IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. **FRANK KALIL BECERRA,** Defendant and Appellant.	S065573 **CAPITAL CASE**

Los Angeles County Superior Court No. BA106878
The Honorable J. D. Smith, Judge

RESPONDENT'S BRIEF

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DEATH PENALTY

TABLE OF CONTENTS

	Page
STATEMENT OF THE CASE	1
STATEMENT OF FACTS	2
A. Guilt Phase	2
1. Prosecution	2
2. Defense	10
3. Rebuttal	14
B. Penalty Phase	14
1. Factors In Aggravation	14
2. Factors In Mitigation	36
ARGUMENT	42
I. THE COURT DID NOT ABUSE ITS DISCRETION IN TERMINATING APPELLANT'S RIGHT OF SELF-REPRESENTATION DURING PRETRIAL PROCEEDINGS BEFORE THE PRELIMINARY HEARING; ANY ALLEGED ERROR WAS HARMLESS	42
A. Factual Background	42
1. Proceedings Before Trial	42
2. Proceedings During Trial	59
B. Relevant Law	61

TABLE OF CONTENTS (continued)

Page

C. The Court Did Not Abuse Its Discretion In Terminating Appellant's Right Of Self-Representation During Pretrial Proceedings Before The Preliminary Hearing 65

D. Any Alleged *Faretta* Error During Pretrial Proceedings Before The Preliminary Hearing Was Harmless 72

II. APPELLANT'S CLAIM IS FORFEITED; THE COURT DID NOT ABUSE ITS DISCRETION IN APPARENTLY RULING THAT APPELLANT WEAR A STUN BELT DURING THE GUILT PHASE OF TRIAL; ANY ALLEGED ERROR WAS HARMLESS 85

A. Factual Background 86

B. Appellant's Claim Is Forfeited 89

C. Relevant Law 95

D. The Court Did Not Abuse Its Discretion In Apparently Ruling Appellant Would Wear A Stun Belt During The Guilt Phase Of Trial 98

E. Any Alleged Error Was Harmless 106

F. Any Alleged Abuse Of Discretion By Judge Horwitz Regarding His Pretrial Ruling Concerning Physical Restraints Was Harmless 114

III. APPELLANT'S CLAIMS REGARDING THE COMPLAINED-OF EXPERT GANG TESTIMONY SHOULD BE REJECTED; ANY ALLEGED ERROR WAS HARMLESS 117

A. Factual Background 118

TABLE OF CONTENTS (continued)

Page

1. The Court's Ruling Regarding Admissibility Of Gang Evidence 118

2. Berry's Testimony 120

3. Sergeant Valdemar's Testimony 125

B. Berry Properly Testified As A Narcotics Expert 134

C. The Expert Testimony Of Berry Concerning Narcotics And Of Sergeant Valdemar Concerning Gangs Was Sufficiently Beyond Common Experience 139

D. The Expert Testimony Of Berry Concerning Narcotics And Sergeant Valdemar Concerning Gangs Was Relevant To Appellant's Motive And Credibility 141

E. The Expert Gang Testimony Of Sergeant Valdemar Was Not Cumulative And Was More Probative Than Prejudicial 145

F. Appellant's Fair Trial And Reliability Determination Claims Are Forfeited; Appellant's Due Process Claim Should Be Rejected; Any Alleged Error Was Harmless 147

IV. THE COURT DID NOT ABUSE ITS DISCRETION IN EXCLUDING THIRD PARTY CULPABILITY EVIDENCE CONCERNING VASHAUN; ANY ALLEGED ERROR WAS HARMLESS 152

A. Factual Background 153

1. The Court's Ruling Regarding Third Party Culpability Concerning Donte Vashaun 153

2. The Court's Ruling Regarding Appellant's Anger 160

TABLE OF CONTENTS (continued)

Page

B. Appellant's Claims Regarding His Right To Present A Complete Defense And His Right To A Reliable Sentencing Determination Are Forfeited 164

C. Relevant Law 165

D. The Court Did Not Abuse Its Discretion In Ruling Regarding Third Party Culpability; Any Alleged Error Was Harmless 166

1. Regarding Vashaun Beating Meekey 167

2. Regarding Appellant's Anger About Vashaun Beating Meekey 177

V. APPELLANT'S CLAIM IS FORFEITED; WENDY CLEVELAND'S EXPERT TESTIMONY REGARDING THE COMPLAINED-OF PRINTS WAS RELEVANT; ANY ALLEGED ERROR WAS HARMLESS 180

A. Factual Background 180

B. Appellant's Claim Is Forfeited 186

C. Relevant Law 189

D. Cleveland's Expert Opinion Regarding The Complained-Of Prints Was Relevant; Any Alleged Error Was Harmless 189

VI. APPELLANT'S CLAIM IS FORFEITED; CALJIC NO. 2.62 WAS PROPERLY GIVEN; ANY ALLEGED ERROR WAS HARMLESS 191

A. Factual Background 191

TABLE OF CONTENTS (continued)

		Page
	B. Relevant Law	192
	C. Appellant's Claim Is Forfeited; CALJIC No. 2.62 Was Properly Given; Any Alleged Error Was Harmless	194
VII.	**APPELLANT CANNOT RAISE HIS CLAIMS OF INSTRUCTIONAL ERROR DUE TO INVITED ERROR; APPELLANT'S INSTRUCTIONAL CLAIMS SHOULD BE REJECTED; ANY ALLEGED ERROR WAS HARMLESS**	197
	A. Factual Background	198
	B. Appellant Cannot Raise His Instructional Claims Due To Invited Error; His Instructional Claims Should Be Rejected; Any Alleged Error Was Harmless	199
	1. CALJIC No. 2.02:	199
	2. CALJIC No. 2.21.2:	201
	3. CALJIC No. 2.22:	202
	4. CALJIC No. 2.27:	203
	5. CALJIC No. 2.51:	204
	6. CALJIC No. 8.20:	205
VIII.	**APPELLANT'S CHALLENGES TO CALIFORNIA'S DEATH PENALTY STATUTE SHOULD BE REJECTED**	207
IX.	**APPELLANT'S CLAIM OF CUMULATIVE ERROR SHOULD BE REJECTED**	210

TABLE OF CONTENTS (continued)

	Page
CONCLUSION	212

TABLE OF AUTHORITIES

	Page
Cases	
Apprendi v. New Jersey (2000) 530 U.S. 466	207
Arizona v. Fulminante (1991) 499 U.S. 279	72, 73
Blakely v. Washington (2004) 542 U.S. 296	207
Buell v. Mitchell (6th Cir. 2001) 274 F.3d 337	210
Coleman v. Alabama (1970) 399 U.S. 1	74-76
Faretta v. California (1975) 422 U.S. 806	61, 62, 65, 66, 71-73, 75, 77, 79, 80, 82-85
Godinez v. Moran (1993) 509 U.S. 389	71
Holmes v. South Carolina (2006) 547 U.S. 319	174, 175
Marks v. Superior Court (2002) 27 Cal.4th 176	90, 91
McKaskle v. Wiggins (1984) 465 U.S. 168	73
Medellin v. Texas (2008) __ S.Ct. __	210
Moon v. Superior Court (2005) 134 Cal.App.4th 1521	76-78

TABLE OF AUTHORITIES (continued)

	Page
People ex rel. Dept. of Public Works v. Alexander (1963) 212 Cal.App.2d 84	135
People v. Adcox (1988) 47 Cal.3d 207	152
People v. Belmontes (1988) 45 Cal.3d 744	193
People v. Bolin (1998) 18 Cal.4th 297	135
People v. Box (2000) 23 Cal.4th 1153	209, 210
People v. Boyette (2002) 29 Cal.4th 381	208
People v. Bradford (1997) 15 Cal.4th 1229	166, 176
People v. Burgener (2003) 29 Cal.4th 833	94, 164, 188, 210
People v. Carpenter (1999) 21 Cal.4th 1016	105
People v. Carson (2005) 35 Cal.4th 1	62-65, 67, 71
People v. Carter (2003) 30 Cal.4th 1166	94, 142, 164, 188, 208
People v. Catlin (2001) 26 Cal.4th 81	140, 206, 209

TABLE OF AUTHORITIES (continued)

	Page
People v. Clark (1992) 3 Cal.4th 41	63, 67, 84
People v. Cleveland (2004) 32 Cal.4th 704	93
People v. Cole (2004) 33 Cal.4th 1158	106, 150
People v. Crayton (2002) 28 Cal.4th 346	42
People v. Crittenden (1994) 9 Cal.4th 83	201
People v. Dent (2003) 30 Cal.4th 213	71, 73
People v. DePriest (2007) 42 Cal.4th 1	165
People v. Doss (1992) 4 Cal.App.4th 1585	135
People v. Douglas (1987) 193 Cal.App.3d 1691	140
People v. Dunkle (2005) 36 Cal.4th 861	82
People v. Duran (1976) 16 Cal.3d 282	86, 95-99
People v. Edelbacher (1989) 47 Cal.3d 983	172
People v. Farman (2002) 28 Cal.4th 107	188, 194, 209

TABLE OF AUTHORITIES (continued)

	Page
People v. Ferraez (2003) 112 Cal.App.4th 925	141
People v. Fierro (1991) 1 Cal.4th 173	77, 86, 116
People v. Frye (1998) 18 Cal.4th 894	205
People v. Funes (1994) 23 Cal.App.4th 1506	143, 146
People v. Gallego (1990) 52 Cal.3d 115	200, 202-206
People v. Gardeley (1996) 14 Cal.4th 605	134, 139, 140, 142
People v. Geier (2007) 41 Cal.4th 555	165, 171
People v. Ghent (1987) 43 Cal.3d 739	194
People v. Gonzalez (2005) 126 Cal.App.4th 1539	143, 146, 187, 190
People v. Goodwillie (2007) 147 Cal.App.4th 695	66
People v. Gray (2005) 37 Cal.4th 168	208, 210
People v. Guerra (2006) 37 Cal.4th 1067	201-203, 205, 207
People v. Gutierrez (2002) 28 Cal.4th 1083	171

TABLE OF AUTHORITIES (continued)

	Page
People v. Hall (1986) 41 Cal.3d 826	165, 169, 171, 173, 175, 176, 180
People v. Hardacre (2001) 90 Cal.App.4th 1392	79
People v. Harvey (1991) 233 Cal.App.3d 1206	140
People v. Heard (2003) 31 Cal.4th 946	189
People v. Hillhouse (2002) 27 Cal.4th 469	202, 209
People v. Hinton (2006) 37 Cal.4th 839	207, 210
People v. Holt (1997) 15 Cal.4th 619	152
People v. Hughes (2002) 27 Cal.4th 287	207
People v. Jablonski (2006) 37 Cal.4th 774	210
People v. Johnson (1970) 13 Cal.App.3d 1	76, 83
People v. Jones (2003) 30 Cal.4th 1084	207, 208
People v. Kaurish (1990) 52 Cal.3d 648	172
People v. Kenner (1990) 223 Cal.App.3d 56	82, 85

TABLE OF AUTHORITIES (continued)

	Page
People v. Kondor (1988) 200 Cal.App.3d 52	193
People v. Koontz (2002) 27 Cal.4th 1041	66
People v. Lamer (2003) 110 Cal.App.4th 1463	192-194
People v. Lewis (2006) 39 Cal.4th 970	94-96
People v. Mar (2002) 28 Cal.4th 1201	95-98, 105-108, 114, 115
People v. Marsden (1970) 2 Cal.3d 118	77
People v. Marshall (1997) 15 Cal.4th 1	74
People v. Martinez (2003) 113 Cal.App.4th 400	146, 147
People v. Maury (2003) 30 Cal.4th 342	207, 208
People v. Michaels (2002) 28 Cal.4th 486	208
People v. Mickey (1991) 54 Cal.3d 612	190
People v. Millwee (1998) 18 Cal.4th 96	94, 164, 188, 201
People v. Montiel (1993) 5 Cal.4th 877	204

TABLE OF AUTHORITIES (continued)

	Page
People v. Morales (2001) 25 Cal.4th 34	152
People v. Morrison (2004) 34 Cal.4th 698	208
People v. Nakahara (2003) 30 Cal.4th 705	201-203, 205, 206
People v. Ochoa (2001) 26 Cal.4th 398	135
People v. Olguin (1994) 31 Cal.App.4th 1355	143
People v. Partida (2005) 37 Cal.4th 428	94, 148-150, 164, 188
People v. Pompa-Ortiz (1980) 27 Cal.3d 519	74, 77, 79
People v. Pride (1992) 3 Cal.4th 195	90
People v. Prieto (2003) 30 Cal.4th 226	189, 190, 208-210
People v. Prince (2007) 40 Cal.4th 1179	174
People v. Redmond (1981) 29 Cal.3d 904	192
People v. Roberts (1992) 2 Cal.4th 271	210
People v. Robinson (2005) 37 Cal.4th 592	165, 166, 173, 175

TABLE OF AUTHORITIES (continued)

	Page
People v. Roehler (1985) 167 Cal.App.3d 353	193
People v. Saddler (1979) 24 Cal.3d 671	192-194, 197
People v. Scheid (1997) 16 Cal.4th 1	142
People v. Slaughter (1984) 35 Cal.3d 629	80
People v. Smith (2003) 30 Cal.4th 581	207, 208
People v. Smith (2005) 35 Cal.4th 334	207, 209
People v. Snow (2003) 30 Cal.4th 43	210
People v. Stanley (2006) 39 Cal.4th 913	80
People v. Stewart (2004) 33 Cal.4th 425	73
People v. Tafoya (2007) 42 Cal.4th 147	89
People v. Taylor (2001) 26 Cal.4th 1155	209
People v. Tena (2007) 156 Cal.App.4th 598	73-77, 80, 82, 84
People v. Tuilaepa (1992) 4 Cal.4th 569	91, 93

TABLE OF AUTHORITIES (continued)

	Page
People v. Turner (1990) 50 Cal.3d 668	204
People v. Valdez (2004) 32 Cal.4th 73	62, 194
People v. Ward (2005) 36 Cal.4th 186	90, 92, 142, 208
People v. Welch (1999) 20 Cal.4th 701	61-63, 67, 71
People v. Williams (1997) 16 Cal.4th 153	143
Ring v. Arizona (2002) 536 U.S. 584	207
State v. Espinoza (Utah 1986) 723 P.2d 420	136
State v. Holmes (2004) 361 S.C. 333	175
Tuilaepa v. California (1994) 512 U.S. 967	207
United States v. Gonzalez-Lopez (2006) 548 U.S. 140	72
United States v. Mechanik (1986) 475 U.S. 66	80
Washington v. Cambra (9th Cir. 1997) 116 F.3d 488	76

TABLE OF AUTHORITIES (continued)

	Page
Statutes	
Evid. Code, § 210	117, 141, 142, 144, 145, 150, 188, 189
Evid. Code, § 350	142
Evid. Code, § 351	142
Evid. Code, § 352	118, 119, 146-148, 150, 167, 188
Evid. Code, § 720	117, 134, 139, 150
Evid. Code, § 801	117, 134, 139-141, 150, 187-190
Pen. Code, § 187	1
Pen. Code, § 190.2	2
Pen. Code, § 190.3	207
Pen. Code, § 245	1
Pen. Code, § 459	1
Pen. Code, § 654	2

TABLE OF AUTHORITIES (continued)

	Page
Pen. Code, § 995	76, 78, 84
Pen. Code, § 1239	2
Pen. Code, § 1259	194
Pen. Code, § 12022	1, 2

Other Authorities

CALJIC, No. 1.00	205
CALJIC, No. 2.01	201
CALJIC, No. 2.02	197, 199-201
CALJIC, No. 2.21.2	197, 201, 202
CALJIC, No. 2.22	197, 202, 203, 206
CALJIC, No. 2.27	197, 203, 204
CALJIC, No. 2.51	197, 204, 205
CALJIC, No. 2.62	191, 192, 194, 196, 197
CALJIC, No. 2.80	151
CALJIC, No. 2.81	151

TABLE OF AUTHORITIES (continued)

	Page
CALJIC, No. 2.82	151
CALJIC, No. 8.20	197, 205, 206
CALJIC, No. 8.83.1	201
CALJIC, No. 8.88	208
CALJIC, No. 17.31	197, 200

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, **v.** **FRANK KALIL BECERRA,** Defendant and Appellant.	S065573 **CAPITAL CASE**

STATEMENT OF THE CASE

In an information filed on February 27, 1996, by the District Attorney of Los Angeles County, it was alleged: in count 1 that appellant committed the crime of murder, in violation of Penal Code[1/] section 187, subdivision (a), against James Harding; in count 2 that appellant committed the crime of murder, in violation of section 187, subdivision (a), against Herman Jackson; in count 3 that appellant committed the crime of first degree residential burglary, in violation of section 459, against George McPherson; and in count 4 that appellant committed the crime of assault with great bodily injury and with a deadly weapon, in violation of section 245, subdivision (a)(1), against McPherson. It was also alleged as to count 3 that appellant personally used a deadly and dangerous weapon, a hunting knife, within the meaning of section 12022, subdivision (b). It was further alleged that the offenses charged in counts 1 and 2 are a special circumstance (multiple murder), within the meaning of section 190.2, subdivision (a)(3). (ICT 280-283.)

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1. All further statutory references will be to the Penal Code, unless otherwise indicated.

On February 27, 1996, appellant pleaded not guilty and denied the special allegations. (IICT 311; 1RT A2.) Trial was by jury. (IXCT 2807; 4RT 507, 520.)

On July 30, 1997, appellant was found guilty of first degree murder in count 1 (XCT 3042; 12RT 1464), of first degree murder in count 2 (XCT 3043; 12RT 1464-1465), of first degree burglary in count 3 (XCT 3045; 12RT 1465), and of assault with great bodily injury and with a deadly weapon in count 4 (XCT 3046; 12RT 1466). (See also XCT 3052-3053 [minute orders showing verdicts].) The jury also found the special circumstance allegation pursuant to section 190.2, subdivision (a)(3), to be true. (XCT 3044; 12RT 1465.) The jury also found the section 12022, subdivision (b), allegation to be true as to count 3. (XCT 3045; 12RT 1465-1466.)

On August 11, 1997, following the penalty phase of trial, the jury returned a verdict of death. (XCT 3079, 3082; 16RT 1945-1946.) The trial court denied appellant's motions for a new trial and to modify the verdict. (XCT 3092-3100.) On October 31, 1997, appellant was sentenced to death in counts 1 and 2. In count 3, appellant was sentenced to the upper term of six years, plus one year for the section 12022, subdivision (b) enhancement, totaling seven years, to be served concurrently. The sentence in count 4 was stayed pursuant to section 654. (XCT 3092, 3100-3110; see also Supp. ICT 5-7, 9-13, 16-25; 16RT 1972-1975.)

This appeal from the judgment of death is automatic. (§ 1239, subd. (b).)

STATEMENT OF FACTS

A. Guilt Phase

1. Prosecution

On December 24, 1994, George McPherson was waiting for Darlene Miller ("Butt Naked") to return to the hotel room, number 421, that they shared

at the Pacific Grand Hotel at 416 South Spring Street in Los Angeles. (5RT 556-558, 565, 567-569, 579-580, 632-633; 8RT 897-898.) When McPherson heard a knock at the door, he believed it was Miller and opened the door. Appellant and two other Hispanic men "burst in" to the room. (5RT 558-559; see 5RT 571-575.) Appellant pushed McPherson against the wall, held McPherson's arm behind his back, and placed a knife to McPherson's neck. (5RT 559-560.) Appellant stated, "'Where's our stuff? We want our stuff.'" (5RT 559-560.) McPherson did not know what appellant was talking about. (5RT 559.) McPherson was told that "they were looking for the stuff which Butt Naked had apparently acquired." (5RT 568.) One of the other men ordered McPherson to get down on the ground, and McPherson complied. (5RT 559-561.) While McPherson was on the ground, appellant and the two men "started ransacking" the room, "pulling out drawers," "going through everything," and "looking for their stuff." (5RT 561.) They found an empty black bag, and one of the two men said, "'This is the bag our stuff was in.'" (5RT 568-569.) When McPherson tried to get up, one of the men kicked him in the chest. (5RT 561-562.) Appellant and the two men said that they would kill McPherson. (5RT 563.) After appellant and the two men ransacked the room, they left. McPherson then left the hotel. (5RT 563-564.)

In the early morning of December 24, 1994, Darlene Miller and James Harding ("Fontain") had $5 and were trying to purchase rock cocaine from a narcotics seller inside the Pacific Grand Hotel. They took the elevator to the ninth floor to see a "connection" or "dope man" named "Tony," but he did not answer his door. After trying to find a second "connection" in the hotel, Miller and Harding contacted appellant because he had previously sold them narcotics. (5RT 581-583.) Appellant was "very high" and did not want to be bothered so he told them to wait. Instead of waiting, Miller and Harding returned to the ninth floor, but there was still no answer at Tony's door. (5RT 582-584.)

Then, Miller and Harding went downstairs to see the hotel security guard, who also sold narcotics. The guard told them to wait. After waiting for a minute, Miller and Harding went to Harding's hotel room, number 415. (5RT 584-585, 664.)

Miller and Harding returned downstairs in the elevator and saw a small, black, plastic bag under the security guard's table in the hotel lobby. Miller recalled that appellant "had dope before in the bag" and could not believe that appellant would lose that bag of narcotics while being high. Miller and Harding looked at the bag for about 10 minutes. Then, they walked towards the bag. While Miller talked to the guard, Harding kicked the bag. When cocaine started falling out of the bag, Harding picked up the bag. Miller and Harding took the stairs instead of the elevator and went to Harding's room. (5RT 585-588.)

Inside Harding's room, Harding opened the bag, and Miller saw a large amount of narcotics. (5RT 588.) Miller panicked because it was such a large amount and said, "'Oh, God, it must be his shit. He's going to kill us.'" (5RT 588.) Miller took a small piece of cocaine and left because she was scared and did not want to be involved, leaving the remainder of the cocaine with Harding. (5RT 589, 593, 649-650.) Miller told Harding, "'That's a lot of dope. There's going to be some shit behind it. That's too much dope for someone to leave and just let it pass.'" (5RT 589.)

Harding went to the ninth floor and bragged that he and Miller "had found some dope." (5RT 589-590.) Miller went to the ninth floor and denied it. Harding was giving and selling narcotics to everybody. (5RT 590, 593-594.) Miller left the hotel. (5RT 594-595.)

On December 24, 1994, Donna Meekey ("Soul Train") was initially staying with Harding in a room on the ninth floor of the hotel when she saw him with a large amount of cocaine. Harding began selling the cocaine. (5RT

656-658, 660-664.) Then, Meekey went to Harding's room, number 415. Harding left his room, and other people went in and out of the room. A man came into Harding's room and said that "someone was looking for the cocaine and that they were going to kill whoever had it." Meekey was afraid for Harding because she knew he had the cocaine. When Harding returned to his room, Meekey and Harding's friend Tony suggested that Harding return the cocaine because several people were aware that Harding was in possession of the cocaine. Harding replied that he was going to return it. (5RT 664-667.)

Later on December 24, 1994, Meekey saw Harding and appellant together in Harding's room. Harding had returned the narcotics to appellant. (5RT 667-668, 683-684, 695-696.) Appellant wanted to meet Meekey so they started talking. As appellant and Meekey spent time together in Harding's room, Harding came in and out of the room because he was selling narcotics for appellant. (5RT 668-669.) Appellant was angry with Harding and "kept mentioning that he was going to kill Fontain." Appellant told Meekey that "he didn't like what [Harding] did and that he was going to kill him." Meekey tried to dissuade appellant by saying that Harding was a good person and Harding had returned the narcotics to appellant. Appellant replied, "'Well, maybe I will just break his leg or arm or something just to show him, you know, you can't do something like that to me.'" (5RT 669.) Throughout the evening, appellant continued making death threats to Harding. (5RT 670.) Appellant also said that he did not believe that Harding had returned all his narcotics. (6RT 694, 702, 705.) Inside Harding's room, appellant told Meekey at least four times that he wanted to kill Harding because Harding had not returned all the drugs. (6RT 702-705.)

At some later point on December 24, 1994, appellant and Meekey went to appellant's hotel room, number 304, and spent more time together. (5RT 670-672, 684; 6RT 712.) Appellant took off his shirt, revealing some tattoos.

When Meekey asked about them, appellant said they had something to do with a gang. (5RT 671.) Meekey asked appellant about the narcotics, and he said that "he gets quantities and keys and things from a big organization that he is involved with," "something about mafia associated." Appellant said "he did associate it with a gang." Appellant also said that he gets large quantities of drugs through either the gang or mafia. (5RT 672; 6RT 708.)

The following morning, on December 25, 1994, appellant and Meekey woke up. (5RT 673-674; 6RT 692.) Appellant said that he still wanted to kill Harding. Meekey tried to distract appellant, but appellant "wanted to rush to the room where Fontain was." (5RT 674; 6RT 705.) Appellant and Meekey went to Harding's room and eventually saw him. Appellant, who was carrying a knife concealed in his sleeve, appeared very angry. Harding appeared nervous. (5RT 674-675; 6RT 706-708, 714-717, 721.) Meekey hugged Harding and told appellant to walk her to the bus stop. On the way to the bus stop, appellant was still angry at Harding and was "still saying he was going to kill him." (5RT 675-676; 6RT 693.)

On December 24 or 25, 1994, in response to telephone calls, Miller returned to the hotel. (5RT 595; 6RT 810-811, 830-831.) In a parking lot near the hotel, Miller, who was with Donte Vashaun, returned the cocaine in her possession to appellant. (5RT 594, 596, 598-599, 637-641, 652, 654; 6RT 791-792, 796-800, 811-812.)

On December 25, 1994, appellant told Miller that "if [she] didn't give him his dope back that every time he sees [her] he is going to kick [her] ass and make [her] pay for the dope." Appellant was with two men, one who had an 18th Street gang tattoo on his arm. Miller told appellant that she had already given appellant what she had. Appellant told Miller that "if [she] did not give him the rest of his dope that [appellant] and his homeboys would fuck [her] up." (5RT 597-601; see also 6RT 712-714.)

At some later date, Miller returned to the hotel to find that the room she shared with McPherson had been ransacked. Miller, Vashaun, and Miller's friend were inside the room at that time. Miller also noticed that a cord from her hot plate had been cut. (5RT 601, 605, 607-608.) Earlier, Vashaun had knocked on the door of Harding's room, but no one responded. Miller and Vashaun were about to go up the stairs when they saw appellant go around to Harding's room. The "door slammed when he went around there." Miller and Vashaun peeked around the corner and waited. Appellant came out of Harding's room and went back down the hallway. After appellant left Harding's room, Vashaun went to Harding's room. Miller heard the noise of a door being pushed. Vashaun came back to Miller and told her that Harding and Herman Jackson were dead in that room. Vashaun appeared "depressed" and "just sad." (5RT 601-605, 608, 643-647.) Vashaun discovered the bodies between 10:00 p.m. on December 27, 1994, and around midnight on December 28, 1994. (6RT 800-803; 8RT 899.) Appellant had gone in and out of Harding's room about 10 minutes before Vashaun discovered the dead bodies in that room. (5RT 604, 642-643.) Vashaun, followed by Miller and "Nadine," went to the ninth floor and told "Red" that Harding and Jackson were dead. Vashaun and Miller went to the hotel front desk and had the police called. (5RT 608; 6RT 802-803, 828-830.)

About 20 minutes later, the police arrived at the hotel. (5RT 608.) When the police arrived, Miller saw appellant, who was by the hotel lobby, leave the hotel "in a hurry." (5RT 608-609, 634-635.) Miller and Vashaun spoke to the police at the hotel on December 28, 1994. (5RT 609, 649; 6RT 754-755, 761.)

About a day and a half to two days before Wilson Berry learned about the deaths of Harding and Jackson, there was an incident in Berry's hotel room involving appellant and Harding. Appellant, who was concerned and frantic,

had told Berry that appellant's drugs were missing. Appellant only went between Berry's room and appellant's room, which were both on the same floor, and the only other people appellant had seen were Harding and Miller. In order to help appellant, Berry began making telephone calls in the hotel. Berry called Harding, Harding asked to speak to appellant, and Harding came to Berry's room. (8RT 973-976, 978-979.) Initially, Harding denied that he had the drugs, but then Harding pulled out an ounce or an ounce and a half and gave it to appellant. When appellant asked Harding about the rest of it, Harding replied that was all he had. Appellant did not appear to believe Harding. (8RT 976-978.) After Harding left Berry's room, appellant said "he knew that that wasn't all the dope" and that Harding was "disrespecting" appellant. (8RT 979-980.)

On December 28, 1994, around 12:45 a.m. or 1:30 a.m., Los Angeles Police Detective Russell Long arrived at the Pacific Grand Hotel. (8RT 896-898, 927.) When Detective Long went to room numbers 415 and 416, which were adjoined by a single open door, he saw the dead victims, Harding and Jackson, who "had been tied together and appeared to have been strangled with electrical cords." The bodies were about 18 inches away from the lamp with the glass table, whose cord had been cut. (8RT 898-899, 901-908, 910, 915, 918, 962-963.) The bodies of Harding and Jackson were transported to the coroner's office in their bound condition. (7RT 847; 8RT 915; see 8RT 916-918, 965-966.) Detective Long also went to one of appellant's rooms (number 811), the room shared by McPherson and Miller (number 421), and Jackson's room (number 302). (8RT 918-925; see also 9RT 1175.)

On December 28, 1994, eleven prints were lifted from room numbers 415 and 416 of the Pacific Grand Hotel. (See 6RT 722-728, 736, 741.) Two of the eleven prints matched appellant. (6RT 728-729.) Appellant's print (Peo. Exh. No. 6-A) was found on the table portion of a lamp with a glass table,

which was inside the living area. Appellant's print (Peo. Exh. No. 6-B) was also found on an empty Pepsi can, which was found in a trash can in the living area. (6RT 729, 735.)

On December 29, 1994, an autopsy was performed on Harding. (7RT 837-838, 840, 865.) Harding's cause of death was strangulation by ligature, specifically an electrical cord. (7RT 841, 851-854, 891.) Harding also had areas of blunt force injury to his head. (7RT 842, 845.) That same day, Jackson's autopsy was conducted. (7RT 842-843, 865.) Jackson's cause of death was strangulation. (7RT 844, 854, 891-892.) Jackson's body was bound with ligatures, specifically electrical tape and some cloth items. (7RT 844.) Jackson also had a large bruise on his chest. (7RT 844-845.) Based on the autopsies and his observations of Harding and Jackson, including the presence or absence of decomposition and Jackson's liver temperature, Dr. Eugene Carpenter, a medical examiner for the Los Angeles County Coroner's Department, believed that Jackson and Harding died about 20 to 30 hours before 6:00 a.m. on December 28, 1994. (7RT 855-857, 859-860, 864-865, 883-884, 890-891.)

At trial, Los Angeles County Sheriff's Sergeant Richard Valdemar, a gang expert, testified that appellant was an admitted 18th Street gang member and his "Sur" tattoo indicated an affiliation with the Mexican Mafia. (8RT 1000-1001, 1005, 1014-1017, 1032-1036; see also 9RT 1041-1042.) Among other things, Sergeant Valdemar testified that if a gang member, who was provided a large amount of cocaine from a gang, lost that cocaine or had it stolen, that gang member was "disrespected" by the person who took the cocaine, and the gang member would have to retaliate or make a "face-saving move," such as killing the person. A particularly heinous method of killing would have an impact on "saving face" in front of the gang. (8RT 1009-1011, 1018, 1020-1022.)

2. Defense

Salvador Kalil, who was appellant's cousin, had a business called Sal's Screen & Glass at 2469 East Colorado Boulevard in Pasadena, where appellant worked as an installation man in December 1994. On December 26, 1994, appellant arrived at work at 8:00 a.m., but Kalil decided not to work that day. Appellant came to Kalil's house at 1075 East Elizabeth in Pasadena to fix a broken toilet. After fixing the toilet, Kalil dropped off appellant in downtown Los Angeles between 1:00 p.m. and 2:00 p.m. (9RT 1050-1053.) On December 27, 1994, Kalil saw appellant because they worked from 8:00 a.m. to 5:00 p.m. (9R 1053.)

In November and December of 1994, appellant lived with his mother, Margarita Becerra ("Margarita"). Margarita was aware that appellant had been working for Kalil. She had never seen appellant with any type of weapon. After December 22, 1994, appellant was not at Margarita's home. (9RT 1087-1088.)

