB 63-78.) However, respondent submits that the encounter was consensual, that appellant, who

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28. Appellant does not contend that he would not have been subject to a lawful arrest if Officer Fraembs had discovered that he was carrying a loaded, concealed weapon (see § 12025 [carrying concealed weapon]). Rather, he argues that the detention was unlawful; therefore, an arrest would also have been unlawful. (AOB 63-78.)

never submitted to Officer Fraembs's authority, was not detained, and that if he was, the officer's actions were lawful under the totality of the circumstances.

For purposes of Fourth Amendment analysis, there are basically three categories of police contacts or interactions with individuals, ranging from the least to most intrusive: consensual encounters, detentions, and arrests. (*Wilson v. Superior Court* (1983) 34 Cal.3d 777, 784.) Consensual encounters are those interactions which result in no restraint of an individual's liberty, i.e., no "seizure," however minimal, and which may properly be initiated by police officers even if they lack "objective justification." (*Florida v. Royer*, *supra*, 460 U.S. at pp. 497, 506; *Wilson v. Superior Court*, *supra*, 34 Cal.3d at p. 784.) Second, there are "detentions," i.e., seizures of an individual which are strictly limited in duration, scope, and purpose, which may be undertaken by police when there is an articulable suspicion that a person has committed or is about to commit a crime. (*Florida v. Royer*, *supra*, 460 U.S. at p. 498; *Wilson v. Superior Court*, *supra*, 34 Cal.3d at p. 784.) Finally, seizures of an individual which exceed the permissible limits of a detention, and which include formal arrests and restraints on an individual's liberty comparable to an arrest, are constitutionally permissible only when the police have probable cause to arrest the individual for a crime. (*Florida v. Royer*, *supra*, 460 U.S. at p. 498; *Wilson v. Superior Court*, *supra*, 34 Cal.3d at p. 784.)

Here, there can be no question that the initial interaction between Officer Fraembs and appellant, Flores, and Cesena was a consensual encounter. "[L]aw enforcement officers do not violate the Fourth Amendment by merely approaching a individual on the street or in another public place." (*Florida v. Royer*, *supra*, 460 U.S. at p. 497; see also *Wilson v. Superior Court*, *supra*, 34 Cal.3d at p. 789.) Nor is an encounter converted into a seizure requiring objective justification merely by the fact that an officer identifies himself as a police officer (*Florida v. Royer*, *supra*, 460 U.S. at p. 497; *United States v.*

Mendenhall (1980) 446 U.S. 544, 555 [100 S.Ct. 1870, 64 L.Ed.2d 497]) or requests identification or information regarding one's identity (*INS v. Delgado* (1984) 466 U.S. 210, 216 [104 S.Ct. 1758, 80 L.Ed.2d 247]; *People v. Lopez* (1989) 212 Cal.App.3d 289, 291). "[A] person has been 'seized' within the meaning of the Fourth Amendment only if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." (*United States v. Mendenhall*, *supra*, 446 U.S. at pp. 554-555; *Wilson v. Superior Court*, *supra*, 34 Cal.3d at p. 790.)

In the instant case, the trial court properly found that the encounter between the officer and appellant's group was consensual. Officer Fraembs stopped his car, got out, and while being "réal nice," asked, "How are you guys doing tonight?" Officer Fraembs did not "detain" appellant and his companions merely by turning on his spotlight on the darkened road, pulling up to the curb, and stopping. (See *People v. Franklin* (1987) 192 Cal.App.3d 935, 940.) Officer Fraembs did not activate the red and blue lights on his light bar, block appellant's way, or order the three to remain where they were. Even if appellant felt he was "the object of official scrutiny," "such directed scrutiny does not amount to a detention." (*Ibid.*, citing *Wilson v. Superior Court*, *supra*, 34 Cal.3d at pp. 790-791.)

Furthermore, the nature of the questions asked by an officer during an encounter may also be relevant to the issue of whether the individual has been detained. (*Wilson v. Superior Court*, *supra*, 34 Cal.3d at p. 791, fn. 11.)

> "As questioning moves from general questioning concerning facts unrelated to a particular crime or class of crimes to questions indicating the officer's interest in a specific crime or class of crimes, the perception of the citizen reasonably may change from one of a voluntary encounter, from which he is free to disengage, to one of a formal police investigation of specific criminal activity, which he is not free to

> ignore . . . . In the absence of actual physical restraints or unequivocal verbal commands, a reasonable person examining the conduct of the officer is more likely to view the circumstances as a seizure when the conduct or verbal activities of the police become more intrusive, that is, when they clearly are related to the investigation of specific criminal acts. It is the threat of arrest and prosecution that produces the perception of restricted liberty in a police-citizen encounter, and that perception is more likely to arise when conduct of the police is linked to the investigation of specific criminal activity."

(*Ibid.*, quoting Williamson, *The Dimensions of Seizure: The Concepts of "Stop" and "Arrest"* (1982) 43 Ohio St.L.J. 771, 795, 802; see also *People v. Clark* (1989) 212 Cal.App.3d 1233, 1236-1238; *People v. Lopez*, *supra*, 212 Cal.App.3d at p. 293 & fn. 2; *People v. Franklin*, *supra*, 192 Cal.App.3d at p. 941.)

Here, Officer Fraembs did not express suspicion, refer to specific criminal activities, or accuse appellant and his companions of anything. (See *People v. Lopez*, *supra*, 212 Cal.App.3d at pp. 291-293 [no seizure occurred when officers asked defendant if a car he was sitting on belonged to him and why he was sitting there, and requested identification; cocaine bindle popped up when defendant opened his wallet]; compare *Wilson v. Superior Court*, *supra*, 34 Cal.3d at pp. 781-782, 790-791 [character of initial encounter, when officer approached defendant at airport, identified himself, and asked if he could have a minute of his time, changed when officer advised defendant that he had information that defendant was carrying a lot of drugs; subsequent search of defendant's luggage based on his consent was invalid].) There was no accusatory questioning, no evidence of the threatening presence of several officers, no display of a weapon by Officer Fraembs, no physical touching, and no use of language or tone of voice indicating that an answer to the officer's

simple question might be compelled. (See *Florida v. Royer*, *supra*, 460 U.S. at pp. 497-498; *United States v. Mendenhall*, *supra*, 446 U.S. at pp. 554-555; *In re James D.* (1987) 43 Cal.3d 903, 911-913; *Wilson v. Superior Court*, *supra*, 34 Cal.3d at pp. 784, 790-791.) Clearly, at this point, the encounter was consensual.

Appellant acknowledges that Officer Fraembs's initial approach amounted to a consensual encounter, not a detention. (AOB 71.) He argues, however, that the officer's subsequent actions constituted an unlawful detention or "seizure." (AOB 71-78.)

The Fourth Amendment prohibits seizures of persons, including brief investigative stops, when they are "unreasonable." (*Terry v. Ohio*, *supra*, 392 U.S. at p. 19 & fn. 16; *People v. Souza* (1994) 9 Cal.4th 224, 229.) The California Constitution has a similar provision. (Cal. Const., art. I, § 13; *People v. Souza*, *supra*, 9 Cal.4th at p. 299.) A seizure occurs when a police officer, "by means of physical force or show of authority" restrains the liberty of a person to walk away. (*Terry v. Ohio*, *supra*, 392 U.S. at p. 19, fn. 16; *People v. Souza*, *supra*, 9 Cal.4th at p. 229.) "[T]he crucial test is whether, taking into account all of the circumstances surrounding the encounter, the police conduct would 'have communicated to a reasonable person that he was not at liberty to ignore the police presence and go about his business.'" (*Florida v. Bostick* (1991) 501 U.S. 429, 437 [111 S.Ct. 2382, 115 L.Ed.2d 389], quoting *Michigan v. Chesternut* (1988) 486 U.S. 567, 573 [108 S.Ct. 1975, 100 L.Ed.2d 565].) The "reasonable person" test "presupposes an *innocent* person." (*Florida v. Bostick*, *supra*, 501 U.S. at p. 438, emphasis in original.)

First, respondent submits that regardless of whether Officer Fraembs's actions may be characterized as a "show of authority" that would make a reasonable person believe he was not free to leave, appellant was never "detained" or "seized," because he never *submitted* to the officer's request or

direction that he sit on the curb with Flores. In *California v. Hodari D.* (1991) 499 U.S. 621 [111 S.Ct. 1547, 113 L.Ed.2d 690], two police officers, dressed in street clothes but wearing jackets with "Police" embossed on front and back, were on patrol in an unmarked car in a high-crime area in Oakland. As they rounded a corner, four or five youths who were huddled around a parked car ran away. One of the officers got out of the car and ran to a spot that brought him face-to-face with Hodari. Hodari was looking behind himself as he ran, and did not see the officer until he was almost upon him, at which point Hodari tossed away a small rock later determined to be crack cocaine. The officer tackled Hodari a moment later and handcuffed him. (*Id.* at pp. 622-623.) Hodari's motion to suppress was denied. The California Court of Appeal reversed the conviction, holding that Hodari had been "seized" when he saw the officer running toward him, that the seizure was unreasonable, and that the evidence of cocaine had to be suppressed. (*Id.* at p. 623.) Following denial of the People's petition for review, the United States Supreme Court granted certiorari and held that at the time he dropped the drugs, Hodari had not been "seized" within the meaning of the Fourth Amendment; therefore, the motion to suppress the cocaine had been properly denied by the trial court. (*Id.* at pp. 623-629.)

The Court noted that Hodari relied upon the proposition that a seizure occurs "when the officer, by means of physical force *or show of authority*, has in some way restrained the liberty of a citizen." (*California v. Hodari D.*, *supra*, 499 U.S. at p. 625, quoting *Terry v. Ohio*, *supra*, 392 U.S. at p. 19, fn. 16, emphasis added.) The Court stated as follows:

> Hodari contends (and we accept as true for purposes of this decision) that [the officer's] pursuit qualified as a "show of authority" calling upon Hodari to halt. The narrow question before us is whether, with respect to a show of authority as with respect to application of physical

force, a seizure occurs even though the subject does not yield. We hold that it does not.

(*California v. Hodari D.*, *supra*, 499 U.S. at pp. 625-626.) Because Hodari did not comply with the purported "show of authority," he was not "seized" until he was tackled, the cocaine that he abandoned while running was not the fruit of a seizure, and the trial court properly denied the motion to suppress. (*Id.* at p. 629.)

Here, whether or not Officer Fraembs's conduct in saying to appellant and Flores, "Why don't you have a seat right there" constitutes a "show of authority," it is clear that appellant never *submitted to* or *complied with* this direction or request. Instead, he simply acted as though he intended to comply, while actually slyly maneuvering himself behind Flores and into a position where he could safely and effectively launch his fatal attack on the unsuspecting officer. Because appellant did not yield to the purported show of authority, there was no seizure, and it cannot be said that the officer's actions were unlawful at the time he was killed.

Second, even assuming arguendo that the encounter had become a "detention," it was still lawful. An investigative stop or detention is lawful "'when the detaining officer can point to specific articulable facts that, considered in light of the totality of the circumstances, provide some objective manifestation that the person detained may be involved in criminal activity.'" (*People v. Mayfield*, *supra*, 14 Cal.4th at p. 791, quoting *People v. Souza*, *supra*, 9 Cal.4th at p. 231; see also *People v. Leyba* (1981) 29 Cal.3d 591, 597; *In re Tony C.*, *supra*, 21 Cal.3d at p. 893; *People v. Conway* (1994) 25 Cal.App.4th 385, 388.)

The "reasonable suspicion" requirement is measured by an objective standard, not by the subjective state of mind of the particular officer at the time of the stop or detention. (*People v. Conway*, *supra*, 25 Cal.App.4th at p. 388,

citing *Graham v. Connor* (1989) 490 U.S. 386, 397 [109 S.Ct. 1865, 104 L.Ed.2d 443], and *Scott v. United States* (1978) 436 U.S. 128, 138 [98 S.Ct. 1717, 56 L.Ed.2d 168]; see also *Whren v. United States* (1996) 517 U.S. 806, 810-814 [116 S.Ct. 1769, 135 L.Ed.2d 89].) The circumstances known to the officer must simply be such as would cause *a reasonable law enforcement officer, in a like position*, drawing when appropriate upon his or her training or experience, to suspect that criminal activity has occurred, is occurring, or is about to occur, and that the person to be stopped or detained is involved in that activity.[29] (*People v. Conway*, *supra*, 25 Cal.App.4th at p. 389.) Even if the officer did not have the state of mind which is hypothecated by the reasons which provide the legal justification for his or her actions, this would *not* invalidate the action taken as long as the circumstances, viewed objectively, justify that action. (*Whren v. United States*, 517 U.S. at p. 813 [constitutional reasonableness of traffic stops does not depend upon the actual motivations of the individual officers involved], citing *Scott v. United States*, *supra*, 436 U.S. at pp. 136, 138.) The Fourth Amendment's concern with "reasonableness" allows certain actions to be taken in certain circumstances, *whatever* the officer's subjective intent. (*Whren v. United States*, *supra*, 517 U.S. at p. 814.) Moreover, "[w]hat is required is not the *absence* of innocent explanation, but the *existence* of 'specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion.'" (*People v. Glaser* (1995) 11 Cal.4th 354, 373, quoting *Terry v. Ohio*, *supra*, 392 U.S. at p. 21.) Indeed, the principal function of the officer's investigation is to resolve that ambiguity and quickly determine whether to allow the

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29. In contrast, an investigative stop or detention based on circumstances which, viewed objectively, support a mere curiosity, rumor, or hunch, is unlawful even if the officer is acting in good faith. (*Terry v. Ohio*, *supra*, 392 U.S. at p. 22; *In re Tony C.*, *supra*, 21 Cal.3d at p. 893; *People v. Conway*, *supra*, 25 Cal.App.4th at p. 389.)

individual to go about his business or hold him. (*In re Tony C.*, *supra*, 21 Cal.3d at p. 894.)

Furthermore, police officers may undertake a properly limited search for weapons if "a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger." (*Terry v. Ohio*, *supra*, 392 U.S. at p. 27; *People v. Glaser*, supra, 11 Cal.4th at pp. 362, 364; *People v. Avila* (1997) 58 Cal.App.4th 1069, 1074.) The United States Supreme Court has recognized that "a perfectly reasonable apprehension of danger may arise long before the officer is possessed of adequate information to justify taking a person into custody for the purpose of prosecuting him for a crime." (*Terry v. Ohio*, *supra*, 392 U.S. at pp. 26-27.) "The officer need not be absolutely certain that the individual is armed . . . ." (*Id.* at p. 27.)

> American criminals have a long tradition of armed violence, and every year in this country many law enforcement officers are killed in the line of duty, and thousands more are wounded. Virtually all of these deaths and a substantial portion of the injuries are inflicted with guns and knives.

(*Terry v. Ohio*, *supra*, 392 U.S. at pp. 23-24, fn. omitted.)

In the instant case, it is clear there was substantial evidence from which a rational juror could find that there were specific and articulable facts which, taken together with reasonable inferences from those facts, reasonably warranted an intrusion on appellant's privacy. (*Terry v. Ohio*, *supra*, 392 U.S. at p. 21; *People v. Glaser*, *supra*, 11 Cal.4th at p. 369; see also *People v. Ritter* (1997) 54 Cal.App.4th 274, 279-280.) There was evidence in the record from which the jury could infer that the stop was made in gang territory, in that it occurred in the same neighborhood where appellant, a gang member, was carrying a loaded gun allegedly because rival gang members had been driving through the area yelling out gang names. It was late at night when Officer

Fraembs saw appellant and his friends, dressed in dark clothing, walking down a darkened street in an industrial area in that neighborhood. When he stopped his car and got out to talk to them, Officer Fraembs was "real nice" and asked a simple, general question, "How are you guys doing tonight?" He was not sarcastic, mean, or aggressive toward the three. This began as a casual encounter in which the officer took a very low-key approach, in an apparent attempt to determine whether any or all of the three might need assistance, or to simply alert them to his presence, to discourage them in the event that they might have been planning any illegal activities.

However, in response, appellant, who was "a lot taller" than Officer Fraembs, instantly adopted a hostile and aggressive attitude, responding rudely to the officer's simple question. Appellant's pugnacious and defiant reaction is a circumstance to be considered in determining the reasonableness of the detention. (See *People v. Souza*, *supra*, 9 Cal.4th at p. 233 [defendant walked away from officer]; see also *United States v. McCarthy* (1st Cir. 1996) 77 F.3d 522, 531 [fact that defendant's responses to officers' questions were evasive and at times defiant "is relevant in evaluating the scope of the officers' conduct"]; *United States v. Richards* (9th Cir. 1974) 500 F.2d 1025, 1029 ["implausible and evasive responses . . . indicated that something was awry and created even more reason for the investigation being pursued further."])

Suddenly, given appellant's extreme reaction to his friendly approach, Officer Fraembs was faced with a situation in which he was outnumbered, without nearby witnesses or assistance, confronted by a bigger man with a bad attitude. "The encounter was escalated by [appellant's] conduct which created an appearance of potential danger to the officer." (*People v. Rosales*, *supra*, 211 Cal.App.3d at p. 330.)

Besides appellant's belligerence, which added a substantial factor in the potential danger to the lone officer, a rational juror could find, as the trial court

found, that Officer Fraembs saw that Joseph Cesena was carrying a knife in a sheath on his belt. The prosecutor noted that the photographs of Cesena showed that his knife sheath "hangs quite low." Since Officer Fraembs asked Cesena to step over to the patrol car first, rather than appellant, who was the belligerent one and therefore more likely to have been searched first, it would be reasonable to conclude that the officer saw something hanging from Cesena's belt and believed it might be a weapon. (See *Pennsylvania v. Mimms* (1977) 434 U.S. 106, 111-112 [98 S.Ct. 330, 54 L.Ed.2d 331] [defendant carried gun in waistband, under jacket; officer's observation of bulge in defendant's jacket when he alighted from car following traffic stop justified pat-down search].) Additionally, Flores was aware that Cesena was carrying the knife. Although the trial court recognized that Cesena could have told Flores about the knife or could have lifted his shirt to display it, Flores did not testify that this was how she became aware of the knife, and a reasonable inference is that she herself saw it hanging from his belt, just as Officer Fraembs did. Under these circumstances, the officer's decision to pat down Cesena and to ask appellant and Flores to sit down "was not only reasonable, but virtually unavoidable." (*People v. Glaser*, *supra*, 11 Cal.4th at p. 369.) As the prosecutor pointed out, once appellant became hostile, the officer was in a potentially dangerous situation, and could not reasonably be expected to simply try to leave.

Under the circumstances, a reasonable juror could find that there were specific and articulable facts which, taken together with their reasonable inferences, would lead a reasonable law enforcement officer in a like position to stop appellant and his companions, and conduct a pat-down search.

The brevity of the detention and the fact that it occurred in an isolated area, thus reducing or eliminating the embarrassment and stigma sometimes associated with a detention, both weigh heavily in favor of finding the detention

was reasonable. (See *People v. Glaser*, *supra*, 11 Cal.4th at pp. 366-367.) Furthermore, as in *Terry v. Ohio*, *supra*, 392 U.S. at pp. 22-24, "two governmental interests justified the limited seizure and search: the interest in effective crime prevention, which dictates police investigation of reasonable suspicions of criminal activity, and the police officer's need to ensure his or her safety while engaged in investigation or other activities." (*People v. Glaser*, *supra*, 11 Cal.4th at p. 364.)

In his attempt to demonstrate that the purported detention was unlawful, appellant refers to each aspect of the encounter separately. (AOB 73-78.) However, in determining the reasonableness of a detention, the reviewing court must look to the *totality* of the circumstances. (*People v. Mayfield*, *supra*, 14 Cal.4th at p. 791; *People v. Loewen* (1983) 35 Cal.3d 117, 128-129; see also *United States v. Cortez* (1981) 449 U.S. 411, 417-418 [101 S.Ct. 690, 66 L.Ed.2d 621].) Although an individual's presence in a "high crime area" may not be enough, *standing alone*, to support a reasonable, particularized suspicion of criminal activity, the location's characteristics *are* relevant in determining whether the circumstances are sufficiently suspicious to warrant further investigation. (*Illinois v. Wardlow* (2000) 528 U.S. 119, 124 [120 S.Ct. 673, 145 L.Ed.2d 570]; *Adams v. Williams* (1972) 407 U.S. 143, 144, 147-148 [92 S.Ct. 1921, 32 L.Ed.2d 612].) Nervous, evasive behavior is also a pertinent factor in determining reasonable suspicion. (*Illinois v. Wardlow*, *supra*, 528 U.S. at p. 124; *United States v. Brignoni-Ponce* (1975) 422 U.S. 873, 885 [95 S.Ct. 2574, 45 L.Ed.2d 607].) Even wholly lawful conduct may justify a reasonable suspicion of criminal activity. (*United States v. Sokolow* (1989) 490 U.S. 1, 9-10 [109 S.Ct. 1581, 104 L.Ed.2d 1]; *United States v. Malone* (9th Cir. 1989) 886 F.2d 1162, 1165.) The reasonable suspicion determination must be based on commonsense judgments and inferences about human behavior. (*Illinois v. Wardlow*, *supra*, 528 U.S. at p. 125; see *United States v. Cortez*,

supra, 449 U.S. at p. 418.) Even if each factor, viewed alone, may be considered consistent with innocent activity, when viewed together, they may support a finding of reasonable suspicion. (*United States v. Malone, supra*, 886 F.2d at p. 1165.) Furthermore, the "endless variations in the facts and circumstances" of detention cases "make a complete comparison of cases difficult and perhaps less useful than in some other areas of the law." (*People v. Glaser, supra*, 11 Cal.4th at p. 371, fn. 4, citing *Florida v. Royer, supra*, 460 U.S. at p. 506.)

It cannot be said, as a matter of law rather than on the basis of any disputed facts, that Officer Fraembs was acting unlawfully at the time that appellant ambushed him. It is manifest that there was substantial evidence to support findings that appellant intentionally killed a police officer in the lawful performance of his duties, in order to avoid a lawful arrest. Therefore, the trial court properly denied appellant's section 1118.1 motion and motion to strike or dismiss these special circumstances, and his claim should be rejected.[30/]

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30. Appellant also states in passing that the judgment of death must be vacated. (AOB 64, 78.) However, he fails to make any argument demonstrating that any error regarding these special circumstances was prejudicial. (AOB 63-78.) This conclusory assertion need not be addressed by this Court. (See *People v. Gionis* (1995) 9 Cal.4th 1196, 1214, fn. 11.) In any event, any possible error in failing to strike these special circumstance allegations was harmless in light of the validity of the lying-in-wait special circumstance (see Arg. I, *ante*). (See *Brown v. Sanders, supra*, 546 U.S. at p. 224; *People v. Mickey, supra*, 54 Cal.3d at p. 703 [where two of four special circumstances were invalidated on appeal, jury's consideration of the two invalid special circumstance findings found harmless under both state and federal law]; *People v. Pensinger* (1991) 52 Cal.3d 1210, 1271-1272 [jury's consideration of invalid torture-murder special circumstance finding did not require reversal of death penalty where there was a proper kidnap-murder special circumstance]; *People v. Benson* (1990) 52 Cal.3d 754, 793 [jury's consideration of invalid witness-killing special circumstance was harmless under both state and federal law]; *People v. Adcox* (1988) 47 Cal.3d 207, 251-252 [jury's consideration of invalid financial-gain special circumstance harmless in light of valid felony-murder-robbery special circumstance]; *People v. Silva* (1988) 45 Cal.3d 604, 632-636

VI.

THE TRIAL COURT PROPERLY ADMITTED TESTIMONY REGARDING THE THREATS MADE TO WITNESSES FLORES, ARAMBULA, AND SILVA, WHICH WERE RELEVANT TO THE DETERMINATION OF THE WITNESSES' CREDIBILITY, AND PROPERLY EXCLUDED CUMULATIVE AND MINIMALLY PROBATIVE EVIDENCE REGARDING FLORES'S STATEMENT TO APPELLANT SEVERAL WEEKS BEFORE THE SHOOTING

Appellant's sixth contention is that the trial court committed reversible error by improperly admitting testimony about threats made to Johanna Flores, Elva Arambula, and Joseph Silva, and by excluding evidence that Flores had threatened appellant several weeks before the shooting. (AOB 79-100.) However, the trial court did not abuse its discretion under Evidence Code section 352, as the threats evidence was highly probative on the issue of the witnesses' credibility, and was admitted for that limited purpose. Moreover, the court properly excluded the evidence of Flores's threat to appellant, given that it was minimally probative and cumulative of other evidence of her potential bias against appellant and motives to lie. In any event, any errors were harmless; therefore, appellant's claim must fail.