Appellant took the stand and testified on his own behalf. (9RT 1092-1117, 1128-1213; 10RT 1220-1292, 1296-1326.) When appellant was 13 or 14 years old, he became affiliated with a group or gang in the downtown area. (9RT 1096-1097.) At that time, appellant was "living in the street," meaning he did not live with his parents and did not like living in foster homes or group homes. (9RT 1097.) While appellant was living in the streets, he became affiliated with the 18th Street gang and became a gang member. (9RT 1098-1099.) Appellant had started using drugs when he was 15 or 16 years old and living on the streets. (9RT 1103.)

Between December 23, 1994 and December 27, 1994, appellant resided at the Pacific Grand Hotel, occupying rooms 210, 304, 720, and 811. (9RT 1105-1107.) On December 24, 1994, from midnight or 1:00 a.m. until about 6:30 a.m. or 7:00 a.m., appellant was "partying" at the Pacific Grand Hotel in

room 210 with Nadine, Linda, and Darlene Miller (Butt Naked). (9RT 1109-1110, 1156.) Around 6:30 a.m., the three women were getting loud and "tweaking" so appellant made them leave. Appellant went to a restaurant on 7th and Main and ate breakfast alone. (9RT 1110-1111.) After breakfast, appellant returned to the hotel and conducted his normal routine of selling drugs. (9RT 1111.) Around 7:30 a.m., appellant saw Miller and Donte Vashaun and conducted a narcotics transaction. (9RT 1111-1113.) Then, appellant went to the hotel room, number 701, of Wilson Berry ("Slim"). Appellant gave Berry some drugs to sell, and appellant returned to his room. (9RT 1113.) When appellant was with Berry, appellant had a quantity of drugs in a little black bag, and the drugs were packaged in chunks of rocks with each rock marked regarding its weight. (9RT 1113-1114.) When appellant left Berry's room, appellant still had his black bag of drugs with him. (9RT 1114.)

When appellant returned to his room, number 210, the hotel security guard told him that his room had been broken into so appellant changed rooms. Appellant went to room 304 and still had his bag of drugs. Then, appellant went to room 701 to tell Berry what had happened to his room. (9RT 1114-1115.) Appellant took the elevator and saw Miller and James Harding (Fontain). (9RT 1115, 1154-1155.) Appellant got off the elevator to visit Berry, and Miller and Harding continued their journey up in the elevator. (9RT 1115, 1155.) After visiting Berry in his room, appellant realized that he had somehow lost his cocaine. "Somehow between [appellant's] room, when [appellant] got on the elevator, to [Berry's] room [appellant] lost the cocaine somewhere in between." (9RT 1116.) Appellant "backtracked" where he had been and believed that Harding and Miller had his drugs. (10RT 1266.)

Appellant went through the hotel looking for his drugs. (9RT 1116, 1128.) With his 18th Street gang member friend "Lefty" and another man, appellant went to room number 421, which was the room shared by Miller and

McPherson. When McPherson opened the door, appellant pushed him against the wall, placed a knife against his neck, asked about appellant's drugs, and asked about Miller's location. McPherson replied that he did not know about the drugs or Miller's location. Appellant searched the room and found the black plastic bag his drugs had been inside. (9RT 1128-1132, 1171-1172, 1192-1198.)

After leaving McPherson, appellant, with Lefty and the other man, went to room 302, where appellant saw Herman Jackson. Appellant asked Jackson about Miller and appellant's cocaine, and Jackson replied he did not know about either. Appellant searched the room but found nothing. (9RT 1133-1135, 1175.)

Then, appellant went to Berry's room. Berry helped appellant by telephoning people in the hotel. Berry had Harding on the telephone, and appellant spoke to Harding. Appellant told Harding that if Harding would return the drugs, appellant would "work something out with [Harding]." (9RT 1135-1136.) Harding came to Berry's room and returned some of the drugs to appellant. When appellant asked about the rest of his drugs, Harding said that Miller had the remainder. Appellant made arrangements with Harding for Harding to sell drugs for appellant. (9RT 1137, 1139-1140.)

Appellant and Harding went to Harding's room, number 415, where they met Donna Meekey. Appellant, Fontain, and Meekey partied together in the room from about 6:00 p.m. to 9:00 p.m. (9RT 1137-1139.) Later that night, appellant and Meekey went to appellant's room, number 304. (9RT 1140-1141.) Appellant and Meekey returned to room 415, where Donte Vashaun answered a telephone call and met Miller. Appellant received some of his drugs from Miller. (9RT 1141-1143, 1156.) Appellant threatened Miller, telling her that she would have to pay for the remainder of the drugs that she had not returned. (9RT 1173-1174; 10RT 1282.) Since appellant received

about one and a half ounces from Miller and about two and a half ounces from Harding, appellant had received about four ounces of the five or six ounces that had been missing. (9RT 1143-1144.)

Appellant, Tyrell, and Vashaun went to a taco stand between 7th and 6th on Main Street and bought food. Appellant returned to room 415 with Tyrell and Vashaun. Meekey was in the room, and Vashaun wanted to talk to her alone, so appellant and Tyrell went to the adjoining room, number 416. Appellant ate his food in room 416 and remained in that room for about 45 minutes to an hour. (9RT 1145-1146.) Appellant left room 415 close to midnight with Meekey, and appellant and Meekey went to appellant's room number 304. In room 304, appellant calmed Meekey down because she was nervous and crying. Then, appellant and Meekey partied by smoking rock cocaine. (9RT 1146-1147.) Appellant and Meekey spent about 12 hours together in appellant's room 304 from about midnight on December 24, 1994, through about noon on December 25, 1994. (9RT 1147.) During their time together, appellant did not talk to Meekey about where he acquired his drugs. (9RT 1157.) Appellant was not a member of the Mexican Mafia, and he never mentioned the Mexican Mafia to Meekey. (9RT 1157, 1175.)

Eventually, appellant and Meekey left appellant's room and went back to room 415, and Harding was there. (9RT 1147.) Appellant and Harding argued. Harding was upset that his room was disheveled. After the argument, appellant and Meekey left room 415, and he took her to the bus stop. (9RT 1148.)

On December 26, 1994, appellant went to work at Sal's Screen & Glass in Pasadena. Appellant met Kalil at the business, but appellant fixed a toilet at Kalil's house in Pasadena. After fixing the toilet, Kalil took appellant to Los Angeles, and appellant returned to the Pacific Grand Hotel around 1:30 p.m. or

2:00 p.m. (9RT 1107-1109, 1159-1161.) On December 27, 1994, appellant went to work. (9RT 1160-1161.)

On December 28, 1994, around 1:00 a.m., appellant was arrested on the sidewalk in front of the hotel. (9RT 1166.) Appellant denied telling a detective on December 28, 1994, that his name was "'killer Frank from 18th Street.'" (9RT 1185-1186.) Appellant was interviewed by police detectives on December 28, 1994 and December 29, 1994. (9RT 1166-1179; 10RT 1298, 1302, 1304-1306.)

Appellant testified that he had nothing to do with the murders of Harding and Jackson. (9RT 1175.) Appellant never saw Jackson and Harding tied up and had nothing to do with them being tied up. (9RT 1175-1176.)

3. Rebuttal

On December 28, 1994, appellant told Detective Armando Romero at the police station that he was from the 18th Street gang and that his moniker was "killer Frank." (10RT 1327-1328, 1330.)

B. Penalty Phase

1. Factors In Aggravation

April 22, 1990

On April 22, 1990, appellant and a group of about 15 men came to the house of Scott Knapp and accused Knapp of having stolen a car stereo from one of them. Although Knapp denied stealing the stereo, they grew angry. Appellant and another man assaulted Knapp. Specifically, appellant swung a chain attached to keys at Knapp, hitting Knapp's neck. When Knapp fell, appellant continued swinging the chain at him. Appellant hit Knapp with the chain about four or five times. Another man hit Knapp in the top of the head. (12RT 1496-1501.) Knapp's injuries consisted of a red welt on his neck and a small, one-inch laceration on his head. (12RT 1503-1504, 1506.)

August 1, 1992

On August 1, 1992, Darryl Starks was in the Los Angeles County men's central jail. (14RT 1675.) Starks was a "trustee," whose "job was to escort other inmates from one section of the jail to another." (14RT 1675-1676.) That day, Starks was escorting some inmates when appellant stopped to talk to his friend, who was another trustee, in the hallway. Starks kept asking appellant to move along, since Starks would get into trouble if he did not return the inmates, but appellant did not want to return. When Starks was about to leave appellant behind and turned around, Starks was struck in the back with a push broom, and appellant was holding the broom. Starks was almost knocked down. Starks took off down the hallway, and appellant pursued him with the broom. Starks eventually ran into the laundry area, grabbed a laundry cart, and used the cart to fend off appellant. Starks ended up grabbing appellant, they tussled, and appellant bit Starks twice in the back. Starks held appellant until the police arrived. As a result, Starks had two bite marks, saw a doctor, and received a tetanus shot. (14RT 1676-1679.)

October 11, 1992

On October 11, 1992, Los Angeles Police Officer James Weigh and his partner Officer Ullum were in a police vehicle on 7th Street, just west of Alameda, when they saw four or five individuals in front of the El Troquero restaurant at 1327 East 7th Street. This area was known to Officer Weigh as a location where narcotics were bought and sold. Officer Weigh and his partner made eye contact with appellant, and appellant immediately left the group and walked into the restaurant. Officer Weigh believed that they had interrupted a narcotics transaction. The officers exited their vehicle and entered the restaurant behind appellant. Inside the restaurant, Officer Ullum asked appellant to stop and advised him that the officers were there for a narcotics

investigation. Officer Weigh asked appellant to put his hands on his head, and appellant complied. As Officer Weigh placed a grip on appellant's hands, appellant pulled forward violently and aggressively, causing both appellant and Officer Weigh to fall to the ground. Officers Weigh and Ullum struggled with appellant in an attempt to gain control of appellant's hands. During the struggle, some of the restaurant booths which were not affixed to the ground were thrown about. Appellant continued to fight, pushing Officer Weigh away and kicking with his feet. Officers Weigh and Ullum drew their batons and displayed them. While lying on his stomach, appellant looked at Officer Ullum and quickly placed his hands behind his back. (14RT 1650-1654, 1657.)

January 19, 1993

On January 19, 1993, at about 1:00 p.m., Deputy Sheriff Ronald Navarette, who was working at the men's central jail, searched appellant's cell while Deputy Trainor searched appellant's property. After searching appellant's cell, Deputy Navarette asked Deputy Trainor whether he had finished conducting his search, and Deputy Trainor said, "no." Deputy Navarette grabbed a legal folder, which had not been searched yet, and found five metal pieces wrapped in an Ace bandage. The wrapped bandage with metal pieces was about 12 inches in length. Although the metal pieces were not sharpened, they could be sharpened to a point and used as shanks, which were jail-made stabbing devices. Shanks could be used to assault other inmates or deputy personnel. (12RT 1509-1515, 1517.)

April 14, 1993

On April 14, 1993, around 3:00 p.m., Correctional Officer Greg Mason was working at Mule Creek State Prison in Ione, California. Officer Mason heard a loud noise coming from appellant's two-man cell. Officer Mason went

to the cell and saw appellant and his cellmate, inmate Mora, fighting. (13RT 1571-1575.) Mora was in the lower bunk of the bunk beds and was defending himself with his hands up, and appellant, who was the "aggressor," was striking Mora. (13RT 1575.) Officer Mason ordered appellant and Mora to stop, and they complied. Officer Mason and other staff separated appellant and Mora, handcuffed them, and escorted them out of the unit. (13RT 1576.) Lieutenant Christine Hudson, who worked at Mule Creek State Prison in April 1993, conducted a hearing based on the section 115 disciplinary report written regarding appellant's incident with Mora. A fistfight, a gang fight, and an assault on a correctional officer are all serious offenses. (13RT 1578-1583.) During the hearing, appellant admitted having been involved in the fight, said that appellant "had asked Officer Mason for a cell move for his cell partner and that Officer Mason told him he would see what he could do and get back to him," and said that appellant "had waited around two hours and he felt like that was long enough to wait, so he beat up inmate Mora." (13RT 1582.)

June 26, 1993

On June 26, 1993, at about 1:30 p.m., Correctional Lieutenant David Stark was working at Mule Creek State Prison when he heard Officer Franklin, who was in the observation post, sound a Code 3 alarm indicating an emergency because of a large fight involving approximately 50 inmates near building 1. Lieutenant Stark responded to the area of the fight. Officer Franklin had given the inmates verbal instructions over the P.A. system to stop, but not all of the inmates stopped. Appellant did not comply with Officer Franklin's order to stop. (13RT 1585-1588.) Lieutenant Stark saw appellant "kind of drawing away from the hub of the incident." (13RT 1588.) Lieutenant Stark ordered appellant to stop and to stay where he was, but appellant continued to move towards the curb. Then, appellant remained at the curb area.

After appellant was at the curb, the whole area was controlled and contained. (13RT 1588-1590.) The inmates involved in this incident were mostly 18th Street gang members or associates, and there were a few white inmates. Members of various gangs do not all get along once they are in state prison. (13RT 1589-1590.)

On June 26, 1993, at about 1:30 p.m., Correctional Officer Kenneth Franklin was working at Mule Creek State Prison in the observation booth in Facility A when he saw about 40 inmates involved in a fight. There were two or three white inmates who were fighting with 15 or 20 Hispanic inmates. (13RT 1592-1594.) Sergeant Franklin yelled over the P.A. system, "'Everybody get down.'" (13RT 1594.) Initially, all the inmates got down, and the fight stopped. Then, at least 20 to 25 of them attempted to get away from the area, and it was the job of responding staff to approach the area and identify inmates who were involved in the situation. This melee involved about 15 or 16 18th Street gang members fighting the white inmates. (13RT 1594-1596.)

Facility Captain Michael Enos was assigned to the Department of Corrections within the Parole Community Services Division. On July 28, 1993, Enos was a correctional lieutenant who conducted a hearing regarding the gang melee that occurred in the A yard on June 26, 1993. The section 115 rule violation report was classified as serious. At the hearing, appellant admitted the charge of participating in a riot and stated that he was there. Then, appellant indicated that he would not make further statements. (13RT 1600-1603, 1609.) However, appellant then stated, "'I will not program on the line here at Mule Creek.'" (13RT 1603-1604.) Captain Enos concluded that appellant "meant he wasn't going to abide by the rules and regulations of the department and the institution as well as the program, programming the facility, that he wasn't going to comply with the operational requirements there of all inmates, that he was going to be a disruptive force on the yard." (13RT 1604-1606.) Appellant

also stated, "'I refuse to abide by the petty bullshit program, pressures put on inmates by the program administrator.'" The program administrator was R. Worthy. (13RT 1606.) Appellant also said, "'If I get put back on the line, I'll do whatever I have to, like go off on the first person I see, to get level 4 points.'" (13RT 1607.) Captain Enos believed that by this statement, appellant "indicated that he again was going to be a major disruptive force, in that that is one of the most serious offenses that warrants placing an inmate in ad seg, removing them from the mainline, main yard," and that appellant "was most likely referring to committing a division 8 offense," which was one of the most serious offenses, which included assaulting an individual, causing very serious injury and typically associated with a weapon. (13RT 1607-1608.) Appellant also stated, "'I max out in November and there ain't anything you or this prison can do to touch me.'" (13RT 1608.) Captain Enos concluded that by this statement, appellant was telling Captain Enos that appellant "had a max date discharge, that it was calculated for him to be released and that no matter what he did we wouldn't be able to keep him." (13RT 1608.)

July 7, 1993

On July 7, 1993, in the evening, Correctional Officer Tom Arlitz was working in the administrative segregation unit at Mule Creek State Prison in Ione, California when he responded to appellant's cell as a result of some loud disruptive type behavior. When Officer Arlitz reached appellant's cell, appellant's cellmate Bermudez claimed that he needed to be removed from the cell because he and appellant were having problems. Officer Arlitz told Bermudez that he was not able to move Bermudez at that time but would check it out. Within a couple of seconds, appellant began striking Bermudez with clenched fists about Bermudez's head and upper body area. (13RT 1615-1617.)

July 25, 1993

On July 25, 1993, at approximately 12:15 a.m., Correctional Officer Roger Merritt was working at Mule Creek State Prison in Ione, California, conducting a security check in his assigned building, building 12 ad seg unit, when he saw a cell that had its window completely covered. That cell, number 130, had a towel hanging in front of its window. Officer Merritt tapped on the cell's door and ordered the inmate, appellant, three times to remove the towel from the window so he could see inside the cell. Appellant did not comply. Officer Merritt left for five minutes and returned. Officer Merritt knocked on the cell door and ordered appellant to remove the towel again. (13RT 1619-1622.) At that point, appellant threw urine underneath the cell door at Officer Merritt and said, "'How does it feel to have my piss on your clean clothes, asshole?'" (13RT 1622-1623.) The urine got on Officer Merritt's pants, shoes, and socks. After a sergeant arrived, they opened the cell. (13RT 1622.) Officer Merritt wrote a disciplinary report regarding this incident. Officer Merritt also wrote an informational report asking the chief medical officer to test appellant for AIDs, but his request was denied. (13RT 1623-1624.) About a month later, while Officer Merritt was working in building 12, around 7:30 p.m., he passed by appellant's cell, and appellant yelled out at Officer Merritt, "'I have AIDs, motherfucker. I hope you die and give it to your wife and kids.'" (13RT 1624.) Appellant also held up the report written by Officer Merritt asking for appellant to be tested for AIDs and said, "'You can't have me tested for AIDs, and I hope you just want to worry, worry, worry.'" (13RT 1624.) Appellant also said, "'I want you just to worry, worry, worry. You are going to die, mother fucker.'" (13RT 1625.) Officer Merritt had a wife and two children. Officer Merritt again asked that appellant be tested for AIDs. (13RT 1624-1625.)

August 19 & 20, 1993

On August 19 and 20, 1993, Correctional Officer Steven Ximenez was working at Mule Creek State Prison. (13RT 1629-1630.) On August 19, 1993, in the evening, Officer Ximenez was working in the administrative segregation housing unit, which is the highest security housing unit at the facility and specifically designed to hold inmates who are a threat to other inmates or staff members. That evening, Officer Ximenez heard a loud commotion and responded to the cell where he saw appellant and inmate Romero involved in an altercation. When Officer Ximenez came up to the cell, they had stopped fighting and were catching their breath. (13RT 1630-1631.) Appellant stated, "'You better get this motherfucker out of here because I'm going to kick his ass.'" (13RT 1631.) Officer Ximenez told appellant to calm down, that Officer Ximenez would notify a supervisor, and that they would remove him from the cell. When Officer Ximenez went to notify his supervisor, appellant and Romero started fighting again. When Officer Ximenez returned to the cell and ordered them to stop fighting and sit on the floor, they complied. Staff responded, and appellant and Romero were removed from the cell. Appellant had a few injuries to his lip and scrapes and bruises. Appellant received medical treatment and was returned to the cell. Romero was moved to another cell. (13RT 1631.)

The following day, on August 20, 1993, appellant was in a cell by himself and was being disruptive. (13RT 1631-1632.) Appellant was being very loud, was yelling, and was throwing "fish lines" out onto the tier. "Fish lines" were small torn strips of sheets which were used to pass items between inmates. (13RT 1632.) When Officer Ximenez went to talk to appellant, appellant grabbed a cup from his sink, came to the door, and threw what he claimed was urine below the cell door, onto Officer Ximenez's shoes and

jumpsuit. Appellant started laughing and said, "'Ha ha, motherfucker. I just threw piss on you.'" (13RT 1632-1633.)

July 22, 1994

On July 22, 1994, Department of Corrections Correctional Officer James Barneburg was working at Pelican Bay State Prison in Crescent City, California, which was a maximum security prison, specifically in the security housing unit (SHU), which houses violent people who commit offenses in the prison. That day, in the SHU unit, Officer Barneburg was performing a body search on an inmate when he heard an altercation in the adjoining pod, which is a section of the housing unit. When Officer Barneburg reached the pod, he saw two inmates, appellant and Vargas, engaged in mutual combat inside their cell. According to policy, the control booth officer opened the door to allow one of the inmates to exit, but when the door was opened, both appellant and Vargas exited the cell and continued their fight on the tier, which was a balcony on front of the cells. Eventually, the fight was broken up. (15RT 1768-1772, 1777.) Officers assigned to Pelican Bay State Prison SHU unit wear a jumpsuit with a stab-proof vest because of past occurrences of attempted assaults on staff. Inmates inside the SHU still get hold of stabbing weapons or make such weapons out of paper clips, staples, or metal pieces. (15RT 1772-1774, 1777.)

August 27, 1994

On August 27, 1994, Correctional Sergeant Don James was working at Pelican Bay State Prison in Crescent City, California, when he was called to the unit by the control booth officer and saw appellant and inmate Esparza in the cell. Esparza was standing at the cell door, holding some material or something to his head, wiping blood from his head, and claiming that he had fallen from the top bunk onto the floor. Esparza's explanation did not seem reasonable to

Sergeant James because there was blood splattered in numerous areas of the cell. With assistants, Sergeant James handcuffed appellant and Esparza and took them to the clinic. (15RT 1780-1781, 1784.) During that time, Esparza stated, "'You're not going to put him back in there in that cell with my television, are you?'" (15RT 1782.) Based on Esparza's statement, Sergeant James believed that there had been mutual combat between appellant and Esparza. Although both appellant and Esparza had injuries, Esparza was more injured. (15RT 1782-1783, 1786.) Esparza had bruises, scrapes, cuts, and a three-and-a-half gash on his head "that went clear to the skull." (15RT 1782.) At the infirmary, Esparza received numerous stitches to his head. (15RT 1783.) Appellant had scratches on his neck, redness to his right shoulder, redness and tenderness to his arm, an abrasion on his deltoid, and a superficial laceration on his finger. (15RT 1782.)

January 10, 1995

On January 10, 1995, Los Angeles County Deputy Sheriff William McCrillis was working at the jail facility as one of the dorm officers when he saw appellant. Deputy McCrillis searched appellant's bunk, lifted up appellant's mattress, and found secreted inside a newspaper, several personal papers, mail, and a jailhouse-made metal shank. The shank was about four inches long and two inches wide. The shank was angled at one end to a sharp point and had wrapped cloth material on the other end for a type of handle. (14RT 1658-1661, 1663-1664.)

March 2, 1995

On March 2, 1995, Los Angeles County Deputy Sheriff Brian Hunt, who was working at the men's central jail, was conducting a cell search on a row where appellant was housed. When Deputy Hunt passed appellant's single-man

cell, appellant threw a cup of liquid through the cell bars at Deputy Hunt. The liquid smelled like a mixture of bleach and urine. Deputy Hunt ducked, but some of the liquid splattered on him. Appellant went to the back of his cell and dipped his cup into his toilet in an attempt to throw more. Deputy Hunt and another senior deputy sprayed appellant with mace. Appellant was handcuffed, removed from his cell, and escorted to the clinic to wash his eyes and irritated skin. (12RT 1518-1523.) At the clinic, appellant told Deputy Hunt, "'I hope you like getting piss thrown on you, you motherfucker.'" (12RT 1522.)

April 20, 1995

On April 20, 1995, at about 6:20 p.m., Deputy Sheriff James Bickel was working at men's central jail assigned to the security movement team when he searched appellant's single-man cell in the administrative segregation housing. In appellant's cell, Deputy Bickel found contraband including excess linen, excess clothing, 20 capsules of aspirin, and a container of bleach. (14RT 1665-1667, 1669-1670.)

July 23, 1995

On July 23, 1995, Los Angeles County Deputy Sheriff David Dombrowski was working at central jail, assigned as the law library deputy, when he saw appellant, who was in pro per. That day, Deputy Dombrowski allowed appellant to enter the law library. After his time in the law library, Deputy Dombrowski returned appellant to his row, where he was allowed to go back to his cell. Appellant refused to go back to his cell. After several opportunities to return to his cell, appellant finally returned to his cell. After he was put inside his cell and the gates were closed, Deputy Dombrowski approached the cell and asked appellant if there was a particular problem. (14RT 1671-1672.) Appellant became agitated and threatened Deputy

Dombrowski, saying he would assault Deputy Dombrowski if given the opportunity the next time the gates were open and threatened to put Deputy Dombrowski in a "body bag." (14RT 1672.) Deputy Dombrowski took appellant's threats seriously because appellant claimed to have association with the Mexican Mafia, and Deputy Dombrowski had some prior knowledge as to why he was in custody or what he was being charged with. (14RT 1674.)

September 28, 1995

On September 28, 1995, Los Angeles Police Detective Fred Faustino was in Division 45 in the courthouse, seated behind the bailiff waiting for an unrelated criminal matter when he saw appellant arguing with the judge and his public defender. Appellant requested pro per status, and Judge Horowitz denied the request. At that time, appellant started yelling at the judge. (14RT 1682-1684.) The judge ordered appellant to sit, and appellant shouted, "'If you fuck with me, I'll fuck with you.'" (14RT 1684.) Appellant turned and started walking towards the lockup door, when he turned to face his attorney and threw a bundle of pencils that missed him and fell into the front row of the courtroom where about three or four children were seated. The pencils which were thrown in the direction of appellant's public defender had sharpened ends on them. (14RT 1684, 1686.)

November 25, 1995

On November 25, 1995, Los Angeles County Sheriff's Department Sergeant Salvador Munoz was working at men's central jail in the office of Operation Safe Jails, where gang investigators interview, classify, and categorize inmates regarding where they are to be housed within the jail system. In the office, Sergeant Munoz saw and heard Deputy Mendoza having a conversation with appellant. Appellant was talking about his gang affiliation

and where he wanted to go within the men's central jail. Appellant was in propria persona, and he spoke about his co-counsel, who was a public defender. (14RT 1686-1689.) Appellant said that he had assaulted his public defender in open court, that he wanted his public defender to depart from his case so he could handle his case himself, that the public defender and judge had refused to allow that to happen, and that appellant was going to assault the public defender on the next court appearance. (14RT 1689.) Appellant also said that "he would do whatever it takes, go through whoever he had to go through to get to the attorney, his public defender." (14RT 1689.) Sergeant Munoz believed that appellant "would kill, assault anyone in his way to accomplish his act." (14RT 1690.) Appellant said, "'I'll just take out who I have to,'" and Sergeant Munoz "inferred that to mean that he would kill whoever he has to to get to his objective, who was at that time Mr. Fisher." (14RT 1691-1693.) Appellant "was talking about his prison activity when he was in prison before at Pelican Bay and that he had been involved in a stabbing of an inmate and some other assaults. And the reason that he wanted to be moved to 1700, this particular module that he wanted to go to was because the brothers, the big homeys, Mexican Mafia members, were housed there and he wanted to be there and have that association with them." (14RT 1690.) Appellant also mentioned assaulting a staff member at Pelican Bay and admitted assaults on staff. (14RT 1690-1691.) Appellant said that he was involved in an assault on a deputy. (14RT 1691.) As a result of hearing appellant's statements, Sergeant Munoz generated a report, made some notifications, requested a special handling of appellant, and attempted to located Fisher. Sergeant Munoz advised Fisher of appellant's statements. Sergeant Munoz took appellant's threats seriously. (14RT 1693-1694.)

On November 25, 1995, Deputy Joe Mendoza was working as a gang unit deputy, Operation Safe Jail, and was interviewing appellant to ascertain his

gang affiliation. Appellant was housed in a high security unit at men's central jail. Appellant said that he was from 18th Street gang and that his moniker was Loquito. Appellant told Deputy Mendoza about incidents he had been involved in at Pelican Bay and at men's central jail, and Sergeant Munoz was about 16 feet away from them, and Sergeant Munoz got closer at some point. Sergeant Munoz's report accurately showed what appellant had told Deputy Mendoza. Appellant told Deputy Mendoza about stabbing someone at Pelican Bay. Appellant told Deputy Mendoza that he threw pencils at his public defender and that he did not want him to be his attorney anymore. (14RT 1698-1701.) Appellant also said, "I'll just take out who I have to." (14RT 1702.) Deputy Mendoza took that to be a serious threat and understood that "when inmates and gang members say that, you know, basically what they are telling me, it doesn't matter what they do, it's to no consequence to them, what their actions will be or the outcome to them, as long as they take care of it, which means stabbing somebody, killing somebody. It is just no consequence because they are in custody and they are going to do what they are going to have to do to meet their goal." (14RT 1702.) Appellant did not tell Deputy Mendoza about an affiliation with the Eme, the Mexican Mafia. (14RT 1702.) Appellant admitted being related to a Sureno since he had a Sur tattoo on his leg. Appellant also wanted to be housed downstairs on Baker Row which is a row where Mexican Mafia members are housed. (14RT 1702-1703.)

January 21, 1996

On January 21, 1996, Los Angeles County Deputy Sheriff Brian Hunt was conducting a security walk with Deputy Kline down a "catwalk," which is a corridor adjacent to a row of cells. The catwalk has glass with a one-way mirror so that the inmates can be observed without seeing the observers. (12RT 1523.) Deputy Hunt saw appellant receive an object wrapped in a towel,

through the bars, from the inmate in the cell next to appellant's cell. Appellant unwrapped the towel and observed three metal objects. Appellant attempted to break one of the larger metal pieces by propping it on the ground at a 45 degree angle and trying to snap it in half with his foot. This larger metal piece was about six inches by eight or ten inches. It is common for inmates to break larger pieces of metal into smaller pieces to make jailhouse shanks. Metal is contraband in county jail. Deputy Kline decided to enter the row to recover the metal pieces. Before Deputy Kline entered the row, appellant wrapped the pieces back into the towel and handed the towel back to his cell neighbor. The cell neighbor placed the towel containing the pieces under the toilet in his cell. (12RT 1523-1526, 1530.)

February 16, 1996

On February 16, 1996, Los Angeles County Deputy Sheriff Brian Hunt escorted appellant to the shower and searched appellant's towel and other property he had taken to the shower. Deputy Hunt found a razor blade wrapped in tissue paper. (12RT 1532-1533.) When Deputy Hunt asked appellant why he had a razor blade and why he needed it in the shower, appellant replied, "'To sharpen my pencils.'" (12RT 1533, 1536.) When Deputy Hunt asked appellant why he would want to do that in the shower, appellant did not have an explanation for why he would want to sharpen his pencils in the shower. Razor blades are contraband. Although the inmates are issued razors for shaving purposes, when the actual razor is taken out, it can be used as a slashing device. Deputy Hunt had seen inmates use razors as slashing devices on other inmates or deputies. (12RT 1533-1534.)

October 28, 1996

On October 28, 1996, at about 9:30 a.m., Los Angeles County Deputy Sheriff Steven Turpen was working at men's central jail, in the maximum security area containing single-man cells. Deputy Turpen and his partner Deputy Yotti searched appellant's cell and found a jail-made club under appellant's mattress of his cell bunk. The club was about 15 to 18 inches long and one and a half inches in diameter. The club was made out of tightly rolled newspapers and shredded pieces of bed sheet. The club was very hard, almost as if it were made of wood. Deputy Turpen also found a razor blade that had been removed from the plastic razor handle. (14RT 1641-1646, 1648.)

December 5, 1996

On December 5, 1996, at about 1:00 p.m., Los Angeles County Sheriff's Sergeant John Steele was working at the inmate reception center at the county jail when he attempted to interview appellant inside an isolation cell. Sergeant Steele opened the metal door of the isolation cell and stood inside the doorway while appellant was sitting on a bench inside the cell. Sergeant Steele tried several times to get a statement from appellant about a prior incident, but during the interview, appellant stood up numerous times, which Sergeant Steele believed posed a threat to him. Sergeant Steele continuously told appellant to sit down and relax. When appellant continued to step up, Sergeant Steele decided that he would terminate the interview for his own safety and return later. Sergeant Steele stepped out of the doorway, closed the cell door, and placed the key into the door in order to lock it. At this point, appellant kicked or forced the door open, which pushed the door towards Sergeant Steele, hitting him on the right cheek and leaving a small red mark. (15RT 1754-1758.)

January 2, 1997

On January 2, 1997, Deputy Sheriff Lawrence Van Daele was working at men's central jail when he searched appellant in preparation to escort him to the exercise yard. During his search of appellant, Deputy Van Daele found a jail-made handcuff key, which was a homemade key used to open handcuffs. The key was made out of packing staple from a box. (14RT 1728-1730.)

February 5, 1997

On February 5, 1997, at 8:30 p.m., Deputy Sheriff Elwood Crane was working at men's central jail in module 1750, which had single-man cells, walking a nurse to the inmates who take medication. While Deputy Crane was handing out mail, the nurse was walking a few cells behind him doing "pill call." (14RT 1709-1712.) When Deputy Crane was walking between cell number 18 (appellant's cell) and cell number 19, he felt a jabbing towards his right rear side. Appellant was closest to Deputy Crane on the back and right side. Deputy Crane jumped back immediately and saw a spear object protruding from the cell. Deputy Crane immediately ran off the row with the nurse. Later, the spear-like object, which consisted of approximately 12 feet of rolled-up magazines and would be around five or seven and a half feet long, was recovered from an empty cell, number 21. It was common for inmates to pass things down the row because the cells are close enough to each other. (14RT 1712-1717, 1722-1727.) Deputy Crane believed that the inmates in that row wanted to "get" Deputy Crane because a week earlier, Deputy Crane and another deputy saw inmates in cell numbers 20 through 24 drinking illegal "pruno," which was a jail-made alcohol. Deputy Crane informed his senior deputy about the drinking on the row, and the inmates on the row were searched. (14RT 1717-1718.) In that row, cell numbers 20 through 24 were Mexican Mafia, cell number 19 was a black male, and cell number 15 was a

Hispanic male. (14RT 1717.) The inmate in cell number 20 was the "shot caller" for the row, who tells the inmates on the row what to do. Appellant was one of the inmates who followed the shot caller on that row. (14RT 1718-1721.)

On February 5, 1997, Deputy Brian Allen was assigned to 1750 to transport inmates to the various places throughout the jail. Deputy Allen, who was in the control booth, saw Deputy Crane walking pill call with a nurse and another deputy when he heard a loud knock on the window. Deputy Allen saw that the deputies needed to get off the row so he opened the door, and the deputies entered the booth. In response to what the deputies said, Deputy Allen went to the corridor across from the row, which has one-way glass, to observe the inmates and see if there was a weapon. Deputy Allen saw, starting with cell 15, a brown paper bag and inmates seeming to place something in the bag. The bag went from cell 15 to cell 17 to cell 18 to cell 19 to cell 20. From cell 20, the bag was thrown into an empty cell, cell 21. Appellant was in cell 18. When the bag was passed to cell 18, it looked like appellant was putting something in the bag. The paper bag found in cell 21 contained another small paper bag that had pieces of magazines and newspapers which were rolled tightly and tied together with string, and these pieces formed together to make a long rod. (15RT 1758-1762, 1766.)

February 16, 1997

In February 1997, Derek Brown was in the Los Angeles County jail in module 1750 with appellant, which was the high-power and protective custody section. Brown was in protective custody. Brown was in the cell next to appellant's cell. Brown saw appellant receive "punishment food" called "jute ball" instead of regular food. (15RT 1736-1738.) On February 16, 1997, Brown was hanging up a T-shirt to dry on the bars when appellant reached his

hand out and sliced Brown's arm twice with a razor blade. Brown went to the sink because he was bleeding and placed toilet paper on his arm to stop the bleeding. When Brown went to the bars to move his T-shirt, appellant tried to cut him but did not succeed. (15RT 1738-1740.) During another incident, when appellant received punishment food and Brown received regular food, appellant threw human waste in a cup at Brown. The human waste hit Brown's face and got into his food. Appellant continued throwing human waste at Brown over and over again. When Brown reported appellant's actions to a deputy, Brown was moved from his cell to another cell which was two cells away from appellant. Appellant continued to throw human waste at Brown even after he was moved to the other cell by throwing the waste at him when Brown came out to take a shower. (15RT 1740-1743.) Appellant threatened Brown, saying he would slice his throat if he ever got a chance. Appellant also said he would do the same thing to Brown's family. (15RT 1743.) Appellant said he would rape and kill Brown's wife and 14-year-old daughter. Brown took these threats seriously and told his wife and oldest daughter about the threats. (15RT 1744.) Appellant felt anger towards Brown because he felt disrespected when Brown would not give appellant Brown's food. (15RT 1743-1744.) At the time of the penalty phase, Brown was incarcerated in state prison after pleading to voluntary manslaughter. (15RT 1745.)

May 12, 1997

On May 12, 1997, Los Angeles County Deputy Sheriff Terry Stedman escorted appellant from one county jail cell to another cell in the discipline row because appellant had broken the plexiglass in front of the first cell. Appellant's hands were handcuffed behind his back, he had a waist chain, and he had handcuffs and a chain on his legs. On his way to the second cell, appellant was agitated and refused to comply with instructions. When appellant

reached the second cell area, the waist chain was taken off him. Appellant was placed in the second cell. Inside this cell, appellant sat down on the bed, lifted his legs, and moved his handcuffed hands from behind his back to his front. This posed a security risk to the deputies because appellant's hands were now in front of his body. Appellant refused to allow the deputies to take off the handcuffs on his hands or legs. Appellant was screaming that he wanted to talk to a sergeant or lieutenant. Appellant rubbed the handcuffs on his hands against a steel table inside the cell and broke the metal links between the handcuffs on his hands. Appellant also rubbed the handcuffs on his legs against the table and also broke these handcuffs apart. A lieutenant arrived, and appellant was screaming about his property. The lieutenant had appellant's brought to his cell, but appellant continued to scream that part of his property was missing. Appellant became very boisterous with the lieutenant. The deputies had taken off the broken handcuffs on appellant's hands. After the deputies took off the chains from appellant's legs, appellant became outraged and out of control and spoke very disrespectfully to the lieutenant. (12RT 1536-1545, 1550, 1552-1555, 1558.) When Deputy Stedman told appellant that the lieutenant deserved respect, appellant "went nuts" and threw a punch through the bars which hit Deputy Stedman in the shoulder. (12RT 1545, 1548-1549.) Appellant ran to the back of the cell and continued to curse and say he was going to spit on them and kill them. (12RT 1545.) Appellant continued to scream that he was going to "get [them] or fuck [them] up on the street" if "he ever saw [them] again." (12RT 1546.)

May 13, 1997

On May 13, 1997, Los Angeles County Deputy Sheriff Leonard Lindenmayer went to the area of appellant's cell in response to a call by Deputy McCowan. When Deputy Lindenmayer reached appellant's cell, he saw that

appellant had climbed up on the cell bars, wrapped his hand in a towel or T-shirt, repeatedly beat the light fixture in his cell, and yelled profanities. Appellant continued this conduct for about 10 or 15 minutes, loosening the heavy metal screen in the light fixture and breaking the bulb. Appellant repeatedly threw part of the broken metal screen from the light fixture at the security glass which separated his cell from the deputies, causing damage to the security glass. Lieutenant Johnson, Sergeant Williams, and an extraction team arrived. They spoke to appellant, and appellant came out of his cell and was handcuffed and placed in ankle restraints and chains. (12RT 1558-1560.) While appellant was being escorted to another cell, he told Deputy Lindenmayer, "'See, I told you I was going to tear up the cells.'" (12RT 1569.). Before appellant was placed in this second cell, the cell had attached to its walls or floor, a metal stand with a wash basin, a toilet, and a metal bed frame with a mattress. The handcuffs and shackles were taken off appellant, and appellant was placed in this cell. Appellant was given food, the cell door was secured, and the deputies left. About 15 minutes later, another deputy, who worked in an area of the jail just below appellant's cell, called Deputy Lindenmayer and told him that gallons of water were coming through the roof. Deputy Lindenmayer and another deputy went to appellant's cell. The toilet in appellant's cell had been ripped off the wall and was laying on the floor. (12RT 1561-1566.)

Regarding Case Records

Lina Natividad was a correctional case records specialist for the Department of Corrections. (14RT 1635-1636.) A Penal Code section "969(b) package is a certified copy from the Department of Corrections of a person's prior convictions." (14RT 1636.) Appellant's 969(b) package (Peo. Exh. No. 24) showed that in case GA008285, appellant was convicted of one count of

unlawful driving or taking of a vehicle, in violation of Vehicle Code section 10851, subdivision (a); and in case number BA055824, appellant was convicted of one count of possession of a controlled substance, in violation of Health and Safety Code section 11350, subdivision (a). Appellant was sent to Wasco State Prison on February 1, 1993. On March 18, 1993, appellant was transferred to Mule Creek State Prison. Then, appellant went to Pelican Bay State Prison. Appellant was paroled on November 2, 1994. (14RT 1636-1641.)

Victim Harding's Relatives

Curtyss Harding ("Curtyss") was James Harding's mother. Harding's birthday was December 26, 1951, and he was murdered on his birthday. Curtyss, who lived outside California, was informed of Harding's death by a nephew who lived in California. When Curtyss learned of Harding's death, she cried and "it has been really hard" for her. (15RT 1786-1789, 1794-1795.) Harding's body was brought to the state where Curtyss resided, and there was a funeral for Harding. However, she was unable to have an open casket funeral for Harding, as was the tradition in her faith, because the mortician said that Harding's body was in such bad condition. (15RT 1789-1791.) Many family members and friends attended Harding's funeral. After the funeral, Curtyss continued to think about Harding. (15RT 1791.) Although Curtyss knew that Harding was involved in drugs when he came to California, that did not make him less of a person to her, and he was still her son. What Curtyss would miss most about Harding was his personality and his presence. (15RT 1781-1782.) Harding had one daughter and three grandchildren. (15RT 1792.) Harding's death had such an impact on family members. (15RT 1792-1793.) Photographs of Harding were shown to the jury. (15RT 1793-1794.)

Brian Harding ("Brian") was Harding's brother. Brian and Harding were very close, and they talked bimonthly or every third month. When Brian

learned that Harding was dead, it tore Brian's heart out because they were very close. Brian was at work when he learned about Harding's death, and Brian was in total shock and immediately left work to go home. Brian had to pull over a couple of times because he could not really drive. When Brian got home, he tried to comfort other family members. Brian still thought about Harding everyday. Brian read some words on behalf of his family regarding the effect of Harding's death on their family. (15RT 1797-1802.)

Joyce Howell was Harding's aunt and Curtyss's sister. Howell lived in California and saw Harding many times in Los Angeles. When she learned of Harding's death, Howell was heartbroken. (15RT 1805-1808.)

2. Factors In Mitigation

Ramona Gamboa ("Ramona") lived in east Los Angeles and was a neighbor of the Becerra family which included appellant, appellant's brother Alfonso ("Alfonso"), and appellant's parents, Ramon Becerra Galvez ("Ramon") and Margarita Becerra ("Margarita"). Gamboa noticed that Ramon was very cruel with his children. He hit his children with whatever he had in his hand and would punish them very heavily. On one occasion, Ramona saw Ramon punishing Alfonso by having him raise his hands up with a brick in each hand. Alfonso did not have a shirt on, and Ramon did not want Alfonso to lower his hands. When Alfonso got tired and lowered his hands, Ramon hit Alfonso's body. Ramona also heard Margarita screaming and telling Ramon not to hit them. Ramona heard all the vulgarities Ramon said to Margarita and the children. Appellant was between three to five years old when Ramona saw how Ramon treated his children. There was a deep hole in the back of the Becerra house, and Ramona once saw Ramon put his sons in the hole to punish them. (15RT 1813-1817, 1823.)

Ramona saw bruises on appellant and Alfonso many times. Appellant had bruises on his legs, arms, and the side of his face. On one occasion,

appellant's head had been bleeding. (15RT 1817.) Ramona heard screams coming from the Becerra house, "like when someone is being beaten and they're in pain and also when the lady would tell him not to beat them." (15RT 1817.) Once, Ramona saw Ramon strike appellant's buttocks so hard with his hand that appellant was lifted up and fell to the floor. (15RT 1818.) Ramon prevented appellant and Alfonso from playing with Ramona's children. (15RT 1818.) Ramon had a bad temper, and he was very violent with his family. (15RT 1818.) There were many incidents where neighbors tried to stop Ramon from beating up his children. (15RT 1818-1819.) Ramon called appellant and Alfonso "assholes" and stupid. (15RT 1819.) Appellant was unable to speak well as a young boy, and he stuttered a little. (15RT 1819-1820.) Ramona called the authorities twice to the Becerra house: once because she was frightened when she heard the children screaming a lot and another time when Alfonso was holding the bricks. (15RT 1820-1821.) Ramona also saw bruises on Margarita many times. (15RT 1821.)

On one occasion, Ramona's children threw a ball over to the Becerra yard and broke a plant. With the plant in his hand, Ramon, who was angry, told Ramona that her children had broken the plant and that he wanted Ramona to punish her children the way he punished his children. Ramona wanted to pay for the plant, but Ramon wanted her to hit her children with a belt. When she refused, he left angry. (15RT 1821-1822.) On another occasion, Ramona saw appellant carrying a heavy can of mixture while Ramon was remodeling his house. Ramon was yelling at his children to bring the mixture faster. When Ramona told Ramon, "'Why are you doing that with the little boy,'" he replied that it was none of her business, and she should not meddle. When Ramona said that it was an injustice to the little boy, Ramon responded, "'You raise your family the way you want to, and I'll raise my family the way I want to.'" (15RT 1822.)

Rafael Gamboa ("Rafael") was Ramona's son. Rafael knew appellant and Alfonso when they were children because they were neighbors and played together. Rafael saw Ramon punish appellant and Alfonso. When Ramon caught appellant and Alfonso playing with Rafael, he whipped his sons with an extension cord. Rafael saw Ramon place his sons into the deep hole in the driveway and on one occasion, park his truck over the hole while his sons were in the hole. Rafael heard screaming from the Becerra house. Rafael also saw Alfonso being punished by Ramon with the bricks. Rafael saw bruises on Margarita and Alfonso but not on appellant, although Rafael saw Ramon hit appellant. Appellant had a speech impediment when he was young. Appellant and Alfonso appeared to be terrified of their father. (15RT 1826-1831.) At the time, Alfonso was between six and nine years old, and Rafael was about the same age. (15RT 1831-1832.)

Rossana Yniguez was a neighbor who lived two doors away from the Becerra family. Yniguez knew appellant and Alfonso when they were growing up. Appellant and Alfonso were terrified of their father. On one occasion, appellant was playing with an empty gasoline can and a match when it blew up in his face, burning his face and hair. Appellant was screaming, and the neighbors, appellant's parents, and other children came out. When Ramon asked what happened, appellant pointed to Yniguez's brother Gallo, who was about the same age as appellant, and repeated Gallo's name. Gallo's mother denied Gallo was involved because she had been feeding him inside the house. Ramon told appellant he was lying, slapped him, yanked his arm, and took him inside their house even though appellant was burned and needed emergency care. Ramona's husband called 911, but Ramon did not. (15RT 1832-1834.) The hole in the ground at the Becerra house was about six feet deep. Yniguez saw Ramon place his sons in the hole, and she could hear the boys screaming and crying while Ramon ignored them. Yniguez also heard the boys being

beaten many times. Yniguez heard Margarita say, "'Don't hit them.'" Yniguez heard the boys screaming. (15RT 1835-1836.) Appellant and Alfonso were always doing some kind of labor at their house. The boys dug the hole by Alfonso actually digging the hole and appellant carrying the buckets of dirt. Appellant was three years old, and Alfonso was eight years old at this time. (15RT 1836.) Another time, Yniguez saw appellant carrying buckets of paint or heavy material when they were remodeling their house. If appellant did not carry it quickly enough, Ramon yelled at him and struck him. (15RT 1836-1837.) While appellant was three to five years old, Yniguez was aware of the authorities being called to control the beatings more than four times. (15RT 1837.)

Vickey Turner-Ezell was a court officer for the Department of Children and Family Services, which deals with protective services and works with families where there is child abuse. Defendant's Exhibit F consisted of Children and Family Services documents pertaining to appellant as a minor and his mother Margarita. (16RT 1841-1845.)

Frances Hanish was the director of medical records at Gateways Hospital, which is a psychiatric hospital. Defendant's Exhibit G consisted of Gateways Hospital documents pertaining to appellant. Appellant was admitted to the hospital on February 5, 1987, and he was discharged on July 6, 1987. Appellant was 16 years old at that time. At that time, the hospital did not have a special program that dealt with adolescents who suffered from child abuse, but that was a reason why a patient may have been admitted to the hospital. (16RT 1846-1848.)

At the time of the penalty phase, Margarita's children were appellant, who was 25 or 26 years old, and Alfonso, who was 30 years old. Margarita indicated that her husband was Ramon, but they divorced in 1985 or 1987. (16RT 1849-1851.) When Margarita and Ramon lived at home together raising

appellant and Alfonso, Ramon was always very severe and harsh with the children. When they were children, meaning appellant was about two, three, or four years old, and Alfonso was about seven or eight years old, Ramon would always punish them for whatever little thing that would happen. Ramon would always hit and beat the children with whatever he had at hand, such as tools or baseball bats. Ramon also imposed certain punishments, like making the children stand with bricks in their hands for long periods of time and beating them with belts or rubber hoses if their hands came down. Ramon would always leave marks on the children's bodies. Ramon struck Margarita in the same manner, and Ramon would not let Margarita say or do anything so she did not try to stop him from striking the children. (18RT 1852-1855.)

There was a large hole on their residence which Ramon used to fix cars while in the hole and under the car. Ramon would punish the children by putting them in the hole for hours without food, and the children could not get out of the hole on their own. The children cried while in the hole but would be quiet to see if Ramon would stop their punishment. (16RT 1855-1856.) Ramon would not allow the children to play with the neighbors' children, but the children would sneak out and play while Ramon was away and then run back home when Ramon was coming home. But if Ramon saw that the children had been playing, he would shout and hit them. (16RT 1856-1857.)

When Alfonso was seven or eight years old and appellant was three years old, the children were taken away from Ramon and Margarita for a while because Alfonso's teacher noticed Alfonso's injuries. The children had cuts, bruises, or marks on their bodies all the time. Margarita and the children were always scared and nervous when Ramon was around. As the children grew older, the punishments grew more severe. (16RT 1857-1858.) When the court took the children away and indicated that they would check every week on how Ramon treated the children, Ramon sold the house and went to Spain for two

years because he said he was not going to allow a third party to tell him how to raise his children. When Margarita returned from Spain, she was living with Ramon and her two children: appellant who was eight or nine years old and Alfonso who was 14 years old. The beatings continued when Margarita returned to the United States. (16RT 1858.)

When Ramon kicked appellant out of the house, appellant was 14 years old. Appellant was placed in a number of foster homes when he was 13 through 15 years of age. Margarita, but not Ramon, would visit appellant when he was under the custody of foster parents. Ramon would scold Margarita when he saw her with appellant and told her that appellant had to learn to respect his father. (16RT 1858-1860.) Margarita loves appellant, and she loved appellant during the period when Ramon was beating him. Although Margarita was capable of preventing Ramon from beating the children, she would end up getting beaten herself. (16RT 1860.) Since appellant was beaten unjustly, Margarita believed appellant was emotionally affected greatly by the beatings. (16RT 1860.) Appellant did not have difficulties regarding his ability to speak when he was growing up. (16RT 1860-1861.)

ARGUMENT

I.

THE COURT DID NOT ABUSE ITS DISCRETION IN TERMINATING APPELLANT'S RIGHT OF SELF-REPRESENTATION DURING PRETRIAL PROCEEDINGS BEFORE THE PRELIMINARY HEARING; ANY ALLEGED ERROR WAS HARMLESS

Appellant contends that the court below arbitrarily revoked his self-representation for impermissible reasons and without warning, in violation of the Sixth and Fourteenth Amendments. (AOB 22-49.) Respondent submits that the court (Judge Horwitz) did not abuse its discretion in terminating appellant's right of self-representation during pretrial proceedings, before the preliminary hearing, in municipal court. Even assuming that the court abused its discretion in terminating appellant's right of self-representation during these pretrial proceedings, respondent submits that any alleged error was harmless.

A. Factual Background

1. Proceedings Before Trial

On May 17, 1995, appellant, who was represented by Deputy Public Defender Gregory Fisher, appeared before Judge David Horwitz in the Municipal Court of Los Angeles Judicial District, County of Los Angeles.[2/] Appellant told Judge Horwitz that he wanted to exercise the Sixth Amendment right to represent himself in the instant case. Appellant indicated that he was already representing himself in another case. Judge Horwitz asked appellant about his other case, his level of education, and his understanding of the

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2. The relevant pretrial proceedings in the instant case, pertaining to the issue of appellant's right of self-representation, occurred in 1995, which was prior to the unification of the municipal and superior courts. (See *People v. Crayton* (2002) 28 Cal.4th 346, 350, fn. 1, 359-360.)

charges in the instant case. After hearing appellant's answers, Judge Horwitz decided to put the matter over and asked appellant to submit a written statement indicating how appellant intended to represent himself and that appellant knew about the charges and possible penalty in the instant case. Deputy Public Defender Fisher asked whether Judge Horwitz wanted Fisher to give appellant a copy of the in propria persona form used by the superior courts, and Judge Horwitz indicated that Fisher should do so. (See Supp. IIICT 25-34; ICT 12.)

On May 19, 1995, appellant appeared with his attorney, Deputy Public Defender Fisher, before Judge Horwitz in municipal court. (See Supp. IIICT 36-38; ICT 13-14.) Judge Horwitz stated:

> First of all, the record should reflect [appellant] has been here a number of times, and the last time [appellant] was here, he requested pro per status. He wanted to relieve Mr. Fisher of the Public Defender's Office. And I asked him to fill out *Faretta* waivers, meaning that he understood that he could represent himself. [¶] He not only filled out one, but he filled out two *Faretta* waiver forms, one to superior court and one for the municipal court. [¶] And I also asked him to file a confidential ex-party [*sic*] order indicating, not talking about the facts of the case, but how he would proceed, such as subpoena duces tecum and investigator and so on. [¶] Based on all these filings, the Court finds that [appellant] knowingly, understandingly, expressly waives his right to an attorney, and he understands that this is a death penalty case, and understanding all this, the Court will grant him pro per status. [¶] So Mr. Fisher, I am going to order you to now turn over all paperwork to [appellant] at this time unless there is other paperwork that you don't have. I would ask you to give that to the clerk. [¶] Now, next, the record should reflect that Ms. [Jennifer] Lentz is here from the District Attorney's Office. She is not the attorney of record in this case. Allan

> Walsh is the attorney of record in this case in terms of prosecuting this case. [¶] [Appellant], now that you are your own attorney, I am going to have to set a date for you and Mr. Walsh to discuss the discovery with you. [¶] And I am suggesting - - first of all, Mr. Walsh is on vacation, and our calendar, the best date to do discovery would be two weeks from today's date, which would be the 2nd of June. [¶] I'm going to sign your orders for investigator and for pro per funds for supplies. But as to discovery, I'm going to have to put that over until Mr. Walsh gets back.

(Supp. IIICT 38-39; see ICT 196-201 [petition to proceed in propria persona]; ICT 202 [in propria persona advisement form]; see also ICT 172, 215 [in propria persona court order authorizing money for telephone calls and writing materials]; ICT 173 [order appointing investigator Jensen for appellant]; ICT 174-195 [appellant's notice of motion for discovery].)

After appellant indicated that he wanted John Jensen as his investigator (Supp. IIICT 39-40), Deputy Public Defender Fisher stated:

> Your Honor, may I state for the record, I have already given [appellant] copies of all the reports in the murder book with witnesses' address and phone numbers deleted. But he has all the copies of all that, except for rap sheets of various victims, which I have not given him. Pursuant to the Court's order, I am now prepared to give him those; [¶] In addition to copies of the two coroner's reports that I just received two days ago, and copies of crime scene photographs, which I just received two days ago, and copies of investigation request and reports. [¶] And those are the only materials that I have which [appellant] does not have. I can give those to your Honor's clerk probably this afternoon for delivery to [appellant].

(Supp. IIICT 40-41.) Appellant asked that Fisher itemize the materials he was giving to appellant and complained that Fisher had not given him a complete murder book. Fisher replied that he would "give [appellant] everything," except for copies of reports in which witnesses' addresses and telephone numbers had not been deleted since appellant had already been given copies of those reports. (Supp. IIICT 41-42.) Judge Horwitz suggested that appellant waive time to June 2, 1995, to address appellant's motion for discovery, and appellant did so. (Supp. IIICT 42-43.)

On June 2, 1995, appellant, who was representing himself, appeared before Judge Horwitz in municipal court. On the record, but outside of Judge Horwitz's presence, Deputy District Attorney Walsh and appellant discussed appellant's 73 discovery requests. For many of appellant's requests, Walsh explained that these items were already contained in the murder book which appellant had in his possession. (See Supp. IIICT 45-65; ICT 14.)

Just before this discussion between appellant and Walsh regarding discovery, appellant wanted to postpone the hearing, as shown in the following exchange:

> [Appellant]: Your Honor, I would like to postpone this hearing for the fact that my investigator just received the murder book this week, and he hasn't had time to duplicate the murder book to me, so before I do this - -
>
> [Judge Horwitz]: That can be another time, but you made several motions. You have made a number of requests.
>
> [Appellant]: Yes.
>
> [Judge Horwitz]: Whether or not you have the murder book, you can certainly discuss these requests, and if you want to get more material and go over that, we can hear about that at a later time. [¶] I ask you and Mr. Walsh to discuss it now.

(Supp. IIICT 46.) Also during the discovery discussion between appellant and Walsh, appellant stated, "In case of a reference report that should be - - so I don't got - - I don't even have the whole murder book. I have pieces here and there. That is why I wanted to postpone this hearing." (Supp. IIICT 60.) After the discussion between appellant and Walsh concerning discovery, Judge Horwitz returned, appellant waived time, and the matter was set for compliance for July 30, 1995. (Supp. IIICT 65.) Then, Judge Horwitz discussed telephone funds and other matters with appellant. (Supp. IIICT 65-67.)

On July 10, 1995, appellant, who was representing himself, appellant's investigator Jensen, and Deputy District Attorney Walsh appeared before Judge Horwitz in municipal court. (See Supp. IIICT 69-75.) Judge Horwitz said, "Today is the day to pick - - it's for setting today. Do the two of you want to discuss among yourselves a date that you want to pick for the preliminary hearing?" Walsh replied, "I'm available any day, your Honor." (Supp. IIICT 70.) Appellant replied that he was submitting a supplemental discovery motion to Walsh. Appellant indicated that at the last appearance, Walsh said that the discovery material sought by appellant had already been handed over to appellant's investigator by Walsh. Appellant stated that he conducted an inventory of such material and found "there's a lot of material missing that Mr. Walsh told [appellant] that was given to [appellant] and hasn't." (Supp. IIICT 70.) Walsh replied that he had never had any dealings with Jensen before meeting that day (July 10, 1995) in court and had never turned over any materials to Jensen. Walsh stated that he had turned over a complete and true copy of the murder book to Fisher, appellant's previous attorney. (Supp. IIICT 70-71.)

Judge Horwitz asked appellant about any missing items and then stated:

> Why don't you meet with your investigator, and Mr. Jensen, I order you, after you meet with [appellant], to then communicate with Mr.

> Walsh on all the matters that [appellant] wants, and I ask you to work that out hopefully within the next two or three weeks and get all those items to [appellant]. And if there's any problem getting those, or if it appears that Mr. Walsh is not willing to give those matters over, then indicate to [appellant], and I'll set another discovery hearing.

(Supp. IIICT 71.) Appellant and Walsh agreed to the date of August 30, 1995. Judge Horwitz said, "And, [appellant], Mr. Walsh, Mr. Jensen, I am ordering all three of you to work together to try to get all these items to [appellant] so that on August 30th I can ask [appellant] if he's ready for prelim, and he will indicate in the affirmative." Judge Horwitz asked appellant, "Do you wish to give up your right to a speedy preliminary hearing and to have a preliminary hearing within 60 days of the date of arraignment and ask the matter go over to August 30th, 1995, as zero of ten court days; yes or no?" Appellant replied, "Yes." (Supp. IIICT 72.) Then, Judge Horwitz discussed other matters, including additional funds, subpoenas served by appellant, appellant's telephone funds, and appellant's supplies. (Supp. IIICT 73-75; see ICT 14-15; see also ICT 228 [appellant's handwritten order for legal supply funds, which was signed by Judge Horwitz, and filed on July 10, 1995]; ICT 230 [appellant's typed order for additional funds for defense investigator, which was signed by Judge Horwitz, and filed on July 10, 1995]; ICT 231-232 [appellant's handwritten order for funds for telephone use, which was signed by Judge Horwitz, and filed on July 10, 1995]; ICT 235-256 [appellant's handwritten motion for compliance with informal discovery, which was filed on July 10, 1995].)

On August 30, 1995, appellant, who was representing himself, appellant's investigator Jensen, and Deputy District Attorney Walsh appeared before Judge Horwitz in municipal court. (See Supp. IIICT 77-84.) Jensen informed Judge Horwitz that he would be retiring, that another investigator,

Frank Mackey, had agreed to accept appellant's case, and appellant was willing to have Mackey take his case. (Supp. IIICT 78-79.) Jensen added:

> We'll continue with some of the things that we had started, such as the C.D. Rohm [*sic*]. We'll take care of those and work with Mr. Mackey on that because I have the equipment, and he doesn't. But I don't see a delay in the matter continuing.

(Supp. IIICT 78.)

Walsh then stated:

> One thing before Mr. Jensen leaves. [¶] Mr. Jensen did come up to my office approximately two weeks ago and took out the murder book, and Mr. Jensen and I went through the murder book page by page by page by page, literally through the entire murder book. [¶] There were some documents Mr. Jensen did not have that I copied and gave to him. He gave me the further request for discovery; one being request for receipt by fax or rap sheets for approximately 25 witnesses, which I submitted to my priors unit for running of raps which has not been completed yet. [¶] Other than that, I believe that all the discovery Mr. Jensen asked of me has been provided, and the audio tapes, which are in reproduction right now being taped.

(Supp. IIICT 79-80.) Walsh indicated that tapes would be ready in three or four days and stated he would contact Jensen when they were ready. (Supp. IIICT 80.)

Then, the following exchange occurred:

> The Court: All right. [¶] [Appellant], what do you wish to address the Court with?
>
> [Appellant]: I have some subpoenas that I submitted, and I need to see if they are here.
>
> The Court: There are a couple of people here.

A voice: From the Persian Hotel.

The Court: And where are you from, sir?

A voice: W.P.I.

The Court: All right. [¶] What else, [appellant]?

[Appellant]: Subpoenas from the coroner's, and from the fire department.

The Court: What do you want me to do with those? Issue body attachments?

[Appellant]: No. They were not body attachments. This is the second time I subpoenaed these people, for the record, and the first time I did not have the body attachment.

The Court: What do you wish to do now?

[Appellant]: I would like to see documents that I requested from - -

The Court: Assuming they are appropriate, what is it you want me to do?

[Appellant]: If I can receive them.

The Court: I do have the return of records from the fire department, and a return from Jack Schwartz. [¶] Do you have any documents, ma'am?

A voice: No.

The Court: And sir, do you have any documents?

A voice: No.

The Court: Next date set for preliminary hearing is what?

[Appellant]: Basically those are from the subpoenas.

The Court: Apart from the subpoenas, what else did you want to bring out?

[Appellant]: The coroner's department, the Hayward Hotel, the Alexander Hotel, and the Frontier Hotel.

The Court: All right. [¶] And what is it you want me to do?

[Appellant]: Those were body attachments. If they are not here, I will ask that you please have them ordered.

The Court: Well, I am not going to do that. I am going to order you again to meet with your investigator and have him serve those subpoenas and come back to me at the next date and indicate - - and if he indicates that those were served and the records are not here - -

[Appellant]: I do have the subpoenas already served, and they are body attachments.

The Court: I will hold those to the next date. And I want your investigator here as well at the next time.

[Appellant]: Is that Mr. Jensen or Mackey?

The Court: Whoever you want.

[Appellant]: Okay.

The Court: What else?

[Appellant]: Also, yes, I did receive some discovery from Mr. Walsh. [¶] By the way, I do have some crime scene pictures that are - - that I haven't received yet from room 302, one of the victim's rooms. That's Mr. Jackson. [¶] And I also haven't received the pictures that were taken of my body of injuries of my hand and my chest that the police took. [¶] I have made a complete list of all the material that I am asking, and Mr. Walsh only supplied me with a number of documents.

The Court: Give those to Mr. Mackey, and then I want you to meet with the investigator. [¶] Can you give those to the investigator?

[Deputy District Attorney Walsh]: Yes.

[Appellant]: I do not have a felony complaint form. Mr. Jensen has told me about this because I don't even know how a felony complaint form looks like.

The Court: Will you provide that as soon as possible, a felony complaint telling him what he is charged with?

[Deputy District Attorney Walsh]: I gave Mr. Jensen in my office a copy of the complaint. I will be happy to make another copy.

[Appellant]: I'm sorry. I didn't receive that. [¶] Also, I do not have no photographs, original copies, prints of the witnesses. The investigator needs those prints for interviewing witnesses and for identification.