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financial-gain special circumstance harmless in light of valid felony-murder-robbery special circumstance]; *People v. Silva* (1988) 45 Cal.3d 604, 632-636 [jury's consideration of three invalid special circumstance findings was harmless error]; *People v. Wade* (1988) 44 Cal.3d 975, 998 [jury's consideration of invalid "heinous" murder special circumstance harmless where finding of torture murder was valid]; *People v. Allen* (1986) 42 Cal.3d 1222, 1281-1283 [jury's consideration of eight excessive special circumstance findings held harmless in light of fact that three valid special circumstance findings remained]; see also *Zant v. Stephens* (1983) 462 U.S. 862, 880-884 [103 S.Ct. 2733, 77 L.Ed.2d 235] [death penalty upheld where one of three aggravating circumstances found true by the jury was subsequently upheld].)

A. The Relevant Trial Proceedings

In his opening statement to the jury, the prosecutor stated that when Father Gard contacted the police regarding Flores, he was concerned about her safety. (5RT 634.) Immediately after appellant shot Officer Fraembs, he pointed his gun at Flores's face and asked, "Are you going to say anything?" She asked, "What?" and appellant repeated the question. Flores answered, "I didn't see anything. I don't know nothing." Appellant told everyone to run. (5RT 641.) After the killing, appellant sold a .45-caliber handgun to Joseph Silva, a lifelong friend of appellant's family who lived two blocks from appellant. Appellant told Silva that he had used the gun to kill a police officer. Several days later, appellant's brother Angel came and took back the gun because they did not want the gun to remain in Pomona. Since Silva became involved in the criminal proceedings against appellant, a Happy Town gang member named Casper had threatened Silva and his family with death. (5RT 647-648.)

Before Flores testified, the jury was excused and the court and counsel discussed various issues relating to her proposed testimony. (6RT 785-818.) Defense counsel referred to a portion of the transcript of the preliminary hearing, in which Flores had testified that she called appellant's home the morning after the shooting, after hearing that the police officer had died. Appellant's brother Angel answered. When Flores asked for appellant, Angel asked, "Who's this?" Flores replied, "Johanna," and Angel said, "I thought you were dead." Flores asked, "Why would I be dead?" Angel replied, "That's what we do to hainas who see things, who see [things] they shouldn't see." The preliminary hearing court had sustained a hearsay objection and had stricken this portion of Flores's testimony. (2CT 427-428; 6RT 792-793.)

Defense counsel argued that the prosecutor should not be permitted to elicit testimony from Flores at trial regarding her conversation with Angel, who

had said "all kinds of things that are damaging and hurtful." Counsel argued that the arguments made by the prosecutor at the preliminary hearing, i.e., that the evidence related to Flores's state of mind and to appellant's consciousness of guilt, "just doesn't seem to fly, and certainly 352 must apply." Counsel requested that the court "prohibit any of this hearsay conversation from coming before this jury." (6RT 793.)

The prosecutor stated that Flores would testify that immediately after shooting Officer Fraembs in the head, appellant had pointed his gun at her face and asked whether she was going to talk. The prosecutor stated, "That is the first fear tactic that has been engaged in in this case." He further stated that Flores had asked to be and had been relocated, that she had stated all along that she was afraid to testify, but that she testified anyway because she thought that the way the officer had died "just wasn't right." (6RT 793-794.)

The prosecutor read aloud the portion of the preliminary hearing transcript to which defense counsel had referred.[31] Citing *People v. Olguin* (1994) 31 Cal.App.4th 1355, and *People v. Gutierrez* (1994) 23 Cal.App.4th 1576, the prosecutor argued that Angel's threats were admissible because they were relevant to Flores's state of mind, that evidence that a witness is afraid to testify or fears retaliation is relevant to the witness's credibility, and that it was not necessary to show that appellant made the threats or that her fear of retaliation was linked to appellant. The prosecutor argued that the fact that a witness was testifying despite her fear was "important in evaluating testimony." (6RT 794-795.)

Defense counsel argued that Angel's statements did not constitute a "direct threat" to Flores. Counsel acknowledged that Flores, who was in

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31. In the trial transcript, the Spanish word which appears as "hainas" in the preliminary hearing transcript (2CT 428) is transcribed as "jaina's." (6RT 794.)

protective custody, had been "scared from Day One." Counsel argued, however, that the trial court should exercise its discretion its discretion under Evidence Code section 352 "not to allow this hearsay kind of evidence to come to this jury." (6RT 795-796.)

During the ensuing discussion regarding a different portion of Flores's preliminary hearing testimony, the prosecutor noted, "Johanna Flores is the central witness in this case. Her credibility is extremely important to the case, obviously. Evidence Code section 785 says, quote, 'The credibility of a witness may be attacked or supported by any party, including the party calling him.'" (6RT 798.)

The court took a recess to consider the four issues pertaining to Flores's testimony which had been raised by appellant during the bench conference. (6RT 803.) When it ruled on this issue, the court stated it would allow the prosecution to elicit the fact that Flores believed that appellant and his brother had threatened her, and she could testify regarding what appellant himself had said to her, but she could not testify that Angel had said, "We kill jaina's that see things that they should not have seen." (6RT 808-810.) The court discussed *People v. Gutierrez*, *supra*, 23 Cal.App.4th 1576, noting that in that case, the eyewitnesses had told the police what they saw, but at trial they recanted. (6RT 810-811.) The court also discussed *People v. Avalos* (1984) 37 Cal.3d 216, 232, which was cited in *Gutierrez*, *supra*, 23 Cal.App.4th at p. 1588, noting that in *Avalos*, the witness had identified the defendant in a live lineup, but hesitated to do so at trial.[32/] The trial court in *Avalos* had ruled that the fact that the witness was afraid was relevant to her credibility, whether or

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32. During in camera proceedings in *Avalos*, it was determined that the witness's fear was not caused by threats or intimidation, but only by nature and the gravity of her testimony. (*People v. Avalos*, *supra*, 37 Cal.3d at p. 232.) During cross-examination in the jury's presence, defense counsel clarified that the witness's fear was due only to the importance of the event. (*Ibid.*)

not that fear was caused by anyone connected with the trial, and that the probative value of this evidence outweighed any prejudice. On review, this Court had held that the trial court's ruling had been well within its discretion. (6RT 811; see *People v. Avalos*, *supra*, 37 Cal.3d at p. 232.)

After discussing *Avalos*, the trial court stated it understood that Flores's statements had been consistent from the time she made her statement to the police until the time of trial. If she recanted or her memory became selective, the court would reconsider whether to allow her to testify regarding the actual content of Angel's statements to her. (6RT 811-812.) The court and defense counsel agreed that it would not be necessary for counsel to renew his objections during Flores's testimony. (6RT 814-815.)

As previously set forth in the Statement of Facts, *ante*, Flores testified that after shooting Officer Fraembs, appellant pointed the gun at her and asked, "Are you going to say anything?" Flores responded, "No, I didn't see nothing, I didn't hear nothing, I don't know nothing." Appellant said, "I'm going to ask you again," and again asked if she was going to say anything. Flores took his threat seriously, and again replied that she "didn't see anything, hear anything or know anything." Appellant told her to run. (6RT 900-901, 918-919; 7RT 943.)

The next morning, Flores called appellant at home and his brother Angel answered. Angel said something threatening to Flores and she was "really scared."[33/] Angel gave the phone to appellant. Appellant asked her how she was. Flores said, "All right, I guess," and asked appellant how he was. Appellant replied, "I'm fine. I'm a killer. I don't give a fuck. It's just another day in the hood." Flores was shocked. She was afraid to say anything because if it sounded like she intended to say something to someone, she was sure that

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33. Defense counsel renewed his objection to this testimony; the objection was overruled. (6RT 922.)

appellant and his gang would probably kill her. (6RT 921-924; 7RT 943, 1007-1010.)

Defense counsel requested a limiting instruction at the time that Flores testified regarding appellant's statements to her the morning after the crime and her own fear, which the court gave, but did not make such a request regarding Angel's statement.[34/] (6RT 924.)

Flores later testified that she did not call 911 after the shooting because she was afraid that appellant and his gang would do something to her. Therefore, she spoke to her family and to Father Gard instead of calling the police, and hesitated when Father Gard first talked to her about speaking with the police. (6RT 933, 940.) Flores said she was testifying, even though she had been threatened by both appellant and his brother and was afraid, because she believed what appellant had done was wrong. (7RT 943.) The following colloquy occurred:

[PROSECUTOR]: You've been – have you been relocated by the Pomona Police Department?

[FLORES]: Yes.

[PROSECUTOR]: Has your entire family been relocated by the Pomona Police Department?

[FLORES]: Yes.

[PROSECUTOR]: Was this done at your request?

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34. When Flores testified she was afraid that appellant and his gang would kill her if appellant thought she was going to talk to anyone about the shooting, defense counsel requested that the trial court instruct the jury that this testimony was received only to show Flores's state of mind, and not for the truth of the matter. The court instructed the jurors, " . . . this statement by the witness as to what she felt based upon statements that were made to her by the defendant in this regard, that's to be considered by you for the sole purpose of determining this witness's credibility and for no other purpose." (6RT 924-925.)

[FLORES]: Yes.

[PROSECUTOR]: Why did you want to be relocated?

[FLORES]: Because they went to my house. They went to my mother's house.

[PROSECUTOR]: Who?

[FLORES]: He said –

[DEFENSE COUNSEL]: Your Honor, excuse me. I'm going to object. This is really not relevant.

THE COURT: Sustained.

[PROSECUTOR]: Are you still involved in the relocation program?

[FLORES]: Yes.

[PROSECUTOR]: Are you still fearful?

[DEFENSE COUNSEL]: Objection. It's not relevant.

THE COURT: Sustained.

[PROSECUTOR]: Do you still live with your sister and your little girl?

[FLORES]: No. I live just me and my little girl.

[PROSECUTOR]: Would you agree we met perhaps five or six days after the officer was killed?

[FLORES]: Yes.

[PROSECUTOR]: Approximately?

[FLORES]: Yes.

[PROSECUTOR]: And we've spoken a number of times over the past 14, 15 months?

[FLORES]: Yes.

[PROSECUTOR]: Do you recall when I first met you and we discussed this incident I said that you were – that you were going to have to go to court and tell what you saw?

[FLORES]: Yes.

[PROSECUTOR]: And we discussed the incident a number of times?

[FLORES]: Yes.

[PROSECUTOR]: In our discussions what did I tell you was the most important thing about your testimony over and above anything and everything else?

[DEFENSE COUNSEL]: I'm going to object as to what [the prosecutor] told her as hearsay and not relevant.

THE COURT: Overruled.

You may answer.

[FLORES]: Just to tell the truth.

[PROSECUTOR]: And you've told the truth?

[FLORES]: Yes.

[PROSECUTOR]: And even to Father Gard?

[FLORES]: Yes.

[PROSECUTOR]: I have nothing further.

(7RT 944-946.)

During his cross-examination of Flores, defense counsel questioned Flores extensively regarding her personal history and reasons she might lie regarding appellant's involvement in the shooting of Officer Fraembs. Counsel questioned Flores about whether she had reviewed transcripts of her prior interviews and her preliminary hearing testimony prior to testifying at trial (7RT 946-947), how long she had lived in the area (7RT 947-948), how much education she had (7RT 948), whether she had ever had sex with, kissed, or "fooled around with" Cesena or Angel (7RT 948-949, 955-957, 970, 974-975), her friendship with members of the Cherryville gang, rivals to appellant's Happy Town gang (7RT 951), whether she had had sex with members of the

Cherryville gang (7RT 951), her sexual relationship with her boyfriend Carlos, a member of the Baldwin Park East gang, before and during her sexual relationship with appellant (7RT 951-952, 971-972), whether she was a "home girl," i.e., a member of, the Happy Town, Cherryville, or Baldwin Park East gangs (7RT 952-955), whether her friend Chantal Cesena was a gang member (7RT 953), whether Flores liked to "party with" gang members (7RT 953-955, 957), her use of alcohol and drugs, and their use by gang members she knew (7RT 957-960), and the use of monikers by gang members and Flores's nickname, "Goon" (7RT 960-962).

Counsel also questioned Flores regarding the details of her relationship with appellant, including whether she considered herself his girlfriend (7RT 971), how soon after meeting appellant she had had sex with him (7RT 971), her anger at appellant for having a girlfriend, Brandy Valore, and for sleeping with Valore during the same period of time that he was sleeping with Flores (7RT 952, 970), Flores's familiarity with appellant's family and his home (7RT 962), the fact that she had stayed with appellant's family for about a week (7RT 963-964), and that her young daughter had been to their home (7RT 964-965), whether she knew Valore and objected to appellant visiting her in Arizona when their baby was ill (7RT 965-967), whether Flores sent appellant money in Arizona so that he could come back to her (7RT 967-968), whether she told appellant, regarding Valore, "It's either her or me"(7RT 967-968), whether she accused appellant of "screwing" Valore (7RT 968-969), whether she was "intensely jealous" of appellant's relationship with Valore (7RT 969), whether she had told people she planned to marry him and told appellant's mother that she considered her to be her future mother-in-law (7RT 969), and whether Flores had told appellant's mother that if she could not "have" appellant, no one else could (7RT 970).

Counsel further questioned Flores about arguments that she and

appellant had regarding their relationships with Valore and Angel (7RT 970-971), and specifically about their sexual encounter and arguments on the evening of the shooting about Valore, Cesena, and appellant accepting a cigarette from another woman (7RT 971, 973-975, 1004).

Counsel also questioned Flores regarding purported discrepancies between her trial testimony and her prior statements to the police, including the fact that she had not initially told the police that Chantal and Jasper had been at Tank's home on the night of the shooting (7RT 960, 972-973), whether she told the police that she and appellant had used methamphetamine that night (7RT 975-976), and whether she had previously indicated that appellant "had an attitude" when stopped by Officer Fraembs, as she testified at trial, or told them he "was paranoid and panicked" (7RT 976-979).

Counsel also asked questions about whether Flores still had appellant's pager when the encounter with Officer Fraembs took place (7RT 978-979), whether she had stated in an earlier interview that Officer Fraembs looked at her before he died (7RT 982-983), how long before the shooting appellant had told her that he was on parole (7RT 983-984, 1000-1001), and whether her initial testimony that appellant told her the morning after the shooting that Officer Fraembs was a "fucking pig" (6RT 923) was incorrect (7RT 1001-1004).

Finally, counsel expressly asked Flores whether she was angry, jealous, and hostile toward appellant because of things which had occurred during their relationship, and whether she was wrongfully accusing him of being the person who shot Officer Fraembs. (7RT 1004-1005.)

On redirect examination, the prosecutor elicited testimony clarifying that appellant had said, "He's just a fucking pig" about a different police officer, on a prior occasion, but that on the morning after the shooting, he did say, "I'm a killer," "I don't give a fuck," and "It's just another day in the 'hood."

(7RT 1005-1011.) Flores had also told the prosecutor during their May 22, 1996, interview that when they were stopped by Officer Fraembs, appellant was being "smart," "rude," and "a jerk." (7RT 1014.) Regarding Chantal and Jasper's presence at Tank's house, Flores did not mention this to the police at first because Chantal was her good friend and Flores did not want anything to happen to her, and because Jasper had family members and Flores was afraid that if she said he had been there, he might "do something." (7RT 1014-1015.) Noting defense counsel's question regarding whether Flores had any negative feelings toward appellant that might cause her to falsely implicate him in the killing, the prosecutor asked, "Do you swear on the life of your daughter that that defendant killed that officer?" Flores answered, "Yes, I do. Yes, I do." (7RT 1018-1019.)

On recross, defense counsel asked whether Flores had told the prosecutor in the May 22, 1996, interview that she thought appellant had been on drugs on the day he shot Officer Fraembs, and whether she had so testified at the preliminary hearing. To both questions, Flores answered, "Yes." (7RT 1019.)

During further direct and cross-examination, both the prosecutor and defense counsel questioned Flores further regarding the sequence of events when Officer Fraembs stopped her and her friends, and regarding her statement to the police that appellant had "panicked." Flores clarified that appellant had not appeared panicked, except when he had first seen the light from the police car and after he shot Officer Fraembs, when he appeared scared that he would be caught. (7RT 1030-1038.)[35/]

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35. Before Flores was called as a witness, the prosecutor noted that she was "having a very difficult time dealing with this case," was "reliving the incident" and "crying a lot," and was "very volatile," and stated he hoped to complete her testimony in one day. (5RT 676-677.) When Flores testified about the shooting, defense counsel asked the court during a sidebar to note for

During a bench conference prior to Father Gard's testimony, defense counsel argued that his testimony should be limited to whether Flores had talked to him and told him the identity of the shooter. The prosecutor noted that during his cross-examination of Flores, defense counsel had implied that Flores was biased against appellant, because she was jealous and because she was friends with members of the rival Cherryville gang, and that she was falsely accusing appellant of shooting Officer Fraembs; therefore, her entire statement to Father Gard should be admitted, pursuant to Evidence Code section 791, as a prior consistent statement. The court held that this section did not apply, as the statements were made after the possible bases for bias had arisen, and the prosecutor agreed not to elicit testimony regarding all of Flores's specific statements to Father Gard. (7RT 1021-1027.)

During a recess when Jason Meyers testified, the prosecutor asked that defense counsel not be allowed to question Meyers regarding any statements made to him or in his presence by Flores, as this would be hearsay and Flores had not been questioned about such statements when she testified and given the opportunity to explain or deny the statements. (8RT 1139-1140.)

After initially stating that he did not know what the prosecutor was referring to, defense counsel said the only thing he could think of was that he might ask Meyers about what Meyers might have heard Flores say when she physically attacked appellant. Counsel stated that according to Meyers, on one occasion he heard Flores "cursing [appellant] out." Flores had been very angry and had said, "Look, I can have you taken out at any time by Cherryville." Counsel argued this would be admissible to impeach Flores. (8RT 1140-1141.)

The prosecutor again argued that Flores had not been asked about this

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the record that she had been very emotional; the court observed that she had been sobbing and using Kleenex. (6RT 905-909.) Defense counsel later noted again that during some portions of her testimony, Flores had "broken down" and become emotional. (7RT 1066.)

statement while testifying and given the opportunity to explain or deny it, that this would constitute impeachment on a collateral matter, and that it should be excluded pursuant to Evidence Code section 352. (8RT 1141-1142.) Defense counsel argued that Meyers knew Flores well and his testimony would give the jurors a "truer picture" of her. (8RT 1142.)

The trial court stated that it appeared Flores's statement would not be offered to prove the truth of the matter asserted; therefore, it was not hearsay. However, if the statement had been made two months before the offense, rather than when Flores was striking appellant on the night of the shooting, it did not appear to be relevant. (8RT 1143.)

Defense counsel stated he believed the statement had been made on a separate occasion, but he had not asked Meyers that question. Counsel stated that Flores had a general pattern of being very angry and hostile toward appellant, that the pair were always bickering, and that Flores had "a foul mouth." Counsel argued that all of this was relevant to show Flores's general attitude toward and relationship with appellant. (8RT 1143-1144.)

The court stated that Flores's general demeanor and attitude toward appellant would be relevant concerning any bias or prejudice she had against appellant, but wanted to know when the statement was made. (8RT 1144-1145.) The prosecutor and defense counsel conferred with Meyers, and the prosecutor informed the court that the statement was made about a month and a half before the shooting, at Tank's house. (8RT 1145.) The court stated as follows:

> [Defense counsel], her state of mind on that evening and shortly before the incident, I believe that's relevant, and you can inquire about anything regarding their relationship and, in particular, the relationship on the day and shortly before, meaning within two weeks before, to show any bias, interest or motive that she might have to testify falsely

against the defendant.

What she said a month and a half previously, I just don't believe that's relevant.

(8RT 1145.)

Defense counsel stated he would like to elicit testimony that Flores and appellant had had a prior argument, a month and a half before the shooting, at Tank's house. (8RT 1146.) The court agreed:

THE COURT: [Defense counsel], if her general relationship that you're trying to elicit from him was the same a month and a half before, then I'm going to allow you to elicit that to show a continuing negative relationship, if that's what you intend to show.

[DEFENSE COUNSEL]: Yes.

THE COURT: But as far as what she said a month and a half before and what her feelings were a month and a half before, I don't believe that's relevant to show bias, interest or motive at or about this time. And that's my ruling.

[DEFENSE COUNSEL]: That's fine. I would just suggest to the Court on the record my theory was that assuming –

THE COURT: You don't have to tell me what your theory was.

[DEFENSE COUNSEL]: It may be helpful for appellate purposes that assuming this girl Johanna Flores would have some motive to come in here and in a sense finger the wrong guy, maybe she would be willing to do that out of intense hatred, dislike and bias toward my client, then I think a prior threat to have him taken out by rival gang members would be relevant.

So that was the basis for my offering that bit of evidence and I just wanted to make sure the Court understands my theory. And it may not change your ruling, but at least that's the reason why I was asking that

that come in.

THE COURT: Well, I see a difference in kind between having Cherryville take you out and having the entire judicial system or the entire justice system put you out of commission, so to speak. My ruling remains the same.

(8RT 1146-1147.)

When Jason Meyers testified on cross-examination, defense counsel elicited his opinion that Flores, nicknamed "Goon," was "like a prostitute," because she "would sleep around with a lot of guys" from "different neighborhoods" and was known as a "ho." According to Meyers, Flores would hang out with members of different gangs, including the Cherryville and West Side gangs. Meyers further testified that Flores used drugs, that she and appellant were always bickering and fighting, and that Flores used profane language toward appellant and slapped him, including on the night of the shooting. That night, Flores said to appellant, "You son of a bitch. What the hell are you doing? What the fuck are you doing?" Flores asked appellant, "Why the fuck are you getting a cigarette from her?" She also called appellant a "fucking asshole." (8RT 1156-1160, 1162, 1172-1174.)

In questioning Meyers on redirect examination, the prosecutor sought to show that Meyers was trying to "dirty up" Flores, as he never told the investigating detectives the things he now said about Flores, he had not been around Flores before the night of the shooting, he was friendly with appellant's Happy Town gang, he did not like the rival Cherryville and West Side Pomona gangs, and he did not want to be known as a "snitch." (8RT 1177-1196.) When Meyers had been interviewed, he said he was afraid to testify in court. He was afraid of "the people on the outside," as he had been shot several months prior to trial in an unrelated incident. (8RT 1195-1196.) On recross-examination, Meyers testified that he would not have testified at trial had he not

been subpoenaed by the prosecution, and that he was telling the truth, including the truth about Flores. (8RT 1196-1198.)

Elva Arambula testified on direct examination that she, Meyers, and Hernandez were walking home after a trip to 7-Eleven when they encountered appellant and Flores. (8RT 1215-1216.) When the prosecutor questioned her regarding where appellant and Flores went when the groups parted, the following exchange occurred:

[PROSECUTOR]: Now, when you last saw the defendant and Johanna where were they?

[ARAMBULA]: On Westmont, heading toward Dennison.

[PROSECUTOR]: And which way, do you know what they did on Dennison? Do you know whether they turned or not?

[ARAMBULA]: No, I don't.

[PROSECUTOR]: You don't?

[ARAMBULA]: No.

[PROSECUTOR]: Did you get your subpoena on June the 6th of this year?

[ARAMBULA]: Yes.

[PROSECUTOR]: And who gave you your subpoena?

[ARAMBULA]: You did.

[PROSECUTOR]: Was I alone?

[ARAMBULA]: No.

[PROSECUTOR]: Who was I with?

[ARAMBULA]: With him.

[PROSECUTOR]: You're referring to Sergeant Winters?

[ARAMBULA]: Yeah.

[PROSECUTOR]: And when I gave you your subpoena, did we briefly go over your testimony? I asked you about the incident?

[ARAMBULA]: Yes.

[PROSECUTOR]: Is that correct?

[ARAMBULA]: Yes.

[PROSECUTOR]: Then do you remember my asking you if you could take us or you could go with us to where you last saw Johanna and the defendant so you could actually show us?

[ARAMBULA]: Yes.

[PROSECUTOR]: Did you agree to do that?

[ARAMBULA]: Yes.

[PROSECUTOR]: Did you go with us?

[ARAMBULA]: Yes.

[PROSECUTOR]: Did you, in fact, show us where you last saw Johanna and the defendant?

[ARAMBULA]: Yes.

[PROSECUTOR]: Did anybody force you to do that?

[ARAMBULA]: No.

[PROSECUTOR]: You did that willingly?

[ARAMBULA]: Yeah.

[PROSECUTOR]: Is that true?

[ARAMBULA]: True.

[PROSECUTOR]: Ma'am, when you did that, did you show us that it was, in fact, that they had turned on Dennison and were walking on Dennison headed toward Mission, that they actually rounded the corner? Did you tell us that?

[ARAMBULA]: I said that they might have.

[PROSECUTOR]: All right. My question to you is this: when you disclosed – when you went to the scene with Detective Winters and I, did you point to the street Dennison and say[,] "They turned on that

street and then I didn't see them any more"? Did you tell us that?

[ARAMBULA]: No. I said I turned on my street; then I didn't see anything.

[PROSECUTOR]: All right. Listen to my question. This is my question to you: Did you tell us that Johanna and the defendant turned onto Dennison and after they turned onto Dennison you no longer saw them? Either yes or no, did you tell us that or not?

[ARAMBULA]: No.

[PROSECUTOR]: All right. In fact, didn't you tell us on June the 6th that they were last seen on Dennison headed toward Mission? Didn't you tell us that?

[ARAMBULA]: No.

(8RT 1222-1225.) When asked how much time had passed between her encounter with appellant and Flores and hearing the police sirens, Arambula testified that it had "seemed like" 20 minutes, but that time seemed to go faster when she had taken "speed." (8RT 1225-1226.)

The prosecutor later asked whether Arambula had received a threat after testifying at the preliminary hearing; Arambula answered, "Yes, I took it that way." When the prosecutor asked who had threatened her, defense counsel requested a bench conference. (8RT 1229.)

Defense counsel asked that the prosecutor make an offer of proof. The prosecutor stated as follows:

This witness is saying now that she never told us that, she never told Detective Winters that they last turned on Dennison. She is now coming up with this: Yes, I admit it was 20 minutes but, oh, it's because I was speeding on meth. This is a question that was not asked of her.

I think it is fairly clear that she's trying to shape her testimony a little bit. What I'm asking is regarding the threat, this defendant's brother

was driven over to her house by the defendant's mother and the brother, which is Angel, Bandit, went to her door and threatened her. As a result the police were ultimately involved.

She testified against Angel for a case here in this courthouse for dissuading a witness. He was convicted, he was sent to prison as a result of this.

(8RT 1230.) The prosecutor stated that he did not intend to ask Arambula about the case against Angel, but wanted to question her regarding the threat "because she's not totally cooperative on the stand; she is volunteering information that is arguably helpful to the defendant. And I think the fact that she has been threatened is relevant." (8RT 1230.)

The court stated it believed the threat was relevant to the issue of Arambula's credibility, but for no other purpose, and it would limit the testimony for that purpose. (8RT 1231.) Defense counsel argued that Arambula was being straightforward and truthful, not evasive, and that the differences between her testimony and her prior statements were "very minor." (8RT 1231.)

Counsel asked when Arambula had been threatened. The prosecutor stated it had happened the day after she testified at the preliminary hearing. Furthermore, during her preliminary hearing testimony, Arambula had testified that she had previously been threatened by phone, when someone called and said that if she testified, her house would be blown up. At the preliminary hearing, Arambula had testified that she was fearful. (8RT 1232; see 2CT 345-348.)

Defense counsel argued that Angel's actions or knowledge of Angel's actions could not be attributed to appellant. Counsel argued that this evidence was "extremely prejudicial" to appellant and should not be admitted, and that the only further inquiry which should be allowed would be whether Arambula

had been threatened by appellant. (8RT 1232-1233.) The prosecutor argued that threats by third parties were admissible regarding the witness's credibility, whether or not they had been sanctioned by the defendant. (8RT 1233.)

The court stated that it would allow the prosecutor to elicit evidence that Arambula had received what she perceived to be a threat, but not that it was from Angel. The court stated that it had previously admitted evidence that Flores had been threatened, but not that Angel had threatened her.[36] It had also allowed testimony that appellant had threatened Flores. The court stated that when defense counsel had objected, the court had previously indicated that this testimony had been admitted for the limited purpose of judging Flores's credibility. In fact, however, the evidence regarding Flores's feeling of being threatened was admitted only as it related to her credibility, while the evidence of appellant's own statements to Flores "came in for all purposes." The limiting instruction given by the court during Flores's testimony was meant to relate to the former, not the latter, and the attorneys would be allowed to argue accordingly. (8RT 1233-1234.)

The prosecutor indicated he wished to ask about who had made the threat, i.e., a Happy Town gang member, without showing that it was Angel, so that the jurors would not speculate that it might have been the police, trying to make Arambula feel she had not done a good enough job of testifying at the preliminary hearing. (8RT 1234-1235.) The court responded as follows:

> Let me tell you what I'm trying to avoid, and I'm trying to allow the People to elicit that she received a threat so that they could properly judge her credibility in spite of the threat she's here testifying. Or if the inference the People want to draw [is that] she's received a threat and

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36. As appellant notes (AOB 89-90, fn. 51), the court misspoke; it had previously allowed evidence that Angel threatened Flores, but not what his actual threat had been. (6RT 808-812.)

therefore she is hedging or fudging on her testimony. Whatever the inference is, I want the People to be able to elicit that so that the jury can draw their own conclusion in this regard. But I don't want them to draw the inference that Angel did it at the direction of the defendant because there is no proof of that. Or that a Happy Town member is doing it at the direction of the defendant because there is no proof of that.

So if your fear is that they may draw an inference that the police threatened her, I'm going to allow you to ask her whether or not that threat was from the police so that she can say no. And I'm going to, if you want elicit that the threat was not from the defendant.

I'm allowing the People to elicit that she received a threat. And if the People want that, it was not from the police.

(8RT 1235.) When the prosecutor asked whether he could inquire if it was someone from the neighborhood, the court responded, "No." Defense counsel stated, "That's fine." (8RT 1235.)

When Arambula resumed testifying, she stated that the threat she had received had not been made by law enforcement personnel, and the prosecutor had told her that she should tell the truth when testifying, regardless of which party asked her the questions. Arambula still lived on 9th Street. (8RT 1236-1237.)

The trial court instructed the jury as follows:

Ladies and Gentlemen of the jury, you've heard testimony concerning this witness receiving what she believed to be a threat. That question and answer may be considered by the jury for the sole purpose of determining the credibility of the witnesses [*sic*] and for no other reason.

(8RT 1238.)

During her cross-examination, Arambula testified that the threat had

been made in August 1996, and that appellant was not the person who made the threat. (8RT 1242.)

Before Joseph Silva testified for the prosecution, defense counsel requested a bench conference and indicated that according to the prosecutor, Silva had not been cooperative with the police. (11RT 1631.) The prosecutor stated that Silva had spoken to his attorney and was willing to testify without a grant of immunity. (11RT 1631.) Defense counsel said that he was not aware of anything indicating Silva had been threatened. (11RT 1632.) However, the prosecutor stated that Silva had told Detectives Collins and Kono that he had been threatened by "Casper," a Happy Town gang member, who told Silva that if he testified, he and his entire family would be killed. (11RT 1632.)

Defense counsel argued that there was no evidence that this threat came from appellant or was made at his direction, that it was "very prejudicial," and that he did not want the jury to think that everyone who testified had been threatened "under the guidance of" appellant. Counsel argued that the evidence was not relevant and that it should be excluded under Evidence Code section 352. (11RT 1632.) The court stated that according to the cases previously cited by the People, the jury could consider the fact that a witness was testifying despite having been threatened in evaluating the witness's credibility. The court stated that it might not be appropriate to allow the prosecutor to inquire regarding the content of the threat and who had made it, and asked the prosecutor to provide the case cites again after the noon recess. (11RT 1633-1634.)

Silva testified that he lived near appellant and had known appellant and Angel for about eight years, since Silva was 12 years old. Silva was not a Happy Town gang member. (11RT 1634-1637.) Silva had seen appellant the day after the shooting, but denied having a conversation with appellant about buying a gun from appellant. (11RT 1637-1638, 1643-1644.) On June 4,

1996, Detectives Collins and Kono had transported Silva to the prosecutor's office for an interview. At the end of the interview, Silva had agreed to return the following day so that his statement could be recorded by a court stenographer. However, the following day, he had refused to return. Silva denied that he was afraid and that he had told the prosecutor during the interview that a day or two after the shooting, he had agreed to buy a .45-caliber gun from appellant.[37] (11RT 1638-1640.) Silva admitted buying a gun from Angel for $100 on the day after Officer Fraembs was killed. He had overheard appellant saying he needed money to go to where his daughter would be born. Silva told Angel he would buy the gun for $100. Silva had seen appellant with the gun at his home on prior occasions. (11RT 1641-1645.)

Defense counsel requested that the court take the noon recess. After the jury was excused, counsel and the court discussed the manner in which the prosecutor had been questioning Silva, as though he were a hostile witness. The court indicated it appeared that the prosecutor was laying a foundation for the admission of Silva's prior inconsistent statements. The prosecutor said this was correct. (11RT 1645-1649.)

The court then asked the prosecutor to provide the case authority regarding the admission of evidence of threats. The prosecutor noted that Silva's demeanor made this relevant. The prosecutor stated that Silva had told him, in the hallway during a pretrial conference, that he was afraid because he had received a threat. The prosecutor again cited *People v. Avalos*, *supra*, 37 Cal.3d at page 232, *People v. Olguin*, *supra*, 31 Cal.App.4th 1355; and *People v. Gutierrez*, *supra*, 23 Cal.App.4th at page 1588. (11RT 1650.)

Following the noon recess, the court stated it had reviewed the cases cited by the prosecutor, which held that threats against a witness were

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37. When asked whether he was deliberately facing the jury and turning his back toward appellant, Silva said he was not. (11RT 1640.)

admissible on the issue of the witness's credibility, regardless of whether or not the defendant had made the threats or was connected to them. (11RT 1651.) The court stated as follows:

> The fact that the witness was threatened by a third person, that, in and of itself, is something that the jury may properly consider in deciding the witness's credibility. And in this instance, that's a substantial issue, meaning the jury is going to have to decide whether he's telling the truth now or whether he was telling the truth at the time that he spoke to Detective Kono.
>
> So under those circumstances, it appears to me that it's admissible.

(11RT 1651-1652.) Defense counsel requested a limiting instruction, and the court agreed to give one. (11RT 1652.)

When Silva's testimony resumed,[38] he denied knowing what kind of gun he was buying, denied he had discussed the gun purchase directly with appellant, and denied that appellant had told him he had used that gun to kill a police officer. (11RT 1684-1695.) The following colloquy occurred:

> [PROSECUTOR]: Well, Mr. Silva, did you tell Detectives Kono and Collins in my office that the defendant told you that he had used that gun, the gun that you had agreed to buy, to kill a police officer, to kill a cop? Did you tell us that in my office?
>
> [SILVA]: I could have said that but that's not the way it happened.
>
> [PROSECUTOR]: All right. Well, have you been threatened in this case, Mr. Silva?
>
> [SILVA]: No.
>
> [PROSECUTOR]: You haven't been threatened?
>
> [SILVA]: No. Somebody told me something one time.

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38. Before Silva resumed testifying, the prosecution presented the testimony of Deputy Medical Examiner James Ribe. (11RT 1658-1683.)

[PROSECUTOR]: What did someone tell you one time?

[SILVA]: Said keep your mouth shut.

[PROSECUTOR]: Somebody told you you better keep your mouth shut?

[SILVA]: Yeah.

[PROSECUTOR]: Who told you that?

[SILVA]: A guy named Casper.

[PROSECUTOR]: Casper?

[SILVA]: Yes.

[PROSECUTOR]: Is Casper a Happy Town street gang member?

[SILVA]: I guess.

[PROSECUTOR]: What is that?

[SILVA]: I guess.

[PROSECUTOR]: You guess?

[SILVA]: Yeah.

[PROSECUTOR]: Well, in fact, you came to speak with me in my office with Detective Kono, didn't you tell us –

[SILVA]: Yeah, I said he was from Happy Town.

[PROSECUTOR]: And is it your testimony today that Casper told you you better keep your mouth shut?

[SILVA]: Yes.

[PROSECUTOR]: Well, did you tell detectives Kono and Collins and myself that, in fact, Casper told you that you and your entire family would be killed if you came into court and testified that the defendant admitted shooting a cop?

[SILVA]: Yep. Yes, Sir.

[DEFENSE COUNSEL]: Your Honor, I would ask the Court to give a limiting instruction at this point, please.

THE COURT: Ladies and Gentlemen of the jury, this testimony received from the witness concerning a statement made to him that he believed to be a threat, it is received for the limited purpose of you deciding this witness's credibility.

(11RT 1695-1696.) Silva testified that he might have told the prosecutor on June 23, 1997, that he was frightened, and might have told the detectives, "I don't want nothing to happen to me." He was "kind of shook up at the time," but at trial, he was "not really frightened." (11RT 1697-1699.)

Silva later testified that sometime after Casper had threatened him, Casper was the person who called Silva to arrange meet at the 7-Eleven to retrieve the gun. However, right after the phone call, Angel came to Silva's house and Silva gave him the gun. (11RT 1721-1724.)

On cross-examination, Silva testified that he still lived in the same neighborhood. (11RT 1726.) Casper had threatened Silva on the same day that Silva heard about the officer being killed. (11RT 1733.) Neither appellant nor Angel had threatened Silva. (11RT 1733.)

During his summation, the prosecutor argued that Flores had no incentive to lie about appellant's involvement in the shooting of Officer Fraembs. The prosecutor argued that appellant had threatened Flores, that her family had to be relocated, and that she had received no benefit from her testimony. Instead, she had come forward because what appellant had done was wrong, and it was wrong for Officer Fraembs to have died the way he did. (15RT 2228-2229.)

The prosecutor argued that Flores's testimony was corroborated by physical evidence and by other testimony, including the testimony of Arambula, who saw appellant and Flores that night, and who had been threatened as a result of her prior testimony in this case. Although Flores testified at trial that she had last seen appellant and Flores at the corner of Westmont and Denison,

she had told Sergeant Winters and Sergeant Miller that she last saw appellant and Flores walking on Denison toward Mission, i.e., "headed right for the crime scene," one block away. Furthermore, both Arambula and Meyers heard sirens about 15 or 20 minutes after they saw appellant and Flores. The prosecutor argued that the testimony of Arambula and Meyers confirmed appellant's presence near the crime scene, within minutes of the murder. (15RT 2236-2237.)

The prosecutor also argued that Silva had been the least cooperative witness, possibly because he was friends with appellant and Angel or because he was afraid. Nevertheless, despite the fact that he still lived in the neighborhood and despite Casper's threat, Silva testified he had bought a gun from appellant for $100, one day after Officer Fraembs was murdered and just 16 days after appellant had paid $155 for that gun. The prosecutor argued that the reason Silva had not persisted after Angel retrieved the gun and Silva never received another gun or his money back was that he realized the gun was the murder weapon. (15RT 2242-2244.)

Defense counsel argued that the jurors would have to decide whether to believe Flores, "perhaps the key witness that the government produced against [appellant]." Counsel argued that Flores had come to court dressed nicely, with her hair nicely done, in order "to present an image to [the jurors] of being the good little girl next door. However, she would create a very different impression in her "normal gang attire clothing," after using methamphetamine heavily for two or three days, uttering profanity. (15RT 2265-2266.) Counsel argued that in Meyers's eyes, Flores was "a common prostitute," who "was sleeping around with the various gang members," and said he had "tried to present some evidence that she at least told the police that she had even slept with [appellant's] brother Angel." Counsel argued that Flores was so jealous of appellant's relationship with Valore that she had a motive to wrongly accuse

him of murder, to slant her testimony regarding his attitude when Officer Fraembs approached them, and to lie about what appellant said to her the morning after the shooting. (15RT 2266-2272.) Counsel argued:

> . . . if we want to get rid of gangs, maybe the quickest way if we could do it was to pull these little home girls out, you see, take these little home girls out of the gang equation so the male gang members have nobody to do dope with, have promiscuous sex with and brag in their macho way about the things that they do. If we can pull these little home girls like Johanna out of these gangs, these gangs just might collapse from their own lack of inertia.
>
> But Johanna Flores is a hard-core home girl gang banger. She wasn't happy just choosing one gang like Happy Town. No, she had to go around with Cherryville, this Baldwin Park gang, sleep with all these guys. That's awful. That's awful. So on some level in the overall scheme of what Fate brought upon Officer Fraembs, she also played her own role in this tragedy.

(15RT 2273.)

In rebuttal, the prosecutor argued that although defense counsel argued that Flores was a "slut" and a "hard-core gang banger," no one had corroborated Meyers's claim that Flores "slept around," and the fact that she was sexually active did not mean she lied. Moreover, Flores testified that she had told the police that appellant was "being a jerk" to Officer Fraembs; she had not fabricated this at trial. (15RT 2349-2353.)

During the conferences regarding jury instructions (14RT 2073-2154; 15RT 2157-2183, 2297-2298, 2302-2303), defense counsel provided the court with a modified version of CALJIC No. 2.05,[39] to which the prosecutor did not

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39. The modified CALJIC No. 2.05 provided as follows:
If you find that an effort to suppress evidence against the

object. The prosecutor requested CALJIC No. 2.06; defense counsel joined in the request.[40] (14RT 2077-2081, 2083-2084.) The prosecutor also requested that CALJIC No. 2.09[41] be given, and the defense joined in the request. (14RT 2081.) The trial court instructed the jurors according to the modified version of CALJIC No. 2.05 (15RT 2391-2392), as well as with CALJIC No. 2.06 (15RT 2392), and CALJIC No. 2.09 (15RT 2392).

After the jury had retired to commence deliberations, defense counsel informed the court that appellant had complained that counsel had not argued more strongly that appellant was innocent. Counsel stated that he had made a tactical decision to argue the way he had. The court stated that counsel had to

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defendant by the intimidation of a witness was made by another person for the defendant's benefit, you may not consider that effort as tending to show the defendant's consciousness of guilt unless you also find that the defendant authorized that effort. If you find defendant authorized the effort, that conduct is not sufficient by itself to prove guilt, and its weight and significance, if any, are for you to decide.

(13CT 3558.)

40. CALJIC No. 2.06 provided as follows:

If you find that a defendant attempted to suppress evidence against himself in any manner, such as by the intimidation of a witness or by destroying evidence or by concealing evidence, this attempt may be considered by you as a circumstance tending to show a consciousness of guilt. However, this conduct is not sufficient by itself to prove guilt, and its weight and significance, if any, are for you to decide.

(13CT 3559.)

41. CALJIC No. 2.09 provides as follows:

Certain evidence was admitted for a limited purpose.

At the time the evidence was admitted you were instructed that it could not be considered by you for any purpose other than the limited purpose for which it was admitted.

Do not consider this evidence for any purpose except the limited purpose for which it was admitted. (13CT 3560.)

"maintain a certain amount of credibility," that "the overwhelming weight of the evidence on the issue of guilt of the charge" was against the defense, and that appellant could not expect a better result than to be convicted of second degree murder, with a not true finding on the special circumstances, as counsel had suggested to the jury. The court stated that counsel had not conceded guilt, but had "called to their attention and asked them to weigh the bias, interests and motive that Johanna Flores had," and added that "under the circumstances, I can't see where there was too much more that you could have done arguing as to the charged offense." (15RT 2428-2429.)

B. The Applicable Law

Except as otherwise provided by statute, all relevant evidence is admissible. (Evid. Code, § 351; *People v. Scheid* (1997) 16 Cal.4th 1, 13; *People v. Jackson* (1989) 49 Cal.3d 1170, 1187.) Relevant evidence is evidence "having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (Evid. Code, § 210; *People v. Scheid*, *supra*, 16 Cal.4th at p. 13; *People v. Jackson*, *supra*, 49 Cal.3d at p. 1187.) The test of relevance is whether the evidence tends logically, naturally, and by reasonable inference, to establish any facts material for the People, such as identity, intent, plan, motive, preparation, or opportunity, or to overcome any material matter sought to be proved by the defense. (*People v. Alcala* (1984) 36 Cal.3d 604, 631; see also *People v. Scheid*, *supra*, 16 Cal.4th at p. 13.) The trial court is vested with broad discretion in determining relevance. (*People v. Scheid*, *supra*, 6 Cal.4th at p. 14; *People* v. *Jackson*, *supra*, 49 Cal.3d at p. 1187.)

Under Evidence Code section 352, "[t]he court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of

misleading the jury." The trial court has broad discretion in assessing whether the probative value of specific evidence is outweighed by concerns of undue prejudice, confusion, or consumption of time. (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124-1125; see also *People v. Valdez* (2004) 32 Cal.4th 73, 108; *People v. DeSantis* (1992) 2 Cal.4th 1198, 1226.) Where a discretionary power is vested in the trial judge, his or her exercise of that wide discretion must not be disturbed on appeal except on a showing that the court exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice. (*People v. Jordan* (1986) 42 Cal.3d 308, 316.)

"Evidence that a witness is afraid to testify or fears retaliation for testifying is relevant to the credibility of that witness and is therefore admissible." (Evid. Code, § 780; *People v. Gonzalez* (2006) 38 Cal.4th 932, 945-946; *People v. Sapp* (2003) 31 Cal.4th 240, 301; *People v. Warren* (1988) 45 Cal.3d 471, 481; *People v. Olguin*, *supra*, 31 Cal.App.4th at p. 1368; see Evid. Code, § 780.) "An explanation of the basis for the witness's fear is likewise relevant to her credibility and is well within the discretion of the trial court." (*People v. Gonzalez*, *supra*, 38 Cal.4th at p. 946; *People v. Guerra* (2006) 37 Cal.4th 1067, 1142; *People v. Gray* (2003) 37 Cal.4th 168, 220; *People v. Burgener* (2003) 29 Cal.4th 833, 869.) "Evidence of possible intimidation would help explain why the witness might repudiate earlier truthful statements." (*People v. Gonzalez, supra*, 38 Cal.4th at p. 946.)

Furthermore, it is not necessary to show threats against the witness were made by the defendant personally or that the witness's fear of retaliation is directly linked to the defendant for the evidence to be admissible. (*People v. Guerra*, *supra*, 37 Cal.4th at p. 1142; *People v. Green*, *supra*, 27 Cal.3d at pp. 19-20; *People v. Olguin*, *supra*, 31 Cal.App.4th at p. 1368; *People v. Gutierrez*, *supra*, 23 Cal.App.4th at pp. 1587-1588.) As the Court of Appeal noted in

Olguin:

> A witness who testifies despite fear of recrimination of *any* kind by *anyone* is more credible because of his or her personal stake in the testimony. Just as the fact a witness expects to receive something in exchange for testimony may be considered in evaluating his or her credibility [citation], the fact a witness is testifying despite fear of recrimination is important to fully evaluating his or her credibility. For this purpose, it matters not the source of the threat . . . .
>
> Regardless of its source, the jury would be entitled to evaluate the witness's testimony *knowing* it was given under such circumstances. And they would be entitled to know not just that the witness was afraid, but also, within the limits of Evidence Code section 352, those facts which would enable them to evaluate the witness's fear. A witness who expresses fear of testifying because he is afraid of being shunned by a rich uncle who disapproves of lawyers would have to be evaluated quite differently than one whose fear of testifying is based upon bullets having been fired into her house the night before the trial.

(*People v. Olguin*, *supra*, 31 Cal.App.4th at pp. 1368-1369, emphasis in original.)

C. The Trial Court Properly Admitted Evidence Regarding The Threat Made To Flores By Angel Mendoza

Appellant first argues that the trial court erred by permitting evidence that Flores had been threatened by appellant's brother, Angel. (AOB 80-88.) Specifically, appellant argues that the evidence of Angel's threat against Flores and her relocation should not have been admitted either as non-hearsay evidence of her credibility as a witness or as statements falling within the state-of-mind exception to the hearsay rule. (AOB 82-86.) He further argues that the prejudicial effect of the evidence far outweighed its probative value. (AOB 87-

88.) Respondent disagrees, and submits that the court properly allowed this evidence, which was highly probative on the issue of the credibility of Flores, the chief prosecution witness regarding the degree of the crime and the truth of the charged special circumstances.