The Court: Why don't we set the next date because I want to make sure that you have all those things before we go ahead with the prelim. [¶] Approximately 30 days from today's date? Will that be enough time, or do you need more time?

[Appellant]: Yeah, that is fine.

(Supp. IIICT 80-83.) The parties agreed to the date of September 28, 1995. Judge Horwitz asked appellant whether he wished to give up his right to a speedy preliminary hearing and to have that hearing within 60 days from the date of arraignment and asked that "the matter go over to September 28, 1995, as zero of 30 court days for prelim setting only." Appellant replied, "Yes, I do." Appellant also submitted an ex parte motion, which Judge Horwitz indicated would be addressed on September 28, 1995. (Supp. IIICT 83-84; see ICT 15-16.)

On September 28, 1995, appellant, who was initially representing himself that day, Deputy Public Defender Fisher, and Deputy District Attorney Lentz appeared before Judge Horwitz in municipal court. (See Supp. IIICT 86-91; see also ICT 16.) Judge Horwitz terminated appellant's right of self-representation, as shown in the following exchange:

The Court: All right. [Appellant], the Court is going to make the following finding: I gave you pro per privileges a little over four

months ago and you continued this case on at least six occasions. The Court finds that everything you've done is dilatory; that this case is never going to get off the ground; that the prelim will never occur; and that all you're doing is stalling. Eventually it's going to have to happen. [¶] I don't want to hear from you anymore.

[Appellant]: Your Honor?

The Court: I'm telling you to be quiet. I'm releaving [*sic*] you. I'm reappointing the public defender's office and you can talk to - -

[Appellant]: Well, your Honor - - I would like to say one thing for the record.

The Court: Say it.

[Appellant]: Okay. First of all, your Honor, this is a capit[a]l case one. I been appointed since May 19 of 1995. I don't have, since May till now, enough time to have enough season of the law to present my preliminary hearing in front of this Court. [¶] As you can see from the advisory counsel motion that I submitted to this Court on my last court appearance, it states a lot of the material that's missing from the law library. There's no Evidence Code books, Jeffersons, talks about the law. [¶] This is a capit[a]l case and you're dealing with my life. I've dealt with Mr. Fisher prior to this. Me and Mr. Fisher do not get along, and this is one of the reasons I took charge of my case is so I can do my investigation because ever since Mr. Fisher was appointed - - since December, he hasn't done nothing. And since I been working from the - - with the Jensens, I done a lot of investigations and ready to do my prelim, but I need time to understand the law. As to the admissibility of hearsay evidence, the admissibility of - - of evidence that's going to be introduced by the district attorney. This is a capit[a]l case, your Honor. This is not a petty theft with a prior. This is a double murder case. [¶]

. . . . [¶] . . . . [¶] . . . . [¶] I have the constitutional right to represent myself under People versus Bigalow [*sic*]. I'm entitled to an advisory counsel, your Honor.

The Court: You made your record. I made my ruling.

[Appellant]: I haven't done nothing to take this privilege away from me. You're taking my constitutional rights from me and that is a reversible error in your part. And I'm going to take this on a writ. And if this is all you have to say, this is all I have to say. I'll take this upon up on a writ. You're not going to take my constitutional rights when I have the rights to represent myself. This is my life, your Honor. You're dealing with my life.

The Court: That will be all.

[Deputy Public Defender Fisher]: We haven't set a date.

[Appellant]: I'll tell you - -

The Court: Just a moment. Just a moment.

[Appellant]: I hope Mr. Fisher doesn't come to the jail and visit me. That, hopefully, is for the record. I do not get along with him. You want to fuck with me, I'll fuck with you.

The Court: Well, I didn't want to jeopardize the bailiff.

[Deputy Public Defender Fisher]: You want to recall it?

[Deputy District Attorney Lentz]: Let's bring - - can we wait until the bailiff comes back out because I'd like to make a record.

(Supp. IIICT 87-89.)

At this point, Deputy District Attorney Lentz described how appellant had thrown four or five sharpened pencils, "in a fit of rage," about 35 feet across the courtroom, nearly missing Deputy Public Defender Fisher. Lentz indicated that she intended to file an assault charge based on appellant's

courtroom behavior. Finally, Lentz asked that the "matter go to November the 9th as 29 of 30 for preliminary hearing." (Supp. IIICT 89-91.)

On November 9, 1995, appellant, his attorney Deputy Public Defender Verah Bradford, and Deputy District Attorney Michael Fishman appeared before Judge Horwitz in municipal court. (See Supp. IIICT 92-100; ICT 16-17.) As shown in the following exchange, Judge Horwitz denied appellant's request to reinstate his in propria persona status:

> [Appellant]: Yes, Mr. - - your Honor, I have several things I would like to address this Court since I was representing myself in a double murder case. On May 17th, I addressed this Court and brought it to the attention that I was having problems with my public defender. [¶] The Court asked me to write a one-page letter regarding what I was going to do while pro per, which I did. Estimate I submitted a three-page letter. I submitted my superior court pro per form and a municipal court plus your request, and you granted my pro per status. [¶] On June 2nd, I had a discovery motion heard which I asked for a continuance, and I was denied, because I didn't receive my murder book from Mr. Fisher yet. [¶] Mr. Walsh, the prosecutor, stated in court that all of the material that I was requesting I had or didn't exist. [¶] On - - I believe it was June - - July 10th, I returned back to this Court, and I submitted another discovery motion with a complete - - with a complete inventory of the murder book, which was turned over to me by Mr. Jensen, the defense investigator. [¶] And, also, I submitted a compliance, a list of exact names, dates and material being requested. You stated that you wanted Mr. Jensen to deal with Mr. Walsh. [¶] Now, I am representing myself in a case that is very delicate. We are dealing with two murders that happened - -
>
> The Court: Just a moment. You are not representing yourself.

[Appellant]: Okay. Well, I was representing myself in a case where two murders occurred. And at the other hand, I am facing the death penalty. My life is in threat. [¶] Now, I am asking - - I have been asking Mr. Walsh to turn over the discovery, which I don't have photographs of the whole complete crime scene. I do not have the transcripts of, I believe, eight prosecution witnesses, which you have ordered Mr. Walsh to turn over to me, and he hasn't complied. [¶] I cannot proceed in a preliminary hearing without all of the material being requested. So it can be to my advantage to know what this case is about. I cannot cross-examine a police officer as to what he spoke to these witnesses without me having that tape or the transcription of that tape. [¶] Now, I also on, I believe it was, 8-28-95 - - Mr. Jensen turned over to me the following discovery - - the probable cause - - okay - - which I already had. He also turned over to me the arrest report which I already had. He also turned over to me the order to transport Frank Becerra to court, Division 30, for arraignment, which I already had. [¶] The only new discovery that he turned over to me was the preliminary investigation of Jackson Herman, which that was new, and the death investigation of Herman - - Harding, James Edward, which that was new, and investigating final report of Donna Meek[e]y, which that was new. [¶] Now, I still don't have the tapes. I still don't have photographs. I still don't have a lot of things that I need. And, also, you have to take into consideration I am a name at the law. [¶] You granted my pro per status May 17th or May 19th, and this is only September when you wanted me to proceed in my preliminary hearing. [¶] Mr. Walsh, the prosecutor, was not here to announce ready for the preliminary hearing, first of all. [¶] Second of all, I have contacted

several of these forensic pathologists, because it is going to be needed in my case as to time and cause of death for these people since - -

The Court: You are getting on to what - - you are getting away - - I assume you are asking me to reinstate your pro per status. Get to the point. [¶] .... [¶] ....

[Appellant]: I have called four different experts, and they have denied being assigned to this case, due to the fact that they don't want to deal with a pro per. So I have made a motion for an advisory counsel under People versus Bigelow, which states four factors which the Court has to take into consideration to appoint an advisory counsel - - one, the seriousness of the charge; two, the complexity of the charge; three, the defendant's general education and, four, his legal knowledge, which I made all those cites. [¶] Also, People versus Bigelow states if the Court finds the defendant incompetent to represent himself, failure - - on a request for an advisory counsel, failure to grant a request is reversible error. [¶] Now, the big thing here is you have punished me by taking my pro per status when I think the appropriate thing was to proceed in my preliminary hearing and not grant my continuance, not to - - not to take my pro per status and my constitutional right. I think that is a right that I have. And I asked - - as of right now, I ask that you please reinstate my pro per status, and that I conduct my own defense in my case, which you granted once before and really didn't have no probable cause to terminate my pro per status.

The Court: Very well. [¶] First of all, I wish to state, when I granted you pro per status, I did it with the understanding that you act as any other attorney would act, and that this Court would give you no special indulgences, and that you would follow the rules and substantive law. [¶] The case was put over an incredible amount of times. The

Court felt that you were dilatory, and the Court is going to cite the case of People versus Lopez, 71 Cal.App.3d 568, which was - - that was a 1977 case, and that was followed in the following cases, [*People v. Teron* (1979)] 23 Cal.3d 103 at page 113[, disapproved on other grounds in *People v. Chadd* (1981) 28 Cal.3d 739], [*Maxwell v. Superior Court* (1982)] 30 Cal.3d 606 at page 621 - - [¶] . . . . [¶] . . . . [¶] . . . . [¶] [*People v. McKenzie* (1983)] 34 Cal.3d 616 at page 628[, overruled on other grounds in *People v. Crayton*, *supra*, 28 Cal.4th 346], [*People v. Joseph* (1983)] 34 Cal.3d 936 at page 945, [*People v. Clark* (1992)] 3 Cal.4th 41 at page 106, [*Curry v. Superior Court* (1977)] 75 Cal.App.3d 221, at page 225 and [*People v. Salas* (1978)] 77 Cal.App.3d 600 at page 604, 77 Cal.App.3d 722 at 731 [*sic*]. And what *Lopez* and all the cases after it say, that after granting pro per status, that status can be revoked because the defendant is "entitled to and will receive no special indulgence by the court, and the defendant must follow all the technical rules of substantive law, criminal procedure and evidence in the making of motions and objections, the presentation of evidence, voir dire and argument." [¶] And that court went on to say "it should be made crystal clear that the same rules that govern an attorney will govern, control and restrict him, and that he will get no help from the judge. He will have to abide by the same rules that it took years for a lawyer to learn." [¶] The Court will make a finding, I am not going to add appointed advisory counsel, because the public defender's office would bring a writ, because they are going to ask the defendant remain pro per, and they will not act as advisory counsel. And the Court is not going to appoint advisory counsel at the cost of the county. [¶] So the Court is left with the following decision to make, and allowing you to remain pro per when I feel that you are not conducting yourself

in a manner that an attorney at law would conduct himself - - I reappointed the public defender's office. [¶] I am going to quote to you from *Faretta*, . . . and this is on page 581 of *Faretta*, footnote 46, "We are told that many criminal defendants representing themselves may use the courtroom for deliberate disruption of their trials. But the right of self-representation has been recognized from our beginnings by federal law and by most of the states, and no such result has thereby occurred. Moreover, the trial judge may terminate self-representation by a defendant who deliberately engages in serious and obstructionist misconduct." They quote Illinois versus Allen, 397 U.S. 337. Footnote 15B and 16B state as follows: "The right of self-representation is not a license to abuse the dignity of the courtroom. Neither is it a license not to comply with relevant rules of procedural and substantive law. Thus, whatever else may or may not be open to him on appeal, a defendant who elects to represent himself cannot thereafter complain that the quality of his own defense amounted to a denial of 'effective assistance of counsel.'" [¶] And that is in fact what this Court is finding, that this case hasn't even gotten to prelim, because it has been put over and over and over and over by you and this Court, if it was reviewing your quality of representation by you, would find that the quality of representation was not adequate. For that reason, the Court's ruling will stand. [¶] The matter will be trailed to Tuesday for Mr. Fisher to - -

[Deputy Public Defender Bradford]: I think it was Monday that he requested.

The Court: Monday. Excuse me.

[Appellant]: Your Honor, may I state something else?

The Court: No. That will be all.

[Deputy Public Defender Bradford]: I believe you requested a transcript.

The Court: So ordered.

(Supp. IIICT 93-100.)

On November 13, 1995, appellant, his attorney Deputy Public Defender Fisher, and Deputy District Attorney Valerie Rose appeared before Judge Horwitz in municipal court. (See Supp. IIICT 102-105; 1CT 17.) Fisher stated:

[Appellant] wants to renew his motion to go pro per. I believe he is going to indicate he could be ready to proceed with the preliminary hearing on that date if he does represent himself. [¶] I would assist him, before being relieved, in asking to have a pathologist appointed because he has trouble doing that pro per. I would be willing to do that. [¶] And I don't know what happened on the days that I wasn't here, and I don't know what happened last Thursday because I was ill; but he does wish to renew that motion. So I am doing that on his behalf. And I believe he is going to indicate he would be ready and would not be dilatory on that date.

(Supp. IIICT 103-104.) Judge Horwitz replied, "the Court's ruling will stand." (Supp. IIICT 104.)

2. Proceedings During Trial

On July 30, 1997, after the guilty verdicts (12RT 1464-1466), the following exchange occurred in superior court, regarding appellant's apparent desire to represent himself for the penalty phase:

[Counsel Garber]: - - [Appellant] has indicated that he wants to substitute in pro per on the penalty phase. He feels he knows the case better than anyone and he feels that under the circumstances he does not want us to represent him any longer. [¶] Is that correct, [appellant]?

[Appellant]: Yes, sir.

[Judge J.D. Smith]: [Appellant] before you do that - - [¶] We will be starting tomorrow.

[Appellant]: That's fine.

[Judge Smith]: - - I want you to do this: First of all, think about it. . . . [¶] . . . . [¶] You are facing the possibility of life without the possibility of parole or the death penalty. Mr. Taylor, Mr. Garber both know what they are doing. . . . [¶] . . . . [¶] . . . . [¶] I think you had better talk to Mr. Taylor and Mr. Garber. It is a different proceeding than you are used to. [¶] Do you understand?

[Appellant]: I already did talk to them.

[Judge Smith]: But I want you to talk to them before I make a decision on that. I have no objection, as long as you are ready to proceed. But I think it is something you want to think about. [¶] You will be ready to proceed, in any event. You, gentlemen, talk to your client. He is still your client to this point. [¶] If you have relatives out there, I would suggest you talk to them about this phase of the proceeding because the trial has a long way to go. Okay? [¶] Let's do that. Tomorrow morning at 9 o'clock be ready to proceed with witnesses. [¶] . . . . [¶] . . . .

[Counsel Taylor]: Your Honor, [appellant] indicated to me that he needed his paperwork so that he can prepare for tomorrow.

[Judge Smith]: Whatever counsel have they can give to him. [¶] There will be nothing special I can do for you at this time. You will be ready to proceed. You will have to think about this today and tonight.

[Appellant]: I have already - -

[Judge Smith]: I am just telling you. [¶] . . . . I am just telling you that Mr. Taylor and Mr. Garber have done this many times. This is a unique situation. Very few judges even handle this. Do you

understand? It is unique; it is different. [¶] If you have any relatives out there, I urge you to talk to them, because it makes a difference whether or not you serve life without the possibility of parole or the death penalty. And then there are issues on appeal - - do you understand? - - that are important to you. Those I will advise you of tomorrow. I want you to think about it. [¶] .... [¶] .... [¶] .... [¶] .... [¶] .... [¶] ....

[Counsel Garber]: The question of his *Faretta* rights will be heard in the morning, then?

[Judge Smith]: Yes.

(See 12RT 1469-1473; see also 12RT 1462.)

The following day, on July 31, 1997, the following exchange occurred:

[Judge Smith]: We are back in session on People versus Becerra. All parties are present. [¶] Yesterday at the conclusion of our day, after the verdict was read, [appellant] indicated to the Court he might want to go pro per. [¶] The Court allowed him to talk to some people and asked counsel for some points and authorities. [¶] I will hear the motion at this time since we are now 15 minutes late. [¶] What is [appellant's] desire at this time?

[Counsel Garber]: Your Honor, [appellant] indicates that he - - he wants - - he now wants us to proceed with the matter; ....

(12RT 1482.)

B. Relevant Law

"A criminal defendant has a right to represent himself at trial under the Sixth Amendment to the United States Constitution. [Citations.]" (*People v. Welch* (1999) 20 Cal.4th 701, 729, citing *Faretta v. California* (1975) 422 U.S. 806 [95 S.Ct. 2525, 45 L.Ed.2d 562].) "A trial court must grant a defendant's request for self-representation if the defendant knowingly and intelligently

makes an unequivocal and timely request after having been apprised of its dangers. [Citations.]" (*People v. Valdez* (2004) 32 Cal.4th 73, 97-98; see also *Faretta v. California*, *supra*, 422 U.S. at p. 835; *People v. Welch*, *supra*, 20 Cal.4th at p. 729.)

Regarding the termination of a defendant's right of self-representation, the United States Supreme Court in *Faretta* stated:

> We are told that many criminal defendants representing themselves may use the courtroom for deliberate disruption of their trials. But the right of self-representation has been recognized from our beginnings by federal law and by most of the States, and no such result has thereby occurred. Moreover, the trial judge may terminate self-representation by a defendant who deliberately engages in serious and obstructionist misconduct. Of course, a State may - even over objection by the accused - appoint a 'standby counsel' to aid the accused if and when the accused requests help, and to be available to represent the accused in the event that termination of the defendant's self-representation is necessary. [¶] The right of self-representation is not a license to abuse the dignity of the courtroom. Neither is it a license not to comply with relevant rules of procedural and substantive law. Thus, whatever else may or may not be open to him on appeal, a defendant who elects to represent himself cannot thereafter complain that the quality of his own defense amounted to a denial of 'effective assistance of counsel.'

(*Faretta v. California*, *supra*, 422 U.S. at p. 834, fn. 46, citations omitted; see also *People v. Carson* (2005) 35 Cal.4th 1, 8.)

Concerning the appropriate standard of review, this Court stated:

> In reviewing the trial court's decision to terminate a defendant's right of self-representation for serious and obstructionist out-of-court misconduct, appellate courts should apply the same abuse of discretion

standard applicable to terminations for in-court misconduct. While out-of-court acts will not necessarily require "'a judgment call' under combat conditions," we nevertheless accord due deference to the trial court's assessment of the defendant's motives and sincerity as well as the nature and context of his misconduct and its impact on the integrity of the trial in determining whether termination of *Faretta* rights is necessary to maintain the fairness of the proceedings.

(*People v. Carson*, *supra*, 35 Cal.4th at p. 12, citations omitted; see *People v. Welch*, *supra*, 20 Cal.4th at p. 735 [trial court possesses much discretion in terminating a defendant's right to self-representation and exercise of that discretion will not be disturbed in absence of a strong showing of clear abuse]; *People v. Clark* (1992) 3 Cal.4th 41, 116 [trial court properly revoked the defendant's in propria persona status and that court's "judgment call" is entitled to deference].)

This Court explained:

Although the trial is the central event in a criminal prosecution, it represents the culmination of many weeks or months of preparation and related proceedings, such as discovery matters and in limine rulings. Not all these pretrial activities will take place in court. Concomitantly, opportunities to abuse the right of self-representation and engage in obstructionist conduct are not restricted to the courtroom. In other words, the "relevant rules of procedural and substantive law" are not limited to those relating solely to the trial itself. Ultimately, the effect, not the location, of the misconduct and its impact on the core integrity of the trial will determine whether termination is warranted.

(*People v. Carson*, *supra*, 35 Cal.4th at p. 9, citations omitted.)

This Court noted that "witness intimidation" is "[o]ne form of serious and obstructionist misconduct." (*People v. Carson*, *supra*, 35 Cal.4th at p. 9.) This Court added:

> [W]e do not suggest witness intimidation is the only type of serious and obstructionist out-of-court misconduct that may warrant termination of self-representation. Whenever "deliberate dilatory or obstructive behavior" threatens to subvert "the core concept of a trial" or to compromise the court's ability to conduct a fair trial, the defendant's *Faretta* rights are subject to forfeiture. Each case must be evaluated in its own context, on its own facts, in light of the considerations discussed below.

(*Id.* at p. 10, citations omitted.) Then, this Court discussed "several factors in addition to the nature of the misconduct and its impact on the trial proceedings," such as: "the availability and suitability of alternative sanctions"; "whether the defendant has been warned that particular misconduct will result in termination of in propria persona status"; and "whether the defendant has 'intentionally sought to disrupt and delay his trial.'" (*Ibid.*)

This Court also noted that unlike a case of in-court misconduct which generally has documentation consisting of the court reporter's recording of events or the trial court's description of events for the record, a case of out-of-court misconduct rarely has similar documentation. (*People v. Carson*, *supra*, 35 Cal.4th at p. 11.) Thus, "it is incumbent on the trial court to document its decision to terminate self-representation with some evidence reasonably supporting a finding that the defendant's obstructive behavior seriously threatens the core integrity of the trial." (*Ibid.*) While leaving the making of the appropriate record to the trial court's discretion, this Court emphasized that "[m]ost critically, a reviewing court will need to know the precise misconduct on which the trial court based the decision to terminate." (*Ibid.*)

C. The Court Did Not Abuse Its Discretion In Terminating Appellant's Right Of Self-Representation During Pretrial Proceedings Before The Preliminary Hearing

Respondent submits that the court (Judge Horwitz) did not abuse its discretion in terminating appellant's right of self-representation during pretrial proceedings in municipal court. The court terminated appellant's in propria persona status during pretrial proceedings before the preliminary hearing on two grounds, that appellant was "dilatory" and was not "follow[ing] the rules and substantive law." (See Supp. IIICT 87 ["The Court finds that everything you've done is dilatory; that this case is never going to get off the ground; that the prelim will never occur; and that all you're doing is stalling."]; Supp. IIICT 97 ["[W]hen I granted you pro per status, I did it with the understanding that you act as any other attorney would act, and that this Court would give you no special indulgences, and that you would follow the rules and substantive law."] & ["The Court felt that you were dilatory, ..."].) Contrary to appellant's assertion (see AOB 34-30), the court did not terminate appellant's right of self-representation solely on the basis that appellant was dilatory.

These two bases are entirely appropriate grounds for terminating a defendant's in propria persona status. (See *Faretta v. California*, *supra*, 422 U.S. at p. 834, fn. 46 [right of self-representation is not "a license not to comply with relevant rules of procedural and substantive law"]; *People v. Carson*, *supra*, 35 Cal.4th at p. 9 ["'relevant rules of procedural and substantive law' are not limited to those relating solely to the trial itself"], citations omitted; *id.* at p. 10 ["Whenever 'deliberate dilatory or obstructive behavior' threatens to subvert 'the core concept of a trial' or to compromise the court's ability to conduct a fair trial, the defendant's *Faretta* rights are subject to forfeiture."], citations omitted; *People v. Lopez*, *supra*, 71 Cal.App.3d at p. 572 [defendant who wishes to represent himself should be advised that, among other things, "he must follow all the technical rules of substantive law, criminal procedure

and evidence in the making of motions and objections, the presentation of evidence, voir dire and argument."].)[3/] In fact, the court specifically relied on the relevant language from *Faretta v. California*, *supra*, 422 U.S. at p. 834, fn.

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3. In *People v. Koontz* (2002) 27 Cal.4th 1041, in rejecting the defendant's claim that the trial court's admonitions regarding the risks of self-representation were inadequate, this Court referred to the case of *People v. Lopez*, *supra*, 71 Cal.App.3d 568, stating:

> [The *Lopez* Court of Appeal] enumerated a set of suggested advisements and inquiries designed to ensure a clear record of a defendant's knowing and voluntary waiver of counsel. First, the court recommended the defendant be cautioned (a) that self-representation is "almost always unwise," and the defendant may conduct a defense "'ultimately to his own detriment'"; (b) that the defendant will receive no special indulgence by the court and is required to follow all the technical rules of substantive law, criminal procedure and evidence in making motions and objections, presenting evidence and argument, and conducting voir dire; (c) that the prosecution will be represented by a trained professional who will give the defendant no quarter on account of his lack of skill and experience; and (d) that the defendant will receive no more library privileges than those available to any other self-represented defendant, or any additional time to prepare. Second, the *Lopez* court recommended that trial judges inquire into the defendant's education and familiarity with legal procedures, suggesting a psychiatric examination in questionable cases. The *Lopez* court further suggested probing the defendant's understanding of the alternative to self-representation, i.e., the right to counsel, including court-appointed counsel at no cost to the defendant, and exploring the nature of the proceedings, potential defenses and potential punishments. The *Lopez* court advised warning the defendant that, in the event of misbehavior or disruption, his or her self-representation may be terminated. Finally, the court noted, the defendant should be made aware that in spite of his or her best (or worst) efforts, the defendant cannot afterwards claim inadequacy of representation.

(*People v. Koontz*, *supra*, 27 Cal.4th at pp. 1070-1071, citing *People v. Lopez*, *supra*, 71 Cal.App.3d at pp. 572-574, citations omitted; see also *People v. Goodwillie* (2007) 147 Cal.App.4th 695, 705, fn. 5.)

46, and *People v. Lopez, supra*, 71 Cal.App.3d at pp. 572-574, in explaining his reasons for terminating appellant's in propria persona status. (See Supp. IIICT 97-99.) Respondent emphasizes that the court's "assessment of [appellant's] motives and sincerity," "the nature and context of [appellant's] misconduct," and "its impact on the integrity of the trial" should be accorded "due deference." (See *People v. Carson, supra,* 35 Cal.4th at p. 12; see also *People v. Welch, supra*, 20 Cal.4th at p. 735; *People v. Clark, supra*, 3 Cal.4th at p. 116.)

Contrary to appellant's contention (see AOB 30-33), the record shows appellant's deliberate dilatory behavior while representing himself. This dilatory behavior was primarily based on appellant's continued and repeated discovery requests for numerous and various items and appellant's assertions that the defense was not in possession of all the requested discovery, when it appears that for some matters, appellant's investigator or previous attorney had been provided with the requested discovery. Moreover, it appears that appellant was not properly following the rules of procedural and substantive law during these pretrial proceedings.

On May 19, 1995, Judge Horwitz granted appellant's request to represent himself. (See Supp. IIICT 38-39.) That same day, Deputy Public Defender Fisher indicated that he already gave appellant copies of all reports in the murder book, with the witnesses' personal information deleted. Fisher also stated that he would give appellant copies of victims' rap sheets, of coroners' reports, of crime scene photographs, and of investigation reports, indicating that these were the only materials in Fisher's possession that appellant did not yet have. In response to appellant's complaint about the murder book, Fisher replied that he would give appellant "everything" except for copies of reports which had not deleted the witnesses' personal information since appellant had already been given copies of those reports. (See Supp.

IIICT 40-42.) Thus, the record shows that on the date appellant was granted self-representation, Deputy Public Defender Fisher had already or shortly would provide appellant with all the materials in Fisher's possession pertaining to appellant's case. The following court date was scheduled for June 2, 1995, in order to address appellant's discovery motion after the prosecutor assigned to the case, Deputy District Attorney Walsh, returned from vacation. (See Supp. IIICT 39, 42-43.)

On June 2, 1995, appellant and Deputy District Attorney Walsh discussed appellant's 73 discovery requests, and Walsh told appellant that many of the items were already contained in the murder book in appellant's possession. (See Supp. IIICT 45-65.) Shortly before and also during this discussion regarding discovery, appellant made requests to "postpone the hearing" because he did not have a duplicate copy of the entire murder book from his investigator. (See Supp. IIICT 46, 60.) Thus, contrary to his assertion that he "did not once seek a continuance . . . or even informally request that a date be postponed" (see AOB 31), appellant expressly asked for a postponement on June 2, 1995. (See also Supp. IIICT 93-94 [Appellant stated, "On June 2nd, I had a discovery motion heard which I asked for a continuance, and I was denied, ..."].)

On the following court date, July 10, 1995, the court asked appellant and Deputy District Attorney Walsh about picking a date for the preliminary hearing. Walsh replied that he was available any day. Appellant responded that he was submitting a supplemental discovery motion. (See Supp. IIICT 70.) Appellant complained that he was missing discovery material which Walsh had earlier stated had been handed over to appellant's investigator. Walsh replied that he had not previously turned over material to appellant's investigator, Jensen, and stated that he had given a complete and true copy of the murder book to appellant's previous attorney, Fisher. The court suggested that

appellant, his investigator Jensen, and Deputy District Attorney Walsh "work together to try to get all these items to [appellant]" so that appellant can indicate on August 30, 1995, that he is ready for the preliminary hearing. (See Supp. IIICT 70-72.) Thus, the record shows that appellant was aware that the court wanted appellant to be ready for the preliminary hearing and that appellant's claimed discovery omissions were suspect.

On the following court date, August 30, 1995, Jensen informed the court that he was retiring, that another investigator, Mackey, had agreed to take appellant's case, that appellant was willing to have Mackey as his investigator, that Jensen would work with Mackey on some matters, and that Jensen did not "see a delay in the matter continuing." (See Supp. IIICT 78-79.) Thus, the record shows that Jensen believed the change in appellant's investigators would not delay the proceedings.

Deputy District Attorney Walsh then stated that about two weeks earlier, he and Jensen went through the entire murder book page by page, that Walsh gave Jensen copies of some documents that Jensen did not have, and that Jensen gave Walsh appellant's further discovery request which included requests for rap sheets of about 25 witnesses. Walsh indicated that he submitted the request for the rap sheets to a unit in his office and that he believed all the requested discovery has been provided, except for these rap sheets and some audiotapes which were in the process of being reproduced. (See Supp. IIICT 79-80.) Thus, the record shows that the prosecutor believed all of appellant's requested discovery had been provided, with the exception of the specified rap sheets and audiotapes which would be provided when ready.

At this point, appellant and the court discussed appellant's submitted subpoenas. The court asked appellant what he wanted regarding these subpoenas, "[a]ssuming they [were] appropriate." After hearing responses from the people present in the courtroom as a result of appellant's subpoenas and

hearing from appellant, the court asked appellant to meet with his investigator regarding the subpoenas. During this exchange, the court also asked for the "[n]ext date set for preliminary hearing." (See Supp. IIICT 80-82.) A review of the exchange between appellant and the court concerning the subpoenas suggests that appellant had not handled matters regarding the subpoenas in an appropriate manner.

Then, appellant acknowledged that he had received some discovery from Walsh but complained that he had not received certain items from Walsh, including pictures of Jackson's room and pictures of appellant's injuries. Appellant said he made a list of the material he was requesting, and the court asked appellant to meet with Mackey about it. The court asked Walsh to "give those to the investigator," and Walsh replied he would. Appellant also complained that he had not received a felony complaint form. Walsh replied that he had already given a copy of that document to Jensen earlier but would provide appellant with another copy. (See Supp. IIICT 82-83.) Thus, the record shows that there was at least one instance where the defense did in fact have possession of a complained-of discovery item, i.e., appellant's investigator had received the item from the prosecutor, contrary to appellant's assertion that the defense did not have the item.

On the following court date, September 28, 1995, the court terminated appellant's in propria persona status. After the ruling, appellant became angry and threw sharpened pencils in the direction of Deputy Public Defender Fisher. (See Supp. IIICT 87-91.)

The record supports the court's findings that appellant's actions, while representing himself during pretrial proceedings, were dilatory and that appellant was not complying with the relevant rules of procedural and substantive law. The court's assessment concerning appellant's motive and sincerity, the nature and context of his misconduct, and its impact on the

integrity of the trial should be accorded due deference. (See *People v. Carson*, *supra*, 35 Cal.4th at p. 12.) Appellant's actions constituted "'deliberate dilatory or obstructive behavior'" and thus, his right of self-representation was subject to being terminated by Judge Horwitz. (See *id.* at p. 10.) Therefore, Judge Horwitz did not abuse his discretion in terminating appellant's right to self-representation at the pretrial stage before the preliminary hearing.

In addition, based on some statements made by the court to appellant, appellant asserts that the court also terminated appellant's right of self-representation on the improper ground that appellant was unable to defend himself. (See AOB 29, 40-43; Supp. IIICT 98 ["I feel that you are not conducting yourself in a manner that an attorney at law would conduct himself"]; Supp. IIICT 99 ["this Court, if it was reviewing your quality of representation by you, would find that the quality of representation was not adequate."]; see also *Faretta v. California*, *supra*, 422 U.S. at p. 836 ["For his technical legal knowledge, as such, was not relevant to an assessment of his knowing exercise of the right to defend himself."]; *People v. Dent* (2003) 30 Cal.4th 213, 217 [defendant's technical legal knowledge is irrelevant to court's assessment of defendant's knowing exercise of right to defend himself]; *People v. Welch*, *supra*, 20 Cal.4th at p. 733 [trial court may not ascertain a defendant's competence to waive counsel by evaluating the ability to represent himself], citing *Godinez v. Moran* (1993) 509 U.S. 389, 399-400 [113 S.Ct. 2680, 125 L.Ed.2d 321].) However, respondent submits that these statements (see Supp. IIICT 98-99) refer to the court's belief that appellant was not "comply[ing] with relevant rules of procedural and substantive law" (see *Faretta v. California*, *supra*, 422 U.S. at p. 834, fn. 46), and not, as appellant claims, to appellant's ability to represent himself.