Here, the physical evidence clearly linked appellant to the crime scene and to the type of gun used to kill Officer Fraembs. However, two other people, Flores and Cesena, were also present at the scene, both of them were friends of appellant and could have been the shooter, Cesena and appellant were fellow gang members, and there were no other eyewitnesses available to testify regarding the exact nature of the encounter between Officer Fraembs and appellant's group and the exact actions taken by appellant when he shot the officer.

Flores was the only eyewitness to the shooting who testified at the preliminary hearing or at trial. Therefore, her credibility was essential to show that it was appellant, rather than Flores or Cesena, who killed Officer Fraembs, that he did so because he did not want to be caught carrying a gun in violation of his parole conditions and arrested (demonstrating that the murder was premeditated and deliberate and committed to avoid lawful arrest; see Args. II, V, *ante*, and Arg. VII, *post*), that Officer Fraembs was lawfully engaged in the performance of his duties (see Arg. V, *ante*), and that appellant used Flores as a shield to move closer to the officer, showing that he killed Officer Fraembs while lying in wait (see Args. I, III, *ante*).

Because of the possibility the jurors would think, as defense counsel continuously urged them to do through his cross-examination of Flores and Meyers and through argument, that Flores was a promiscuous, drug-using, intensely jealous "hard-core gang banger," who was retaliating against appellant for his relationship with Valore by implicating him in the shooting and by slanting her testimony to make him appear more culpable than he actually was,

the prosecutor was entitled to introduce evidence to demonstrate that she was testifying despite the fact that she had received a threat from appellant's brother, who was also a member of appellant's gang, which she took seriously enough to request that her family be relocated. (See *People v. Olguin*, *supra*, 31 Cal.App.4th at pp. 1368-1369 [holding trial court properly admitted evidence that eyewitness to murder (in which victim and defendant were rival gang members) had been threatened by third persons following the shooting].)

Appellant, citing *People v. Avalos*, *supra*, 37 Cal.3d at p. 232, *People v. Olguin*, *supra*, 31 Cal.App.4th at pp. 1368-1369, *People v. Gutierrez*, *supra*, 23 Cal.App.4th at pp. 1587-1588, and *People v. Brooks* (1979) 88 Cal.App.3d 180, 187, argues that the testimony regarding the threat to Flores should not have been admitted because Flores neither recanted nor had "substantial inconsistencies" in her testimony. (AOB 82-85.) However, this Court did not hold in *Avalos* that a recantation or substantial inconsistency is a prerequisite to the admission of evidence that the witness was afraid to testify. In that case, the witness had identified the defendant in a live lineup. When she was asked at trial whether the person she had identified in the lineup was in the courtroom, she *hesitated* before answering *yes*. (*People v. Avalos*, *supra*, 37 Cal.3d at p. 232.) This Court held that the trial court properly exercised its discretion under Evidence Code section 352 by admitting evidence that the witness was afraid to testify, as the determination that an explanation of her *hesitation* would be relevant to the jury's assessment of her credibility was well within the trial court's discretion. (*Ibid.*, citing *People v. Green*, *supra*, 27 Cal.3d at p. 20.) The witness's hesitation and subsequent answer, clearly, did not constitute either a recantation or a substantial inconsistency with her prior identification of the defendant.

In *Green*, the defendant challenged the admission of testimony from which, he asserted, the jury could infer that he had previously been incarcerated.

A prosecution witness, Don Sheehan, who had disposed of the murder weapon at the defendant's behest, testified on direct examination that he had told the arresting officers he was afraid to go to prison on a pending parole violation charge. When the prosecutor asked why he was afraid, Sheehan stated that the defendant "had a lot of friends there." (*People v. Green*, *supra*, 27 Cal.3d at p. 19.) On review, this Court held that this testimony was not inadmissible as a matter of law. (*Id.* at pp. 19-20, citing Evidence Code section 780, subd. (f).) Sheehan had admitted that the authorities promised him he would not be sent to prison on his parole violation. (*Id.* at p. 20.) This Court stated as follows:

> It was apparent that defendant would attack Sheehan's credibility – as he did on cross-examination – by suggesting this promise was the motive for his testimony favorable to the prosecution. In anticipation thereof, the district attorney sought to show that the promise was given instead for the sole purpose of allaying Sheehan's justifiable fear of peer retaliation in prison.

(*Ibid.*)

Clearly, then, where the prosecution can reasonably anticipate that the defense will attack the credibility of a witness, the trial court may, within the exercise of its discretion, permit the prosecution to introduce evidence supporting the witness's credibility on direct examination. Given this Court's holdings in *Avalos* and *Green*, it is apparent that the fact that the witnesses in *Olguin* and *Gutierrez* had actually recanted or had "substantial inconsistencies" in their testimony before the testimony regarding threats was introduced does not indicate that this is a *prerequisite* to the admission of such testimony, and the Court of Appeal did not purport to impose such a requirement in either case. (See *People v. Olguin*, *supra*, 31 Cal.App.4th at pp. 1367-1369; *People v. Gutierrez*, *supra*, 23 Cal.App.4th at pp. 1586-1588.)

In *People v. Brooks*, *supra*, 88 Cal.App.3d 180, a witness who had

identified the defendant as the armed robber from a group of photographs, but failed to identify him at a live lineup, was allowed to testify that she could not identify him at the time of the lineup because she was confused by someone who had told her that she could have mistaken the defendant for another man or vice versa. (*Id.* at pp. 184-185.) A second witness was allowed to testify extensively about threats made against her by the defendant's girlfriend. (*Id.* at p. 185.) On review, the Court of Appeal held that the first witness's testimony was non-hearsay because it was offered for a proper credibility purpose, as the witness had initially identified the defendant as the perpetrator and had later retracted that identification. (*Id.* at p. 187.) As to the second witness, the Court of Appeal noted that no inconsistent testimony preceded the threat evidence, and found that the threat evidence was immaterial to any issue and irrelevant to the case, *and* that the "the *fact* evidence which this witness produced was likewise irrelevant." (*Ibid.*, emphasis in original.) The court stated that although the prosecutor may have anticipated a credibility problem, "the lack of relevancy of this witness' testimony strongly suggests the presentation of this witness was solely to call the jury's attention to the threat," and that in any event, the prosecutor "jumped the gun . . . in his production of such evidence." (*Ibid.*)

Even if *Brooks* could be interpreted to hold that recantation or inconsistent testimony is a prerequisite for the admission of threats evidence, such a holding would be invalid in light of this Court's holdings that credibility evidence was properly admitted in *Avalos* and *Green*, where there had been no recantation or inconsistent testimony prior to the admission of the challenged evidence. (See *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

Furthermore, the fact that the defense would try to undermine Flores's credibility was not only predictable, but, as the trial court noted, was actually

the *only* reasonable defense strategy available. (See 15RT 2428-2429.) This strategy was clearly signaled at the preliminary hearing, when defense counsel had also questioned Flores regarding her gang affiliations, her use of drugs and alcohol, the fact that she had a boyfriend while also dating appellant, how soon after meeting appellant she had slept with him, whether she had had sex with Cesena and/or Angel, and whether she was jealous of appellant's relationship with Valore, fought with him about Valore on the night of the shooting, and was angry that he asked Arambula and Hernandez for a cigarette that night. (2CT 444-464.) Counsel had specifically asked whether Flores had immediately reported the shooting to the police (2CT 479-481), whether she had lied to the police about who had been at Tank's house on the night of the shooting (2CT 459), and whether she had told the police that appellant "panicked" and that he had taken drugs that day (2CT 475-476). He had also questioned Flores regarding whether she had ever told anyone that she was going to try to "set [appellant] up" by luring him to a location where he could be injured or killed by rival gang members (2CT 444), and whether she had told him that if she could not have a "one-on-one relationship" with him, she would see to it that no one else would ever have a relationship with him (2CT 455). Counsel had asked Flores, "You are aware of the tremendous importance that your testimony bears in this whole matter, are you not?" He had also asked whether she had told the truth and whether she had any motive to unjustly accuse appellant of killing Officer Fraembs. (2CT 482.)

Assuming only for the sake of argument that, as appellant claims, a witness's recantation or prior inconsistent statement is a prerequisite to the admission of testimony regarding threats, here, it was inevitable that the defense would attack Flores's credibility with her prior inconsistent statements, which were clearly material to the questions of premeditation and deliberation and the truth of the charged special circumstances. Given that it was only a matter of

timing in the admission of testimony regarding Flores's fear (i.e., whether the evidence would come in on direct or redirect examination), the trial court's ruling permitting the introduction of that testimony on direct examination cannot have been prejudicially erroneous.

Appellant also notes that in *People v. Brooks*, *supra,* 88 Cal.App.3d 180, the trial court instructed the jury that the alleged threats were admitted for the limited purpose that they had a bearing on the witness's state of mind, and also read CALJIC No. 2.05. Appellant argues that the fact that the court in this case also gave CALJIC No. 2.05 did not cure the purported error, and that the evidence could not have been admitted to show consciousness of guilt, as the threats were not shown to have been made by appellant or authorized by him. (AOB 85-86.)

However, in the absence of a request, the trial court was not required to give a limiting instruction. (*People v. Sapp*, *supra*, 31 Cal.4th at p. 301; *People v. Hernandez* (2004) 33 Cal.4th 1040, 1053 [where defendants failed to specifically request limiting instruction at the appropriate time regarding use of gang evidence admitted to support charged gang enhancement, the court had no sua sponte duty to give one]; *People v. Collie* (1981) 30 Cal.3d 43, 63-64; see also *People v. Padilla* (1995) 11 Cal.4th 891, 950, disapproved on other grounds in *People v. Hill* (1998) 17 Cal.4th 800, 823; *People v. Johnson* (1993) 6 Cal.4th 1; *People v. Milner* (1988) 45 Cal.3d 227; *People v. Morse* (1992) 2 Cal.App.4th 620, 650-651; Evid. Code, § 355[42]) Here, appellant requested a limiting instruction when Flores testified that when she talked to him the morning after the crime, she was afraid when *appellant* said, "I'm fine. I'm a killer. I don't give a fuck. It's just another day in the hood." (6RT 924.)

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42. Evidence Code section 355 provides, "When evidence is admissible as to one party or for one purpose and is inadmissible as to another party or for another purpose, the court *upon request* shall restrict the evidence to its proper scope and instruct the jury accordingly." (Emphasis added.)

However, he made no such request regarding the testimony about Angel's threat.[43/]

Furthermore, the modified CALJIC No. 2.05 *provided by appellant* and given by the court expressly informed the jurors that they were not to consider efforts made by other persons to intimidate witnesses for appellant's benefit to be evidence of appellant's consciousness of guilt, in the absence of evidence that he had authorized the effort. (13CT 3558; 15RT 2391-2392.) As appellant notes (AOB 86, fn. 48), California law does prohibit proving consciousness of guilt by use of attempts to suppress evidence unless those attempts can be connected to a defendant (see *People* v. *Hannon* (1977) 19 Cal.3d 588, 596-600), but that was not done here, as there was no argument or suggestion that this evidence reflected consciousness of guilt. (See *People v. Green*, *supra*, 27 Cal.3d at p. 20 [not necessary that threats against prosecution witnesses be "linked" to defendant, "as the prosecution never claimed that the witnesses' fear was the result of any effort on defendant's part to procure false testimony"]; *People v. Olguin*, *supra*, 31 Cal.App.4th at p. 1368 [no argument or suggestion that evidence of attempts to suppress evidence reflected defendant's consciousness of guilt; evidence was strictly limited to establishing witness's state of mind].)

Appellant further argues that the challenged testimony was not admissible pursuant to the "state of mind" exception to the hearsay rule codified in Evidence Code section 1250, as that section relates only to the *declarant's* state of mind, and here the declarant was Angel, not Flores. (AOB 82, 86.) However, the prosecutor never proffered the evidence under that section. Although he referred to Flores's "state of mind," in context, it was clear that he

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43. As the trial court later noted (8RT 1233-1234), the instruction it gave at appellant's request (6RT 924-925) had been intended to relate only to the evidence regarding Flores's fear, as appellant's own statements *were* admissible for all purposes, i.e., to show consciousness of guilt.

was referring to her *credibility*, i.e., the fact that she was testifying despite being afraid, because she was telling the truth and it was "the right thing to do." (6RT 795 [discussing *People v. Olguin*, *supra*, 31 Cal.App.4th 355, prosecutor stated, "That case stands for the proposition that threats from a third person . . . were properly admitted to establish the witness's state of mind. The fact that a witness is testifying despite fear is important in evaluating testimony."].)

Appellant also argues that the prejudicial impact of Flores's testimony regarding Angel's threat and her fear far outweighed its probative value, and therefore should have been excluded under Evidence Code section 352. (AOB 87-88.) However, it is clear that the trial court did not abuse its wide discretion by admitting this evidence.

Appellant claims that the trial court "completely ignored the question of whether the prejudicial effect of the evidence outweighed its probative value," and "failed to make a ruling regarding appellant's Evidence Code section 352 objection and did not engage in the weighing process at all." (AOB 87-88.) However, the record clearly belies this claim. As set forth previously, the trial court listened to extensive arguments from the prosecutor and defense counsel regarding the probative value and potential prejudicial effect of this evidence. (6RT 792-798.) Defense counsel expressly objected under Evidence Code section 352 more than once. (6RT 793, 796.) The trial court took a recess for the express purpose of considering the four issues which had been raised relating to Flores's testimony, including this issue. (6RT 803.) When it ruled on this issue, the court discussed the cited cases and clearly considered the potential prejudice to appellant when it ruled that although the fact that Angel said something to Flores which she perceived to be a threat was admissible because it related to her credibility, the actual *content* of that threat would not be admitted unless Flores recanted or exhibited "selective memory" in her trial testimony. (6RT 808-812.)

in admitting the evidence over appellant's Evidence Code section 352 objection. Despite appellant's disingenuous claim that "Flores's credibility was not at issue" (AOB 88), it was clear that her testimony was critical to the issues of the shooter's identity, the degree of the murder, and the truth of the charged special circumstances,[44] and it was equally clear that the defense intended to attack her credibility on the basis of her relationships with rival gang members, her purportedly sexually promiscuous lifestyle, and her jealousy and anger toward appellant. Therefore, the fact that Flores was willing to testify despite receiving a threat which made her so afraid that she requested relocation was extremely relevant and highly probative on the issue of her credibility. It simply cannot be said that the probative value of this evidence was *substantially outweighed* by the probability that its admission would create a *substantial danger* of *undue* prejudice.

D. The Trial Court Properly Admitted Evidence Regarding Threats Made By Third Parties To Arambula And Silva

Appellant also argues that the trial court erred by admitting evidence that Arambula had received what she perceived to be a threat after she testified at the preliminary hearing, and that Silva had been threatened by Casper, a Happy Town gang member. (AOB 92-94.) Again, respondent disagrees.

1. The Threat Against Arambula

Appellant contends that the "alleged inconsistency" in Arambula's

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44. Appellant refers to a "potentially inconsistent fact" in Flores's testimony, regarding her purported failure to tell the police in her initial statement that appellant had "an attitude" when approached by Officer Fraembs, as a "minor point." (AOB 84.) In fact, however, this particular point was essential to the determination of whether Officer Fraembs had been killed in the *lawful* performance of his duties, and the importance of this issue was clearly recognized by both parties at trial, as well as being the subject of one of appellant's claims in this appeal. (See Arg. V, *ante*.)

testimony, regarding the direction in which appellant and Flores were walking when the two groups parted, was "minor" and "virtually inconsequential." (AOB 92-93.) In fact, however, Arambula's testimony on this point was anything *but* minor. At trial, she testified that appellant and Flores were walking on Westmont Avenue, heading toward Denison, and that she did not know whether or not they had turned on Denison. Arambula denied telling the prosecutor and Detective Winters, when the three of them visited the scene prior to trial, that she last saw appellant and Flores turn on Denison toward Mission Boulevard. (8RT 1222-1225.)

As the prosecutor pointed out in his summation (15RT 2236-2237), and as would have been evident on the map and aerial photograph of the area which were used by the witnesses to illustrate their testimony,[45/] if appellant and Flores turned on Denison toward Mission, they were "headed right for the crime scene," one block away, only 15 or 20 minutes before sirens were heard when police officers responded to the scene of the shooting after a woman called 911 (see 5RT 653-660). In contrast, if they had continued walking on Westmont past Denison, they would not have been walking directly toward the crime scene. Arambula also attempted to qualify her prior statement regarding how much time passed between the encounter with appellant and the sound of the police sirens, testifying that she had only said it "seemed like" 20 minutes, and that time seemed to go faster when she had taken "speed." (8RT 1225-1226.)

Arambula's testimony provided important corroboration of Flores's testimony, which had been so heavily attacked by the defense. Because of her evident unwillingness to testify at trial, and her apparent attempts to retreat from

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45. (Peo. Exh. Nos. 13 [map], 42 [aerial photograph]; 7RT 1089; 8RT 1094-1098, 1101-1102, 1209, 1212; 12RT 1864-1870; 15RT 2236 [prosecutor refers to map during argument]; see also 6RT 869-872 [Flores testifies she and appellant walked on Denison to Mission, toward Humane Way].)

prior statements regarding the fact that she saw appellant heading directly toward the crime scene shortly before the shooting, the fact that Arambula had been threatened after testifying at the preliminary hearing was highly probative on the issue of her credibility.

Moreover, the trial court clearly considered the possible prejudice to appellant of such evidence, not allowing testimony that the threat was made by Angel, who was appellant's brother and had also threatened Flores, but allowing the parties to clarify that the threat had not been made by appellant or by any law enforcement officer. (8RT 1235, 1242.) Furthermore, the trial court expressly instructed the jurors that this evidence was to be considered for the sole purpose of determining credibility. (8RT 1238.) It cannot be said that the trial court abused its wide discretion in admitting this evidence.

2. The Threat Against Silva

Appellant also argues that evidence of threats made against Silva by third parties should not have been admitted, because any discrepancies between Silva's trial testimony and his prior statements were "minor," and "not substantial," and the threats did not actually affect his testimony. (AOB 92-94.) Once again, respondent disagrees with appellant's premise that the evidence of threats against the witnesses was admissible only if the witness recanted or was otherwise inconsistent in his or her testimony. In any event, the evidence of the threats against Silva was properly admitted by the trial court.

As the prosecutor informed the court, Silva had been uncooperative during portions of the investigation, a Happy Town gang member had threatened Silva's life and the lives of his family members, Silva had told the prosecutor that he was afraid, and his fear was relevant to explain his demeanor at trial. (11RT 1631-1632, 1650.) When he testified, Silva turned his back toward appellant and denied having discussed the purchase of the gun with appellant, insisting that the transaction had been conducted with Angel.

(11RT 1638-1645, 1684-1695.) He admitted that he "could have" told Detectives Kono and Collins that appellant said he had used the gun "to kill a cop," but that this was "not the way it happened." (11RT 1695.)

Once again, the court clearly considered the possibility of undue prejudice to appellant, and gave a limiting instruction as requested by appellant. (11RT 1696.) Furthermore, Silva testified that he still lived in appellant's neighborhood and that he had not been threatened by appellant or Angel. (11RT 1726, 1733.)

The prosecution bore the burden of showing that appellant was the person who shot Officer Fraembs. Given the fact that the gun was not found, the prosecution's ability to link the murder weapon to appellant, to account for its unavailability at trial, and to demonstrate that it was appellant and not Angel, Cesena, or another Happy Town gang member who killed Officer Fraembs (as the defense had implied when questioning Flores regarding her relationships with other gang members and her purported motives to "frame" appellant), the difference between Silva's statements to the investigators and his trial testimony was not "minor" or "insubstantial."[46/] The trial court did not abuse its broad discretion by admitting this evidence.

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46. Appellant argues that Silva *did* testify that appellant told him he had killed a police officer, though not that he had killed him with the gun that Silva was buying from appellant, and that the discrepancy was "not substantial." (AOB 90, 92-93, citing 11RT 1692, 1736.) However, this testimony was elicited *after* the trial court ruled that the evidence of threats was admissible on the question of Silva's credibility (11RT 1651-1652), and appellant did not request that the court reconsider its ruling on the basis that this testimony somehow rendered the threats irrelevant or less probative. Moreover, appellant's own admission to Silva that this gun was the murder weapon was certainly highly probative of his guilt, especially when coupled with evidence that he sold the gun at a loss shortly after purchasing it and immediately following the murder, then his brother retrieved the gun and apparently disposed of it.

E. The Trial Court Properly Excluded The Proffered Testimony Of Jason Meyers Regarding A Threat Purportedly Made Against Appellant By Johanna Flores Several Weeks Before The Shooting

Next, appellant argues that the trial court erred by excluding evidence that on one occasion, about a month and a half before the shooting, Meyers heard Flores "cursing [appellant] out" and angrily saying, "Look, I can have you taken out at any time by Cherryville." (AOB 94-95; see 8RT 1140-1147.) However, the trial court did not abuse its broad discretion under Evidence Code section 352 by excluding this evidence.

Appellant argues that the trial court was incorrect when it stated that the evidence was not relevant. (AOB 94.) It is clear, however, in the context of its entire remarks, that the court was considering, in light of the substantial amount of evidence already elicited regarding Flores's motives, the relative probative value of this particular piece of evidence, given the enormous difference between an angry woman in a mercurial relationship making a blustery threat to have a rival gang "take out" her philandering lover and, several weeks later, deciding to actually manipulate the criminal justice system to convict him of capital murder. (8RT 1146-1147.)

As set forth previously, there had already been *extensive* testimony establishing that Flores and appellant had a tempestuous relationship, that neither had been sexually faithful to the other, that Flores associated with other gang members, including rival gang members, and used drugs, that she often used profanity, and that she was angry and jealous over appellant's relationship with Valore and his attention to other women. The jury also heard evidence supporting a theory that appellant was not the actual shooter, i.e., Flores had known Joseph Cesena longer than she had known appellant, she was close friends with Chantal Cesena, and she initially lied to the police regarding Chantal's presence at Tank's house on the night of the shooting. When there

is already evidence of the witness's lack of credibility, it is within the discretion of the trial court to exclude impeachment evidence as cumulative. (*People v. Burgener* (1986) 41 Cal.3d 505, 525, disapproved on other grounds in *People v. Reyes* (1998) 19 Cal.4th 743, 756.)

Contrary to appellant's claim (AOB 95), the trial court by no means impeded his ability to put on a defense by presenting evidence of Flores's possible animosity toward appellant and a potential motive for her to falsely implicate him in the murder or to exaggerate his culpability. Given defense counsel's far-reaching and far-from-gentle portrayal of Flores as a lying, promiscuous, drug-using, profane, "hard-core gang banger," the sort of girl whose very existence was the reason that boys joined gangs and committed crimes (15RT 2265-2273), it can hardly be said that the exclusion of this particular threat undermined the defense's ability to show that Flores was not, in fact, "the good little girl next door" (15RT 2265), and that she was biased against appellant.[47/] For the same reasons, even if the trial court erred by excluding the proffered evidence, it is not reasonably probable that a result more favorable to appellant would have been reached had the evidence been admitted. (Evid. Code, § 354; *People v. Babbitt* (1988) 45 Cal.3d 660, 688-689; *People v. Wright* (1985) 39 Cal.3d 576, 586; *People v. Watson* (1956) 46 Cal.2d 818, 836.)

F. Any Possible Error In Admitting Evidence Of Threats Made Against Flores, Arambula, And Silva Was Harmless

Finally, appellant argues that the purported error in admitting evidence of the threats made against Flores, Arambula, and Silva denied him the right to a fair trial and a reliable judgment of death, and therefore requires reversal of

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47. The fact that defense counsel initially did not even know what evidence the prosecutor was referring to (see 11RT 1140) certainly indicates that this particular evidence was not crucial to the defense.

the first degree murder conviction, the special circumstance findings, and the death judgment. (AOB 95-100.) Respondent disagrees.

Had the trial court excluded the evidence, it is not reasonably probable that appellant would have received a more favorable result; therefore, there was no miscarriage of justice. (*People v. Earp* (1999) 20 Cal.4th 826, 878; *People v. Rodrigues*, *supra*, 8 Cal.4th at p. 1124; *People v. Watson*, *supra*, 46 Cal.2d at p. 836; Evid. Code, § 353.) Even without the evidence regarding the threats, there was overwhelming evidence that it was appellant who deliberately killed Officer Fraembs, that the murder was deliberate and premeditated, and that the special circumstance allegations were true. For the same reasons, it is clear that the admission of this evidence did not render the trial fundamentally unfair; therefore, there was no denial of due process. (See *People v. Partida* (2005) 37 Cal.4th 428, 439 [the admission of evidence, even if erroneous under state law, results in a due process violation only if it makes the trial fundamentally unfair].)

Appellant argues that the evidence of threats made to these three witnesses "caused the jurors to fear for their own safety." (AOB 97.) Appellant cites two incidents in support of this claim. First, during the prosecution's case-in-chief in the guilt phase, after Flores, Meyers, Arambula, and Silva had testified, and following the testimony of criminalist Dale Higashi, the court stated that some of the jurors had approached the bailiff and indicated that they had observed a gentleman in the audience who came to court in the morning but not in the afternoon. Although the man had not said or done anything, the jurors were uncomfortable because "he sits there." (12RT 1831.) The prosecutor stated that someone had asked the man that day who he was, and he had said he was "merely a court watcher" and "a citizen." The man had an olive complexion, short hair, and a three- or four-day growth of stubble on his face. (12RT 1831.) The court stated it believed the man was a spectator,

and that if the jurors said anything more to the bailiff, the court would allow them to use the judges' elevator to leave, but it had no reason to exclude the man from the courtroom, as he had not said or done anything and it was "just his appearance that makes them uncomfortable." (12RT 1831-1832.) When the court excused the jury at the end of the day, it stated as follows:

> One thing I wanted to talk to you about very briefly: some of you had expressed concern as to a spectator that was in the courtroom and this concern was expressed to the bailiff. Our information is that that person is a citizen in the community, that he is a spectator. All of you know that courtrooms are open to the public and they are free to come in to view at any time they may wish to. It's our belief that there is no reason for anyone to be concerned about that person. If that should change, we will inform you. I don't believe there is anything to be concern[ed] about.

(12RT 1901-1902.)

The second incident occurred during the penalty phase of the trial. After excusing the jury for the day, the court spoke with Mike Fischer, a reporter for the *Daily Bulletin*. The court stated that it had signed an order authorizing the newspaper's photographer to take still photographs. A juror had informed the court that the previous day, the victim's mother and a police officer had been photographed leaving the courtroom, and the juror was behind them when the photograph was taken. The court asked that the photographer produce the photographs he had taken, so that the court could determine whether the juror was in the picture, and if so, could order that the photograph not be used or that it be cropped. (18RT 2716-2717.) The following day, the photographs were provided to the court. The juror had, in fact, appeared in a single, unpublished photograph. The court ordered that the photograph and negative be destroyed and that the newspaper not publish any photograph in which a juror appeared,

in order to "safeguard the interests of jurors." (18RT 2736-2738.)

Respondent submits that neither of these incidents demonstrates that the jurors were, as appellant claims, afraid for their own safety. If some jurors were discomfited by the presence of a spectator whose relationship to the case was unclear to them, there is no showing that this discomfiture was anything more than temporary, as it does not appear that the jurors said anything further to the bailiff or actually used the judges' elevator thereafter.[48/] Nor does it appear that the juror who was accidentally photographed was frightened because there had been evidence that three of the prosecution's witnesses had been threatened prior to trial. Had the jurors been afraid that their service in this case put their personal safety at risk, it is likely that at least one juror would have expressed such fear to the court. Any discomfiture they felt was as likely caused by the evidence regarding gangs, which the defense expressly wanted to come in at trial (6RT 908) and the admission of which appellant does not challenge on appeal, and by the fact that this was a case in which a trained and experienced police officer had been caught off guard and brutally, senselessly murdered. Moreover, the jurors had been questioned regarding their views on the death penalty and were aware that they might be called upon to make the extremely serious penalty decision in this case. There is simply no showing that the

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48. Prior to returning the jury to the courtroom for the reading of the verdicts in the guilt phase, the court stated to the audience, "Because we may have another phase of this trial, I am going to ask you to restrain any show of emotion. After the jury is back into the jury room, you will be allowed to remain in the courtroom for approximately 15 minutes or so, then we are going to ask you to vacate the courtroom. Thank you very much." (15RT 2435-2436.) After the verdicts were read, the court stated it would have the jurors return to the jury room, then excuse appellant, and then have the jurors exit via the "back elevator." (15RT 2441-2443.) However, this appears to have been done in order to avoid exposing the jury to reactions to the guilt verdicts prior to their participation in the penalty phase. It does not appear to have been related to the earlier incident regarding the spectator.

admission of the evidence of threats against three of the prosecution's witnesses created an atmosphere of fear among the jurors such that appellant was deprived of a fair trial.

Appellant further argues that by "erroneously admitting the irrelevant threats evidence the trial court permitted the prosecutor to engender a fear of appellant" and that "this fear-mongering and innuendo assumed great importance" in light of "the lack of physical evidence connecting appellant with the crime." (AOB 97-98.) However, in addition to Flores's testimony that appellant was the shooter, there was further overwhelming evidence that appellant was the person who shot and killed Officer Fraembs, and it is clear that the prosecution neither needed to nor did rely on the evidence of threats as a substitute for other proof of identity.

As set forth in detail in the Statement of Facts, shortly after the shooting, at about 2:04 a.m., appellant's stepfather was awakened by sirens and heard appellant talking excitedly on the phone, telling someone to turn on their scanner. During the next 15 or 20 minutes, Lukens heard noises and the doorbell, and when appellant's mother brought their dog to the bedroom, she told him that a police officer had been shot over by Humane Way.

When the police responded to the crime scene, they found appellant's pager. The numbers stored in the pager included the phone number of Cesena, who was found hiding nearby. Purchase records from the store whose label was on the pager showed that appellant had purchased the pager. Whenever Flores called appellant's pager, he responded by calling her. The only times that Flores saw appellant without his pager were when he was having it repaired and once when Angel was holding the pager while appellant was in the same room. When Flores talked to appellant on the phone the morning after the shooting, appellant said, "I'm fine. I'm a killer. I don't give a fuck. It's just another day in the hood." Appellant also told her he had lost his pager and was

going to try to find it, though he knew that police had blocked off the streets.

The day after the shooting, Flores told her family and her priest what had happened, and after being persuaded by her priest to tell the police about the shooting, she did so. Meyers, Arambula, and Hernandez had encountered appellant and Flores in the vicinity of the crime scene shortly before the shooting.

Appellant had told Flores that he was on parole and "couldn't go back." Appellant was, in fact, on parole, and did face a substantial amount of time in custody if found in violation of parole. When arranging to meet Cesena on the night of the shooting, appellant had expressed a desire for haste, because he was "strapped," meaning carrying a gun, and did not want to "get busted." When Officer Fraembs had approached appellant and his friends, appellant said, "Oh, shit, the jura," and, "Oh, shit. I got the gun."

The police also found a spent .45-caliber Remington Peters shell casing at the crime scene near Officer Fraembs's body, as well as an expended large-caliber bullet projectile with blood on it, which was consistent with the shell casing. The bullet could have been fired from a Haskell .45-caliber semiautomatic pistol, as both the projectile and the pistol have six lands and grooves with a right-hand twist. Appellant had purchased a Haskell .45-caliber handgun for $155 two weeks before the shooting. Meyers took appellant to buy the gun and also helped him by buying .45-caliber Remington bullets for the gun. Appellant was carrying this gun on the night of the shooting. Flores did not see appellant discard the gun as they fled the scene after appellant shot Officer Fraembs and threatened Flores with the gun, and the police searched the area extensively but did not find a gun.

When the police searched appellant's home, they found a box for Remington brand .45-caliber ammunition, consistent with the shell casing and bullet found at the crime scene, which contained the plastic ammunition tray

and a single .32-caliber bullet. Appellant's left thumb print appeared on the tray. They also found 17 shiny Remington Peters round-nose .45-caliber bullets in a new camera case which had been discarded in the trash can in the enclosed back yard; the trash had been collected two days earlier, before the shooting. Appellant's stepfather had never seen the bullets or ammunition box before, and had not discarded the bullets or camera case, which was his. The bullets were the same caliber, brand, and type as the casing and projectile found near Officer Fraembs's body, and were the same type as those depicted on the ammunition box. The single gunshot wound that killed the officer was consistent with this type of ammunition.

The gun which appellant had purchased two weeks earlier was not found at appellant's house or at Tank's house. After the officer was killed, and after appellant said he wanted to sell the gun, Silva bought it from Angel for only $100. Appellant told Silva that he had "killed a cop with that gun." A few days later, appellant told Silva that somebody would pick up the gun and said, "I can't have that in Pomona." During this three-way phone conversation, appellant's mother said, "I'd like to have that one," and appellant said, "Burn it?" His mother answered, "Yeah. Yeah," and appellant said, "That's what I'm talking about." Appellant's brother retrieved the gun from Silva. Although Silva received neither his money nor another gun in return, he had not complained or inquired about this.

Appellant stayed at home for three days after the shooting, then left the area and went to Arizona. While there, he called his mother several times. During these conversations, he told her to dispose of the jacket he had been wearing on the night of the shooting. He also made several remarks that if Flores was a witness, "then there is a problem," and told his mother to talk to Chantal Cesena and ask her to tell Flores that she had "better realize what she's doing" and "that she is not the only one who has a daughter." Appellant also

told his mother to have Chantal contact Flores's mother, make her realize what Flores was "getting into," and have her tell her daughter not to testify. Appellant also said, "But if you hear from her and everything, just make sure she knows what she's doing and how far she is willing to go" and "Because as far as she's willing to go, the police ain't going to protect her." Appellant also told his mother that he had spoken with an attorney, had discussed what evidence the police would not have against him, and had acknowledged that the police had his pager.

In addition, as previously set forth, when the prosecutor argued that Flores, Arambula, and Silva had been threatened, he also made it clear that the significance of the threats was to show that Flores was telling the truth despite her fear, and to explain why Arambula and Silva appeared as reluctant witnesses and shaped their testimony to sound less incriminatory than the statements they had previously made during the investigation.

In light of the overwhelming evidence that appellant was the person who shot Officer Fraembs, the court's instructions to the jurors at the time the evidence was admitted and at the close of evidence, and the fact that the prosecutor's arguments regarding the threats also clarified that they were significant in determining the credibility of the witnesses, it is not reasonably probable that appellant would have received a better result had this evidence been excluded, and it is equally clear that the trial was not rendered unfair or unreliable by the admission of this evidence.[49/]

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49. Furthermore, had the trial court excluded this evidence, it is apparent that the prosecution could have pursued the introduction of other evidence regarding threats against the witnesses, made by appellant himself. During Agent Hallberg's testimony, the prosecutor requested a bench conference. The prosecutor stated that on June 26, 1996, the agent met with appellant in county jail and appellant told Agent Hallberg that the lives of the witnesses in this case were in danger "from the homeboys." The prosecutor stated he wished to ask Agent Hallberg about this incident, as it indicated appellant's consciousness of

Appellant also argues that "it is more than reasonably possible" and "reasonably probable" that the admission of this evidence affected the penalty determination. (AOB 98-100.) Appellant notes that Ryan Schultz testified at the penalty phase that he had not initially told the police that appellant and others had shot up his car and beaten and robbed him, because he feared appellant and "his gang." Appellant argues that in the context of this testimony, it is reasonably probable that the admission of the threats evidence in the guilt phase could have had a significant impact on at least one of the jurors in the penalty phase. (AOB 99.)

However, there is no reasonable basis for finding that Shultz's *fear* of appellant and his gang, even coupled with any fear felt by Flores, Arambula, and Silva, tipped the scales in favor of the death penalty rather than life without the possibility of parole as to any juror. It is manifest that the most compelling evidence in support of the death penalty had nothing to do with any fear engendered in the witnesses by appellant or his family or fellow gang members. Rather, it is clear that the penalty decision was based upon: appellant's brutal, completely senseless and cowardly execution of a young officer who had overcome many personal obstacles in his own life and dedicated himself to serving others, as a soldier and in law enforcement, and whose needless death left a gaping hole in the lives of his mother, sister, friends, and fellow officers; appellant's own callous attitude toward the killing and utter lack of remorse, as

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guilt. Defense counsel argued that this could be a reference to other gang members, that it did not prove appellant had made or intended to make any specific threats to anyone, and that it was highly prejudicial. The prosecutor argued it was a statement made by appellant and that defense counsel could elicit other possible meanings on cross-examination. After the court indicated it would want to read the entire statement and allow both parties to present authority before ruling, the prosecutor withdrew his request to present this statement. (11RT 1623-1628.) However, had the court excluded the evidence appellant challenges on appeal, the prosecutor might well have been more inclined to pursue the admission of this testimony.

evidenced by his own statements and his attempts to dispose of evidence and evade capture; and the fact that this vicious, selfish crime was not his first. It is not reasonably possible that any error in admitting the threats evidence at the guilt phase might have affected the penalty verdict. (See *People v. Brown*, *supra*, 46 Cal.3d at pp. 446-449.)

G. Conclusion

The evidence of threats made to Flores, Arambula, and Silva was clearly limited to the witnesses' state of mind, attitude, bias, prejudice, or lack thereof; for this purpose it was highly relevant. (See *People v. Olguin*, *supra*, 31 Cal.App.4th at p. 1368.) The credibility of the witnesses was a vital issue. The evidence of threats was extremely probative regarding their credibility, and was important information for the jurors to have in order to effectively evaluate whether the witnesses were biased and whether to credit their trial testimony or their prior statements. The court's instructions and the arguments of counsel made the limited purpose of this evidence clear to the jurors. Moreover, in light of the overwhelming evidence against appellant at both the guilt and penalty phases of the trial, any error in admitting the threats evidence was clearly harmless. Therefore, appellant's claim should be rejected.

VII.

EVIDENCE CONCERNING APPELLANT'S PAROLE STATUS WAS PROPERLY ADMITTED TO SHOW MOTIVE AND INTENT, APPELLANT NEVER PROFFERED THE EVIDENCE OF HIS PRIOR PAROLE VIOLATION AT TRIAL FOR THE SAME PURPOSE FOR WHICH HE NOW CONTENDS IT SHOULD HAVE BEEN ADMITTED, AND THE TRIAL COURT WAS NOT REQUIRED TO GIVE CALJIC NO. 2.50 SUA SPONTE

Appellant contends that evidence of his parole status and his statement to Flores about returning to jail should have been excluded, but once admitted, he should have been permitted to introduce evidence that his parole had not been violated on other occasions, and the trial court should have instructed the jury according to CALJIC No. 2.50. (AOB 101-111.) However, this evidence was highly probative on the central issues of appellant's intent and motive regarding the degree of the murder and the truth of the special circumstance allegations. Moreover, appellant never argued that evidence that his parole had not been violated when he tested positive for methamphetamine one month before the instant shooting should be admitted for the reason he now states on appeal, and the evidence was properly excluded. Furthermore, although defense counsel indicated prior to trial that he would submit a limiting instruction regarding the parole status evidence, he never did so, and the trial court was not required to give such an instruction sua sponte. Therefore, appellant's claim must fail.

A. The Relevant Trial Proceedings

Prior to trial, the prosecution filed a motion seeking to admit evidence regarding appellant's parole status for the purpose of proving his mental state and his motive. (2CT 543-551.) The prosecutor stated in the written motion that on May 11, 1996, appellant was on parole from the California Youth

Authority, which was due to expire on December 2, 1998. According to Parole Agent Carl Hallberg, appellant's parole officer, appellant had 575 days of commitment time available should he be found in violation of the terms and conditions of his parole, which included a condition that he not possess any deadly weapons or firearms. (2CT 543.)

During the investigation, a pager found near Officer Fraembs's body was determined to belong to appellant, a Happy Town gang member, who lived several blocks from the site of the shooting. A telephone number stored in the pager belonged to Cesena, another Happy Town gang member, who had been found hiding in bushes near the scene of the shooting. (2CT 544.)

When Johanna Flores was interviewed by the police, she told them that she had been having a romantic relationship with appellant for three months. When appellant was making arrangements with Cesena by phone to meet on the night of Officer Fraembs's murder, Flores heard appellant tell Cesena that he should hurry to the meeting place because appellant had a gun and did not want to get "busted." (2CT 546.) After they met Cesena and became aware that a police car was approaching as they walked down the street, appellant said, "Oh, shit, the *hurdas*!" At the preliminary hearing, Flores had testified that "hurdas" was street slang for "police."[50/] When the police car stopped, appellant said, "Oh, shit, I have the gun." At an earlier time, appellant had told Flores that he was on parole and, if arrested, would be returned to custody for a long period of time. Appellant demanded to know why they were being stopped, shot the officer as he patted down Cesena, and pointed the gun at Flores's face and asked her if she was going to talk. The following morning, appellant told Flores on the phone that he was a killer and did not care what he had done because "it was just another day in the 'hood." (2CT 547.)

Citing Evidence Code section 1101, *People v. Durham* (1969) 70 Cal.2d

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50. At trial, the Spanish slang term was recorded as "jura." (6RT 879.)

171, 186-188, *People v. Powell* (1974) 40 Cal.App.3d 107, 154-155 (disapproved on other grounds by *People v. Harris* (1984) 36 Cal.3d 36, 53), and *People v. Gonzales* (1948) 87 Cal.App.2d 867, 877, the prosecution argued that evidence of appellant's parole status was admissible and relevant to prove his mental state at the time of the crime and his motive for shooting Officer Fraembs. The evidence was relevant and critical to prove that this was not a rash act, but rather an intentional, willful, deliberate, and premeditated murder. It was also relevant to prove the truth of the three special circumstance allegations, as it explained why appellant would murder a police officer in the performance of his duties, in order to avoid a lawful arrest, while lying in wait. (2CT 548-551.)

At the hearing on this motion, the court stated it had read the motion and inquired whether defense counsel wished to be heard. (1RT 42.) Defense counsel stated as follows:

> Your Honor, I understand [the prosecutor's] theory here. I think basically the [C]ourt simply has to weigh the [Evidence Code section] 352 effect versus any probative effect. Certainly the defense would prefer that the jury not learn that my client was on parole, so I'm going to submit the matter. [The prosecutor] may want to address the [C]ourt further as to why he thinks this would be relevant and admissible.

(1RT 42.) The prosecutor indicated that he had made all of his arguments in the written motion. (1RT 43.) The court stated as follows:

> [Defense counsel], unless there's new case authority, I would intend to allow the People to elicit the parole status based upon my reading of the motion that the People have presented. It's a statement that the defendant made to a percipient witness, that what would happen to him if he were stopped and they were to find a firearm on him, what he intended to do, and all of these statements are just not only relevant but

overwhelmingly relevant. Meaning, they far outweigh any prejudicial effect. We have issues of motive, intent, deliberation, premeditation, and for all of these mental states, his status and his statements with regard to his status just makes it overwhelmingly probative as weighed against any prejudicial effect.

(1RT 43.)

The prosecutor stated that he planned to introduce this evidence by eliciting testimony regarding appellant's statement to Flores, by presenting appellant's parole officer to testify that two or three months before Officer Fraembs was killed, the parole officer had advised appellant that one of the conditions of his parole was that he not use or possess weapons, and by presenting a document setting forth his parole conditions, signed by appellant. (1RT 43-44.) The following colloquy occurred:

THE COURT: . . . You know, the real 352 issue has to do with the defendant's statement to the girl and once that statement is in, the fact that he knew he was on parole, he knew of his parole conditions, that's – that's presented to the trier of fact, so that if a parole agent comes in and states, yes, this was a parole condition and the defendant signed the conditions on such and such a date, that adds no more than what the defendant already stated to a witness that presumably is going to come in to testify concerning her observations and the statements made by the defendant.

[DEFENSE COUNSEL]: Your Honor, I have discussed [this] with [the prosecutor]. If the [C]ourt allows this in, as you've indicated you would, that we would probably want to bring out that this was a juvenile commercial burglary conviction that my client was on parole for, so the jury at least won't have to speculate why he was on parole.

THE COURT: [Defense Counsel], if you elicit that, I think that

would be proper and appropriate to put it in perspective as to what the parole was for.

[DEFENSE COUNSEL]: That's fine.

And then of course, Your Honor, we would submit a limiting instruction as to why you are allowing this to come in.

THE COURT: 2.50 - -

[DEFENSE COUNSEL]: Yes.

THE COURT: - - 2.51, are those the instructions?

[DEFENSE COUNSEL]: Yes.

[PROSECUTOR]: Yeah.

And I have absolutely no problem with that. I think a limiting instruction is appropriate and it's correct and it's fair to the defendant, and in light of [defense counsel's] request, which I also think is completely fair and reasonable, that we elicit what the defendant was on parole for. I'll do that in my direct.

THE COURT: As long as he doesn't object. I mean, here we're well before trial. We're discussing these issues and with [defense counsel] stating he would want that elicited. I don't see a problem with that.

THE COURT [*sic*]: Okay.

[PROSECUTOR]: Okay. Great.

(1RT 44-45.)

During trial, when Flores testified regarding the night of the shooting, she stated that as she, appellant, and Cesena were walking down Humane Way on their way back to Tank's house, a bright light coming from behind them lit the ground in front of them. The three all looked in back of them to find the source of the light. Flores saw Officer Fraembs in his patrol car. (6RT 876-879.) The following colloquy occurred:

[PROSECUTOR]: Did the defendant say anything upon turning around, looking over his left shoulder back in the direction of where you now see a police car?

[FLORES]: He said, Oh shit, the jura.

[PROSECUTOR]: Oh, shit, the jura. What is "jura"?

[FLORES]: The cops.

[PROSECUTOR]: Now, previous to this night, in your relationship with the defendant had he ever made a statement to you whether he was on parole or not?

[FLORES]: Yes.

[PROSECUTOR]: What did he say about that?

[FLORES]: He told me he was on parole and he can't - - that he couldn't go back.

[PROSECUTOR]: What do you mean "he couldn't go back"?

[FLORES]: Well, that he didn't want to go back.

[PROSECUTOR]: Now, was this sometime in that two or three months relationship that you had?

[FLORES]: Yes.

(6RT 879-880.)

After Flores testified that Officer Fraembs drove up slowly and stopped his car behind them, on the same side of the street on which they were walking, the following colloquy occurred:

[PROSECUTOR]: Did you - - you mentioned that previous to this night the defendant had told you he was on parole, didn't want to go back or couldn't go back?

[FLORES]: Yes.

[PROSECUTOR]: By "going back," does that mean back to custody?

[FLORES]: Yes, back to jail.

[PROSECUTOR]: Did you say something to him, "him" being the defendant, when you saw that this police car had now come to a stop?

[FLORES]: I think I told him to run. I did tell him to run, but I don't remember when it was at that exact time, when the car stopped or when he got off [*sic*: out of] the car I think I told him to run.

(6RT 880-881.)

On cross-examination, the following exchange occurred between Flores and defense counsel:

[DEFENSE COUNSEL]: I believe, Miss Flores, that you also testified and told the jury that at some point in time that my client had told you that he was on parole. Do you remember that?

[FLORES]: Yes.

[DEFENSE COUNSEL]: All I want to know is, in relationship to when Officer Fraembs was killed, when did my client tell you that? Was it early on when you first met him two months before? When was it?

[FLORES]: I don't exactly remember. I know he told me, but I don't remember.

[DEFENSE COUNSEL]: But it was quite a while before this shooting incident happened with Officer Fraembs, correct?

[FLORES]: It could have been. I don't remember exactly when I told him. I mean it's been a year, back then. I - -

[DEFENSE COUNSEL]: I think the main point that I want - -

[FLORES]: That's all little stuff. I didn't care about that.

[DEFENSE COUNSEL]: Listen to me, please.

There was no conversation that Friday night or going into Saturday morning with my client about him being on parole. Nothing like that happened that night, did it?

[FLORES]: I think that night he did tell me he was on parole. When he told me he was going to take the gun, "I'm strapped," I think he did tell me or he told Sparky. I'm not exactly sure but I think he did say something like that.

[DEFENSE COUNSEL]: So now you're saying maybe he told you that the night of the shooting?

[FLORES]: I'm not exactly sure. It's been a year. I remember him shooting the cop. That is in my head and it never leaves. I don't remember all the other stuff.