D. Any Alleged *Faretta* Error During Pretrial Proceedings Before The Preliminary Hearing Was Harmless

Even assuming that the court abused its discretion in terminating appellant's in propria persona status during pretrial proceedings in municipal court, respondent submits that any alleged error was harmless. Although *Faretta* error involving a trial court's abuse of discretion in terminating a defendant's right to self-representation during the actual trial is generally reversible per se, respondent asserts that such *Faretta* error during a preliminary hearing is subject to harmless error analysis. Since the complained-of termination in appellant's case occurred even *before* the preliminary hearing, any alleged *Faretta* error involving the municipal court judge's alleged abuse of discretion in terminating appellant's right of self-representation should also be subject to harmless error analysis, as will be discussed below.

In *United States v. Gonzalez-Lopez* (2006) 548 U.S. 140 [126 S.Ct. 2557, 165 L.Ed.2d 409], the United States Supreme Court, citing its previous case in *Arizona v. Fulminante* (1991) 499 U.S. 279 [111 S.Ct. 1246, 113 L.Ed.2d 302], explained that there were two classes of constitutional errors, stating:

> The first we called "trial error," because the errors "occurred during presentation of the case to the jury" and their effect may "be quantitatively assessed in the context of other evidence presented in order to determine whether [they were] harmless beyond a reasonable doubt." These include "most constitutional errors." The second class of constitutional error we called "structural defects." These "defy analysis by 'harmless-error' standards" because they "affec[t] the framework within which the trial proceeds," and are not "simply an error in the trial process itself." Such errors include the denial of counsel, the denial of the right of self-representation, the denial of the right to public

trial, and the denial of the right to trial by jury by the giving of a defective reasonable-doubt instruction.

(*United States v. Gonzalez-Lopez, supra*, 126 S.Ct. at pp. 2563-2564, citations and footnote omitted.)

Respondent acknowledges that *Faretta* error during the actual trial is generally reversible per se. The "denial of the right to self-representation at trial" is reversible per se because it is a "'structural defect affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself' [citation]." (*People v. Stewart* (2004) 33 Cal.4th 425, 462, citing *Arizona v. Fulminante, supra*, 499 U.S. at p. 310; see also *McKaskle v. Wiggins* (1984) 465 U.S. 168, 177, fn. 8 [104 S.Ct. 944, 79 L.Ed.2d 122] ["Since the right of self-representation is a right that when exercised usually increases the likelihood of a trial outcome unfavorable to the defendant, its denial is not amenable to "harmless error" analysis. The right is either respected or denied; its deprivation cannot be harmless."]; *People v. Dent, supra*, 30 Cal.4th at p. 217 [citing *McKaskle v. Wiggins* in stating that "[e]rroneous denial of a *Faretta* motion is reversible per se"]; *People v. Tena* (2007) 156 Cal.App.4th 598, 614.) However, respondent asserts that "an error that would constitute a structural defect *at trial* is not invariably reversible per se when confined to the preliminary hearing." (See *People v. Tena, supra*, 156 Cal.App.4th at p. 613, original italics.)[4/]

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4. In *Faretta*, the United States Supreme Court held that "a defendant in a state criminal trial has a constitutional right to proceed without counsel when he voluntarily and intelligently elects to do so," and that a State may not force a lawyer upon him when he insists that he wants to conduct his own defense. (See *Faretta v. California, supra*, 422 U.S. at p. 807.) Respondent notes that in his dissent in *Faretta*, Justice Blackmun noted future procedural issues concerning *Faretta*'s holding such as, "May a violation of the right to self-representation ever be harmless error?" (See *id.* at pp. 846, 852 (dis. opn. of Blackmun, J.).)

The right of self-representation stems from the Sixth Amendment, which states in part that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." (U.S.C.A. Const. Amend. VI.)

> A defendant in a criminal case possesses two constitutional rights with respect to representation that are mutually exclusive. A defendant has the right to be represented by counsel at all critical stages of a criminal prosecution. At the same time, the United States Supreme Court has held that because the Sixth Amendment grants to the accused personally the right to present a defense, a defendant possesses the right to represent himself or herself.

(*People v. Marshall* (1997) 15 Cal.4th 1, 20, citations omitted; see *People v. Tena*, *supra*, 156 Cal.App.4th at p. 604 [a defendant possesses two mutually exclusive rights under the Sixth Amendment: the right to be represented by counsel at all critical stages of a criminal prosecution and the right to represent himself].)

In *Coleman v. Alabama* (1970) 399 U.S. 1 [90 S.Ct. 1999, 26 L.Ed.2d 387], the United States Supreme Court held that "the Alabama preliminary hearing is a 'critical stage' of the State's criminal process at which the accused is 'as much entitled to such aid (of counsel) as at the trial itself.' [Citation.]" (*Id.* at pp. 9-10.) In that case, the petitioners were not provided with appointed counsel at the preliminary hearing, and the United States Supreme Court concluded that "[t]he test to be applied is whether the denial of counsel at the preliminary hearing was harmless error under *Chapman v. California* [(1967) 386 U.S. 18 [87 S.Ct. 824, 17 L.Ed.2d 705]]. [Citation.]" (*Coleman v. Alabama*, *supra*, 399 U.S. at p. 11; see *People v. Pompa-Ortiz* (1980) 27 Cal.3d 519, 530 ["Thus, even in a situation as extreme as the denial of counsel, the U.S. Supreme Court [in *Coleman v. Alabama*] has held that the harmless error

rule is applicable. [Citation.]"]; *People v. Tena*, *supra*, 156 Cal.App.4th at p. 613.)

Similarly, *Faretta* error at a preliminary hearing should be subject to harmless error analysis using the standard of *Chapman v. California*, *supra*, 386 U.S. at p. 24. As explained by the Court of Appeal in the case of *People v. Tena*, *supra*, 156 Cal.App.4th 598,

> [T]o hold otherwise leads to a result difficult to reconcile with the right to a full defense guaranteed all defendants by the Sixth Amendment: a defendant wrongfully *denied* the advantages of counsel at the preliminary hearing would be obliged to carry a heavier burden on appeal than a defendant who wrongfully *received* these advantages. Unless both errors are subject to harmless error analysis, the defendant who seeks and is denied counsel at the preliminary hearing must show prejudice from this error, whereas a defendant who benefits from counsel at the preliminary hearing after an improper denial of self-representation - and who subsequently requests and receives counsel at trial - would be entitled to per se reversal of the judgment.

(*People v. Tena*, *supra*, 156 Cal.App.4th at p. 614, original italics.)

> Accordingly, unless a defendant improperly denied self-representation at the preliminary hearing is held to the same requirement, the defendant will be entitled to an automatic reversal of the judgment, even though the error will typically work in his or her favor at trial. Neither the Constitution nor case law compels such an anomalous result.

(*Id.* at pp. 614-615.) Therefore, relying on *Coleman v. Alabama*, *supra*, 399 U.S. 1, the Court of Appeal in *Tena* concluded, among other things, that "the denial of self-representation at the preliminary hearing, like the denial of counsel at the preliminary hearing, is subject to harmless error analysis [pursuant to *Chapman v. California*, *supra*, 386 U.S. at p. 24]." (*People v.*

Tena, supra, 156 Cal.App.4th at pp. 614-615; but see *Moon v. Superior Court* (2005) 134 Cal.App.4th 1521, 1528-1534 [a petitioner who was erroneously denied the right to represent himself at the preliminary hearing, subsequently filed a section 995 motion complaining he was not granted self-representation, and then sought relief by filing a petition for writ of mandate/prohibition after his section 995 motion had been denied, was not required to show prejudice from the erroneous denial of the right of self-representation].)

In another case, the Court of Appeal in *People v. Johnson* (1970) 13 Cal.App.3d 1, held that the municipal court's refusal to allow the defendant to represent himself during the preliminary hearing, "if erroneous, was harmless beyond a reasonable doubt." (*Id.* at p. 5.) Referring to the holding in *Coleman v. Alabama* that "the harmless error doctrine applies to the right to counsel at preliminary hearings," the Court of Appeal in *Johnson* stated:

> If it be assumed that a defendant, being entitled to counsel at the preliminary hearing, is also entitled to represent himself at such hearing, it is obvious that the denial of the right of self-representation would likewise be subject to the harmless error test. There can be no question that there would be far less likelihood of prejudice resulting from the denial of a defendant's right to represent himself at the preliminary hearing than from the denial of his right to counsel at such hearing.

(*People v. Johnson, supra*, 13 Cal.App.3d at p. 5, citing *Coleman v. Alabama, supra*, 399 U.S. at pp. 10-11.)[5/]

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5. Although the Ninth Circuit's unpublished memorandum decision in *Washington v. Cambra* (9th Cir. 1997) 116 F.3d 488, has no precedential value (see 9th Cir. Rule 36-3), respondent notes that the Ninth Circuit in that case cited both *Coleman v. Alabama, supra*, 399 U.S. at pp. 10-11, and *People v. Johnson, supra*, 13 Cal.App.3d at p. 5, in indicating that an erroneous denial of the right to proceed pro se at the preliminary hearing was subject to harmless error analysis.

Moreover, this Court's opinion in *People v. Pompa-Ortiz*, *supra*, 27 Cal.3d 519, further supports respondent's assertion that any alleged pretrial *Faretta* error involving the municipal court judge's alleged abuse of discretion in terminating appellant's right of self-representation before the preliminary hearing should be subject to harmless error analysis. In *People v. Pompa-Ortiz*, this Court stated:

> [I]rregularities in the preliminary examination procedures which are not jurisdictional in the fundamental sense shall be reviewed under the appropriate standard of prejudicial error and shall require reversal *only if defendant can show that he was deprived of a fair trial or otherwise suffered prejudice as a result of the error at the preliminary examination*. The right to relief without any showing of prejudice will be limited to pretrial challenges of irregularities. At that time, by application for extraordinary writ, the matter can be expeditiously returned to the magistrate for proceedings free of the charged defects.

(*People v. Pompa-Ortiz*, *supra*, 27 Cal.3d at p. 529 [regarding error in denying the defendant a public preliminary hearing], italics added; see *People v. Tena*, *supra*, 156 Cal.App.4th at pp. 613, 615; see also *People v. Fierro* (1991) 1 Cal.4th 173, 220 [since the dangers of unwarranted shackling at a preliminary hearing were not as substantial as during trial, a lesser showing than that required at trial was appropriate; error in shackling the defendant during preliminary hearing was not prejudicial].)

A comparison of the instant case with the case of *Moon v. Superior Court*, *supra*, 134 Cal.App.4th 1521, illustrates why appellant should be required to show prejudice in the instant case. In *Moon v. Superior Court*, the petitioner requested self-representation, as well as a *Marsden*[6] hearing, during his preliminary hearing. The magistrate denied both requests. (*Id.* at pp. 1523-

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6. *People v. Marsden* (1970) 2 Cal.3d 118.

1527.) After the petitioner was bound over on all the charges and an information was filed in superior court, the petitioner moved to dismiss the information under section 995 on the basis that he was denied his right of self-representation during the preliminary hearing. The superior court found that the magistrate had erred in not allowing the petitioner to represent himself but concluded that there was no showing of prejudice and thus, denied the petitioner's motion. The petitioner then filed a petition for writ of mandate/prohibition, challenging the superior court's ruling. (*Id.* at pp. 1527-1528.) The Court of Appeal concluded that the magistrate had erred in denying the petitioner's request for self-representation and that the petitioner was entitled to have the information set aside under section 995 without having to show prejudice. (*Id.* at pp. 1528-1534.)

Unlike the petitioner in *Moon v. Superior Court*, appellant did not raise the claim that he was improperly denied the right of self-representation during pretrial proceedings in a section 995 motion. (See *Moon v. Superior Court*, *supra*, 134 Cal.App.4th at p. 1528.) Appellant, through counsel Garber, did file a section 995 motion, but the motion was made to dismiss the burglary charge in count 3 on the grounds that there was no evidence presented at the preliminary hearing that a burglary had been committed regarding McPherson and that appellant had not been held to answer on the burglary count. Judge Smith denied appellant's section 995 motion. (See IICT 314-324; see also 1RT D13-D15, E7-E9, G10-G11.) Moreover, there is no indication in the record that appellant, unlike the petitioner in *Moon* (see *Moon v. Superior Court*, *supra*, 134 Cal.App.4th at p. 1528), filed a petition for writ of mandate/prohibition or other extraordinary writ regarding the allegedly improper denial of his pretrial request for self-representation, despite appellant's statement to the court, on September 28, 1995, after his in propria persona status had been terminated, that appellant would indeed "take this on a writ"

(see Supp. IIICT 87-89). Since appellant did not attempt to address the allegedly improper denial of his right of self-representation prior to trial when the alleged *Faretta* error occurred, appellant should be required to show prejudice in the instant case. (See *People v. Pompa-Ortiz*, *supra*, 27 Cal.3d at p. 529 ["The right to relief without any showing of prejudice will be limited to pretrial challenges of irregularities. At that time, by application for extraordinary writ, the matter can be expeditiously returned to the magistrate for proceedings free of the charged defects."].)

Since *Faretta* error during a preliminary hearing should be subject to harmless error analysis, as explained above, any alleged pretrial *Faretta* error in appellant's case, involving the municipal court judge's alleged abuse of discretion in terminating appellant's right of self-representation *before* the preliminary hearing, should also be subject to harmless error analysis. Assuming arguendo that the court abused its discretion in terminating appellant's in propria persona status during pretrial proceedings before the preliminary hearing, any alleged error was harmless beyond a reasonable doubt for the following reasons:

First, appellant fails to show that he was "deprived of a fair trial or otherwise suffered prejudice" as a result of the alleged pretrial *Faretta* error before the preliminary hearing. (See *People v. Pompa-Ortiz*, *supra*, 27 Cal.3d at p. 529.) In particular, appellant fails to show that the outcome of the pretrial proceedings, specifically the preliminary hearing, would have been any different (i.e., that appellant would not have been held to answer after the preliminary hearing) had he represented himself during the pretrial proceedings. The standard of probable cause at a preliminary hearing is much lower than the standard of proof beyond a reasonable doubt at trial. (See *People v. Hardacre* (2001) 90 Cal.App.4th 1392, 1400 [probable cause is a lower standard of proof than either proof beyond a reasonable doubt or by a preponderance of the

evidence]; see also *People v. Slaughter* (1984) 35 Cal.3d 629, 636-637.) Thus, the fact that appellant was convicted by jury at trial while represented by counsel shows that any pretrial *Faretta* error in not allowing appellant to represent himself during pretrial proceedings such as the preliminary hearing was harmless. (See also *United States v. Mechanik* (1986) 475 U.S. 66, 69-70 [106 S.Ct. 938, 89 L.Ed.2d 50] [in federal prosecution, petit jury's guilty verdict meant that any error in grand jury's decision to issue indictment against defendants was harmless beyond a reasonable doubt since verdict indicated "not only that there was probable cause to believe that the defendants were guilty as charged, but also that they are in fact guilty as charged beyond a reasonable doubt"].)

Second, any allegedly improper termination of appellant's right of self-representation during pretrial proceedings was harmless because appellant's subsequent conduct showed that he abandoned his earlier desire to represent himself during pretrial proceedings and acquiesced in being represented by attorneys Garber and Taylor during the guilt phase of trial. (See *People v. Tena, supra*, 156 Cal.App.4th at p. 615 [finding no prejudice under *Chapman* because "[f]ollowing the preliminary hearing, [the defendant] appeared with retained counsel of his choice, who represented [the defendant] throughout trial," and the defendant "has not attempted to demonstrate that his defense at trial was in any way impaired by his failure to represent himself at the preliminary hearing"].) "Numerous courts have held that after a defendant invokes the right to self-representation, a waiver may be found if it reasonably appears that the defendant abandoned the request. [Citations.]" (*People v. Tena, supra*, 156 Cal.App.4th at p. 610; see *People v. Stanley* (2006) 39 Cal.4th 913, 929, 931, 933 ["In light of defendant's subsequent acceptance of several appointed counsel to represent him [both at the preliminary hearing and throughout the ensuing trial] without ever renewing his request for self-

representation [which had been made and denied in municipal court about one year before the preliminary hearing], we conclude he must further be found to have ultimately abandoned his desire to invoke his *Faretta* rights in these capital murder proceedings. [Citation.]"].)

In the instant case, during pretrial proceedings, appellant requested his right to self-representation and was granted in propria persona status on May 19, 1995. (See Supp. IIICT 35-34, 36-39.) On September 28, 1995, the court revoked appellant's right to represent himself (see IIICT 87-91), and denied appellant's subsequent requests on November 9, 1995 (see Supp. IIICT 92-100) and on November 13, 1995 (see Supp. IIICT 102-104) to reinstate appellant's in propria persona status. On December 13, 1995, counsel Garber was appointed to represent appellant because the Public Defender's Office declared a conflict. Judge Horwitz, who was presiding over appellant's case, also recused himself, based on the filing of the case involving appellant having allegedly thrown pencils at Deputy Public Defender Fisher in Judge Horwitz's courtroom, and appellant's instant case was transferred to Judge Glenette Blackwell. (See Supp. IIICT 107-109; ICT 17-18, 31, 278.) Appellant was represented by counsel Garber for the remainder of the pretrial proceedings. Counsel Garber represented appellant during the preliminary hearing, which occurred on February 13, 1996, before Judge Blackwell. (See ICT 28-159.) There is no indication in the record that appellant made another pretrial request for self-representation after counsel Garber was appointed as appellant's attorney and appellant's case was transferred to Judge Blackwell.

Appellant was represented by attorneys Garber and Taylor for the guilt phase portion of trial. The trial was held before Judge Smith in superior court. There is no indication in the record that appellant made another request for self-representation during the guilt phase portion of the actual trial. On July 30, 1997, after the guilty verdicts were read, appellant requested self-representation

for the penalty phase of trial but on the following day, July 31, 1997, he changed his mind and asked for continued representation by his attorneys. (See 12RT 1462, 1464-1466, 1469-1473, 1482-1483.)

Since the record does not show that appellant made any unequivocal requests for self-representation during pretrial proceedings before Judge Blackwell while being represented by counsel Garber which included the preliminary hearing, or during the guilt phase trial before Judge Smith while being represented by attorneys Garber and Taylor, it reasonably appears that appellant abandoned his earlier desire to represent himself during pretrial proceedings before Judge Horwitz. By his subsequent silence on the matter, appellant essentially acquiesced to being represented by attorneys Garber and Taylor during the actual guilt phase trial. (See *People v. Kenner* (1990) 223 Cal.App.3d 56, 59, 62 [After trial court failed to rule on defendant's *Faretta* motion, defendant failed to follow up on his request despite having both the "time and opportunity" to do so, and thus, defendant's "conduct throughout the proceedings indicated unequivocally that he agreed to and acquiesced in being represented by counsel," especially since "[d]efendants who sincerely seek to represent themselves have a responsibility to speak up."].) Thus, any allegedly improper termination of appellant's pretrial *Faretta* right by Judge Horwitz was harmless since appellant's abandonment of his earlier desire to represent himself during pretrial proceedings shows that appellant did not truly want to represent himself during the preliminary hearing or the actual guilt phase of trial. (See *People v. Tena*, *supra*, 156 Cal.App.4th at p. 615, citing *People v. Dunkle* (2005) 36 Cal.4th 861, 907-910 [noting that this Court in *Dunkle* "held that a defendant who was wrongfully denied the right to self-representation for a year during pre-trial proceedings, but who subsequently expressly waived this

right and proceeded to trial with counsel, was not entitled to relief on appeal, reasoning that the defendant's waiver had 'cured the error.' [Citation.]"].)[7/]

It should also be noted that appellant had the opportunities to again request self-representation before different judges during the pretrial and trial proceedings. After Judge Horwitz, who had granted and then terminated appellant's in propria persona status during pretrial proceedings, was recused from the case, appellant could have, but did not make a request for self-representation when he appeared for pretrial proceedings before Judge Blackwell. For actual trial proceedings, appellant appeared before yet another judge, Judge Smith, but did not make a request for self-representation during the guilt phase trial. If appellant truly wanted to represent himself during the trial, he could have made *Faretta* motions all throughout his guilt phase trial and repeatedly expressed his fervent desire to represent himself during trial. Appellant clearly knew that he could make another *Faretta* request since after he was convicted, he requested self-representation for the penalty phase but later withdrew that request. (See 12RT 1462, 1464-1466, 1469-1473, 1482-1483.) Since appellant was facing different judges (Judge Blackwell and Judge

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7. Respondent notes that in the hypothetical situation where a defendant's pretrial in propria persona status was improperly revoked (so that the defendant was represented by counsel before trial and during the preliminary hearing), but the defendant later requested and was granted self-representation during the actual trial, any pretrial *Faretta* error would be harmless because the defendant ultimately did represent himself at trial. (See *People v. Johnson*, *supra*, 13 Cal.App.3d at p. 5 [Where the defendant was denied right to represent himself at the preliminary hearing but allowed to represent himself at trial, any error was harmless beyond a reasonable doubt because at the preliminary hearing, the prosecution called only one witness (the victim), who was thoroughly cross-examined by the public defender, and the victim was present at trial where the defendant cross-examined her at length; thus, the defendant "has failed to suggest any way in which he was prejudiced by the court's refusal of his request to represent himself at the preliminary hearing."].)

Smith), and not Judge Horwitz, appellant could not reasonably believe that making another *Faretta* request would have been futile. (See *People v. Tena*, *supra*, 156 Cal.App.4th at p. 611 [noting that defendant appeared before a different bench officer and thus had a "fresh opportunity to make a *Faretta* request"].)

Finally, the reasonableness of utilizing a harmless error analysis in a case such as appellant's is evident. Assuming that the court abused its discretion in terminating appellant's right of self-representation during pretrial proceedings before the preliminary hearing, the reversible-per-se standard would result in the nullification of all subsequent proceedings, appellant's guilt phase jury trial in which he was convicted of capital murder, and appellant's penalty phase trial in which he was ultimately sentenced to death. This Court has stated, "We have an obligation to interpret *Faretta* in a reasonable fashion to vindicate the legitimate rights of defendants while at the same time avoiding turning the trial into a charade in which a defendant can continually manipulate the proceedings in the hope of eventually injecting reversible error into the case no matter how the court rules." (*People v. Clark*, *supra*, 3 Cal.4th at p. 116.)

As noted above, when appellant's counsel made a section 995 motion, that motion did not include the allegedly improper termination of appellant's right of self-representation during the pretrial stage. (See IICT 314-324; see also 1RT D13-D15, E7-E9, G10-G11.) Although appellant stated that he would "take this on a writ" after the court terminated his right of self-representation at the pretrial stage (see Supp. IIICT 87-89), there is no indication in the record that appellant did actually file a writ challenging the termination of his in propria persona status. If appellant had included the allegedly improper termination of his right to self-representation during the pretrial stage in his section 995 motion or filed a petition for writ of mandate/prohibition, then appellant could have attempted to remedy any alleged

Faretta error that occurred during the pretrial stage at the early part of the proceedings in 1996 or 1997. Yet appellant did not do so, and his first complaint regarding this alleged pretrial stage *Faretta* error occurs in his opening brief on appeal following his capital murder conviction and death penalty sentence, filed in 2007, which was about 12 years after the allegedly improper termination of his right of self-representation in 1995. (See *People v. Kenner, supra*, 223 Cal.App.3d at pp. 59, 62 [the defendant did not mention his unresolved *Faretta* request until filing his opening brief in the Court of Appeal, and the Court of Appeal stated that if the record were to establish that this was the defendant's "cunning strategy," such "gamesmanship should not be rewarded" on appeal].) For all these reasons, even assuming that the court abused its discretion in terminating appellant's right of self-representation during pretrial proceedings before the preliminary hearing, any alleged error was harmless. Therefore, appellant's contention should be rejected.

II.

APPELLANT'S CLAIM IS FORFEITED; THE COURT DID NOT ABUSE ITS DISCRETION IN APPARENTLY RULING THAT APPELLANT WEAR A STUN BELT DURING THE GUILT PHASE OF TRIAL; ANY ALLEGED ERROR WAS HARMLESS

Appellant contends that the trial court erroneously forced him to wear a REACT belt restraint during the guilt phase of his capital trial, in violation of state law and the due process clause of the Fourteenth Amendment. (AOB 50-71.) Initially, respondent submits that appellant's claim is forfeited on appeal. In any event, respondent submits that the trial court (Judge Smith) did not abuse its discretion in apparently ruling that appellant wear a stun belt during the guilt phase of trial. Moreover, any alleged error was harmless.

A. Factual Background

On July 31, 1997, just before the start of the penalty phase, the following exchange occurred outside the jury's presence:

[Deputy District Attorney Ratinoff]: Your Honor - -

[Judge Smith]: Yes, ma'am?

[Deputy District Attorney Ratinoff]: - - with regard to [appellant] wanting to wear his jail blues and also be shackled as opposed to wearing the belt, I would like the Court to note that under People versus Fierro, which is . . . 1 Cal.4th 173, a 1991 case, at page 218, the rule is that during a trial a defendant cannot be subjected to physical restraints of any kind in the courtroom while in the jury's presence unless there is a showing of a manifest need for such restraints. And then that court cites a string of cases as well.[8/] [¶] I would ask the Court to note that *during the guilt phase that the Court had indicated that* [*appellant*] *was to have the belt on him because he was a high-security risk based on certainly the statement in aggravation that the Court was aware of and his prior conduct, particularly in custody as well as out of custody.* [¶] I understand, and I would ask to be corrected if I am incorrect, I understand that [appellant] has now refused to wear that belt and as a result the Court had no option but to have him - -

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8. In *People v. Fierro*, *supra*, 1 Cal.4th 173, this Court quoted from the case of *People v. Duran* (1976) 16 Cal.3d 282, 290-291, that "during a trial 'a defendant cannot be subjected to physical restraints of any kind in the courtroom while in the jury's presence, unless there is a showing of a manifest need for such restraints.' [Citations.]" (*People v. Fierro*, *supra*, 1 Cal.4th at p. 218.) The Court in *Fierro* held that "as at trial, shackling should not be employed at a preliminary hearing absent some showing of necessity for their use," but "a lesser showing than that required at trial is appropriate" because the "dangers of unwarranted shackling at the preliminary hearing," while real, were "not as substantial as those presented during trial." (*Id.* at p. 220.)

[Judge Smith]: I think the law is clear. I made the record about he is in his jail blues. [¶] He did not refuse. *He said he may have a heart condition - -*

[Appellant]: I have a heart condition.

[Judge Smith]: - - for the record, and *the bailiffs and defense counsel notified the Court that in the best interest of his health that he not wear the belt.* And so in lieu of the belt, based on those articulated issues by the district attorney, we have draped the table and we have shackled his feet. [¶] And he is in jail blues because you want to be, right?

[Appellant]: Yes, your Honor.

[Judge Smith]: Thank you.

[Deputy District Attorney Ratinoff]: Thank you, your Honor.

[Judge Smith]: Okay. [¶] Let's proceed. [Trial counsel] Taylor will be back shortly.

(12RT 1487-1489, italics added; see also 12RT 1482.)

During record correction proceedings on December 10, 2003, the following discussion occurred regarding the issue of restraints:

[Judge Smith]: And after that, do you have some information - - or Miss Lovelace [capital appeals coordinator] did about Diana Grace, our former reporter on this case. Is that correct?

[Appellate counsel Bernstein]: Your Honor, I did have some informal discussions with Miss Lovelace, as well, in the pendency between our hearings, and she did give me some information that I suggested she put on the record so that the Court could make an informed decision on that issue regarding the restraints that apparently were used during the guilt phase of the trial on [appellant].

Ms. Lovelace: This is Addie. [¶] I spoke with Diana Grace, and Diana indicated that, based on your request to have her global certain words, such as "stun gun," to try to obtain the hearing dates of certain proceedings, she is not at liberty to do that, because that is not her job, necessarily, to do that. [¶] So she's requesting that, if counsel wants any proceeding, that you would have to - - Miss Bernstein would have to produce the date.

[Judge Smith]: I spoke to her, also, Miss Bernstein. And as you know, she is also the reporter for the grand jury. And I went over the procedures, what they do, what they don't do, and she just can't do that. It's not in her purview of record correction, and she is not going to do it, and I am not going to order her to do that. [¶] But if you can find specific dates, times, pages, or whatever you need, then we will see if we can produce it for you. [¶] Is that all right?

[Appellate counsel Bernstein]: Yes. I don't anticipate being able to be any more exact, given the information I have.

[Judge Smith]: Yes.

[Appellate counsel Bernstein]: So that may or may not appear as an issue for record correction. Instead, if it appears that there was a prior hearing, counsel, trial counsel personnel, if it appears that there was a prior hearing, then we will see what we can do on finding dates or in the alternative seek to settle it.

(12/10/03 RT 3-4; see VCT 310; see also VCT 102-103 [appellant's amended preliminary motion for a complete and accurate record on appeal, which included request for "[t]ranscript held prior to guilt phase proceedings during which court held that [appellant] was to wear a stun belt as he was a high security risk (RT 1488)"]; VCT 249, 294.)

After the record correction proceeding on December 10, 2003, it does not appear that appellate counsel requested a settled statement regarding any hearing during which Judge Smith had apparently ruled that appellant wear a stun belt during the guilt phase of trial. (See VCT 313-320 [appellant's applications for settlement of the appellate record]; VICT 35-46 [appellant's proposed settled statement]; VICT 57-62 [appellant's engrossed settled statement]; VICT 65 [Judge Smith's order regarding engrossed settled statement].)

B. Appellant's Claim Is Forfeited

Appellant's specific claim is that the trial court erroneously forced him to wear a stun belt during the guilt phase of trial, in violation of state law and the due process clause of the Fourteenth Amendment. (AOB 50.) Specifically, appellant asserts that the court "unilaterally and without proper consideration of the particular facts of this case," such as appellant's heart condition, elected to put a stun belt on appellant. (See AOB 50-51.) Appellant states that because the court "knew that appellant suffer[]ed from a serious heart condition and was the primary witness on his own behalf, the decision to place him in a stun belt at the guilt phase necessarily impeded the exercise of his Sixth and Fourteenth Amendment rights. . . ." (AOB 51.)

First, respondent submits that appellant has forfeited his claim, that the court erred in ruling that appellant wear a stun belt during the guilt phase of trial, because appellant has not met his burden of affirmatively showing error. There is no indication in the appellate record of the court making a specific ruling on the use of a stun belt on appellant. Appellant did not make a request to settle the record during record correction proceedings (after the apparent inability to locate and thus obtain a transcript of a ruling) regarding any hearing during which the court made this complained-of ruling about the stun belt. (See *People v. Tafoya* (2007) 42 Cal.4th 147, 164 [Defendant contended that the

joint trial denied him the right to a jury drawn from a representative cross-section of the community because co-defendant used peremptory challenges against prospective jurors with Hispanic names, but this Court found, among other things, that defendant "failed to make an adequate record of the ethnicity of prospective jurors, making it difficult for a reviewing court to determine which prospective jurors were Hispanic" and thus, defendant "has not preserved this issue for appellate review"]; *Marks v. Superior Court* (2002) 27 Cal.4th 176, 192-197 [regarding settled statements].) In the absence of affirmative evidence, error will not be assumed. (See *People v. Ward* (2005) 36 Cal.4th 186, 206, citing *People v. Pride* (1992) 3 Cal.4th 195, 233 [Although defendant contended on appeal that the jurors saw his shackles when he had to show his tattoos during the testimony of a prosecution witness, this Court stated that "the record fails to support such an assertion" and the Court "will not assume this occurred in the absence of affirmative evidence."].)

During record correction proceedings, appellate counsel did request a "[t]ranscript [of any hearing] held prior to guilt phase proceedings during which court held that [appellant] was to wear a stun belt as he was a high security risk (RT 1488)." (VCT 102-103.) On December 10, 2003, the court stated that if appellate counsel "can find specific dates, times, pages," regarding any hearing concerning the restraints that were used on appellant during the guilt phase of trial, then "we will see if we can produce it [a transcript of such hearing] for you." (12/10/03 RT 3-4.) After appellate counsel replied that she did not "anticipate being able to be any more exact, given the information [she had]," counsel stated "that may or may not appear as an issue for record correction." (12/10/03 RT 4.) Appellate counsel added, "[I]f it appears that there was a prior hearing, counsel, trial counsel personnel, if it appears that there was a prior hearing, then we will see what we can do on finding dates or in the alternative seek to settle it." (12/10/03 RT 4.) After the record correction

proceeding on December 10, 2003, it does not appear that appellate counsel requested to settle the record regarding any hearing during which the court had apparently ruled that appellant wear a stun belt during the guilt phase of trial. (See VCT 313-320; VICT 35-46, 57-62, 65.)

Although appellant cannot be faulted for the inability of the court reporter or other personnel to locate a transcript of any hearing during which the court made its ruling regarding the stun belt, appellant could have either (1) made further efforts, perhaps by inquiring of trial counsel, to determine the date of such a hearing in order to facilitate the locating of any such transcript for augmentation, or (2) asked to settle the record regarding this matter after having asked for a certificate indicating that a transcript cannot be obtained. (See *Marks v. Superior Court, supra*, 27 Cal.4th at pp. 192-194.) It is unknown whether the record could have been settled regarding such a hearing, through the memories of the trial judge (Judge Smith), Deputy District Attorney Ratinoff, trial counsel Garber, trial counsel Taylor and/or others who may have been present at such a hearing, since there was no request to settle the record about this matter. Since appellant makes the claim that the court erred in apparently ruling that appellant wear a stun belt during the guilt phase of trial, it is appellant's burden to affirmatively show this alleged error by making all reasonable efforts to provide the appellate court with a record of the proceedings during which the alleged error occurred. Appellant has failed to meet his burden.

Second, since there is no record of any hearing during which the court apparently ruled regarding the stun belt, it is unclear whether appellant made a timely objection to the stun belt at that time. "It is settled that the use of physical restraints in the trial court cannot be challenged for the first time on appeal," and a defendant's "failure to object and make a record below waives the claim here. [Citations.]" (*People v. Tuilaepa* (1992) 4 Cal.4th 569, 583; see

People v. Ward, *supra*, 36 Cal.4th at p. 206 [defendant forfeited shackling claim on appeal because he failed to make an appropriate and timely objection regarding his shackling on constitutional or any other grounds].) Thus, respondent submits that appellant has forfeited his claim since appellant fails to affirmatively show that he made a timely objection to any ruling that appellant wear a stun belt during the guilt phase of trial.

Moreover, regarding his current appellate claim that the court's apparent stun belt ruling was erroneous specifically because appellant had a heart condition, respondent submits that this appellate claim is forfeited because it can reasonably be inferred from the record that if appellant objected to the use of the stun belt at the time of any ruling, he did not object specifically based on his heart condition at that time but rather, referred to his heart condition just before the start of the penalty phase. On July 31, 1997, just before the beginning of the penalty phase, the court stated that "[appellant] said he may have a heart condition," and "the bailiffs and defense counsel notified the Court that in the best interest of [appellant's] health that he not wear the belt." (12RT 1488.) It was on that date that appellant was shackled instead of wearing the stun belt. (See 12RT 1487-1489.) It can be reasonably inferred from this record that appellant did not object to the use of the stun belt based on his heart condition until just before the beginning of the penalty phase. The same trial judge, Judge Smith, made the apparent ruling about appellant wearing a stun belt during the guilt phase and also made the ruling before penalty phase that appellant not wear the belt due to his heart condition. Had Judge Smith been informed, during any hearing regarding the use of the stun belt at the guilt phase, that appellant had a heart condition, it is reasonable to infer that Judge Smith would have acted the same way he did on July 31, 1997, when he was informed that appellant had a heart condition - - meaning, Judge Smith would not have allowed the belt in light of appellant's heart condition. Thus, it is

reasonable to infer from the record that appellant did not base any objection to the stun belt being worn during the guilt phase, on his heart condition, and that the first mention of his heart condition as a basis for not allowing the stun belt was on July 31, 1997. (See *People v. Cleveland* (2004) 32 Cal.4th 704, 740, citing *People v. Tuilaepa*, *supra*, 4 Cal.4th at p. 583 ["Defendants argue the court erred in ordering the leg braces and improperly abdicated its responsibility to the bailiff. However, they did not object at trial to what actually occurred. One of the defense attorneys said the security should not include 'shackling,' and the defense attorneys wanted the court to ensure that the jury would not see the brace. But none objected to using leg braces under the pants. Accordingly, the issue is not cognizable on appeal. [Citation.]"].)

Contrary to the reasonable inference from the record of July 31, 1997, appellant asserts that "[f]rom the beginning of the proceedings, the trial court and its staff were aware that appellant suffered from a heart condition." (AOB 51.) To support his assertion (see AOB 51-52), appellant refers to portions of the record showing that appellant needed a special, low sodium diet due to his high blood pressure and ulcers. (See ICT 12 [March 14, 1995 minute order showing an order for a special diet was issued by Judge Horwitz]; ICT 28, 34-35 [before start of preliminary hearing on February 13, 1996, counsel Garber informed Judge Blackwell that "based on a medical examination [appellant] was put on a special, assigned a special diet because he suffers from very severe high blood pressure. . . ."]; 1RT B1, B3-B5 [on March 11, 1996, appellant told Judge Smith that he was "on a special diet due to [his] high blood pressure" and was "issued low sodium for high blood pressure plus for [his] ulcers"]; 1RT N1, N3-N4 [on June 19, 1997, appellant told Judge Smith that he took "maxide, the medicine for high blood pressure"]; 1RT O1, O19 [on June 27, 1997, in the context of discussing appellant's special diet and medication for high blood pressure, Judge Smith stated that "[b]lood pressure is a very dangerous and

serious thing"].) However, none of these cited portions of the record refer to appellant having a heart condition. Although appellant also asserts that the "trial court [Judge Smith] was repeatedly made aware of appellant's heart condition" (see AOB 62, citing 1RT B3, B4, O19), the portions of the record cited by appellant show only that Judge Smith was informed that appellant had "health problems," "high blood pressure," and "ulcers," and there is no reference to appellant having a heart condition. (See 1RT B3-B5, O18-O19.) Thus, appellant has forfeited his claim that Judge Smith's ruling was erroneous specifically because of appellant's heart condition.

In addition, since appellant cannot show that he made a timely objection to any ruling regarding the stun belt, appellant has forfeited his federal constitutional claims related to the stun belt ruling, including his claims concerning Fifth and Fourteenth Amendment due process, and "related constitutional rights" under the Sixth Amendment such as the presumption of innocence, the right to a fair trial, the right to participate in his defense, the right to confer with counsel, and the right of confrontation (see AOB 51, 57-58, 61-63), because he also cannot show that he objected on these grounds at the trial level. (See *People v. Carter* (2003) 30 Cal.4th 1166, 1196, fn. 6; *People v. Burgener* (2003) 29 Cal.4th 833, 869, 886; *People v. Millwee* (1998) 18 Cal.4th 96, 128-129; see also *People v. Lewis* (2006) 39 Cal.4th 970, 1031 [finding that defendant's constitutional claims regarding Fifth, Sixth, and Fourteenth Amendments concerning trial court's shackling ruling were forfeited except for defendant's claim that trial court's ruling had additional legal consequence of violating due process]; *People v. Partida* (2005) 37 Cal.4th 428, 431, 433-439.) For all of these reasons, appellant's claim is forfeited on appeal.

Assuming appellant may raise this issue on appeal, it should be rejected on its merits.

C. Relevant Law

In *People v. Duran*, *supra*, 16 Cal.3d 282, this Court discussed the use of physical restraints on a defendant, stating:

> We believe that possible prejudice in the minds of the jurors, the affront to human dignity, the disrespect for the entire judicial system which is incident to unjustifiable use of physical restraints, as well as the effect such restraints have upon a defendant's decision to take the stand, all support our continued adherence to the *Harrington* [*People v. Harrington* (1871) 42 Cal. 165] rule. We reaffirm the rule that a defendant cannot be subjected to physical restraints of any kind in the courtroom while in the jury's presence, unless there is a showing of manifest need for such restraints.

(*People v. Duran*, *supra*, 16 Cal.3d at pp. 290-291, footnote and citation omitted; see *People v. Mar* (2002) 28 Cal.4th 1201, 1216; see also *People v. Lewis* (2006) 39 Cal.4th 970, 1031.) This Court further concluded in *Duran* "that in any case where physical restraints are used those restraints should be as unobtrusive as possible, although as effective as necessary under the circumstances." (*People v. Duran*, *supra*, 16 Cal.3d at p. 291, fn. 8, footnote omitted; see also *People v. Mar*, *supra*, 28 Cal.4th at p. 1217.)

> In the interest of minimizing the likelihood of courtroom violence or other disruption the trial court is vested, upon a proper showing, with discretion to order the physical restraint most suitable for a particular defendant in view of the attendant circumstances. The showing of nonconforming behavior in support of the court's determination to impose physical restraints must appear as a matter of record and, except where the defendant engages in threatening or violent conduct in the presence of the jurors, must otherwise be made out of the jury's presence. The imposition of physical restraints in the absence of a

record showing of violence or a threat of violence or other nonconforming conduct will be deemed to constitute an abuse of discretion.

(*People v. Duran*, *supra*, 16 Cal.3d at p. 291; see also *People v. Mar*, *supra*, 28 Cal.4th at p. 1217.)

The imposition of restraints in a proper case is normally a judicial function in which the prosecutor plays no necessary part. Although the prosecutor may bring to the court's attention matters which bear on the issue, it is the function of the court, not the prosecutor, to initiate whatever procedures the court deems sufficient in order that it might make a due process determination of record that restraints are necessary. The court's determination, however, when made in accordance with our views herein, cannot be successfully challenged on review except on a showing of a manifest abuse of discretion.

(*People v. Duran*, *supra*, 16 Cal.3d at p. 293, fn. 12; see also *People v. Mar*, *supra*, 28 Cal.4th at p. 1217.)

In applying *Duran* in subsequent cases, this court has explained that "[w]hile no formal hearing as such is necessary to fulfill the mandate of *Duran*, the court is obligated to base its determination on *facts*, not rumor and innuendo even if supplied by the defendant's own attorney. Furthermore, the cases emphasize that a trial court under *Duran* is obligated to make its *own* determination of the "manifest need" for the use of such restraint as a security measure in a particular case, and may not rely solely on the judgment of jail or court security personnel in sanctioning the use of such restraints. . . .

(*People v. Mar*, *supra*, 28 Cal.4th at p. 1218, citation omitted, original italics; see also *People v. Lewis*, *supra*, 39 Cal.4th at p. 1032.)

In *People v. Mar, supra*, 28 Cal.4th 1201, this Court held that *People v. Duran, supra*, 16 Cal.3d 282, "properly governs a trial court's decision to compel a defendant in a criminal case to wear a stun belt at trial." (*People v. Mar, supra*, 28 Cal.4th at p. 1219.) This Court in *Mar* explained:

> Even when the jury is not aware that the defendant has been compelled to wear a stun belt, the presence of the stun belt may preoccupy the defendant's thoughts, make it more difficult for the defendant to focus his or her entire attention on the substance of the court proceedings, and affect his or her demeanor, before the jury - especially while on the witness stand.

(*People v. Mar, supra*, 28 Cal.4th at p. 1219.)

This Court in *Mar* also stated that before a trial court approves the use of a stun belt, the court must consider the following factors and "may approve the use of a stun belt only if it determines that the use of the belt is safe and appropriate under the particular circumstances." (*People v. Mar, supra*, 28 Cal.4th at p. 1230.) First, "a trial court must take into consideration the potential adverse psychological consequences that may accompany the compelled use of a stun belt and should give considerable weight to the defendant's perspective in determining whether traditional security measures - such as chains or leg braces - or instead a stun belt constitutes the less intrusive or restrictive alternative for purposes of the *Duran* standard." (*Id.* at p. 1228.) Second, "the risk of accidental activation is one that should be considered by the trial court, and should be brought to the attention of any defendant who is asked to express a preference regarding the use of such a stun belt over a more traditional security restraint." (*Id.* at p. 1229.) Third, "the stun belt poses special danger when utilized on persons with particular medical conditions, such as serious heart problems." (*Ibid.*) "[U]se of a stun gun belt without adequate medical precautions is clearly unacceptable." (*Ibid.*) Fourth, "a trial

court's assessment of whether the stun belt proposed for use in a particular case is the least restrictive device that will serve the court's security interest must include a careful evaluation of this design choice." (*Id.* at p. 1230.)

Finally, in *People v. Mar*, *supra*, 28 Cal.4th 1201, this Court used the standard of *People v. Watson*, *supra*, 46 Cal.2d at pp. 836-837, in evaluating any prejudicial effect concerning the improper use of a stun belt, stating:

> Given the above circumstances - the relative closeness of the evidence, the crucial nature of defendant's demeanor while testifying, and the likelihood that the stun belt had at least some effect on defendant's demeanor while testifying - we determine that even if the prejudicial effect of the trial court's error is evaluated under the *Watson* standard applicable to ordinary state law error, there is a reasonable probability that the error affected the outcome of defendant's trial.

(*People v. Mar*, *supra*, 28 Cal.4th at p. 1225, citing *People v. Watson*, *supra*, 46 Cal.2d at pp. 836-837, citation and footnote omitted; see also *People v. Duran*, *supra*, 16 Cal.3d at p. 296.) This Court in *Mar* added:

> Because we conclude that the error in the present case was prejudicial even under the *Watson* standard, we need not determine whether the trial court's error in requiring defendant to testify while wearing a stun belt, without an adequate showing of danger, constituted federal constitutional error that is subject to a more rigorous prejudicial error test.

(*People v. Mar*, *supra*, 28 Cal.4th at p. 1225, fn. 7.)

D. The Court Did Not Abuse Its Discretion In Apparently Ruling Appellant Would Wear A Stun Belt During The Guilt Phase Of Trial

Assuming that appellant has not forfeited his claim regarding the use of the stun belt during the guilt phase of trial, appellant's claim fails on the merits.

As noted above, just before the beginning of the penalty phase, the prosecutor reminded the court that

> during the guilt phase [] the Court had indicated that [appellant] was to have the belt on him because he was a high security risk based on certainly the statement in aggravation that the Court was aware of and his prior conduct, particularly in custody as well as out of custody.

(12RT 1488.) Based on the prosecutor's statement, it can reasonably be inferred that the court gave some indication that appellant would wear a stun belt during the guilt phase of trial based on appellant's status as a "high security risk" and appellant's prior conduct in and out of custody.

Although there is no transcript in the record regarding a ruling by the court concerning the use of a stun belt (see 12/10/03 RT 3-4), respondent's position is that the court did not abuse its discretion in apparently ruling appellant would wear a stun belt during the guilt phase of trial because there is ample evidence in the record to support the prosecutor's implication that the court considered appropriate factors that showed a "manifest need" for such a restraint. (See *People v. Duran, supra*, 16 Cal.3d at pp. 290-291.) Specifically, the record shows appellant's "violence or a threat of violence or other nonconforming conduct." (See *id.* at p. 291.)

Since there is no transcript of any ruling, the exact date of such a ruling regarding use of the stun belt is unclear. However, it is reasonable to infer that all conduct by appellant prior to trial was considered by the trial court (Judge Smith) when it ruled appellant would wear a stun belt during the guilt phase of trial. In the instant case, the voir dire of prospective jurors began on June 30, 1997. (See 2RT 1, 14). On July 10, 1997, the selected jurors and alternate juror were sworn. (See 4RT 447, 507, 520.) All of the following matters, showing appellant's violence, threat of violence, or nonconforming conduct, occurred before the start of his trial.

Before trial, on September 28, 1995, appellant, appearing before Judge Horwitz, threw sharpened pencils at Deputy Public Defender Fisher after his right to represent himself had been terminated. (See Supp. IIICT 86-91.) The following discussion occurred regarding that incident:

> [Judge Horwitz]: Calling the Becerra matter. [¶] Ms. Lentz, do you wish to be heard?
>
> [Deputy District Attorney Lentz]: I do, your Honor. [¶] For the record, at the conclusion of the hearing, as [*appellant*] stood over near the door, adjacent to the bailiff, he *took a packet of what appeared to me to be four or five sharpened pencils and, in a fit of rage, threw them some 35 feet across the courtroom, nearly missing Mr. Fisher.* [¶] I'd ask the Court at this point to ask the bailiff to write up an incident report. I will tell the Court and counsel that I intend to file an assault charge on this count. I have not appeared on this case before, but the behavior that was witnessed in court did constitute a crime. I recognize it may cause some problems for Mr. Fisher. It may cause further delay with the case. I am intending to pursue other remedies with respect to that delay; but at this point in time, it's - - [*appellant*] *displayed what appeared to me to be among the most violent potential that I've seen among a custody defendant in all of the hard core cases that I've tried.* And I appreciate the Court's concern and the bailiff's concern in getting him out of the courtroom, *protecting the citizens who are sitting in the audience.*
>
> [Judge Horwitz]: Well, the Court has great problems about bringing [appellant] out again to trail the case. Today is 0 of 30 court days and because of the - - what [appellant] displayed about five minutes ago in this courtroom, and *out of concern for the safety of the bailiff and all other people here in the courtroom*, over [appellant's] objection,

although today is 0 of 30 court days - - technically, in special circumstances cases, he's allowed to be present. That's why I brought him out; but based on his activities, *I simply do not feel that this court would be a safe place and have him out here at the same time.* [¶] The last day I believe is November 8 or 9. [¶] What date - - Mr. Walsh being in trial, what date did you want this to trail to?

(Supp. IIICT 89-91, italics added.)[9/]

Before trial, on March 11, 1996, appellant, represented by counsel Garber, appeared before Judge Smith. (See 1RT B1.) During a discussion between counsel Garber, appellant, and the court regarding several matters, Judge Smith asked appellant, "Did you have a little problem this morning, I understand?" (1RT B3.) Appellant complained about his "discipline diet" in the jail and also stated, "I have been in the disciplinary section of the jail since January 26th for miscellaneous things as having razors, ..." (1RT B3-B4.) Among other things, the court told appellant to "cooperate" and "behave" himself in jail. (1RT B4-B5.)

Before trial, on May 1, 1996, there was a hearing before the court concerning the defense request to have the sheriff's department held in contempt for failing to allow appellant's counsel to interview appellant in the booths at the jail in a particular manner that would ensure more privacy. (See 1RT D1-D13.) During this hearing, Deputy County Counsel James Owens, who represented the sheriff's department, explained that appellant was a "high-security inmate." Deputy County Counsel Owens stated, "There is a security problem with the inmate. They don't place a very, very high-security inmate, which this man is classified as, in those booths." (1RT D4.) Owens also said,

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9. Later, but still before trial, on May 20, 1996, appellant appeared before Judge Smith represented by counsel Garber for the instant case and represented by attorney Vatche Tashjian for the case involving Deputy Public Defender Fisher as the victim. (See 1RT E1-E2, E10-E12.)

"[T]he deputies usually prefer to put high-security inmates such as [appellant] in this area close to the deputy workstation. . . ." (1RT D5.) In discussing a problem with appellant's counsel trying to give appellant "a lengthened, sharpened pencil," Owens stated, "This man is a high-security inmate and the sheriff has these rules, and the basis of these rules are in fact that these folks are dangerous and things such as lengthened, sharpened pencils have been used as weapons in the jail." (1RT D6.) After hearing from counsel Garber, the court found no contempt on the part of the sheriff's department and said that appellant and counsel Garber would be allowed to have three spaces between themselves and others in the interview room. (See 1RT D6-D13.)

Before trial, on May 14, 1997, appellant, represented by counsel Garber, appeared before the court (Judge Smith). (See 1RT M1.) Appellant complained that his legal documents had been seized, stating:

> The problem is on Monday night I was transferred from my housing to another housing for no reason, just my door got stuck. They blamed me for it. They was not going to give me no blankets, no sheets and no mattress, *so I broke the whole cell.* In the process they moved me to another cell. They still wouldn't give me no nothing to sleep with or nothing. Finally they transferred me back to my location. I haven't had no cosmetics, no nothing in my cell other than my underwear and myself for two days. [¶] This morning they wouldn't even give me a razor to come to court or nothing. *So I refused to cuff up to come to court.* Finally they gave me my legal stuff and my shoes and all that. . . .

(1RT M1-M2, italics added.)

Before trial, on June 19, 1997, appellant, represented by counsel Garber, appeared before the court (Judge Smith) and discussed his difficulties after having been placed in isolation in the jail, as shown in the following exchange:

[Judge Smith]: Let me just say this: sometimes when you do those things they take things away. See, they can put you in isolation.

[Appellant]: It wasn't nothing to do with that.

[Judge Smith]: I know. I am saying that the sheriff runs the jail. So if you do anything to disturb it, they have a right to take the stuff away and put you in isolation. [¶] I am trying to support you in this.

[Appellant]: Even if it is legal?

[Judge Smith]: They can put you in isolation with nothing, without even any clothes.

[Appellant]: That's fine, but they didn't take my property due to any misconduct or anything that happened here in the courtroom.

[Judge Smith]: We will get it back for you. But I want you to work with me and behave now. I am doing all I can for you here.

[Appellant]: No problem.

The Court: Do you promise to do that for me?

[Appellant]: No problem.

[Counsel Garber]: Deputy Crowl, is there any way when you turn the paperwork in that you can advise them that we would like to get back the documents, or do I have to take it up with the IRC?

The bailiff: No.

[Judge Smith]: The bailiff, he is working for you. You have to behave yourself.

(1RT N2-N3.) Also, during that same court day, the following exchange occurred:

[Counsel Garber]: . . . Since he has been in isolation, as you put it, Judge, he hasn't been able to get any paper; and he does keep me informed of what he is reading and what he is doing and so forth. [¶]

I would ask the Court to permit me to give him two blank rolls of paper to keep, legal documents.

[Appellant]: You know, you can't get to the commissary when you are in isolation for a pencil and some writing tablet, so I can write notes to my attorney.

[Judge Smith]: He can give them to him one at a time. They have to be inspected by the bailiff.

[Appellant]: Is it all right? Because I will be writing all kinds of little things that I want to talk to my attorney about.

(1RT N7.) Later that same court day, the following exchange occurred:

[Judge Smith]: Is that all right? Are you happy now? [¶] Listen, I want your word. I will work with you. I want you to behave yourself with these guys. Gordon and these guys are trying to help you.

[Appellant]: No problem.

(1RT N9.)

Before trial, on June 27, 1997, appellant, represented by counsel Garber, appeared before the court (Judge Smith), and the following exchange occurred regarding appellant's prior acts of assaultive behavior. (1RT O1-O2.)

[Counsel Garber]: . . . [¶] Judge, I recently received from the district attorney, after two-and-a-half years, a list of 53 alleged allegations of assaultive behavior.

[Judge Smith]: How many are as recent as six months?

[Counsel Garber]: I don't know.

[Judge Smith]: How many as recent as a month?

[Counsel Garber]: The point is, Judge, every one of those has to be checked out. How could I have checked it out in the last month, when we got this information, when we've had all of this other stuff? That is why we requested a continuance.

[Judge Smith]: These are events in jail. [Appellant], to cut down on discovery, will have to behave himself. . . .

(1RT O14-O15.) Therefore, based on this record demonstrating appellant's violence, threat of violence, and nonconforming conduct which showed a manifest need for restraints, the court did not abuse its discretion in apparently deciding that appellant should wear a stun belt during the guilt phase of trial. (See *People v. Carpenter* (1999) 21 Cal.4th 1016, 1046 [An "'order is presumed correct; all intendments are indulged in to support it on matters as to which the record is silent, and error must be affirmatively shown.' [Citation.]"].)

Appellant also specifically complains that the court failed to find that appellant had been found free of any medical condition (such as a heart condition) that would make the use of the stun belt unduly dangerous. (See AOB 60, citing *People v. Mar*, *supra*, 28 Cal.4th at pp. 1201, 1206, & AOB 62-63.) Appellant also complains that the court failed to determine whether the stun belt was the least restrictive restraint. (See AOB 59.) This Court in *Mar* stated that one of the factors a trial court must consider in determining whether the use of a stun belt on a defendant was appropriate is whether the stun belt would pose special danger when used on individuals with particular medical conditions, such as serious heart problems. (*People v. Mar*, *supra*, 28 Cal.4th at p. 1229.) This Court in *Mar* also stated that a trial court's "assessment of whether the stun belt proposed for use in a particular case is the least restrictive device that will serve the court's security interest must include a careful evaluation of this design choice." (*Id.* at p. 1230.)

Respondent notes that appellant's guilt phase trial occurred in 1997, well *before* this Court issued its decision in *Mar* in 2002. It was only after the *Mar* decision that it became clear that, among other things, it should not be assumed that a stun belt was the least intrusive means of restraint because it was not

visible, and particular medical conditions should be considered. The *Mar* decision expressly stated that its discussion was intended to provide guidance for future cases. (See *People v. Mar*, *supra*, 28 Cal.4th at pp. 1225-1226 ["[W]e believe it is appropriate, in order to provide guidance both to the trial court in this case - should a question as to the potential use of a stun belt arise on retrial - and to other trial courts that may be faced with a question regarding the use of a stun belt in *future* trials, to consider a number of distinct features and risks concerning the use of a stun belt that properly should be taken into account by a trial court under the *Duran* standard, before compelling a criminal defendant to wear such a device at trial."], italics added.) Thus, the trial court in the instant case was not expected to anticipate that it would be required to consider the additional factors listed in *Mar* in determining the use of a stun belt. In any event, as noted above (see Argument II, B), it can be reasonably inferred from the record that the court was not made aware of appellant's heart condition until shortly before the penalty phase of trial, when it ruled that appellant should be shackled instead of wearing the stun belt due to his heart condition. In addition, even assuming that appellant's various federal constitutional claims were not forfeited, these claims also fail for the same reasons addressed above. (See *People v. Cole* (2004) 33 Cal.4th 1158, 1187, fn. 1 ["The predicate of defendant's claim of federal constitutional error is the existence of state law error. In the absence of state law error, the claim of federal constitutional error falls of its own merit."].)

E. Any Alleged Error Was Harmless

Contrary to appellant's claim (see AOB 64-71), even assuming that the court abused its discretion in apparently finding appellant should wear a stun belt during the guilt phase of trial, any alleged error was harmless under *People v. Watson*, *supra*, 46 Cal.2d at pp. 836-837. (See *People v. Mar*, *supra*, 28 Cal.4th at p. 1225.) First, contrary to appellant's assertion that he was nervous

due to the stun belt (see AOB 68-69), a review of appellant's testimony generally suggests that wearing the stun belt did not have such an effect on his demeanor while testifying. (See *People v. Mar, supra*, 28 Cal.4th at p. 1225.)[10/] Although appellant points to various instances during his testimony where he claims he was told by the court to "simply answer the questions the prosecutor asked" (see AOB 68) and "to calm down and not to interrupt the attorneys" (see AOB 69), these instances show, not that appellant was nervous, but that appellant was trying to explain his version of events and was frustrated by what he perceived as the prosecutor's limiting form of questioning.

Specifically, after the jury returned a verdict of death (16RT 1945-1946) and the court denied the defense motion for a new trial (16RT 1956), appellant was allowed to address the court (see 16RT 1956-1958). Appellant complained, among other things, that he was not allowed to testify as freely as he had wished, stating:

> As for the district attorney, all her witnesses got up there, she never once stopped a witness. When she asked a question, she let them go on and on, let them talk about gangs and anything that will prejudice me. [¶] But when I got up there on that stand, it's been three years, I have been trying to tell everything that happened the best that I remember that happened and that D.A., she always tried to get a specific yes and no answer from me when the answer was a yes and a no. For an example, she tried to say that I knew how to rock cocaine in November but I did not know how to rock cocaine in December. And it's true. But she

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10. Unlike in *Mar*, appellant's trial counsel did not make another objection to the stun belt at the beginning of the defense case (see 9RT 1049-1050) or just before appellant's testimony (see 9RT 1092-1093), and trial counsel did not ask that the stun belt be removed only for appellant's trial testimony. (See *People v. Mar, supra*, 28 Cal.4th at p. 1212.) Moreover, at no point during his testimony did appellant complain that the stun belt was making him nervous or affecting his ability to testify or aid in his defense.

> wanted a yes and a no to get me pinned down, but the answer is a yes and a no. To this day I do not know how to rock a half a kilo of cocaine but I do know how to rock two or three grams. Okay?

(16RT 1957.) During his statement, although appellant complained that he was not allowed to testify freely due to the prosecutor's limiting way of questioning him (16RT 1957), appellant did not complain that he had problems testifying due to wearing a stun belt.

After appellant's statement, the court explained to appellant that the prosecutor had conducted her cross-examination of appellant in a professional manner. (16RT 1959-1960.) Appellant responded:

> When I got up on that stand, the clerk, she swore me in to tell the truth. When I got on that stand, it was my understanding that she was asking the questions; I was going to answer them. Let me answer them; don't let me - - don't let her try to get an answer that she wants to hear. I want to say the answer that she asked me.

(16RT 1959.) Appellant added that the prosecutor "tried to fucking stop me all the time." (16RT 1960.) Appellant also complained about the court, stating: "Many times you stopped me and you told me, 'Answer yes and no,' when the answer wasn't a yes and a no, it wasn't a yes or no answer." (16RT 1960.)

These statements made by appellant show that he was eager to testify to his version of events and was angered by what he perceived as unfair limitations on his testimony by the prosecutor and the trial court. Appellant's statements belie any suggestion that he was nervous during his testimony or that his ability to testify freely was affected due to wearing a stun belt.

Second, the instant case did not involve "relative closeness of the evidence." (See *People v. Mar*, *supra*, 28 Cal.4th at p. 1225.) Rather, there was strong evidence of appellant's guilt of the instant crimes.

George McPherson testified that on December 24, 1994, appellant and two other Hispanic men "burst in" to room number 421, which was the hotel room at the Pacific Grand Hotel that McPherson shared with Darlene Miller. (See 5RT 556-559, 569.) Appellant pushed McPherson against the wall, placed a knife at his neck, and stated, "'Where's our stuff? We want our stuff.'" (5RT 559-560.) McPherson was told that "they were looking for the stuff which Butt Naked [Darlene Miller] had apparently acquired." (5RT 568.) Appellant and the other two men said that they would kill McPherson. (5RT 563.) Appellant and the other two men "ransack[ed]" McPherson's room, "pulling out drawers" and "looking for their stuff." (5RT 561.) One of the men referred to an empty black bag and said, "'This is the bag our stuff was in.'" (5RT 568-569.) After ransacking the room, appellant and the two men left McPherson's room. (5RT 563-564.)

Darlene Miller testified that in the early morning of December 24, 1994, she and James Harding (also known as "Fontain") were trying to buy "rock" cocaine in the Pacific Grand Hotel. After unsuccessfully trying to find two "connection[s]" in the hotel to purchase narcotics from, Miller and Harding contacted appellant, who was "very high" and told them to wait. Miller and Harding did not want to wait so they tried to find other sellers in the hotel and eventually went to Harding's hotel room. When Miller and Harding took the elevator downstairs to see the hotel security guard who also sold narcotics, they saw a small, black, plastic bag under the guard's table in the lobby. Miller recalled that appellant "had dope before in the bag" and could not believe that appellant could have lost the bag while high. Miller and Harding walked towards the bag. While Miller talked to the guard, Harding kicked the bag, and picked it up when cocaine started falling out of the bag. Miller and Harding took the stairs back to Harding's room. (5RT 581-588.)

Inside Harding's room, they opened the bag and saw a large amount of cocaine. Miller took a small portion of the cocaine and left because she was scared of appellant since Miller "had a feeling it was his dope." (5RT 588-589, 593, 649.) Harding was in possession of the remainder of the cocaine. (5RT 589, 593.) Harding then went to the ninth floor of the hotel, "bragg[ed]" that he and Miller had found some narcotics, and was giving and selling narcotics to people. (5RT 589-590, 593.)

On December 24, or 25, 1994, Miller met appellant near the hotel, with Donte Vashaun, and she returned the cocaine in her possession to appellant. (5RT 594-596, 598-599, 652, 654.) On December 25, 1994, appellant, who was with two other men, told Miller that "if [she] didn't give him his dope back that every time he sees [her] he is going to kick [her] ass and make [her] pay for the dope." (5RT 597-601.) Miller told appellant that she had already returned what she had to appellant. (5RT 597.) Appellant replied that "if [she] did not give him the rest of his dope that [appellant] and his homeboys would fuck [her] up." (5R 598.)