[DEFENSE COUNSEL]: What you're telling the jury then it's very possible that any statement that my client made to you that he was a parolee was told to you a considerable time before the officer was killed, right? That's possible?

[FLORES]: It is possible, yes.

(7RT 983-984.)

Following a recess, defense counsel requested a bench conference outside the presence of the jurors and Flores. Counsel stated that he wanted to impeach Flores with a statement she had made to the prosecutor during an interview on May 22, 1996. The prosecutor had asked, "When did he tell you he was on parole and he would go back for year?" Flores had answered, "If he - - this was before. This was way before even any of this was happening. He had told me 'If I ever go back, I'm going to go back for a long time.'" (7RT 985-986.)

Counsel stated that he wanted to elicit testimony that Flores had told the prosecutor that appellant said he was on parole "way before even any of this was happening," but requested a ruling on whether the prosecutor would be permitted to ask her on redirect examination about appellant's statement, "If I ever go back, I'm going to back for a long time." Counsel argued that the

former statement, by Flores, was relevant to show when appellant had referred to his parole status, but the latter statement, by appellant, was not relevant. (7RT 987.) The prosecutor argued that pursuant to Evidence Code section 356, if defense counsel inquired as to part of the interview, the prosecutor would be entitled to inquire as to the rest of it. (7RT 987-988.) The court ruled, and the parties agreed, that if defense counsel merely used the transcript to refresh Flores's recollection regarding when the statement was made, the prosecution would not inquire further into the exact words appellant used. However, the court indicated that if the defense elicited testimony that was unclear, the People would be entitled to clarify it by eliciting the entire statement. (7RT 988-989.)

When cross-examination continued, defense counsel asked Flores to read the transcript of her May 22, 1996, interview with the prosecutor. (7RT 1000-1001.) The following exchange took place:

> [DEFENSE COUNSEL]: Now, does that statement you gave to [the prosecutor] back in May of last year, does that help refresh your memory as to when - -
>
> [FLORES]: Yes.
>
> [DEFENSE COUNSEL]: - - when my client told you he was on parole?
>
> [FLORES]: Yes.
>
> [DEFENSE COUNSEL]: Is it true that he actually told you that way before any of this shooting incident happened?
>
> [FLORES]: Yes.

(7RT 1001.)

On redirect examination, Flores testified that on the night of the shooting, appellant told Cesena on the phone, "Hurry up, because I don't want to get busted." Appellant told Cesena to hurry because appellant had the gun. This was separate from the statement that appellant had made to Flores that he

was on parole and did not want to "go back." (7RT 1011-1012.) Appellant made no request for a limiting instruction during Flores's testimony.

Later in the trial, prior to calling Agent Hallberg to the stand, the prosecutor requested a bench conference. The prosecutor stated that defense counsel wanted to ask Agent Hallberg about a topic which would exceed the scope of direct examination, but which the prosecutor was objecting to on the basis that it was not relevant, i.e., that appellant had tested positive for methamphetamine a month before the shooting. (11RT 1593-1594.)

Defense counsel stated that from November 1995 until May 1996, each time appellant had reported to Agent Hallberg, the agent would ask appellant if he was using drugs, and appellant consistently responded that he was, in fact, "using." Agent Hallberg advised appellant that he was going to test him, and that it "might be in his best interest to clean up." Sometime in April 1996, the parole officer tested appellant, and the test came back positive for methamphetamine. (11RT 1594-1595.) The following colloquy occurred:

> [DEFENSE COUNSEL]: Certainly I think the dirty test a few weeks before the officer was killed is relevant. We've had testimony from Yolanda (*sic*) Flores that my client had told her she (*sic*) had used drugs, so *I think that this is strong corroborative circumstantial evidence to support my position that there was a good chance that my client might have been under the influence of methamphetamine at the time he shot the officer.*
>
> *The weight that the jury wants to put on this is up to them, but it is an important piece of circumstantial evidence. So I'm going to ask that it come in for that purpose.*
>
> THE COURT: [Defense Counsel], it appears to me that that calls for speculation. The fact that he tested positive a month before, you know, for purposes of a diminished capacity defense you need someone to say

that that evening they observed him or they knew how he acted when he was under the influence of methamphetamine, and I don't see that anybody has done that. I mean, these are people that were with him. And you've explored the question concerning how he was acting and everyone has said he has acted normal.

You know, no one has been able to say that it appeared to them that he was under the influence or that he was acting other than normal. *And so the fact that he tested positive a month before, I just don't see that as being relevant to the issue of whether or not he was under the influence on the night of the incident.*

And if the People object, and they are objecting, that's my ruling, that the objection is sustained. It's not relevant. It calls for speculation.

Concerning he's on parole, it seems to me that the only thing that is relevant is that he is on parole, that there are terms and conditions and if he violates terms and conditions of parole, that he can be sent back to the Youth Authority. And if one of the terms and conditions is that he obey all laws, okay. If a condition is that he not own, use or possess any firearms, okay. But you know, I've previously ruled that you can elicit the fact that he was on parole and in order to put it in proper perspective, if you violate terms and conditions he can be sent back.

That there are terms and conditions that he was in violation of, whether it's curfew or possession of a gun, okay. But I mean I don't want you to think that this is open-ended, that you can go into any number of things. You've never represented, and I'm under the impression that your statement to the Court is I'm going to elicit that he was on parole, certain terms and conditions that are relevant to this case, and that's the extent of what you intend to elicit from this witness.

[PROSECUTOR]: Essentially, yes. I'm going to have him explain

to the jury what a parole officer is because many of them might not know what that is.

THE COURT: That's fine.

(11RT 1595-1597, emphasis added.)

The prosecutor reminded the court that at the time the court had ruled that the evidence of appellant's parole status would be admissible, defense counsel had stated that he would also want the jury to hear why appellant was on parole. However, the parole officer had now told defense counsel that appellant was on parole for residential burglary and assaulting a school officer. Therefore, defense counsel no longer wanted the jury to hear why appellant was on parole, and the prosecutor did not intend to elicit this testimony. (11RT 1597.) The court stated it believed it had ruled that defense counsel could elicit testimony regarding the reason that appellant was on parole, and if he did so, the prosecution could inquire about this on redirect; however, the prosecution would not be permitted to initiate this testimony. (11RT 1597-1598.)

Defense counsel stated that he did not intend to elicit this testimony, but he might introduce evidence regarding the maximum amount of time that appellant might be returned to custody, if the prosecution did not elicit this information. Defense counsel stated that "the last [*sic*] time [appellant] could be sent back is 18 months plus whatever time he might get for the illegal possession of [a] gun would be one year [in] county jail, because it is a misdemeanor. One way or another that will come out." (11RT 1598.) The prosecutor indicated that he would elicit this information. (11RT 1598.)

As previously set forth in the Statement of Facts, Agent Hallberg testified that he had been supervising appellant on parole since January 1992. Prior to his release from a CYA institution on November 27, 1995, appellant had been advised by a parole board member regarding the conditions of his

parole, which included conditions that he not possess any weapon or knowingly associate with gang members. Appellant signed a form stating he understood the conditions of his parole. (11RT 1600-1609, 1612-1615; 12CT 3455; see Peo. Exh. Nos. 34, 35.)[51/]

On November 28, 1995, appellant met with Agent Hallberg, who talked with appellant for 15 minutes regarding all the conditions of parole, including the weapon and gang association conditions. Agent Hallberg also discussed with appellant the consequences of violating the conditions of parole, and specifically informed him if he violated parole, he would be returned to a CYA institution for one year and seven months, or 575 days. Appellant could also spend an additional one year in custody if found in possession of a weapon, a misdemeanor. Again, appellant signed a form indicating he understood the conditions of parole. (11RT 1604, 1608-1609, 1612-1617, 1620, 1622-1623, 1628-1630; see Peo. Exh. No. 36.) During Agent Hallberg's testimony, appellant again made no request for a limiting instruction.

During the conferences regarding jury instructions (14RT 2073-2154; 15RT 2157-2183, 2297-2298, 2302-2303), the prosecution requested that CALJIC No. 2.09[52/] be given, and the defense joined in the request.

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51. During Agent Hallberg's testimony, defense counsel requested a bench conference and objected to a portion of People's Exhibit Number 35. The court noted that this portion indicated that appellant lived in a gang area and was "a leader" and an opinion that it might be difficult for appellant to "complete a good parole"; this portion of the document was removed. (11RT 1610-1612.)

52. CALJIC No. 2.09 provides as follows:

> Certain evidence was admitted for a limited purpose.
>
> At the time the evidence was admitted you were instructed that it could not be considered by you for any purpose other than the limited purpose for which it was admitted.
>
> Do not consider this evidence for any purpose except the limited purpose for which it was admitted. (13CT 3560.)

(14RT 2081.) The prosecution also requested that CALJIC No. 2.51[53] be given. Defense counsel stated, "I don't join but will submit." The court said it would give the instruction as requested. (14RT 2085-2086.) Neither party requested that the court instruct the jury according to CALJIC No. 2.50.[54]

In his summation, to support his contention that the killing was willful, deliberate, and premeditated, the prosecutor argued that appellant was on parole and faced up to two years and five months in custody, including 17 months[55]

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53. CALJIC No. 2.51 provides:

> Motive is not an element of the crime charged and need not be shown. However, you may consider motive or lack of motive as a circumstance in this case. Presence of motive may tend to establish the defendant is guilty. Absence of motive may tend to show the defendant is not guilty. (13CT 3570.)

54. CALJIC No. 2.50 provided, in relevant part, as follows:

> Evidence has been introduced for the purpose of showing that the defendant committed [a crime] [crimes] other than that for which [he] [she] is on trial.
>
> Such evidence, if believed, was not received and may not be considered by you to prove that defendant is a person of bad character or that [he] [she] has a disposition to commit crimes. Such evidence was received and may be considered by you only for the limited purpose of determining if it tends to show:
>
> * * *
>
> [The existence of the intent which is a necessary element of the crime charged;]
>
> * * *
>
> [A motive for the commission of the crime charged;]
>
> * * *
>
> For the limited purpose for which you may consider such evidence, you must weigh it in the same manner as you do all other evidence in the case.
>
> You are not permitted to consider such evidence for any other purpose.
>
> (CALJIC, 5th Ed., Jan. 1996 Supp. to Vol. 1.)

55. As Agent Hallberg testified, appellant actually faced an additional 575 days in custody, i.e., *19* months, rather than 17 months (575 ÷ 30 = 19.16).

in CYA for violating parole and an additional year for carrying a loaded, concealed weapon in a public place. Furthermore, he had told Flores that he was on parole and could not "go back"; therefore, it was apparent that appellant was concerned about being caught in violation of his parole. (15RT 2192.) The prosecutor also argued that when appellant saw Officer Fraembs searching Cesena, he knew, because he had "mouthed off" to the officer, that he would be searched next, and the officer would find his concealed weapon. Therefore, it was apparent that the only reason he killed Officer Fraembs was in order to avoid a lawful arrest. (15RT 2211-2213.)[56]

Without conceding that appellant was the killer, defense counsel argued that the killer had simply panicked when he shot Officer Fraembs, and that the prosecution had failed to prove first degree murder on the basis of premeditation and deliberation or lying in wait, and had also failed to prove the special circumstances. Counsel argued that appellant would not have been hostile to the officer, that Flores had told the police that appellant was paranoid and panicked, and that he would still receive substantial punishment if found guilty of second degree murder. (15RT 2258-2345.) Counsel specifically argued that appellant had no ill will toward the officer, that he was not carrying a gun in order to kill a police officer, and that if appellant had really deliberated, he would not have killed the officer rather than face a comparatively moderate term if he were returned to custody, particularly considering that any time imposed for carrying a concealed weapon would likely run concurrent with time imposed for a parole violation based on that

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(11RT 1622-1623.)

56. In arguing that appellant was the killer, the prosecutor also pointed out that the signature on the service agreement for the pager found at the crime scene matched appellant's signature on the form acknowledging his parole conditions. (15RT 2213-2215.)

offense. (15RT 2309.)

In his rebuttal, while arguing that appellant had not panicked but had deliberated before shooting Officer Fraembs, the prosecutor again argued that appellant did not want to go back to jail. (15RT 2373.)

The trial court instructed the jurors according to CALJIC No. 2.09 and CALJIC No. 2.51. (15RT 2392, 2397.) The court did not give CALJIC No. 2.50.

B. The Trial Court Properly Admitted Evidence Of Appellant's Parole Status To Show Intent And Motive

Appellant first argues that the trial court erred by admitting evidence of his parole status over his Evidence Code section 352 objection. Appellant contends that the probative value of this evidence was "not substantial," and was outweighed by its "high" prejudicial effect. (AOB 103-106.) Respondent disagrees.

As a preliminary matter, appellant's failure to object to this evidence when Flores and Agent Hallberg testified about his parole status should preclude him from raising this issue on appeal. (See *People v. Clark*, *supra*, 3 Cal.4th at pp. 125-126; see also Evid. Code, § 353, subd. (a).) Although litigation of admissibility at a pretrial hearing may excuse this objection at trial requirement (see *People v. Morris* (1991) 53 Cal.3d 152, 189-190, disapproved on other grounds in *People v. Stansbury* (1995) 9 Cal.4th 824, 830), here it was the prosecutor and not appellant who brought the pretrial motion in limine. When the court asked if the defense wished to be heard on the motion, his counsel made only a mild comment that "the defense would prefer" not to have the jury hear of appellant's parole status. (1RT 42) Respondent submits this was not a sufficient objection to preserve the issue for appeal.

In any event, the claim fails on its merits.

Except as otherwise provided by statute, all relevant evidence is

admissible. (Evid. Code, § 351; *People v. Scheid* (1997) 16 Cal.4th 1, 13; *People v. Jackson* (1989) 49 Cal.3d 1170, 1187.) Relevant evidence is evidence "having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (Evid. Code, § 210; *People v. Scheid*, *supra*, 16 Cal.4th at p. 13; *People v. Jackson*, *supra*, 49 Cal.3d at p. 1187.) The test of relevance is whether the evidence tends logically, naturally, and by reasonable inference, to establish any facts material for the People, such as identity, intent, plan, motive, preparation, or opportunity, or to overcome any material matter sought to be proved by the defense. (*People v. Alcala* (1984) 36 Cal.3d 604, 631; see also *People v. Scheid*, *supra*, 16 Cal.4th at p. 13.) The trial court is vested with broad discretion in determining relevance. (*People v. Scheid*, *supra*, 6 Cal.4th at p. 14; *People* v. *Jackson*, *supra*, 49 Cal.3d at p. 1187.)

Evidence Code section 1101, subdivision (a), provides in part that, "[e]xcept as provided in this section . . . evidence of a person's or a trait of his or her character (. . . in the form of . . . evidence of specific instances of his or her conduct) is inadmissible when offered to prove his or her conduct on a specified occasion." There are, however, clear exceptions to this rule, partially codified in Evidence Code section 1101, subdivision (b). That statute provides that "[n]othing in this section prohibits the admission of evidence that a person committed a crime, civil wrong, or other act when relevant to prove some fact (such as motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident, . . .) other than his or her disposition to commit such an act." Subdivision (b) clarifies that section 1101 "does not prohibit admission of evidence of uncharged misconduct when such evidence is relevant to establish some fact other than the person's character or disposition." (*People v. Ewoldt* (1994) 7 Cal.4th 380, 393; see also *People v. Kipp* (1998) 18 Cal.4th 349, 369.) Use of such evidence to show motive and intent is expressly

permitted by Evidence Code section 1101, subdivision (b). (*People v. Demetrulias* (2006) 39 Cal.4th 1,14.)

This Court noted in *Ewoldt* that, although relevant, to be admissible, evidence of uncharged offenses "must not contravene other policies limiting admission, such as those contained in Evidence Code section 352." (*People v. Ewoldt*, *supra*, 7 Cal.4th at p. 404; see also *People v. Kipp*, *supra*, 18 Cal.4th at p. 371.) Under Evidence Code section 352, "[t]he court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury."

Under Evidence Code section 352, the trial court has broad discretion in assessing whether the probative value of specific evidence is outweighed by concerns of undue prejudice, confusion, or consumption of time. (*People v. Rodrigues*, *supra*, 8 Cal.4th at pp. 1124-1125; see also *People v. Valdez*, *supra*, 32 Cal.4th at p. 108; *People v. DeSantis*, *supra*, 2 Cal.4th at p. 1226.) Where a discretionary power is vested in the trial judge, his or her exercise of that wide discretion must not be disturbed on appeal except on a showing that the court exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice. (*People v. Jordan*, *supra*, 42 Cal.3d at p. 316.)

In addition, "'[t]he prejudice which exclusion of evidence under Evidence Code section 352 is designed to avoid is not the prejudice or damage to a defense that naturally flows from relevant, highly probative evidence.'" (*People v. Zapien* (1993) 4 Cal.4th 929, 958, quoting *People v. Karis* (1988) 46 Cal.3d 612, 638.) Rather, the statute uses the word "in its etymological sense of 'prejudging' a person or cause on the basis of extraneous factors." (*People v. Zapien*, *supra*, 4 Cal.4th at p. 958; *People v. Farmer* (1989) 47

Cal.3d 888, 912, disapproved on other grounds in *People v. Waidla* (2000) 22 Cal.4th 690, 724, fn. 6.)

A trial court's ruling admitting evidence of other crimes, which is essentially a determination of relevance, is reviewable for abuse of discretion. (*People v. Kipp*, *supra*, 18 Cal.4th at p. 369; *People v. Hayes* (1990) 52 Cal.3d 577, 617; *People v. Gordon* (1990) 50 Cal.3d 1223, 1239.) Once again, such a ruling must not be disturbed on appeal unless the trial court's ruling "falls outside the bounds of reason." (*People v. Kipp*, *supra*, 18 Cal.4th at p. 371; *People v. DeSantiis*, *supra*, 2 Cal.4th at p. 1226.)

Evidence that a defendant is on parole at the time he committed the charged crimes may be relevant to show his intent and motive at the time he committed the charged offenses. (See *People v. Durham*, *supra*, 70 Cal.2d at pp. 186-189 [defendant's parole status relevant to prove motive for committing first degree murder]; *People v. Powell*, *supra*, 40 Cal.App.3d at pp. 154-155 [defendant's parole status relevant to prove intent to commit first degree murder and to rebut diminished capacity defense]; see also *People v. Vidaurri* (1980) 103 Cal.App.3d 450, 460-462 [defendant's knowledge of the existence of a warrant for his arrest on the date of the charged offense relevant to show his intent and motive for his violent reaction to security officers' attempt to arrest him for shoplifting].)

"Not only is other-crimes evidence relevant and material to the issues of motive, intent, and knowledge, it is often necessary." (*People v. Garcia* (1981) 115 Cal.App.3d 85, 107.) As long as the offenses have a direct logical nexus, the probative value of other-crimes evidence on the issue of motive does not depend on similarities between the charged and uncharged crimes. (*People v. Demetrulias*, *supra*, 39 Cal.4th at p. 15.)

In the instant case, evidence that appellant was on parole, that he was aware of the terms and conditions of his parole, and that he had stated to Flores

that he was on parole and "couldn't go back" to jail, was highly probative regarding his state of mind when he shot the officer. This evidence was extremely relevant to show that this was a first degree murder and to prove the special circumstance allegations.

First, this evidence demonstrated that appellant premeditated and deliberated the shooting. Taking into consideration appellant's knowledge of his parole conditions, his statement to Flores, his immediate and overtly hostile reaction to Officer Fraembs's casual approach, his own references (when speaking to Cesena on the phone immediately before setting out to meet him and when Officer Fraembs approached the trio) to the fact that he was carrying a gun, and his decision to sneak up on the officer and shoot him without warning, while Officer Fraembs was occupied in patting down Cesena, clearly show that appellant realized that he would also be searched, that his gun would be found, and that he was in danger of being returned to custody on a very serious parole violation.

Second, as the prosecutor stated in his written motion, "Absent this evidence, the jury would not understand why [appellant] would act so drastically as to murder a police officer in the performance of his duties; or murder to avoid arrest; or sneak up on the officer to execute him." (2CT 550.) This evidence was extremely probative in that it showed that appellant deliberately shot Officer Fraembs in order to avoid being arrested and returned to custody. Although his possession of a concealed weapon was a misdemeanor which could subject him to a year in custody, the fact that it also constituted a violation of his parole meant that appellant faced an additional one year and seven months in custody if he was arrested. The fact that appellant faced a substantial amount of time in custody if he were to be arrested, and that he himself had stated that he "couldn't go back," provided the only credible motive for this otherwise senseless crime.

Moreover, contrary to appellant's contention (AOB 105-106), the fact that he may not have made the statement that he "couldn't go back" on the evening of the shooting does not diminish its relevance and probative value. (See *People v. Douglas* (1990) 50 Cal.3d 468, 511 [where there was a three-year time lag between prior acts and charged crimes, reviewing court observed, "The remoteness of the evidence goes to its weight and not its reliability."].) Given that he had been released from CYA in November 1995, and made the statement at least three months later, after meeting Flores, it is clear that his parole status was an *ongoing* concern for him. This is consistent with the fact that immediately before setting out with Flores to meet Cesena, appellant told Cesena on the phone to hurry to the meeting place because appellant was carrying a gun and did not want to "get busted," as well as the fact that when Officer Fraembs approached them, appellant said, "Oh, shit, the jura," and, "Oh, shit, I have the gun."

It is manifest that the evidence regarding appellant's parole status was "of ample probative value to outweigh its prejudicial effect." (*People v. Durham*, *supra*, 70 Cal.2d at p. 189.) Furthermore, the prejudicial effect of that evidence was simply that which "naturally flows from relevant, highly probative evidence" (*People v. Zapien*, *supra*, 4 Cal.4th at p. 958; *People v. Karis*, *supra*, 46 Cal.3d at p. 638), rather than that which was likely to cause the jury to prejudge appellant based on *extraneous* factors. In addition, any potential for prejudice was decreased because the evidence of appellant's parole status was "no stronger and no more inflammatory than the testimony concerning the charged offenses." (*People v. Ewoldt*, *supra*, 7 Cal.4th at p. 405.)

Although appellant compares the facts of this case to cases in which the defendant expressly stated his intent to kill in order to avoid arrest at the actual time of the confrontation with the police (AOB 105-106), any difference here from the facts in those cases merely goes to the weight, rather than the

admissibility, of the evidence, and was simply a factor for the jury to consider.[57] It is clear that the trial court did not abuse its wide discretion under Evidence Code section 352 in allowing testimony regarding appellant's parole status.

Even had the trial court excluded the evidence, it is not reasonably probable that appellant would have received a more favorable result; therefore, there was no miscarriage of justice. (*People v. Earp*, *supra*, 20 Cal.4th at p. 878; *People v. Rodrigues*, *supra*, 8 Cal.4th at p. 1124; *People v. Watson*, *supra*, 46 Cal.2d at p. 836; Evid. Code, § 353.) Even without the evidence regarding appellant's parole status, there was overwhelming evidence that it was appellant who killed Officer Fraembs, that the murder was deliberate and premeditated, and that the special circumstance allegations were true.

On appeal, as at trial, appellant does not contend that the evidence of identity was weak in any way. The only real issues at trial were the degree of the crime and the truth of the special circumstance allegations. Flores testified that appellant did not appear panicked except when he first saw the light from the police car and immediately after he shot Officer Fraembs. Flores's description of the fatal encounter demonstrated that appellant acted very

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57. Appellant cites *People v. Stanley, supra,* 39 Cal.4th at p. 926, and *People v. Aguirre* (1995) 31 Cal.App.4th 391. (AOB 105-106.) However, in *Stanley*, the crimes to which appellant refers were past crimes committed by the defendant which were presented in the penalty phase as factors in aggravation, rather than being the current crimes with which he was charged or prior crimes presented to prove intent or motive in the charged offenses. (*People v. Stanley*, *supra*, 39 Cal.4th at p. 926.) In *Aguirre*, the defendant was intoxicated at the time he broke into the home of his former girlfriend and, when the police arrived, stated, "I ain't going to jail alive" or "I won't be taken just like that." (*People v. Aguirre*, *supra*, 31 Cal.App.4th at pp. 394-395.) The published portion of the opinion concerned the validity of CALJIC No. 4.21.1 regarding the legal significance of voluntary intoxication. (*Id.* at pp. 395-402.) Neither *Stanley* nor *Aguirre* demonstrates that in the instant case, evidence of appellant's statement to Flores was not probative simply because it may not have been made on the night of the murder or because he did not expressly state that he would kill in order to avoid arrest.

deliberately, calmly maneuvering to a position where he could attack without warning. Furthermore, appellant's statements to Cesena before leaving Tank's house, that he was "strapped," meaning carrying a gun, and did not want to get "busted," as well as his statement, "Oh, shit. I got the gun," when Officer Fraembs approached, showed that he did not want to be caught in possession of the gun and arrested.

Moreover, at appellant's election, the jurors were informed only that he was on parole from the California Youth Authority and that he faced a substantial amount of time in custody if his parole was violated; they were not informed that he had previously been convicted of residential burglary and assault. The mere fact that appellant was on CYA parole and did not want to "go back" was hardly so inflammatory as to convince the jurors that appellant was a killer and cause them to convict him of first degree murder and find the special circumstances to be true. Nor did the prosecutor argue such a theory, either expressly or impliedly. Rather, he made it clear that the significance of appellant's parole status was to show his intent and motive in shooting Officer Fraembs.

It is not reasonably probable that appellant would have received a more favorable result had evidence that he was on parole not been admitted. (See *People v. Dominguez*, *supra*, 121 Cal.App.3d at p. 501; see also *People v. Harris*, *supra*, 22 Cal.App.4th at pp. 1580-1581.) For the same reasons, it is clear that the admission of this evidence did not render the trial fundamentally unfair; therefore, there was no denial of due process. (See *People v. Partida*, *supra*, 37 Cal.4th at p. 439 [the admission of evidence, even if erroneous under state law, results in a due process violation only if it makes the trial fundamentally unfair].)

C. Appellant Waived His Claim Regarding Evidence Of His Prior Parole Violation, And That Evidence Was Properly Excluded

Next, appellant argues that the evidence he proffered regarding his prior parole violation should have been admitted to show that he had not previously been returned to custody for violating parole, in order to counter the prosecution's claim that this was his motive for shooting Officer Fraembs. (AOB 106-108.) This claim should also be rejected.

A party cannot claim on appeal that evidence was erroneously excluded unless he or she actually proffered the evidence and made an adequate offer of proof, which apprised the trial court of the substance, purpose, and relevance of the excluded evidence. (Evid. Code, § 354; *People v. Morrison* (2004) 34 Cal.4th 698, 711; *People v. Hill*, *supra*, 3 Cal.4th at p. 989, disapproved on other grounds in *Price v. Superior Court* (2001) 25 Cal.4th 1046, 1069, fn. 13; *People v. Pride*, *supra*, 3 Cal.4th at p. 235.)

Here, during the bench conference preceding Agent Hallberg's testimony (11RT 1593-1599; see AOB 102), defense counsel stated he wished to elicit testimony that in April 1996, appellant had tested positive for methamphetamine in order "to support [his] position that there was a good chance that [appellant] might have been under the influence of methamphetamine at the time he shot the officer." (11RT 1595.) This was the *only* purpose for which the testimony was proffered, and the *only* basis on which the trial court ruled. (11RT 1595-1597.)[58]

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58. Appellant does not contend that the trial court's ruling was erroneous on this basis. (AOB 106-108.) In any event, as the court noted (11RT 1595-1596), there had been no evidence that appellant used drugs in the night of the shooting, and the testimony of the witnesses who had seen him that evening showed that he did *not* use drugs with Flores that night or appear to be under the influence of drugs just before the shooting. (7RT 941-943, 976, 1015-1016; 8RT 1110-1111, 1148, 1160, 1181, 1243-1244.) Evidence is irrelevant if it leads only to speculative inferences. (*People v. Morrison*, *supra*,

Because appellant never argued at trial that he wished to elicit this testimony in order to counter the claim that he committed the murder in order to avoid being returned to custody for a parole violation, he may not now claim on appeal that the trial court should have admitted it for that purpose. (See *People v. Morrison*, *supra*, 34 Cal.4th at p. 712 [offer of proof did not encompass theories of relevance advanced on appeal]; *People v. Valdez*, *supra*, 32 Cal.4th at pp. 108-109 [offer of proof stating purpose of proffered testimony was to show police inadequately investigated crime was insufficient to preserve claim that testimony was relevant as third party culpability evidence].)[59/]

D. The Trial Court Was Not Required To Give CALJIC No. 2.50 Sua Sponte

Finally, appellant claims that he requested that the trial court instruct the jury with CALJIC No. 2.50, and that the court erred by failing to do so. (AOB 108-110.) Again, respondent disagrees with appellant's characterization of the trial proceedings, and submits that he failed to request the instruction and

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34 Cal.4th at p. 711; *People v. Kraft*, *supra*, 23 Cal.4th at p. 1035.) Therefore, in the absence of evidence that he did use drugs that night, the fact that appellant tested positive for methamphetamine use *the month before* the shooting was not relevant to show his state of mind *at the time of the shooting*.

59. Even if appellant had advanced this theory at trial, the fact that his parole had not previously been violated on the basis of a single positive drug test and his admissions of drug use does little to prove that he would not have been concerned that his parole could and would be violated for the much more serious act of carrying a loaded, concealed weapon in public, while in the presence of another gang member (an additional violation of his parole conditions). This is particularly true in light of his own statements regarding the gun on the evening of the shooting. Therefore, even if the trial court erred by excluding the proffered evidence, it is not reasonably probable that a result more favorable to appellant would have been reached had the evidence been admitted. (Evid. Code, § 354; *People v. Babbitt*, *supra*, 45 Cal.3d at pp. 688-689; *People v. Wright*, *supra*, 39 Cal.3d at p. 586; *People v. Watson*, *supra*, 46 Cal.2d at p. 836.)

that the trial court was not bound to give it sua sponte.

The hearing on the prosecution's motion to admit appellant's parole status was held on June 23, 1997. At that time, defense counsel stated that if the court allowed the prosecution to introduce evidence of appellant's parole status, in order to avoid speculation by the jury, he intended to elicit testimony that appellant was on parole following a juvenile commercial burglary conviction, *and then he would submit* a limiting instruction in connection with this evidence, which the prosecutor agreed would be appropriate to give. (1RT 42-45.)

The trial testimony commenced one month later, on July 24, 1997. (5RT 606, 653.) As previously set forth, appellant did not request that any limiting instruction be given when Flores and Agent Hallberg testified. When Agent Hallberg testified, defense counsel decided *not* to inquire regarding the nature of the prior offense after learning that in fact appellant was on parole for residential burglary and assaulting a school officer. (11RT 1597-1598.)

At the close of the guilt phase, the prosecution requested that CALJIC No. 2.09 be given, appellant joined in that request, and that instruction was given. (14RT 2081.) However, during all of the conferences held regarding the instructions, neither party requested that CALJIC No. 2.50 be given. (14RT 2073-2154; 15RT 2157-2183, 2297-2298, 2302-2303.)

Respondent submits that appellant's indication, *one month prior to the commencement of testimony*, that he *would be submitting* a limiting instruction regarding the evidence concerning his parole status *when he elicited testimony regarding the nature of the prior offense*, was simply insufficient to require the court to give CALJIC No. 2.50, particularly given that appellant did *not* elicit that testimony and that he failed to request any limiting instruction at the time of the parole status testimony and failed to request any instruction in addition to CALJIC No. 2.09 at the close of the guilt phase. Furthermore, the trial court

was not required to give this instruction sua sponte. (*People v. Padilla*, *supra*, 11 Cal.4th 891, 950; *People v. Hernandez* (2004) 33 Cal.4th 1040, 1053 [where defendants failed to specifically request limiting instruction at the appropriate time regarding use of gang evidence admitted to support charged gang enhancement, the court had no sua sponte duty to give one]; *People v. Collie*, *supra*, 30 Cal.3d at pp. 63-64 [court not required to instruct jury sua sponte regarding evidence of past criminal conduct admitted to establish intent, motive, and common modus operandi]; see also *People v. Johnson* (1993) 6 Cal.4th 1, 49; *People v. Milner*, *supra*, 45 Cal.3d at pp. 251-252; *People v. Morse, supra,* 2 Cal.App.4th at pp. 650-651; Evid. Code, § 355.[60])

Although there is a "narrow exception" to the general rule not requiring sua sponte instruction, i.e., when the evidence is a dominant part of the evidence against the accused and is both highly prejudicial and minimally relevant to any legitimate purpose (*People v. Rogers* (2006) 39 Cal.4th 826, 854; *People v. Hernandez*, *supra*, 33 Cal.4th at pp. 1051-1052), that exception does not apply here. As previously argued, the evidence was highly probative. However, it did not constitute a "dominant part" of the evidence against appellant. Therefore, this exception does not apply, and the court was required to give CALJIC No. 2.50 only upon request. (See *People v. Hernandez*, *supra*, 33 Cal.4th at p. 1052.)

Appellant argues that where other-crimes evidence is relevant only to a special circumstance, "'it should be accompanied by a jury instruction limiting its use.'" (AOB 109, quoting *People v. Bigelow*, *supra*, 37 Cal.3d at p. 748.) However, as set forth previously, it is clear that this evidence was not only relevant to the charged special circumstances, but also to prove the underlying

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60. Evidence Code section 355 provides, "When evidence is admissible as to one party or for one purpose and is inadmissible as to another party or for another purpose, the court *upon request* shall restrict the evidence to its proper scope and instruct the jury accordingly." (Emphasis added.)

murder.

Appellant also argues that the need for a limiting instruction was acute in light of the fact that the evidence showed he was a gang member, and that the jury might surmise that his parole status was associated with gang activity. (AOB 110.) Aside from the fact that defense counsel stated that he had made a "tactical and strategic" decision not to object to evidence of gang membership because he wanted this "to be developed" (6RT 908-909), no suggestion was made by the witnesses or the prosecutor that the offense for which appellant was on parole was related to gang activity, and it was the defense which chose not to elicit testimony regarding the actual nature of the prior offense.

Assuming arguendo that the trial court should have instructed the jury according to CALJIC No. 2.50, even in the absence of a timely request by appellant, any possible error in failing to give such instruction was clearly harmless because it is not reasonably probable appellant would have received a more favorable result in the absence of the error. (*People v. Watson*, *supra*, 46 Cal.2d at p. 836.) It was made clear by the context of the testimony, as well as by the prosecutor's argument, that the purpose of this evidence was not to demonstrate that appellant was a bad person because he was on parole, and therefore he must have murdered Officer Fraembs, but rather to demonstrate appellant's motive for shooting the officer, which showed that he considered his actions, that the murder was premeditated and deliberate, and that the special circumstance allegations were true. CALJIC No. 2.50 would not have significantly aided appellant or weakened the strength of the evidence of guilt the jury properly could have considered. (See *People v. Hernandez*, *supra*, 33 Cal.4th at p. 1054.)

E. Conclusion

For the reasons set forth, evidence of appellant's parole status was properly admitted to prove his motive and intent regarding the degree of the

murder and the truth of the special circumstance allegations. Moreover, his claim that the trial court should have admitted evidence that his parole had not been violated based on his prior drug use has been waived because he failed to alert the court to the justification for the admission of this evidence which he now proffers on appeal. Finally, appellant failed to request a limiting instruction regarding the evidence of his parole status, and the court was not required to give CALJIC No. 2.50 sua sponte. Therefore, his claims must be rejected.

VIII.

THE TRIAL COURT PROPERLY INSTRUCTED THE JURY WITH CALJIC NO. 2.51

The trial court instructed the jury pursuant to CALJIC No. 2.51, the standard motive instruction, as follows:

> Motive is not an element of the crime charged and need not be shown. However, you may consider motive or lack of motive as a circumstance in this case. Presence of motive may tend to establish the defendant is guilty. Absence of motive may tend to show the defendant is not guilty.

(13CT 3570; 15RT 2397.)

Even though appellant acquiesced in the giving of CALJIC No. 2.51 (see 14RT 2085-2086), he now complains the instruction was defective in certain respects. He maintains that CALJIC No. 2.51 "improperly allowed the jury to determine guilt based upon the presence of an alleged motive and shifted the burden of proof to appellant to show an absence of motive to establish innocence, thereby lessening the prosecution's burden of proof." (AOB 112.) Specifically, appellant raises three concerns with CALJIC No. 2.51: (1) it allowed the jury to determine guilt based on motive alone (AOB 112-116); (2) it impermissibly lessened the prosecutor's burden of proof and violated due process (AOB 116-119); and (3) it shifted the burden of proof to imply that

appellant had to prove innocence (AOB 119-120). This Court has repeatedly rejected each of these arguments regarding CALJIC No. 2.51, and should do so again here, as appellant presents no compelling reason for this Court to reconsider its prior decisions.

A. CALJIC No. 2.51 Does Not Allow The Jury To Determine Guilt Based On Motive Alone

Appellant first contends CALJIC No. 2.51 allowed the jury to determine guilt based on motive alone. (AOB 112-116.) In prior cases, this Court has repeatedly rejected appellant's argument regarding CALJIC No. 2.51, because the instruction clearly states that motive alone is *in*sufficient to establish guilt. (*People v. Cook* (2007) 40 Cal.4th 1334, 1362; *People v. Cleveland* (2004) 32 Cal.4th 704, 750; *People v. Snow* (2003) 30 Cal.4th 43, 97-98; *People v. Frye* (1998) 18 Cal.4th 894, 958.) As stated in *Snow:*

> If the challenged instruction somehow suggested that motive alone *was* sufficient to establish guilt, defendant's point might have merit. But in fact the instruction tells the jury that motive is not an element of the crime charged (murder) and need not be shown, which leaves little conceptual room for the idea that motive could establish *all* the elements of the murder. When CALJIC No. 2.51 is taken together with the instruction on the concurrence of act and specific intent (CALJIC No. 3.31) and the instruction outlining the elements of murder and requiring each of them to be proved in order to prove the crime (CALJIC No. 8.10), there is no reasonable likelihood [citation] it would be read as suggesting that proof of motive alone may establish guilt of murder.

(*People v. Snow*, *supra*, 30 Cal.4th at pp. 97-98, italics in original.)

Appellant acknowledges this Court's decision in *Snow* (see AOB 113-115), but attempts to get around it by presenting a "contextual argument," which he candidly concedes this Court rejected in *People v. Cleveland*, *supra*, 32

Cal.4th at p. 750. (AOB 115.) "Nevertheless," argues appellant, because other instructions, such as the consciousness of guilt instructions in CALJIC Nos. 2.05, 2.06 and 2.52, admonished jurors that those circumstances were insufficient to establish guilt, appellant maintains such an omission in CALJIC No. 2.51 "would have permitted the jurors to understand that motive alone could establish guilt." (AOB 116.) Unfortunately for appellant, this Court recently rejected this identical claim in *People v. Guerra, supra*, 37 Cal.4th at pp. 1134-1135:

> Defendant next argues the motive instruction erroneously informed the jury that evidence of motive alone was sufficient to establish guilt because, unlike the court's instruction on consciousness of guilt, the motive instruction did not explicitly state that evidence of motive alone is *not* sufficient to prove guilt. (*People v. Cleveland, supra*, 32 Cal.4th at p. 750.) This claim is not cognizable, however, because defendant was obligated to request clarification and failed to do so. (*People v. Hillhouse, supra*, 27 Cal.4th at p. 503 [117 Cal.Rptr.2d 45, 40 P.3d 754] [a party must request a clarifying instruction in order to argue on appeal than an instruction correct in law was too general or incomplete].) In any event, we find no error in the instruction and no prejudice. The jury was properly instructed on the reasonable doubt standard. We find no reasonable likelihood the jury would interpret the instruction as stating that motive alone was sufficient to prove defendant's guilt. (*People v. Cleveland, supra*, 32 Cal.4th at p. 750.) Certainly, the jury's verdict in this case was not based solely on motive.

The same is true in the instant case: appellant did not request any clarification to the instruction and, in any event, the instruction was not erroneous and did not cause any prejudice. Thus, appellant's claim must be rejected.

B. CALJIC No. 2.51 Does Not Impermissibly Lessen The Prosecution's Burden Of Proof

Appellant argues that instructing the jury pursuant to CALJIC No. 2.51 impermissibly lessened the prosecution's burden of proof on three issues in the instant case: (1) whether appellant had the *intent* to kill to avoid arrest; (2) whether appellant *intended* to kill a police officer; and (3) whether appellant *intentionally* killed the officer while lying in wait. (AOB 116-117; emphasis added.) According to appellant, "there is no logical way to distinguish motive from intent" and "the jury would not have been able to separate instructions defining 'motive' from 'intent.'" (AOB 117.) Thus, reasons appellant, by instructing the jury pursuant to CALJIC No. 2.51 that "motive was not an element of the crime," the motive instruction impermissibly lessened the prosecution's burden of proof on the three issues. (AOB 116-119.) This claim is meritless.

In *People v. Hillhouse*, *supra*, 27 Cal.4th at pp. 503-504, this Court rejected a similar claim:

> Turning to the merits, although malice and certain intents and purposes are elements of the crimes, as the court correctly instructed the jury, *motive* is not an element. "Motive, intent, and malice—contrary to appellant's assumption—are separate and disparate mental states. The words are not synonyms. Their separate definitions were accurate and appropriate." [Citation omitted.] Motive describes the reason a person chooses to commit a crime. The reason, however, is different from a required mental state such as intent or malice.

(See also *People v. Guerra*, *supra*, 37 Cal.4th at p. 1135.) The same is true in the instant case. Even though the prosecution was required to prove appellant's intent as an element on the issues raised by appellant (see AOB 116-119), motive was not an element and the prosecution was not required to prove it.

Since "the instructions as a whole did not refer to motive and intent interchangeably" (see 13CT 3548-3615), respondent submits there is "no reasonable likelihood that the jury understood those terms to be synonymous." (*People v. Guerra, supra*, 37 Cal.4th at p. 1135.) Accordingly, appellant's claim fails.

C. CALJIC No. 2.51 Does Not Shift The Burden Of Proof To Imply That Appellant Has To Prove Innocence

Finally, appellant contends CALJIC No. 2.51 shifted the burden of proof to imply that he had to prove innocence. (AOB 119-120.) As stated by appellant, CALJIC No. 2.51 "effectively placed the burden on appellant to show an alternative motive to that advanced by the prosecutor." (AOB 119.) As noted by this Court in *People v. Prieto* (2003) 30 Cal.4th 226, 254, "no reasonable juror would misconstrue CALJIC 2.51 as 'a standard of proof instruction apart from the reasonable doubt instruction set forth clearly in CALJIC 2.90.'" And, more recently, in *People v. Guerra, supra,* 37 Cal.4th at p. 1134, this Court noted that in *People v. Cleveland, supra,* 32 Cal.4th 704, 711, it rejected the claim that the motive instruction shifted the prosecution's burden of proof to imply that the defendant had to prove his innocence "and defendant offers no persuasive reason to revisit our decision." The same is true in the instant case.

IX.

THE GUILT PHASE INSTRUCTIONS DID NOT IMPERMISSIBLY UNDERMINE OR DILUTE THE REQUIREMENT OF PROOF BEYOND A REASONABLE DOUBT

Appellant contends that various instructions given at the guilt phase undermined the requirement of proof beyond a reasonable doubt. (AOB 121-131.) Specifically, he contends that the instruction on circumstantial evidence (CALJIC No. 2.02) "undermined the requirement of proof beyond a reasonable

doubt" (AOB 122-125), while other instructions (CALJIC Nos. 2.21.2, 2.22, 2.27, and 8.20) "vitiated the reasonable doubt standard" (AOB 125-128). These claims are meritless because this Court has previously rejected the identical arguments raised by appellant.

Appellant first maintains that the instruction on circumstantial evidence (CALJIC No. 2.02) — which effectively advised the jury that if "one interpretation of the evidence as to the specific intent or mental state appears to you to be reasonable and the other interpretation unreasonable, you must accept the reasonable interpretation and reject the unreasonable" (see 13CT 3557; 15RT 2390) — permitted the jury to find him guilty "if appellant reasonably appeared guilty . . . even if they entertained a reasonable doubt as to whether he had premeditated the killings." (AOB 122.) Appellant maintains the instruction undermined the reasonable doubt standard in two respects: (1) it "compelled the jury to find [him] guilty of murder and to find the special circumstances to be true using a standard lower than proof beyond a reasonable doubt"; and (2) it "required the jury to draw an incriminatory inference when such an inference appeared 'reasonable.'" (AOB 123-124.) Thus, appellant argues the "instruction had the effect of reversing, or at least significantly lightening, the burden of proof, since it required the jury to find appellant guilty of first degree murder as charged unless he came forward with evidence reasonably explaining the incriminatory evidence put forward by the prosecution." (AOB 124.) In *People v. Nakahara* (2003) 30 Cal.4th 705, 714, this Court rejected the arguments raised by appellant and noted " . . . we have recently rejected these contentions and we see no reason to reconsider them." (See *People v. Guerra*, *supra*, 37 Cal.4th at p. 1139 ["We have repeatedly rejected these arguments, and defendant offers no persuasive reason to reconsider out prior decisions."]; *People v. Riel* (2000) 22 Cal.4th 1153, 1200.)

Appellant next contends that four instructions — CALJIC Nos. 2.21.2

(witness wilfully false), 2.22 (weighing conflicting testimony), 2.27 (sufficiency of testimony of one witness) and 8.20 (deliberate and premeditated murder) — "diluted the constitutionally mandated reasonable doubt standard." (AOB 125.) Respondent submits this Court has previously rejected each of appellant's claims.

Appellant argues that CALJIC No. 2.21.2 "lessened the prosecution's burden of proof" because the instruction "authorized the jury to reject the testimony of a witness 'willfully false in one material part of his or her testimony' unless 'from all the evidence, you believe the probability of truth favors his or her testimony in other particulars.'" The prosecution's burden of proof was thus lessened, appellant continues, because the instructions allowed the jury "to credit prosecution witnesses if their testimony had a 'mere probability of truth.'" (AOB 126.) However, this Court has made it abundantly clear that "the targeted instruction says no such thing." (*People v. Nakahara*, *supra*, 30 Cal.4th at p. 714, citing *People v. Hillhouse*, *supra*, 27 Cal.4th at p. 493, and *People v. Riel*, *supra*, 22 Cal.4th at p. 1200; see also *People v. Guerra*, *supra*, 37 Cal.4th at p. 1139.)

Appellant also argues that CALJIC No. 2.22 improperly advised the jury "to determine which party has presented evidence that is comparatively more convincing than that presented by the other party." And by doing so, appellant says, the instruction "replaced the constitutionally-mandated" reasonable doubt instruction with a standard which is "indistinguishable" from the preponderance of the evidence standard. (AOB 126-127.) As noted by this Court in *People v. Nakahara, supra*, 30 Cal.4th 705:

> Although we have not considered the point, we adopt the reasoning of Court of Appeal cases holding that CALJIC No. 2.22 is appropriate and unobjectionable when, as here, it is accompanied by the usual instructions on reasonable doubt, the presumption of innocence, and the

People's burden of proof (see CALJIC No. 2.90).

(*People v. Nakahara, supra*, 30 Cal.4th at pp. 714-715.) As appellant's jury was instructed with the usual instructions on reasonable doubt, the presumption of innocence, and the prosecution's burden of proof (13CT 3579), appellant's challenge to CALJIC No. 2.22 must be rejected. (See also *People v. Guerra, supra*, 37 Cal.4th at p. 1139.)

Appellant also contends that CALJIC No. 2.27 was "flawed" because it "erroneously suggested that the defense, as well as the prosecution, had the burden of proving facts." He maintains CALJIC No. 2.27 was erroneous because "the defendant is only required to raise a reasonable doubt about the prosecution's case, and cannot be required to establish or prove any 'fact.'" (AOB 127.) This Court rejected appellant's contention in *People v. Turner* (1990) 50 Cal.3d 668, when it held that limiting CALJIC No. 2.27 to prosecution witnesses only would permit the defense witnesses an unwarranted aura of veracity. As explicated in *People v. Montiel* (1993) 5 Cal.4th 877:

> We acknowledged [in *Turner*] some ambiguity in the modified instruction's undifferentiated reference to "proof" of "facts," but we made clear that application of the single-witness instruction [CALJIC No. 2.27] against the prosecution alone would accord the testimony of defense witnesses an unwarranted aura of veracity.