At some later point, Miller returned to the hotel to find that the room she shared with McPherson had been ransacked. Donte Vashaun and Miller's friend were inside the room at the time. (5RT 601, 605, 607.) Earlier, Vashaun had knocked on the door to Harding's room, but he was apparently not there. (5RT 601-602.) When Miller and Vashaun were about to go up the stairs, they saw appellant go around to Harding's room. The door slammed. Miller and Vashaun waited around the corner. Appellant came out of Harding's room. Miller saw Vashaun then go around to Harding's room and heard the sound of a door being pushed. Vashaun came to Miller and told her that Harding and Herman Jackson were dead. (5RT 602-605, 608, 643-647.) Miller had seen appellant go in and come out of Harding's room about 10 minutes before Vashaun discovered that Harding and Jackson were dead in

Harding's room. (5RT 604.) Vashaun, followed by Miller, went to the ninth floor and told "Red" that Harding and Jackson were dead. Then, Vashaun and Miller went to the hotel front desk and had the police called. (5RT 608.) When the police arrived about 20 minutes later, Miller saw appellant, who was in the lobby, leave the hotel "in a hurry." (5RT 608-609.)

Donte Vashaun testified that on December 24, 1994, he went to room number 415 to see Harding, but appellant was there with Meekey. (6RT 810.) Vashaun also indicated that he was with Miller when she returned the cocaine to appellant. (6RT 791-792, 798-800, 810-812.) Vashaun also testified that appellant had told him that appellant had lost a bag of cocaine. (6RT 781-783.) Vashaun discovered the bodies in Harding's room between 10:00 p.m. on December 27, 1994 and around midnight on December 28, 1994, and the room had been torn apart. Electrical cords and wires were wrapped around the bodies of Harding and Jackson. (6RT 800-803, 826.)

Los Angeles Police Detective Russell Long, who responded to the hotel around 12:45 a.m. or 1:30 a.m. on December 28, 1994, testified that he saw the two victims in the hotel room. The bodies of Harding and Jackson "had been tied together and appeared to have been strangled with electrical cords." (8RT 896-898, 904, 907, 927.) The room where the bodies were found appeared to have been ransacked. (8RT 899.)

Dr. Eugene Carpenter, a medical examiner for the Los Angeles County Coroner's Department, had performed the autopsy of Harding and supervised the autopsy of Jackson. (7RT 837-838, 840, 842-843, 865.) Dr. Carpenter testified that the cause of Harding's death was strangulation by ligature, specifically an electrical cord. Harding also had some area of blunt force trauma to his head. (7RT 841-842, 845, 851-854, 891.) When Jackson's body was brought to the coroner's office, his body was bound with ligatures, specifically electrical tape and some cloth items. The cause of Jackson's death

was strangulation. Jackson also had a large bruise on his chest. (7RT 844-845, 854, 891-892.) The bodies of Harding and Jackson had been bound together. (7RT 847.)

Salvador Kalil, who was appellant's cousin, testified for the defense that appellant worked for his business, Sal's Screen & Glass, as an installation man in December 1994. In the course of his work, appellant had access to several tools, including knives, hammers, pliers, and "snips" which were used to turn screws and cut wire. There was also a dumpster behind the business where excess wires were thrown away. (9RT 1050-1051, 1060, 1062-1063, 1068, 1071-1073, 1083.)

Donna Meekey testified that on December 24, 1994, she was staying with Harding at the hotel when she saw Harding return to his room with a large amount of cocaine. Harding began selling the cocaine in the hotel. (5R 658, 660-664.) At some point that day, Harding had returned the cocaine to appellant after people told Harding that whoever had the cocaine would be killed. (5RT 666-668; 6RT 683-684, 695-696.) Then, appellant and Meekey spent time together in Harding's room while Harding sold narcotics for appellant. Appellant angrily and repeatedly told Meekey that he was going to kill Harding or harm Harding because he did not like what Harding had done. Appellant also mentioned that he did not believe that Harding had returned all the drugs to appellant. (5RT 669-670; 6RT 694, 702-705.) Later that same day, appellant and Meekey went to appellant's hotel room and spent time together. (5RT 670, 672, 684; 6RT 712.) Meekey asked appellant about the drugs, and he replied that "he gets quantities and keys and things from a big organization that he is involved with," "something about mafia associated." (5RT 672.) Appellant said that "he did associate it with a gang" and that he got large quantities of drugs through either the gang or mafia. (5RT 672; 6RT 708.)

The following morning, on December 25, 1994, appellant was still angry about Harding and continued to say that he wanted to kill and hurt Harding. (5RT 674; 6RT 705, 715.) Appellant and Meekey went to Harding's room and eventually met Harding. Appellant was very angry at Harding, and Harding appeared nervous. (5RT 674-675; 6RT 706, 714, 721.) Then, appellant walked Meekey towards the bus stop. On the way, appellant was still angry at Harding and said that he would kill Harding. (5RT 675.)

Wilson Berry testified that about a day and a half to two days before he learned about the death of Harding and Jackson, there was an incident in Berry's hotel room involving appellant and Harding. Appellant had told Berry that appellant's drugs were missing. Appellant was concerned and frantic. Appellant said that he only went between Berry's room and appellant's room, which were both on the same floor, and the only other people appellant had seen were Harding and Miller. Appellant told Berry that he would give Berry some of the drugs if Berry helped him get the drugs back. Berry began making telephone calls in the hotel. Berry called Harding, Harding asked to speak to appellant, and Berry handed the telephone to appellant. Then, Harding came to Berry's room. (8RT 973-976, 978-979.) Initially, for about 35 to 40 minutes, Harding denied that he had the drugs. Then, Harding pulled out an ounce or an ounce and a half and gave it to appellant. Appellant asked Harding about the rest of it, and Harding replied that was all he had. Appellant did not appear to believe Harding. (8RT 976-978.) After Harding left Berry's room, appellant said "he knew that that wasn't all the dope" and that Harding was "disrespecting" appellant. (8RT 979-980.)

Wendy Cleveland, a forensic print specialist for the Los Angeles Police Department, testified that inside room numbers 415 and 416 of the hotel, two of eleven prints matched appellant. Appellant's print was found on the table portion of a lamp with a glass table that was in the living area. Appellant's

print was also found on an empty Pepsi can found in a trash can of the living area. (See 6RT 722-723, 725, 728-729, 735-736.)

Los Angeles County Sheriff's Sergeant Richard Valdemar, a gang expert, testified that appellant was an admitted 18th Street gang member. (8RT 1000-1001, 1005, 1014-1017.) Sergeant Valdemar testified that appellant had a "Sur" tattoo, and a person who has such a tattoo indicates an affiliation and alliance with the Mexican Mafia. (8RT 1016-1017, 1032, 1035-1036.) Sergeant Valdemar also testified that if a gang member is provided about a half a kilogram or a kilogram of cocaine from a gang and that cocaine gets lost or stolen, that gang member was "disrespected" by the person who took the cocaine, and the gang member would have to retaliate or make a "face-saving move", such as killing the person. The method of killing would have an impact on "saving face" in front of the gang, especially if particularly heinous. (8RT 1009-1011, 1021-1022.) Thus, there was strong evidence of appellant's guilt.

For these reasons, any alleged error regarding the court's apparent ruling regarding the use of a stun belt was harmless because it is not reasonably probable that the alleged error affected the outcome of appellant's trial. (See *People v. Mar, supra*, 28 Cal.4th at p. 1225; *People v. Watson, supra*, 46 Cal.2d at pp. 836-837.) In addition, for the same reasons, any alleged error regarding the use of a stun belt was not prejudicial even under a stricter standard, and any federal constitutional error was harmless beyond a reasonable doubt. (See *Chapman v. California, supra*, 386 U.S. at p. 24; *People v. Mar, supra*, 28 Cal.4th at p. 1225, fn. 7.) Therefore, appellant's contention should be rejected.

F. Any Alleged Abuse Of Discretion By Judge Horwitz Regarding His Pretrial Ruling Concerning Physical Restraints Was Harmless

Appellant also refers to Judge Horwitz's ruling, during a pretrial proceeding on May 19, 1995, in municipal court, regarding appellant being

subject to physical restraints, specifically handcuffs, a waist chain, and leg chains, before trial. (See AOB 50-51, citing ICT 13, 203, 205-210 & Supp. IIICT 42.) Appellant asserts that before trial, Judge Horwitz "refused to entertain appellant's motions regarding his restraints and delegated all security decisions to the sheriff." (AOB 50, citing Supp. IIICT 42 [Judge Horwitz stated, "On the restraints, I have ruled. And that is up to the sheriff, and I am not going to get involved with that."]; see also *People v. Mar*, *supra*, 28 Cal.4th at p. 1218 [trial court abuses its discretion if it abdicates its decision-making authority regarding use of physical restraints to security personnel or law enforcement].)

First, respondent notes that Judge Horwitz's ruling regarding physical restraints occurred before trial in municipal court. In his motion to have physical restraints removed in holding cells and during court proceedings (see ICT 203-210), appellant acknowledged that "in this instance the defendant is not in trial" (ICT 207).

Second, Judge Horwitz's ruling regarding appellant being subject to physical restraints before trial is a separate ruling from Judge Smith's apparent ruling regarding appellant wearing a stun belt during the guilt phase of trial. Appellant attempts to combine Judge Horwitz's pretrial ruling regarding physical restraints and Judge Smith's apparent ruling regarding the stun belt by stating that "the trial court [presumably referring to Judge Horwitz] abdicated its responsibility to make an independent determination that some form for physical restraint was necessary, allowing this decision to be made solely by the sheriff'and that "as a consequence of the trial court's [Judge Horwitz's] abdication of judicial responsibility, there was no independent determination that a stun belt was the least restrictive and medically appropriate form of restraint," and as "a result, the court [Judge Smith] illegally and inappropriately

required appellant to wear a stun belt despite his serious heart condition." (See AOB 58-59.)

During his argument that he was erroneously forced to wear a stun belt during the guilt phase of trial, appellant continues to combine Judge Horwitz's pretrial ruling with Judge Smith's apparent ruling regarding the stun belt. (See AOB 50, 58-62.) Since there is no record of Judge Smith's apparent ruling regarding the stun belt, it is inaccurate for appellant to assert or imply that Judge Smith deferred to law enforcement personnel regarding his decision that appellant wear a stun belt during the guilt phase of trial.

In any event, to the extent that appellant is raising a claim regarding Judge Horwitz's pretrial ruling regarding physical restraints, any alleged error was harmless because appellant fails to show that his physical restraints during pretrial proceedings, which were not held before a jury, prejudiced him under the lower standard of prejudice concerning shackling during pretrial proceedings. (See *People v. Fierro*, *supra*, 1 Cal.4th at p. 220 ["[S]hackling should not be employed at a preliminary hearing absent some showing of necessity for their use. Nevertheless, while the dangers of unwarranted shackling at the preliminary hearing are real, they are not as substantial as those presented at trial. Therefore, a lesser showing than that required at trial is appropriate."].) Moreover, appellant fails to show that any witnesses at the preliminary hearing observed his restraints and were prejudiced against him as a result. (See *id.* at p. 220.) In addition, for the same reasons why Judge Smith's apparent ruling regarding the stun belt was not prejudicial, Judge Horwitz's pretrial ruling regarding physical restraints was also harmless. (See Argument II, E; see also *People v. Fierro*, *supra*, 1 Cal.4th at p. 220.)

III.

APPELLANT'S CLAIMS REGARDING THE COMPLAINED-OF EXPERT GANG TESTIMONY SHOULD BE REJECTED; ANY ALLEGED ERROR WAS HARMLESS

Appellant contends that the erroneous admission of the prosecution's incompetent and irrelevant expert testimony about gangs impermissibly bolstered the prosecution's theory of the case and denied appellant a fair trial. (AOB 72-107.) Specifically, appellant argues that (1) Wilson Berry was not competent to testify as a gang expert (AOB 92-95), (2) the gang testimony of Berry and Los Angeles County Sheriff's Sergeant Richard Valdemar was not proper expert testimony that was sufficiently beyond the common experience of the jury (AOB 80-85), (3) the expert gang testimony of Berry and Sergeant Valdemar was not relevant (AOB 85-92), and (4) the expert gang testimony of Berry and Sergeant Valdemar was cumulative of other less prejudicial evidence, and its prejudicial impact far outweighed its probative value (AOB 95-101).

Appellant's several claims regarding the complained-of gang evidence should be rejected. First, respondent submits that the record shows that Berry did not testify as a gang expert but rather, as a narcotics expert, and Berry properly testified as a narcotics expert, within the meaning of Evidence Code sections 720 and 801, subdivision (b). Second, the testimony of Berry concerning narcotics and of Sergeant Valdemar concerning gangs was proper expert testimony that was "sufficiently beyond common experience," within the meaning of Evidence Code section 801, subdivision (a). Third, the expert testimony of Berry concerning narcotics and of Sergeant Valdemar concerning gangs was relevant, within the meaning of Evidence Code section 210, because it related to appellant's motive and credibility. Fourth, the expert gang testimony of Sergeant Valdemar was not cumulative and was more probative

than prejudicial, within the meaning of Evidence Code section 352. Finally, any alleged error was harmless.

A. Factual Background

1. The Court's Ruling Regarding Admissibility Of Gang Evidence

On July 14, 1997, outside the jury's presence, the trial court (Judge Smith), the prosecutor (Deputy District Attorney Ratinoff), counsel Taylor, and counsel Garber discussed the issue of gang evidence. (See 5RT 525-534.) In response to the prosecutor's filed motion to admit gang evidence (XCT 2810-2817), counsel Taylor stated:

> . . . But this is not a gang case and I think under several concepts the gang evidence should not come in. More importantly, it is not relevant. Number two, it opens up a can of worms here. You are talking about [an Evidence Code section] 352 issue. Number three, it is speculative as to whether or not there were any gangs involved in this case. . . .

(5RT 526-527.) Counsel Taylor added that the prosecution wanted to admit gang evidence, specifically concerning the 18th Street gang, for its prejudicial effect. (5RT 527.) Counsel Taylor reiterated that the gang evidence should not be admitted because it was "highly prejudicial" and had "minimal relevancy" in the instant case. (5RT 527.)

The prosecutor replied that the gang evidence was "highly relevant" and "would survive [an Evidence Code section] 352 analysis." (5RT 529.) The prosecutor noted that appellant and "two of his homeboys" threatened George McPherson and that appellant told Donna Meekey that "he gets the drugs from the Mafia, the gang." (5RT 528.) The prosecutor stated that "a gang expert would be able to clarify for the jury the relationship between gangs and their narcotics trade, particularly downtown, when drugs are lost." (5RT 528.) The prosecutor also said that appellant, who had possessed about half a kilogram of

cocaine and then lost a significant amount of the cocaine, was "still responsible," and "with the connection of the gangs, it makes the motive even stronger that he has someone [the gang] to answer to." (5RT 528.)

Counsel Taylor responded that McPherson could not say that the two individuals with appellant were gang members. (5RT 529.) Regarding appellant's alleged statement to Meekey regarding the source of his drugs, counsel Taylor said that "we are going into a whole side issue with respect to the gang expert and speculation as to . . .who has drugs," that speculation would be the basis for the gang expert to say that a particular person with a certain amount of drugs must have gotten the drugs from a gang, and that this was again an issue regarding Evidence Code section 352. (5RT 529-530.) Regarding appellant's alleged statement to Darlene Miller that he would "get [his] homeys and mess [her] up," counsel Taylor said that "homeys" could refer to "friends you hang out with" and did not necessarily refer to gang members. (5RT 530.)

The prosecutor emphasized that appellant told Meekey that he "gets the drugs from people he knows who are affiliated with his gang, the Mafia." (5RT 531.) The prosecutor stated that appellant was an 18th Street gang member and noted appellant's gang tattoos. (5RT 531.) The prosecutor also said the gang evidence "will absolutely clarify for the jury the intent behind the homicides." (5RT 531.) When counsel Taylor replied that the instant case was not "a gang case" (5RT 531), the prosecutor stated:

> . . . [P]art of the motivation here is that when a gang member is in possession of a large quantity of cocaine to sell he is responsible for that cocaine and you can't just lose nine ounces of cocaine in the middle of downtown L.A. and not be responsible for it. You have . . . a higher authority to answer to. [¶] [Appellant] is an 18th Street gang member.

He tells Donna Meekey that is where he gets his dope from. He goes ransacking rooms with his homeys. . . .

(5RT 531-532.)

The trial court ruled that gang evidence was admissible but limited to how drugs were sold and how drugs were retrieved if lost, stating:

. . . On the gang issue, we queried the jury there may be some gang issues. I think the gang expert can testify. I think if you belong to a gang, you dress like a gang member, you act like a gang member, you intimidate like a gang member, you use homeboys like gang members, if you have tattoos like a gang member, if you sell dope like a gang member, you are a gang member. [¶] This is not the United States Marine Corps. I've said that a hundred times. They don't take an oath that anyone would give a damn about. They don't have to take a physical. They don't follow any rule of honor. The only rule of honor they have is they don't rat anybody out. [¶] It is not a major thing for this Court. The appellate court, the supreme court, feels the same way I do. [¶] The testimony can be limited to the fact if someone is selling dope, how they get it back. I think they can do that. Whether violence is involved, that is a different thing. Intimidation is certainly circumstantial evidence of gang membership. If you lose dope, to get it back you use muscle. I don't think it is unique, different. Every juror would probably know about it. [¶] They are entitled to a gang expert to talk about that, not gangs killing everybody or drive-by shootings. That will be limited to that. . . .

(5RT 533-534; see XCT 2819.)

2. Berry's Testimony

During Berry's direct examination, the following exchange occurred:

[Deputy District Attorney Ratinoff]: So what did you do to help [appellant] find his dope?

[Berry]: I called - - I started like making calls in the hotel. We were in my room, and then I found out that people were getting their doors kicked in and some people had got beat up and stuff. And then I called Fontain [Harding] and I told Fontain if he had it that it might be too hot for him to handle, if he wanted to, you know, give it back.

[Deputy District Attorney Ratinoff]: What was that? I'm sorry?

[Berry]: That if he had the stuff and he thought it might be too hot for him to handle, there might be more trouble, a lot of trouble behind having it if he got caught with it.

[Deputy District Attorney Ratinoff]: Well, what did you mean by that?

[Counsel Garber]: Objected to as being irrelevant.

[Judge Smith]: Overruled.

[Berry]: It's like when you sell dope, if you - - if someone has that much of your stuff, they have taken it from you, you almost are duty bound to do something to them physical.

[Deputy District Attorney Ratinoff]: What do you mean by that?

[Berry]: It's like if I was in the dope business, if I was selling dope and I let you take my dope and just walk around in my face with it, then why should anybody else buy it when they can just take it and walk around in my face with it.

[Deputy District Attorney Ratinoff]: So what has been your experience in terms of what people do?

[Counsel Garber]: Objected to, your Honor, as irrelevant and being speculative.

[Judge Smith]: I think he is a quasi expert. I think I will limit it to what he just testified. [¶] Sustained.

[Deputy District Attorney Ratinoff]: Okay.

(8RT 974-975.)

Also during Berry's direct examination, the following exchange occurred:

[Deputy District Attorney Ratinoff]: After Fontain left the room what, if anything, did [appellant] tell you about what had just happened?

[Berry]: It was like he was disrespecting him, like - -

[Judge Smith]: Wait, wait. What did he say, if anything? What did he say?

[Berry]: He said something like - - I know he asked me do I believe him and then he said - - he said, "If he found that and he knew it wasn't his, he should have gave it back. I would have like gave him some. And it's like if you find something and it's not - - and you know it's not yours and you keep it anyway, it's like stealing or disrespecting a person," something to that effect.

[Deputy District Attorney Ratinoff]: Okay. And what does disrespecting mean out on the streets?

[Counsel Garber]: Objected to as calling for a conclusion and speculation.

[Deputy District Attorney Ratinoff]: I will call him as my expert, your Honor.

[Judge Smith]: I think he already testified to if you take someone's dope, something about they are in your face with it. I think he already testified to that. [¶] I will sustain the objection.

(8RT 980.)

During Berry's direct examination, the following exchange occurred:

[Deputy District Attorney Ratinoff]: And do you think that it's also fair to say that you know the way things work out on the street in terms of - -

[Counsel Garber]: I am going to object to the form of the question, your Honor, do you think it would be fair to say.

[Deputy District Attorney Ratinoff]: I will rephrase it. [¶] Do you know the way things work out on the street with regard to the way that drugs are bought and sold?

[Counsel Garber]: Same objection.

[Judge Smith]: You live on the streets primarily?

[Berry]: Yeah.

[Judge Smith]: You sell dope, buy dope there?

[Berry]: Yes.

[Judge Smith]: You know the world of the dope seller, pusher, user, what happens - -

[Berry]: Yes.

[Judge Smith]: - - if you are involved in something?

[Berry]: Yeah.

[Judge Smith]: The answer is yes?

[Berry]: Yes.

[Judge Smith]: Okay.

[Deputy District Attorney Ratinoff]: And if someone disrespects you, what happens?

[Counsel Garber]: Objected to as calling for a conclusion and being beyond his expertise.

[Deputy District Attorney Ratinoff]: I will call him as my expert.

[Judge Smith]: You don't think this man is an expert?

[Berry]: You have to do something to stay in business. You have to basically do something to them. You have to influence them, make an example out of them or influence them not to do it or influence everyone else not to do what they did.

[Deputy District Attorney Ratinoff]: And does it make a difference in terms of where you get your dope from? If your dope is taken or lost or what have you, does it make a difference in terms of where you got your dope from, how you would handle it?

[Berry]: Yes.

[Deputy District Attorney Ratinoff]: How so?

[Berry]: If it's - - if it's your dope that you paid for, then it's just between you and the individual. If someone furnished you the dope or gave you the dope on consignment, it's between you, the individual and whoever you got it from.

[Deputy District Attorney Ratinoff]: And if you got it - - you've been around a long time. If a dope seller gets a whole bunch of dope from his gang, how are things handled?

[Berry]: You know, you either - - you lie to them in order to get it. If you take - - if you get their dope to sell and make a profit and you go out and you party with it, then you lie to them, you lie to your homeys, you just lie, and so that makes it bad. [¶] Then on top of that if you lose it, if you lie again and say that someone took it from you, then they are going to exert pressure on you to either get it back or, if someone took it, they want to know why didn't you do anything to the person that took it from you.

[Deputy District Attorney Ratinoff]: And so what do you have to do then?

[Berry]: You have to basically either do something to the person that took it from you or they're going to do something to you. They're just not going to accept this as a loss because you came and you lied to them to get it from them.

(8RT 985-987.)

3. Sergeant Valdemar's Testimony

Just before the trial testimony of Sergeant Valdemar, counsel Taylor stated, "For the record, your Honor, we are going to object to this testimony." Judge Smith replied, "Your objection is noted. The Court did give some guidelines." (8RT 1001.)

During Sergeant Valdemar's direct examination, the following exchange occurred:

[Deputy District Attorney Ratinoff]: Can you describe for us the relationship between the narcotics trade - - and we can focus on the downtown L.A. area - - and gangs and what that relationship is about?

[Counsel Taylor]: I am going to object, your Honor, lack of foundation, being an expert in that area.

[Judge Smith]: Thank you. [¶] Overruled.

[Sergeant Valdemar]: In my experience working with gangs, almost all the gangs that operate have a significant number of their group that deal in narcotics. [¶] Some gangs actually fund their operations through the sale of narcotics, especially when the gang gets larger and more sophisticated. Then you see more organization and sometimes links to criminal cartels, especially the Mexican cartels, the Colombian cartels, some of the large black gang drug distributors and, of course, the Mexican Mafia.

[Deputy District Attorney Ratinoff]: How is it that gangs handle narcotics out on the street? In other words, how do they handle street sales?

[Sergeant Valdemar]: Street sales are usually left to the lower echelon, the new arrivals within the gang. Those are what they used to call spoon dealers who operate on the street and make, you know, just a few dollars; and they go to a secondary person to restock themselves and turn over the money that they've made. Of course, they take a portion of that, usually about half. [¶] The person on the next level would probably be like an ounce dealer or even up to a pound dealer. And then, of course, they would have their source and their source would be a larger dealer, a mid-level dealer, and that person would deal in kilos. And then the ultimate source would be a person who dealt in multiple kilos.

[Deputy District Attorney Ratinoff]: Let's take the mid-level dealer who would be in possession of kilos. How are the kilos given to that gang member to then go and sell?

[Sergeant Valdemar]: There is several different ways, and different gangs operate in different ways. If a person is dealing for the gang, that is, that the narcotics itself is for the purposes of advancing the gang, then sometimes that drug is advanced to him without payment and he is expected to - - it's called fronted. The dope is fronted to him and he is expected to pay back what the cost of that drug would be. Of course, he would keep the profit. [¶] Then gangs also operate allowing an individual who is operating on his own to operate in their area, but then they would tax that person. The gang would charge them approximately a third to operate in the gangs' turf. And it's understood that the gang

then would provide them protection from other groups and from being ripped off and that type of thing.

[Deputy District Attorney Ratinoff]: So if a gang member gets, let's say, a half a kilo or a kilo or cocaine from the gang and goes out into the street with this kilo or half kilo of cocaine and, let's say, they're fronted that kilo and if in the course of having that cocaine some of it gets lost or stolen, what's the relationship between the gang and the seller, the person in possession of that or responsible for that half kilo?

[Sergeant Valdemar]: First of all, these are normally not people with a great deal of trust. They distrust each other all the time. And so a person coming to a dealer who he's been fronted drugs from with a story about losing the drug or having it stolen would probably be highly suspect and would have to answer and prove it in some particular way. And then if he did actually prove that it was stolen or lost, then that would mean that that person had been foolish and disrespected by the person who took that drug and he, as a gangster, would have to retaliate or at least make some kind of a face-saving move to show that he was not irresponsible with the drug.

[Deputy District Attorney Ratinoff]: So how does that person, to prove that he was not irresponsible with the drug, how does he save face?

[Sergeant Valdemar]: Well, it could vary. If it was a small amount of drugs, the person might promise that when they sell the next batch of drugs that they would give an additional amount to the source to make up for the amount that is lost or that the person would cut the drug more so that he could make more of a profit and reimburse the loss. [¶] But if it's a larger amount of drugs, where that wouldn't be possible, then the

person would have to take some kind of a face-saving action, and in the gang world that primarily means killing someone.

[Deputy District Attorney Ratinoff]: And when someone says - - a gang member says that he has been disrespected, what's the significance of that in terms of narcotics sales or narcotics loss?

[Sergeant Valdemar]: That would be very significant. The person who had been disrespected would have to retaliate in order that the same type of thing would not happen to them again, they would not become a target of other strong gang members of street people who have seen - - who had seen him lose face and have somebody take drugs away and no consequences come to the person who had done that.

[Deputy District Attorney Ratinoff]: And if that drug seller then goes and kills the person who he believes took his drugs, is that sufficient with the higher-ups in the gang to save face?

[Sergeant Valdemar]: Sometimes not. Even though the person might kill another person, make an attempt to kill another person, it's entirely up to the person that - - the larger drug source what that person would feel like. [¶] For instance, he might take that as an [a]ffront, that that was an act of disrespect to him that wouldn't be satisfied with the killing of a lower-level gang member.

[Deputy District Attorney Ratinoff]: Would the manner in which the person - - [¶] You've got a drug seller who's lost or some of his dope has been stolen and he believes he knows who did it. If he wanted to save face by killing the other individual, would the method of killing have an impact on his saving face in front of the gang?

[Sergeant Valdemar]: Yes, ma'am.

[Counsel Taylor]: I am going to object, your Honor, speculation.

[Judge Smith]: Overruled.

[Sergeant Valdemar]: The person would be expected to make an example of a person who disrespected them in that manner. And by "make an example" I mean that the method of killing would be particularly heinous so as to terrorize other street gang members and prevent anything like that happening again.

[Deputy District Attorney Ratinoff]: Is half a kilo of cocaine considered a significant amount in terms of a mid-level dealer?

[Sergeant Valdemar]: Yes, ma'am.

(8RT 1007-1011.)

During the direct examination of Sergeant Valdemar, the following exchange occurred:

[Deputy District Attorney Ratinoff]: And if someone indicated to another person that he gets the drugs from a large organization, the Mafia, and has this tattoo on himself also, Diez Y Ocho, does that have significance to you?

[Sergeant Valdemar]: Yes, ma'am.

[Deputy District Attorney Ratinoff]: What is that significance?

[Sergeant Valdemar]: That would mean to me if a person was telling me that they would be using not only the power and influence that they had physically or whatever their reputation, street reputation would be, he would be adding to that the power and influence of Diez Y Ocho, or the 18th Street gang, and additionally saying that they're backed by the Mexican Mafia, the power and influence of the Mexican Mafia.

[Deputy District Attorney Ratinoff]: If a person gets his drugs - - and in this case we'll use a half a kilo as an example - - if a person gets his half kilo of cocaine from his gang, and in this case it would be 18th Street, and is affiliated with the Mafia, does that have any particular significance to you if those narcotics are lost in part or stolen in part?

[Sergeant Valdemar]: Yes, ma'am. During our investigation I found that it's a quantum leap even from a gang as sophisticated as the 18th Street to a person who is involved in a prison gang. They are the worst of the worst and they are very violent, and retribution is a common factor. And often that retribution and violence is overkill. And so disrespecting the Mexican Mafia is normally a death sentence.

[Deputy District Attorney Ratinoff]: Does a person who is affiliated with, who affiliates himself as from the south, Sur, who is an 18th Street gang member - - is there any method that is fairly common or, let's say, well known in terms of this retribution? [¶] And what I mean by that is: What is the idea of humiliation as it pertains to the concept of disrespecting someone?

[Sergeant Valdemar]: Well, within this soldier-like culture, warrior culture, of course, masculinity and machoism is a major factor. So disrespecting a person often has to do with their sexual orientation. Calling a person a chavala, girl, as opposed to a male is a very insulting thing and a puto, a homosexual, is even worse. And the final act of degradation, of course, is to sexually rape the person. [¶] If you have seen the movie "American Me," this is depicted in the movie several times, the first time when the lead character who was modeled after Cheyenne Cadena, the Mexican Mafia, is raped in juvenile hall; the second time when a member of the Sicilian Mafia is sodomized and murdered in a prison system for his father's lack of cooperation with the Mexican Mafia; and a third time when the lead character is unable to have sex in a normal way with his wife or girlfriend. These things were so insulting to the Mexican Mafia that the Mexican Mafia put out a hit contract on people who were associated as advisors in that movie and, in fact, killed three of them.

[Counsel Taylor]: I am going to object. That is not relevant to this case.

[Deputy District Attorney Ratinoff]: It goes to his expertise with regard to humiliation as it pertains to disrespect.

[Judge Smith]: Thank you.

[Deputy District Attorney Ratinoff]: If someone is murdered after they have - - after a drug seller and user in possession originally of a half a kilo of cocaine believes that an individual has stolen or found his cocaine and not returned it and then goes to kill that individual in a particularly gruesome way by strangulation with electrical cords - - [¶] Would you agree that that would be considered by 18th Street or the Mexican Mafia as a gruesome way?

[Counsel Taylor]: I am going to object. That is pure speculation on his part.

[Judge Smith]: He spent almost 25 years in the system. He's talked to inmates. His credentials, he has testified in the Mexican Mafia case, testified in most of the superior courts I know of. [¶] I think he can testify to that. I don't think you have to be an expert to testify on some of these matters. That is only to help the jury understand the culture. [¶] Overruled.

[Deputy District Attorney Ratinoff]: - - and during the course or prior to the strangulation the two men's pants are pulled down exposing on one of them the entire buttocks and on the other part of the buttocks, would that indicate something to you in terms of the manner of killing as you've described?

[Sergeant Valdemar]: Yes, ma'am. That is an act of disrespect, in my opinion; but there might be other reasons. In the street and prison

culture often a person hides his valuables in a rectal stash or keister stash, and so in looking for valuables you would search there.

[Deputy District Attorney Ratinoff]: Okay. If a gang member who is from the 7th and Broadway clique, an 18th Street gang member, is in the downtown area at the Pacific Grand Hotel and is walking around with approximately a half a kilo of cocaine, is both selling and using it, that individual gets high repetitively over a course of days, he loses a lot of the half kilo that he originally is in possession of and he then finds out who has that lost or stolen cocaine, he then proceeds to track down, to hunt, for that person, takes some of his homeboys and hunts for the drugs and the person and threatens repetitively to kill the person who he believes has his drugs and the next day he's known to make a death threat on the person who he believes is in possession of his drugs, that individual has admitted getting the drugs from his gang, from a large organization, the Mafia, would the death of the individual who he had been looking for by strangulation, with pants pulled down exposing the buttocks on one and partially exposing the buttocks on the other - - based on that hypothetical situation, does that have significance to you, given your gang experience and your knowledge of the narcotics trade as it relates to gangs?