(*People v. Montiel, supra*, 5 Cal.4th at p. 941.)

Moreover, as in *Turner* and *Montiel*, given the instructions that the prosecution had the burden of proving the elements of the offenses beyond a reasonable doubt, it is difficult to "imagine that the generalized reference to 'proof' of 'facts' in CALJIC No. 2.27 would be construed by a reasonable jury to undermine these much-stressed principles." (*People v. Turner, supra*, 50 Cal.3d at p. 697; see *People v. Montiel, supra*, 5 Cal.4th at p. 941.) Accordingly, appellant's contention must be rejected.

Appellant further contends that CALJIC No. 8.20 misled the jury regarding the prosecution's burden of proof. CALJIC No. 8.20 advised the jury that deliberation and premeditation "must have been formed upon pre-existing reflection and not under a sudden heat of passion or other condition precluding the idea of deliberation . . . ." (13CT 3583.) Appellant argues that the word "precluding" "could be interpreted to require the defendant to absolutely preclude the possibility of premeditation, as opposed to raising a reasonable doubt." (AOB 127-128.) Again, this Court rejected this identical claim in *People v. Nakahara, supra*, 30 Cal.4th 705:

> We think that, like CALJIC 2.22, this instruction is unobjectionable when, as here, it is accompanied by the usual instructions on reasonable doubt, the presumption of innocence, and the People's burden of proof. These instructions make it clear that a defendant is not required to absolutely preclude the element of deliberation.

(*People v. Nakahara, supra*, 30 Cal.4th at p. 715.) As mentioned above, since appellant's jury was instructed with the usual instructions on reasonable doubt, the presumption of innocence, and the prosecution's burden of proof (13CT 3579), appellant's challenge to CALJIC No. 8.20 must be rejected.

Finally, as appellant correctly notes (AOB 128-130), this Court has rejected his claims as to the challenged instructions as lessening the prosecution's burden of proof and by operating as a mandatory conclusive presumption of guilt. He asks this Court to reconsider these holdings because their analysis was "flawed." (AOB 129.) However, appellant presents nothing new, persuasive or compelling in support of his request. (See AOB 128-130.) Thus, there is no reason to reconsider these precedents. (*People v. Nakahara, supra*, 30 Cal.4th at p. 714.)

X.

THE LYING-IN-WAIT SPECIAL CIRCUMSTANCE ADEQUATELY NARROWS THE CLASS OF PERSONS ELIGIBLE FOR THE DEATH PENALTY

Appellant contends the lying-in-wait special circumstance violates the Eighth Amendment because it fails to adequately narrow the class of persons eligible for the death penalty. (AOB 132-141.) Appellant argues that rather than narrowing the class of persons eligible for the death penalty, the lying-in-wait special circumstance "defines capital conduct in a manner identical to that which is required to establish premeditated murder." (AOB 133.) As stated by appellant, "[t]he lying-in-wait special circumstance is so broad that it embraces nearly all premeditated murders" and therefore "does not appreciably narrow the class of death-eligible defendants." (AOB 140.) In rejecting the claim raised by appellant, this Court stated the following in *People v. Nakahara*, *supra*, 30 Cal.4th at page 721:

> Defendant next argues that the lying-in-wait special circumstance (§ 190.2, subd. (a)(15)) is invalid for failure to sufficiently narrow the class of persons eligible for death and to provide a meaningful basis for distinguishing the few cases in which death is imposed from the many cases in which it is not. (See *Furman v. Georgia* (1972) 408 U.S. 238, 313 [92 S.Ct. 2726, 2764, 33 L.Ed.2d 346] (conc. opn. of White, J.).) We have repeatedly rejected this contention, and defendant fails to convince us the matter warrants our reconsideration. (See *People v. Hillhouse, supra*, 27 Cal.4th at p. 510; *People v. Frye, supra*, 18 Cal.4th at p. 1029; *People v. Crittenden, supra*, 9 Cal.4th at pp. 154-156; *People v. Morales*, *supra*, 48 Cal.3d at pp. 557-558 [257 Cal.Rptr. 64, 770 P.2d 244].)

(See also *People v. Greier*, *supra*, 41 Cal.4th at pp. 617-618; *People v. Moon*, *supra*, 37 Cal.4th at p. 44; *People v. Carpenter*, *supra*, 15 Cal.4th at p. 419.)

Likewise, it should be noted that appellant's claim that the distinction between the lying-in-wait special circumstance and lying-in-wait first degree murder is "unclear" and "fails to appreciably narrow the class of death-eligible defendants" (AOB 137) has been also rejected by this Court. As stated in *People v. Gutierrez, supra*, 28 Cal.4th at pp. 1148-1149:

> Defendant contends the special circumstance of lying in wait is unconstitutional because there is no significant distinction between the theory of first degree murder by lying in wait (i.e., one of the theories of the Stopher murder) and the special circumstance of lying in wait, and that the special circumstance therefore fails to meaningfully narrow death eligibility. We have repeatedly rejected the same contention with respect to analogous facts and circumstances—see, e.g., *People v. Crittenden* (1994) 9 Cal.4th 83, 155 [36 Cal.Rptr.2d 474, 885 P.2d 887]; *People v. Sims, supra*, 5 Cal.4th at page 434; *People v. Roberts* (1992) 2 Cal.4th 271, 322-323 [6 Cal.Rptr.2d 276, 826 P.2d 274]; *People v. Wader* (1993) 5 Cal.4th 610, 669 [20 Cal.Rptr.2d 788, 854 P.2d 80]; *People v. Edwards, supra,* 54 Cal.3d at p. 824 [1 Cal.Rptr.2d 696, 819 P.2d 436]; *People v. Edelbacher, supra*, 47 Cal.3d at p. 1023; *People v. Morales*, *supra*, 48 Cal.3d at pp.557-558 [257 Cal.Rptr. 64, 770 P.2d 244]— and do so again here.
>
> "[M]urder by means of lying in wait requires only a wanton and reckless intent to inflict injury likely to cause death. (*People v. Ruiz* (1988) 44 Cal.3d 589, 614 [244 Cal.Rptr. 200, 749 P.2d 854]; *People v. Atchley* (1959) 53 Cal.2d 160, 175, fn. 4 [346 P.2d 764] . . . .)" (*People v. Webster* (1991) 54 Cal.3d 411, 448 [285 Cal.Rptr. 31, 814 P.2d 1273].) [Fn. omitted.] In contrast, the lying-in-wait special circumstance requires "an intentional murder, committed under circumstances which include (1) a concealment of purpose, (2) a substantial period of watching

and waiting for an opportune time to act, and (3) immediately thereafter, a surprise attack on an unsuspecting victim from a position of advantage . . . ." (*People v. Morales, supra*, 48 Cal.3d at p. 557; *People v. Carpenter, supra*, 15 Cal.4th at p. 388 [63 Cal.Rptr.2d 1, 935 P.2d 708]; *People v. Sims, supra*, 5 Cal.4th at p. 432.) Furthermore, the lying-in-wait special circumstance requires "that the killing take place *during the period of concealment and watchful waiting*, an aspect of the special circumstance distinguishable from a murder perpetrated by means of lying in wait, or following premeditation and deliberation. (*People v. Edelbacher*[*,supra*], 47 Cal.3d 983, 1022 . . . .)" (*People v. Sims, supra*, 5 Cal.4th at p. 434.)

The distinguishing factors identified in *Morales* and *Sims* that characterize the lying-in-wait special circumstance constitute "clear and specific requirements that sufficiently distinguish from other murders a murder committed while the perpetrator is lying in wait, so as to justify the classification of that type of case as one warranting imposition of the death penalty." (*People v. Sims, supra*, 5 Cal.4th at p. 434.)

Appellant's contention must therefore be rejected, as this Court has previously considered the issue and appellant presents no new or persuasive reason to revisit the matter.

XI.

IF A COUNT OR SPECIAL CIRCUMSTANCE IS REDUCED OR VACATED, THE PENALTY OF DEATH DOES NOT NEED TO BE REVERSED, GIVEN THE OVERWHELMING AGGRAVATING EVIDENCE PRESENTED AT THE PENALTY PHASE

Relying on *Silva v. Woodford* (9th Cir. 2002) 279 F.3d 825, 849, appellant contends that "[i]f this Court reduces or vacates any of the counts or

special circumstances, the matter should be remanded for a new sentencing hearing to permit the reconsideration of the death judgment." (AOB 142.) A reversal or reduction of any of the convictions or special circumstances, argues appellant, indicates that "the delicate calculus" undertaken by the trier of fact in reaching its penalty determination "is necessarily skewed" and a new penalty phase is required. (AOB 142-144.) Appellant is mistaken.

Preliminarily, it must be noted that the opinions of lower federal courts are not binding on this Court. (*People v. Seaton*, *supra*, 26 Cal.4th at p. 653.) Moreover, *Silva v. Woodford, supra*, 279 F.3d 825, the case cited and relied upon by appellant (see AOB 142), does not stand for the proposition that reduction, vacation or reversal as to any count or special-circumstance finding results in an automatic penalty phase retrial. *Silva* involved a determination that trial counsel's ineffective performance was prejudicial where counsel had not investigated and presented mitigating evidence of family history and substance abuse at the penalty phase, the jury had questions about life without parole, three of four special circumstances found by the jury were subsequently invalidated by this Court, and an accomplice who was also convicted of two murders was sentenced to life without parole. (*Id.* at pp. 847-850.)

Assuming arguendo this Court reduces, vacates or reverses a count or special circumstance, any such reduction or reversal, given the other special circumstances and the overwhelming evidence presented at the penalty phase, would not warrant reversal of the penalty determination. Appellant does not discuss this fact or appear to dispute this fact, but rather maintains a harmless error analysis at the penalty phase is inappropriate. As stated by appellant, "This court cannot conduct a harmless error review regarding the death sentence without making findings that go beyond the facts reflected in the verdict alone." (AOB 143.)

However, as noted in *Brown v. Sanders, supra*, 546 U.S. at pp. 221-224,

an invalid eligibility or sentencing factor does not require reversal of the death penalty in California if the jury properly considered the underlying facts and circumstances of the invalid factor. Here, there was no reversible error because there were two other special circumstances, and the jury necessarily was required to consider all of the facts and circumstances of the lying-in-wait special circumstance in determining penalty because that special circumstance, and the underlying murder and other special circumstances that were found to be true, all involved the same criminal event. (See also *Clemons v. Mississippi* (1990) 494 U.S. 738, 745-750 [110 S.Ct. 1441, 108 L.Ed.2d 725]; *Zant v. Stephens*, *supra*, 462 U.S. at pp. 890-891 [fact that one aggravating factor may be found invalid does not mean a death penalty may not stand where there are other valid aggravating factors]; *People v. Hillhouse, supra,* 27 Cal.4th at p. 512 [invalid conviction for kidnapping for robbery, felony-murder theory, and felony-murder special circumstance did not require reversal of the penalty]; *People v. Roberts*, *supra*, 2 Cal.4th 271, 327 [appellate court examines whether there is a reasonable possibility that the jury would have recommended a sentence of life without possibility of parole]; *People v. Mickey, supra,* 54 Cal.3d at p. 703 [where two of four special circumstances were invalidated on appeal, jury's consideration of the two invalid special circumstance findings subject to harmless-error analysis].)

Finally, assuming arguendo that this Court finds that on the facts of this case the reduction, vacation, or reversal of any count or special circumstance warrants a reversal of the penalty determination, a retrial of the penalty phase is not precluded under the United States Supreme Court decisions in *Ring v. Arizona, supra,* 536 U.S. 584 and *Apprendi v. New Jersey, supra,* 530 U.S. 466. This Court has held that *Apprendi* and *Ring* have no application to the penalty phase procedures of this state. (*People v. Prieto*, *supra*, 30 Cal.4th at pp. 262-264, 271-272, 275; *People v. Nakahara*, *supra*, 30 Cal.4th at pp. 721-722.)

XII.

CALIFORNIA'S DEATH PENALTY STATUTE DOES NOT VIOLATE THE FEDERAL CONSTITUTION

Appellant raises several claims regarding the constitutionality of the death penalty law as interpreted by this Court and as applied at appellant's trial. He maintains that many features of the death penalty law violate the federal Constitution. (AOB 145-164.) As he himself concedes (AOB 145), these claims have been raised and rejected in prior capital appeals before this Court. Because appellant fails to raise anything new or significant which would cause this Court to depart from its earlier holdings, his claims should be rejected. Moreover, it is entirely proper to reject appellant's complaints by case citation, without additional legal analysis. (*People v. Welch* (1999) 20 Cal.4th 701, 771-772; *People v. Fairbank* (1997) 16 Cal.4th 1223, 1255-1256.)

First, appellant's claim that the instruction which set forth section 190.3, factor (a), as applied, "resulted in the arbitrary and capricious imposition of the death penalty" (AOB 145-147) has been repeatedly rejected by this Court. (*People v. Guerra, supra,* 37 Cal.4th at p. 1165; *People v. Hinton* (2006) 37 Cal.4th 839, 912; *People v. Smith* (2005) 35 Cal.4th 334, 373; see *Tuilaepa v. California* (1994) 512 U.S. 967, 976 [114 S.Ct. 2630, 129 L.Ed.2d 750] [explaining that section 190.3, factor (a), was "neither vague nor otherwise improper under our Eighth Amendment jurisprudence"]). It should be rejected again in this case.

Second, appellant contends that the death penalty statute and accompanying jury instructions fail to set forth the appropriate burden of proof. Specifically, appellant raises the following claims: (1) the death penalty statute and accompanying instructions unconstitutionally failed to assign to the State the burden of proving beyond a reasonable doubt the existence of an aggravating factor, that the aggravating factors outweigh the mitigating factors, and that

death is the appropriate penalty (AOB 147-149); (2) the Sixth, Eighth and Fourteenth Amendments to the federal Constitution require the State to bear some burden of proof at the penalty phase and, if not, the jury then should have been specifically instructed that there was no burden of proof at the penalty phase (AOB 149-150); (3) the Sixth, Eighth and Fourteenth Amendments require juror unanimity as to the aggravating factors, including unadjudicated criminal activity (AOB150-152); (4) the instructions violated the Eighth and Fourteenth Amendments because they failed to inform the jurors: (a) that the central determination is whether death is the appropriate punishment (AOB 153-154); (b) that if they determined that mitigation outweighed aggravation, they were required to return a sentence of life without the possibility of parole (AOB 154-155); (c) that even if they determined aggravation outweighed mitigation, they could still return a sentence of life without the possibility of parole (AOB 155-156); (d) there was no need for unanimity as to mitigating circumstances (AOB 156-157); and (e) there was a presumption of life (AOB 157-158). These claims are meritless.

This Court has repeatedly rejected each of the foregoing arguments. For example, this Court has held that the sentencing function at the penalty phase is not susceptible to a burden-of-proof qualification. (*People v. Manriquez* (2005) 37 Cal.4th 547, 589; *People v. Burgener, supra*, 29 Cal.4th 833, 885; *People v. Anderson* (2001) 25 Cal.4th 543, 601; *People v. Hawthorne* (1992) 4 Cal.4th 43, 79.) Also, there is no requirement that the penalty jury be instructed concerning burden of proof – whether beyond a reasonable doubt or by preponderance of the evidence – as to existence of aggravating circumstances (other than other-crimes evidence), greater weight of aggravating circumstances over mitigating circumstances, or appropriateness of a death sentence. There is also no requirement that the penalty jury achieve unanimity as to the aggravating circumstances (*People v. Samuels* (2005) 36 Cal.4th 96, 137) and there is no

basis for a claim that the penalty jury must be instructed on the absence of a burden of proof (*People v. Cornwell* (2005) 37 Cal.4th 50, 104).

Moreover, the death penalty statute is not unconstitutional because it does not require that the jury find death as the appropriate penalty beyond a reasonable doubt. (*People v. Jablonski* (2006) 37 Cal.4th 774, 837; *People v. Stitley* (2005) 35 Cal.4th 514, 573.) And, no presumption exists in favor of either death or life imprisonment without the possibility of parole in determining the appropriate penalty, and thus such an instruction would have been improper. (*People v. Maury* (2003) 30 Cal.4th 342, 440; *People v. San Nicolas* (2004) 34 Cal.4th 614, 662-667; *People v. Kipp* (2001) 26 Cal.4th 1100, 1137; *People v. Arias* (1996) 13 Cal.4th 92, 190.) There is no requirement that the jury be instructed to return a life without parole sentence if it determined that mitigation outweighed aggravation (*People v. Catlin* (2001) 26 Cal.4th 81, 174), or that it could return a life without parole sentence even if it determined aggravating factors substantially outweighed mitigating ones (*People v. Smith*, *supra*, 35 Cal.4th 334, 370), or that it unanimity was not required as to mitigating factors (*People v. Coddington* (2000) 23 Cal.4th 529, 641).

Finally, nothing in *Apprendi v. New Jersey, supra,* 530 U.S. 466, *Ring v. Arizona*, *supra*, 536 U.S. 584, or *Blakely v. Washington* (2004) 542 U.S. 296 [124 S.Ct. 2531, 159 L.Ed.2d 403], affects what this Court has stated regarding the sentencing function at the penalty phase not being susceptible to a burden-of-proof quantification. This Court has expressly rejected the argument that *Apprendi, Ring,* and/or *Blakely* affect California's death penalty law or otherwise justify reconsideration of this Court's prior decisions on this point. (*People v. Ward* (2005) 36 Cal.4th 186, 221; *People v. Morrison* (2004) 34 Cal.4th 698, 730-731; *People v. Prieto*, *supra*, 30 Cal.4th at pp. 262-263; *People v. Snow*, *supra*, 30 Cal.4th at p. 126, fn. 32.) Thus, appellant's claims must be rejected.

Third, appellant's claim that written findings regarding the aggravating factors is required by the federal Constitution (AOB 158-159) has been rejected by this court on numerous occasions. (*People v. Cook* (2006) 39 Cal.4th 566; *People v. Prieto*, *supra*, 30 Cal.4th at p. 275; *People v. Snow*, *supra*, 30 Cal.4th at p. 127; *People v. Lucero*, *supra*, 23 Cal.4th at p. 741.) It should be rejected again in this case.

Fourth, appellant's claims that the instructions to the jury on mitigating and aggravating factors violated his constitutional rights (AOB 159-162) have been previously rejected by this Court. For example, contrary to appellant's claim (AOB 159-161), there is no requirement the trial court delete inapplicable factors. (See *People v. Stitley*, *supra*, 35 Cal.4th at p. 574; *People v. Kipp*, *supra*, 26 Cal.4th at p. 1138; *People v. Riel*, *supra*, 22 Cal.4th at p. 1225; *People v. Earp*, *supra*, 20 Cal.4th at p. 899; *People v. Carpenter, supra,* 15 Cal.4th at p. 1064.) Likewise, appellant's claim that the failure to instruct that statutory mitigating factors are relevant solely as mitigators violated the Eighth and Fourteenth Amendments (AOB 161-162) has been rejected by this Court. (*People v. Hinton* (2006) 37 Cal.4th 839, 912; *People v. Morrison, supra,* 34 Cal.4th at p. 730; *People v. Kraft*, *supra*, 23 Cal.4th at pp. 1078-1079.) And, finally, the use of the adjective "extreme" in factors (d) and (e) and the adjective "substantial" in factor (g) did not act as a barrier to the consideration of mitigating evidence in violation of the Sixth, Eighth and Fourteenth Amendments. (*People v. Prieto*, *supra*, 30 Cal.4th at p. 276; *People v. Brown* (2004) 33 Cal.4th 382, 402; *People v. Maury*, *supra*, 30 Cal.4th at p. 429; *People v. Jones* (1997) 15 Cal.4th 119, 190, disapproved on other grounds in *People v. Hill*, *supra*, 17 Cal.4th 800, 823.) Appellant has not presented this Court with any persuasive reason to reconsider its prior holdings on these issues.

Fifth, appellant contends that the absence of intercase proportionality review from California's death penalty law violates his Eighth and Fourteenth

Amendment right to be protected from the arbitrary and capricious imposition of the death penalty. (AOB 162-163.) Appellant's point is not well taken. Neither the federal Constitution nor the state Constitution requires intercase proportionality review. (*People v. Jablonski, supra*, 37 Cal.4th at p. 837; *People v. Panah* (2005) 35 Cal.4th 395, 500; *People v. Kipp, supra*, 26 Cal.4th at p. 1139.) The United States Supreme Court has held that intercase proportionality review is not constitutionally required in California (*Pulley v. California* (1984) 465 U.S. 37, 51-54 [104 S.Ct. 871, 79 L.Ed.2d 29]) and this Court has consistently declined to undertake it as a constitutional requirement (*People v. Jablonski, supra*, 37 Cal.4th at p. 837; *People v. Panah, supra*, 35 Cal.4th at p. 500; *People v. Welch, supra*, 20 Cal.4th at p. 772; *People v. Majors* (1998) 18 Cal.4th 385, 442); *People v. Fierro* (1991) 1 Cal.4th 173, 253.) Appellant's claim should thus be rejected.

Sixth, appellant claims California's death penalty law violates the Equal Protection Clause of the federal Constitution because non-capital defendants are accorded more procedural safeguards than a capital defendant. (AOB 163.) However, this Court has held many times that capital and non-capital defendants are not similarly situated and thus may be treated differently without violating equal protection principles. (*People v. Manriquez, supra*, 37 Cal.4th at p. 590; *People v. Hinton, supra,* 37 Cal.4th at p. 912; *People v. Smith, supra*, 35 Cal.4th at p. 374; *People v. Boyette* (2002) 29 Cal.4th 381, 465-467.) Thus, appellant's claim is meritless.

Finally, appellant's claim that the use of the death penalty as a regular form of punishment falls short of international norms (AOB 163-164) has been repeatedly rejected by this Court (*People v. Cook, supra,* 39 Cal.4th at pp. 618-619; *People v. Snow, supra,* 30 Cal.4th at p. 127; *People v. Ghent* (1987) 43 Cal.3d 739, 778-779) and appellant has not presented any significant or persuasive reason for this Court to reconsider its prior decisions.

XIII.

APPELLANT RECEIVED A FAIR TRIAL AS THERE WAS NO CUMULATIVE PREJUDICE

Appellant's final contention is that "[a]ssuming that none of the errors is prejudicial by itself, the cumulative effect of these errors nevertheless undermines confidence in the integrity of the guilt and penalty phase proceedings and warrants reversal of the judgment of conviction and sentence of death." (AOB 165.) Respondent disagrees.

Respondent submits that when the merits of the issues are considered, there are no multiple errors to accumulate. Whether considered individually or for their cumulative effect, the alleged errors could not have affected the outcome of the trial. (See *People v. Guerra, supra,* 37 Cal.4th at p. 1165; *People v. Hinton, supra,* 37 Cal.4th at p. 913; *People v. Jablonski, supra,* 37 Cal.4th at p. 837; *People v. Panah, supra,* 35 Cal.4th at p. 1165; *People v. Burgener, supra,* 29 Cal.4th at p. 884.) The records shows that appellant received a fair trial. Nothing more is required. This Court should, therefore, reject appellant's claim of cumulative error.

CONCLUSION

Accordingly, for the reasons stated, respondent respectfully asks that the Judgment, the Abstract of Judgment, and the Commitment be modified to reflect the lying-in-wait special circumstance, and that the conviction, the special circumstance findings, and the judgment of death be affirmed.

Dated: March 27, 2008

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 70,934 words.

Dated: March 27, 2008

Respectfully submitted,

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Attorney General of the State of California

Karen Bissonnette

KAREN BISSONNETTE
Deputy Attorney General
Attorneys for Respondent

DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **People v. Ronald Bruce Mendoza (Death Penalty Case)**
Case No.: **S065467**

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 and 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 that same day in the ordinary course of business.

On April 1, 2008, I served the attached **RESPONDENT'S BRIEF** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system at the Office of the Attorney General at 300 South Spring Street, Suite 1702, Los Angeles, CA 90013, addressed as follows:

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The Honorable Bruce F. Marrs
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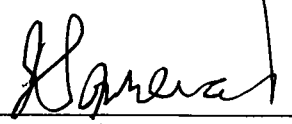
(Please see additional service list attached)

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on April 1, 2008, at Los Angeles, California.

Linda Sarenas
Declarant



Signature

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Case Name: People v. Ronald Bruce Mendoza
Case No. S065467
Declaration of Service, cont'd, page 2.

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