[Counsel Taylor]: I am going to object, speculation.

[Judge Smith]: Thank you. [¶] An expert can use all the information he has available in the form of a hypothetical question. In doing so the Court doesn't state that all of the facts are true. It is for the jury to determine. [¶] The facts presented by the district attorney are all present in this trial. Overruled.

[Sergeant Valdemar]: Yes. In my opinion, it would be more likely that the person who fronted the dope would be satisfied in that

circumstance than if the person were merely to disappear or be murdered in a more conventional way.

[Deputy District Attorney Ratinoff]: And when you say "satisfied," do you mean that the larger or more - - the higher-up gang member would be satisfied that the individual had done something about the loss of the drugs, killing two individuals?

[Sergeant Valdemar]: Yes, ma'am. And I would have to say more satisfied because I wouldn't be - - it's always a personality thing. The gang member could completely be unsatisfied even though all that had been done. [¶] So I couldn't say for sure that that person would be satisfied, but he would be more likely to be satisfied by such a gruesome killing than to just have the person disappear.

[Deputy District Attorney Ratinoff]: And do gang members, do 18th Street gang members, who are affiliates of the Mexican Mafia know that - -

[Sergeant Valdemar]: Yes, ma'am.

[Deputy District Attorney Ratinoff]: - - based on your experience?

[Sergeant Valdemar]: Yes, ma'am.

[Counsel Taylor]: Your Honor - -

[Judge Smith]: Know what?

[Deputy District Attorney Ratinoff]: Do 18th Street gang members who are affiliated with the Mexican Mafia know that the higher-ups in the gang will be more likely to be satisfied if a person is killed in retaliation for the drugs being taken?

[Counsel Taylor]: Objection, speculation.

[Judge Smith]: Thank you. [¶] Overruled. [¶] Can you make that determination?

[Sergeant Valdemar]: In my opinion, they would be.

(8RT 1017-1023.)

B. Berry Properly Testified As A Narcotics Expert

Appellant claims that Berry was incompetent to testify as a gang expert. (AOB 92-95.) Respondent submits that the record shows Berry did not testify as a gang expert, but rather, as a narcotics expert. Berry was competent to testify as an expert regarding narcotics, which he properly did, within the meaning of Evidence Code sections 720 and 801, subdivision (b).

Evidence Code section 720 states:

> (a) A person is qualified to testify as an expert if he has special knowledge, skill, experience, training, or education sufficient to qualify him as an expert on the subject to which his testimony relates. Against the objection of a party, such special knowledge, skill, experience, training, or education must be shown before the witness may testify as an expert. [¶] (b) A witness' special knowledge, skill, experience, training, or education may be shown by any otherwise admissible evidence, including his own testimony.

(See *People v. Gardeley* (1996) 14 Cal.4th 605, 617 ["California law permits a person with 'special knowledge, skill, experience, training, or education' in a particular field to qualify as an expert witness (Evid. Code, § 720) and to give testimony in the form of an opinion ([Evid. Code,] § 801)."].)

Moreover, Evidence Code section 801 states in relevant part:

> If a witness is testifying as an expert, his testimony in the form of an opinion is limited to such an opinion as is: [¶] . . . . [¶] (b) Based on matter (including his special knowledge, skill, experience, training, and education) perceived by or personally known to the witness or made known to him at or before the hearing, whether or not admissible, that is of a type that reasonably may be relied upon by an expert in forming an opinion upon the subject to which his testimony relates, unless an

expert is precluded by law from using such matter as a basis for his opinion.

A trial court exercises its discretion in determining a witness's expert status. (*People v. Ochoa* (2001) 26 Cal.4th 398, 437; *People v. Bolin* (1998) 18 Cal.4th 297, 321-322.) "The exercise of discretion is not grounds for reversal unless '"the court exercised its discretion in an arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice."' [Citations.]" (*People v. Ochoa*, *supra*, 26 Cal.4th at pp. 437-438.)

Contrary to appellant's characterization of Berry as a gang expert for the prosecution (see AOB 75, 92-95), the record shows that the prosecutor presented Berry as an expert concerning narcotics based on his knowledge and experience concerning the use and sales of narcotics. (See 5RT 525-534 [discussion between Judge Smith, prosecutor Ratinoff, counsel Taylor, and counsel Garber regarding admissibility of gang evidence]; 8RT 968-999 [Berry's trial testimony]; 11RT 1335-1358, 1397-1418 [prosecutor's closing argument]; see also XCT 2810-2817 [prosecution's motion to admit gang evidence which concerned the People's request "to permit the People's expert to testify regarding gang evidence"]; XCT 2819 ["People's motion to admit gang evidence and allow gang expert to testify is heard and granted limited only to facts of selling narcotics."].)

Based on his personal experience as a user and seller of narcotics, Berry was knowledgeable and competent to testify as an expert concerning narcotics. (See *People v. Doss* (1992) 4 Cal.App.4th 1585, 1595-1596 [Agent from Bureau of Narcotics Enforcement was qualified as an expert concerning certain pharmaceutical drugs and was properly allowed to opine that under the facts of the posed hypothetical, the drugs were possessed for the purpose of illegal street sales]; *People ex rel. Dept. of Public Works v. Alexander* (1963) 212 Cal.App.2d 84, 90-92 [finding that trial court erred in not allowing a "valuation

witness" to opine about a specific property's "highest and best use" because "[i]t is not necessary that a valuation witness be a professional appraiser or real estate broker in order to qualify as an expert"]; see also *State v. Espinoza* (Utah 1986) 723 P.2d 420, 421 [Utah Supreme Court found no abuse of discretion in the trial court's allowing of a police officer to testify as an expert concerning narcotics paraphernalia found in the defendants' home because the officer "had been involved in the drug culture as a user and a seller for four or five years prior to becoming a police officer," and the officer "had worked for several years as an investigator and demonstrated to the court his knowledge of the current drug culture before the court qualified him as an expert."].) In this regard, appellant apparently agrees. (See AOB 94 ["Although the trial court's voir dire arguably established Berry's expertise to testify to the habits and culture of the 'dope seller, pusher, user,' . . . ."].) At trial, Berry testified, among other things, that he had been living in the downtown Los Angeles area for the last five or six years (8RT 969-970); that he was using and selling drugs when he met appellant in December 1994 (8RT 970, 990); that he had used and sold drugs for "[q]uite some time" (8RT 970); that he was a cocaine user (8RT 974); and that he primarily lived "on the streets," sold and bought "dope" "on the streets," and knew about the "world of the dope seller, pusher, and user" (8RT 985, 998).

The only specific reference to gangs in Berry's testimony involved the prosecutor asking him, "If a dope seller gets a whole bunch of dope from his *gang*, how are things handled?" (8RT 987, italics added.) In response, Berry testified:

> You know, you either - - you lie to them in order to get it. If you take - - if you get their dope to sell and make a profit and you go out and you party with it, then you lie to them, you lie to your homeys, you just lie, and so that makes it bad. [¶] Then on top of that if you lose it, if

you lie again and say that someone took it from you, then they are going to exert pressure on you to either get it back or, if someone took it, they want to know why didn't you do anything to the person that took it from you.

(8RT 987.) After the prosecutor asked, "And so what do you have to do then?" Berry responded:

You have to basically either do something to the person that took it from you or they're going to do something to you. They're just not going to accept this as a loss because you came and you lied to them to get it from them.

(8RT 987.) Thus, this testimony illustrates that Berry, while properly testifying as an expert about narcotics, based on his personal experiences as a narcotics user and seller, specifically testified about one aspect of the narcotics trade - - the source of the narcotics and how the repercussions of losing narcotics or having narcotics stolen varies depending on the source of the narcotics.

During her closing argument, the prosecutor made several references to Berry. (See 11RT 1337, 1339-1343, 1348-1351, 1353, 1403-1404.) A review of the prosecutor's closing argument shows that the prosecutor primarily referred to Berry's testimony as a narcotics expert in order to show that a narcotics seller who loses the narcotics or has it stolen, will be accountable to the source of the narcotics, and if the source of the narcotics is a gang, the narcotics seller is bound to react in a certain way.

In her closing argument, the prosecutor stated that Berry has "been out on the street for a long time" and "articulated how drug sales take place, about what happens when drugs are stolen or lost and who you have to be accountable to, what happens." (11RT 1339.) The prosecutor said that Berry testified that one way a person can influence other "drug sellers" and "drug users" "from not taking" and "not stealing" that person's cocaine was "by doing something

physical," including "kill[ing]." (11RT 1341, 1351.) In her closing argument, the prosecutor spoke about the importance of "accountability" to the gang if it is the source of the narcotics, stating:

> Mr. Berry explained to you how drug sales are transacted and the repercussions. He said when drugs are taken from a person or a person loses some drugs, you have to either do something to the person who has your drugs or the gang is going to do something to you. . . . [¶] . . . . [¶] Mr. Berry told you that if a dope seller gets a whole bunch of dope from his gang to sell and makes a profit and you go out and you party with it and then you lie to them, which is what [appellant] did in telling his homeboys - - because if [appellant] lost his drugs, you've got these two homeboys there. He had to have told them something to help him get the dope back - - you lie to your homeys and that makes it bad, and then on top of that if you lose it, if you lie again and say that someone took it from you, which is exactly what [appellant] was feeling - - he said it over and over to Wilson Berry after Fontain [Harding] had not returned all of the drugs; he felt that he'd been stolen from - - Wilson Berry tells us they're going to exert pressure on you to either get it all back or, if someone took it, they want to know why didn't you do anything to the person that took it from you.

(11RT 1342-1343.) In the rebuttal portion of her closing argument, the prosecutor stated:

> Wilson Berry testified about his personal knowledge of the Pacific Grand Hotel, about how cocaine is used and sold at the Pacific Grand Hotel, about what gang members do when their drugs are lost or stolen.

(11RT 1403.)[11/] Thus, a review of the record shows that the prosecutor presented Berry as an expert regarding narcotics, not gangs. Based on his personal experience as a narcotics user and seller, Berry properly testified as a narcotics expert within the meaning of Evidence Code sections 720 and 801, subdivision (b), and appellant's claim should be rejected.

C. The Expert Testimony Of Berry Concerning Narcotics And Of Sergeant Valdemar Concerning Gangs Was Sufficiently Beyond Common Experience

Appellant claims that the testimony of Berry and Sergeant Valdemar concerning gangs was not proper expert testimony because it did not address matters that were sufficiently beyond the common experience of the jury. (AOB 80-85.) Respondent submits that the testimony of Berry concerning narcotics and of Sergeant Valdemar concerning gangs was proper expert testimony that was "sufficiently beyond common experience," within the meaning of Evidence Code section 801, subdivision (a).

Evidence Code section 801 states in relevant part:

> If a witness is testifying as an expert, his testimony in the form of an opinion is limited to such an opinion as is: [¶] (a) Related to a subject that is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact; . . . .

(See *People v. Gardeley*, *supra*, 14 Cal.4th at p. 617 ["Under Evidence Code section 801, expert opinion testimony is admissible only if the subject matter of the testimony is 'sufficiently beyond common experience that the opinion of an expert would assist the trier of fact.' The subject matter of the culture and

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11. During his closing argument, counsel Taylor referred to Berry, stating: "Wilson Berry talked about the fact that [appellant] was selling a higher grade of drugs at that hotel than other individuals." (11RT 1384; see also 11RT 1385 [Counsel Taylor referred to Berry as knowing the victims as Fontain and J.J."].)

habits of criminal street gangs . . . meets this criterion."], citations omitted; see also *People v. Gonzalez*, *supra*, 38 Cal.4th at p. 944.) "A claim that expert opinion evidence improperly has been admitted is reviewed on appeal for abuse of discretion. [Citation.]" (*People v. Catlin* (2001) 26 Cal.4th 81, 131.)

Initially, respondent reiterates that Berry testified as an expert concerning narcotics, not gangs. (See Argument III, B.) Since appellant complains only about expert gang testimony, his claim does not truly include the expert narcotics testimony provided by Berry. Nonetheless, respondent notes that the subject matter of Berry's expertise, concerning narcotics, was sufficiently beyond common experience, within the meaning of Evidence Code section 801, subdivision (a). (See *People v. Harvey* (1991) 233 Cal.App.3d 1206, 1228 ["A wealth of California cases, . . . , allow expert testimony in the field of narcotics. [Citations.]"]; *id.* at pp. 1228-1229 [finding no error in the trial court's admission of agent's "expert testimony regarding the significance of various activities and the role of each defendant in the hierarchy of a Colombian cocaine distribution cell."]; *People v. Douglas* (1987) 193 Cal.App.3d 1691, 1694 [finding that expert police officer testimony concerning conduct of marijuana seller and buyer, weight and packaging of marijuana, and amount of cash found on seller, "'is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact.' [Citation.]"].) Thus, the trial court did not abuse its discretion in allowing the expert testimony of Berry concerning narcotics.

Regarding the expert gang testimony provided by Sergeant Valdemar, respondent submits that this subject matter concerning gangs was sufficiently beyond common experience, within the meaning of Evidence Code section 801, subdivision (a), because the testimony concerned how gangs perceived disrespect, humiliation, and "saving face" (see 8RT 1009-1011, 1018-1023) and the use of drugs sales by gangs (see 8RT 1007-1009). (See *People v. Gardeley*,

supra, 14 Cal.4th at p. 617; see also *People v. Gonzalez*, *supra*, 38 Cal.4th at p. 945 ["Whether members of a street gang would intimidate persons who testify against a member of that or a rival gang is sufficiently beyond common experience that a court could reasonably believe expert opinion would assist the jury. 'It is difficult to imagine a clearer need for expert explication than that presented by a subculture in which this type of mindless retaliation promotes "respect."' [Citations.]"]; *People v. Ferraez* (2003) 112 Cal.App.4th 925, 930-931 [In concluding there was substantial evidence to support the defendant's conviction for street terrorism, the Court of Appeal found that "the gang expert's testimony was necessary to explain to the jury how a gang's reputation can be enhanced through drug sales and how a gang may use proceeds from such felonious conduct," and that "[t]hese are matters 'sufficiently beyond common experience that the opinion of an expert would assist the trier of fact'" within the meaning of Evidence Code section 801, subdivision (a).].) Thus, the trial court did not abuse its discretion in allowing the expert testimony of Sergeant Valdemar concerning gangs because such testimony was sufficiently beyond common experience, within the meaning of Evidence Code section 801, subdivision (a). Therefore, appellant's contention should be rejected.

D. The Expert Testimony Of Berry Concerning Narcotics And Sergeant Valdemar Concerning Gangs Was Relevant To Appellant's Motive And Credibility

Appellant claims that the expert testimony of Berry and Sergeant Valdemar concerning gangs was not relevant. (AOB 85-92.) Respondent submits that the expert testimony of Berry concerning narcotics and of Sergeant Valdemar concerning gangs was relevant, within the meaning of Evidence Code section 210, because it related to appellant's motive and credibility.

Evidence Code section 210 states:

> "Relevant evidence" means evidence, including evidence relevant to the credibility of a witness or hearsay declarant, having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action.

(See Evid. Code, § 350 ["No evidence is admissible except relevant evidence."]; Evid. Code, § 351 ["Except as otherwise provided by statute, all relevant evidence is admissible."]; see also *People v. Scheid* (1997) 16 Cal.4th 1, 13-14 ["The test of relevance is whether the evidence tends '"logically, naturally, and by reasonable inference" to establish material facts such as identity, intent, or motive.'"], citations omitted.) "The trial court has broad discretion in determining the relevance of evidence but lacks discretion to admit irrelevant evidence. (*Id.* at p. 14, citations omitted.)

Initially, respondent again notes that Berry did not testify as a gang expert but as a narcotics expert. (See Argument II, B.) In any event, respondent submits that the expert testimony of Berry concerning narcotics and of Sergeant Valdemar concerning gangs was relevant in the instant case because it showed appellant's motive for the instant crimes, and it related to appellant's credibility.

First, the expert gang testimony of Sergeant Valdemar was relevant, within the meaning of Evidence Code section 210, because it showed appellant's motive for the instant crimes. (See *People v. Ward*, *supra*, 36 Cal.4th at p. 210 [concluding that expert opinions fell within the gang culture and habit evidence approved of in *People v. Gardeley*, *supra*, 14 Cal.4th 605, because the "substance of the experts' testimony, as given through their responses to hypothetical questions, related to defendant's motivation for entering rival gang territory and his likely reaction to language or actions he perceived as gang challenges. [Citations.]"]; *People v. Carter* (2003) 30 Cal.4th 1166, 1194 [Evidence of a defendant's gang membership "is admissible

when relevant to prove identity or motive, if its probative value is not substantially outweighed by its prejudicial effect. [Citation.]"]; *People v. Williams* (1997) 16 Cal.4th 153, 194 ["[I]n a gang-related case, gang evidence is admissible if relevant to prove motive or identity, so long as its probative value is not outweighed by its prejudicial effect. [Citation.]"]; *People v. Gonzalez* (2005) 126 Cal.App.4th 1539, 1549 ["The People are entitled to 'introduce evidence of gang affiliation and activity where such evidence is relevant to an issue of motive or intent.' [Citation.]"]; *People v. Olguin* (1994) 31 Cal.App.4th 1355, 1369 ["Evidence of gang activity and affiliation is admissible where it is relevant to issues of motive and intent [citations]. . . ."]; *People v. Funes* (1994) 23 Cal.App.4th 1506, 1518-1519 [stating that "[c]ases have repeatedly held that it is proper to introduce evidence of gang affiliation and activity where such evidence is relevant to an issue of motive or intent" and finding that the "trial court properly admitted evidence of gang affiliation and activity to prove intent and motive with respect to the murder"].)

At trial, Sergeant Valdemar explained that a narcotics seller, who had been "fronted" or provided the narcotics by a gang and then loses the narcotics or has it stolen, would be accountable to the gang. The narcotics seller would have to prove that the narcotics had been stolen or lost and then, in the case of a larger amount of narcotics, would have to "retaliate" or "make some kind of face-saving move," such as "killing someone." (See 8RT 1009-1010.) Sergeant Valdemar also testified that it would be more likely that the source of the narcotics, especially if a gang, would be "satisfied" by a "particularly heinous" or "gruesome" manner of killing those who took the narcotics from the seller, such as that involving "humiliation" and "disrespect." (See 8RT 1011, 1018-1023.) Since the two victims in the instant case were found strangled and tied together with cords with their pants pulled down (see 7RT 847; 8RT 898, 904, 915-917, 1021-1022), Sergeant Valdemar's expert gang

testimony was relevant to show appellant's motive for killing the victims in this particular manner.

Similarly, the expert narcotics testimony of Berry, specifically concerning the repercussions when the source of a seller's narcotics is a gang, was relevant, within the meaning of Evidence Code section 210, because it showed appellant's motive for the instant crimes. Berry testified that when a person has taken narcotics from a seller, the seller was "duty bound to do something to them physically," and in the situation where the seller was provided the narcotics by a gang, the seller would "have to basically either do something to the person that took [the narcotics] from [the seller] or [the gang would] do something to [the seller]." (See 8RT 974-975, 985-987.)

Second, both the expert testimony of Sergeant Valdemar concerning gangs and Berry concerning narcotics, was relevant, within the meaning of Evidence Code section 210, because it concerned appellant's credibility. Contrary to appellant's assertion (see AOB 87-90), Meekey's testimony (see 5RT 671-672; 6RT 708) provided the "'evidentiary link'" that appellant obtained his narcotics from a gang. There was also evidence of appellant's gang membership, such as his tattoos. (See 8RT 1014-1017.) Contradicting Meekey's testimony, appellant testified that he obtained the cocaine by stealing it from under the Lincoln Heights house of his narcotics supplier "Augie." (See 9RT 1102-1103, 1205-1207; 10RT 1220-1229.) Appellant specifically denied that he spoke with Meekey about how he obtained the narcotics and denied that he mentioned the Mexican Mafia to Meekey. (See 9RT 1157.) The expert testimony of Sergeant Valdemar concerning gangs and of Berry concerning narcotics was relevant to appellant's credibility, specifically concerning appellant's claim that he had obtained the cocaine by stealing it from Augie, as opposed to having been "fronted" the cocaine by a gang. The expert testimony of Sergeant Valdemar and Berry showed that appellant's frantic and violent

search for his lost cocaine was more consistent with him having been supplied the cocaine by a gang and thus being accountable to the gang for the missing cocaine.

As the prosecutor argued in her closing argument,

> Now, Fontain [Harding] returned some of the dope to [appellant]; and [appellant], prior to that, had been looking for it frantically, frantically looking for this dope, which apparently is just a big plus to him. He's claiming to you that he stole this dope. Well, if he stole it, it's all a plus. It's all a plus; it's all extra. He's being paid by his cousin, Sal, and he's being paid a wage, so he's bringing home money to live, to save, . . . , and yet he's trying to convince you that he stole this cocaine and that he's selling it just for his own personal needs. It is starting to not make sense and his version of how he gets the cocaine, at least as he testified here in this trial, begins to unravel.

(11RT 1347-1348.) The prosecutor added:

> In this case the reasonable inference about where [appellant] got the drugs, his behavior afterwards, his frantic need to retaliate for the loss of his drugs because he'd been disrespected, the reasonable inference that you must draw is that what Donna Meekey told you is the truth and that he got it in some way . . . associated and related to the 18th Street gang that he is a member of.

(11RT 1348.) Thus, the expert testimony of both Sergeant Valdemar and Berry was relevant to appellant's credibility, within the meaning of Evidence Code section 210. Therefore, appellant's contention should be rejected.

E. The Expert Gang Testimony Of Sergeant Valdemar Was Not Cumulative And Was More Probative Than Prejudicial

Appellant claims that the expert testimony of Berry and Sergeant Valdemar concerning gangs was cumulative of other less prejudicial evidence,

and its prejudicial impact far outweighed its probative value. (AOB 95-101.) Respondent again notes that Berry testified as a narcotics, and not a gang, expert, and submits that the expert gang testimony of Sergeant Valdemar was not cumulative of other evidence and was more probative than prejudicial, within the meaning of Evidence Code section 352.

Evidence Code section 352 states:

> The court in its discretion may exclude evidence of 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 admission of gang evidence over an Evidence Code section 352 objection will not be disturbed on appeal unless the trial court's decision exceeds the bounds of reason.'" (*People v. Gonzalez*, *supra*, 126 Cal.App.4th at p. 1550, citations omitted.)

Contrary to appellant's claim that the testimony of Berry and Vashaun showing that drug dealers retaliate with violence when their drugs are stolen made the expert gang testimony unnecessary (see AOB 100), as explained above (see Argument III, D), the expert gang testimony of Sergeant Valdemar was very probative to show appellant's motive for killing the victims in the particularly "gruesome" manner involving strangulation by cords since appellant had been provided the narcotics by a gang (see 7RT 847; 8RT 898, 904, 915-917, 1009-1011, 1018-1023). (See *People v. Martinez* (2003) 113 Cal.App.4th 400, 413 ["'Case law holds that where evidence of gang activity or membership is important to the motive, it can be introduced even if prejudicial. [Citations.]' [Citation.]"]; *People v. Funes*, *supra*, 23 Cal.App.4th at p. 1519 [finding that the trial court did not abuse its discretion under Evidence Code section 352 by allowing the prosecution to present "the entire

picture of the rivalry" between two gangs].) Thus, the expert gang testimony provided by Sergeant Valdemar on these specific topics concerning gangs was not cumulative of other evidence, especially since Berry testified as a narcotics expert.

Although appellant complains that evidence concerning the gangs, and the Mexican Mafia in particular, was too prejudicial (see AOB 96-100), the expert gang testimony by Sergeant Valdemar concerning gangs was more probative than prejudicial because, as explained above (see Argument III, C), it explained to the jury the gangs' perceptions of disrespect, humiliation, and "saving face," which was important in this case given the way the victims were strangled and killed with cords. (See 8RT 1009, 1011, 1018-1023; see also *People v. Martinez* (2003) 113 Cal.App.4th at p. 413.)

In addition, contrary to appellant's assertion that the prosecutor "made appellant's gang membership the cornerstone upon which it built its case against him" (see AOB 99-100), the prosecutor said during the rebuttal portion of her closing argument:

> . . . So he's a gang member. Does that mean just because he's a gang member he killed these two people? No. Just because he's got these tattoos, does that mean he's a killer? No. . . .

(11RT 1405.) Therefore, the expert gang testimony of Sergeant Valdemar was not cumulative of other evidence and was more probative than prejudicial, within the meaning of Evidence Code section 352.

F. Appellant's Fair Trial And Reliability Determination Claims Are Forfeited; Appellant's Due Process Claim Should Be Rejected; Any Alleged Error Was Harmless

Appellant also argues that the erroneous admission of expert gang testimony violated his rights to due process, to a fair trial, and to a reliable determination of guilt and penalty under the Sixth, Eighth, and Fourteenth

Amendments. (See AOB 72-73, 102, fn. 29, 106.) Respondent submits that even assuming *People v. Partida*, *supra*, 37 Cal.4th at p. 431, applies to a narrow due process claim, appellant's other federal constitutional claims are forfeited by his failure to object to the complained-of gang evidence on those specific grounds at the trial level.

> In *People v. Partida*, *supra*, 37 Cal.4th 428, this Court concluded that a trial objection must fairly state the specific reason or reasons the defendant believes the evidence should be excluded. If the trial court overrules the objection, the defendant may argue on appeal that the court should have excluded the evidence for a reason asserted at trial. A defendant may not argue on appeal that the court should have excluded the evidence for a reason *not* asserted at trial. A defendant may, however, argue that the asserted error in overruling the trial objection had the legal consequence of violating due process.

(*Id.* at p. 431, original italics.)

At the trial level, counsel Taylor objected to the admission of gang evidence on the basis that it was irrelevant, minimally relevant, speculative, and highly prejudicial, and counsel Taylor referred to Evidence Code section 352. (See 5RT 526-527, 529-531.) The trial court ruled that the gang expert would be allowed to testify, "limited to the fact if someone is selling dope, how they get it back." (See 5RT 533-534.)

During Berry's testimony, counsel Garber made several objections. When the prosecutor asked Berry what he meant by saying Harding might be in a lot of trouble if caught with the cocaine, counsel Garber objected that it was irrelevant. The trial court overruled the objection. Berry testified that if someone has taken narcotics from a narcotics seller, the seller was almost "duty bound to something to them physical." (8RT 974-975.) When the prosecutor asked Berry if that had been Berry's experience regarding what people did,

counsel Garber objected that it was irrelevant and speculative. The trial court said that Berry was a "quasi expert," would "limit it to what he just testified," and sustained the objection. (8RT 975.) When the prosecutor asked Berry what "disrespecting mean[t] out on the streets," counsel Garber objected that it called for a conclusion and was speculation. The trial court said that Berry had already testified to that and sustained the objection. (8RT 980.) When the prosecutor asked Berry how "things work out on the street with regard to the way that drugs are bought and sold," counsel Garber twice objected to the form of the question. After the trial court asked Berry questions about his experience of living on the streets and of buying and selling narcotics, the prosecutor asked Berry what happened "if someone disrespects you." Counsel Garber objected that it called for a conclusion and was beyond Berry's expertise. After the prosecutor said she was calling Berry as an expert, the trial court said, "You don't think this man is an expert?" (See 8RT 985-986.)

Before Sergeant Valdemar's testimony, counsel Taylor objected to his testimony, and the trial court noted the defense objection. (8RT 1001.) During Sergeant Valdemar's testimony, counsel Taylor objected on the basis of "lack of foundation, being an expert in that area," speculation, and irrelevance. The trial court overruled these objections. (See 8RT 1007, 1011, 1019-1020, 1022-1023.) The record shows that appellant did not object to the complained-of expert testimony of Berry and Sergeant Valdemar on the grounds that it violated his rights to a fair trial and a reliable determination of guilt and penalty. Thus, these claims are forfeited.

Assuming appellant's due process claim falls under *People v. Partida*, *supra*, 37 Cal.4th at p. 431, this narrow due process claim concerning the complained-of gang evidence (see AOB 101-102) should be rejected for the same reasons, addressed above, that there was no state law error because: (1) Berry properly testified as a narcotics expert, not a gang expert (see Evid. Code,

§ 720 & § 801, subd. (b)); (2) the testimony of Berry concerning narcotics and of Sergeant Valdemar concerning gangs was proper expert testimony that was "sufficiently beyond common experience" (see Evid. Code, § 801, subd. (a)); (3) the expert testimony of Berry concerning narcotics and of Sergeant Valdemar concerning gangs was relevant (see Evid. Code, § 210); and (4) the expert gang testimony of Sergeant Valdemar was not cumulative and was more probative than prejudicial (see Evid. Code, § 352). (See *People v. Partida*, *supra*, 37 Cal.4th at p. 439, original italics ["But the admission of evidence, even if erroneous under state law, results in a due process violation only if it makes the trial *fundamentally unfair*. [Citations.]"]; *People v. Cole*, *supra*, 33 Cal.4th at p. 1187, fn. 1 [Absent state law error, the federal constitutional error claim "falls of its own merit."].)

Appellant also argues that admission of the complained-of gang evidence was prejudicial under either *Chapman v. California*, *supra*, 386 U.S. at p. 24, or *People v. Watson*, *supra*, 46 Cal.2d at p. 836. (See AOB 103-107.) "Absent fundamental unfairness, state law error in admitting evidence is subject to the traditional *Watson* test: The reviewing court must ask whether it is reasonably probable the verdict would have been more favorable to the defendant absent the error. [Citations.]" (*People v. Partida*, *supra*, 37 Cal.4th at p. 439 [accepting Court of Appeal's conclusion that the trial court's error in admitting some gang evidence was harmless]; see *People v. Watson*, *supra*, 46 Cal.2d at p. 836.) As explained above, there was no state law error regarding the complained-of gang evidence and thus, no corresponding due process violation. Even assuming that the trial court abused its discretion regarding the gang evidence, any alleged error was harmless under *People v. Watson*, *supra*, 46 Cal.2d at p. 836. First, contrary to appellant's assertion (see AOB 104-105), there was strong evidence of appellant's guilt of the instant crimes, even apart from the complained-of gang evidence. (See Argument II, E.) Second, the jury

was given several instructions pertaining to expert testimony (CALJIC No. 2.80),[12] opinion testimony (CALJIC No. 2.81),[13] and hypothetical questions (CALJIC No. 2.82).[14] (See XCT 2996-2998; 11RT 1433-1435.) It is

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12. The jury was given CALJIC No. 2.80, regarding expert testimony, as follows:

> A person is qualified to testify as an expert if [he] has special knowledge, skill, experience, training, or education sufficient to qualify [him] as an expert on the subject to which [his] testimony relates. [¶] A duly qualified expert may give an opinion on questions in controversy at a trial. To assist you in deciding such questions, you may consider the opinion with the reasons given for it, if any, by the expert who gives the opinion. You may also consider the qualifications and credibility of the expert. [¶] You are not bound to accept an expert opinion as conclusive, but should give to it the weight to which you find it to be entitled. You may disregard any such opinion if you find it to be unreasonable.

(XCT 2996; 11RT 1433-1434.)

13. The jury was given CALJIC No. 2.81, regarding opinion testimony of lay witness, as follows:

> In determining the weight to be given to an opinion expressed by any witness you should consider [his] or [her] credibility, the extent of [his] or [her] opportunity to perceive the matters upon which [his] or [her] opinion is based and the reasons, if any, given for it. You are not required to accept such an opinion but should give it weight, if any, to which you find it entitled.

(XCT 2997; 11RT 1434.)

14. The jury was given CALJIC No. 2.82, concerning hypothetical questions, as follows:

> In examining an expert witness, counsel may propound to [him] a type of question known in the law as a hypothetical question. By such a question the witness is asked to assume to be true a set of facts, and to give an opinion based on that assumption. [¶] In permitting such a question, the court does not rule, and does not necessarily find that all the assumed facts have been proved. It only determines that those assumed facts are within the probable or possible range of the evidence. It is for

presumed that the jury followed its given instructions. (See *People v. Morales* (2001) 25 Cal.4th 34, 47; *People v. Holt* (1997) 15 Cal.4th 619, 662; *People v. Adcox* (1988) 47 Cal.3d 207, 253 .) Third, contrary to appellant's assertion (see AOB 104), the prosecutor did not argue that appellant's status as a gang member was the main reason to convict him of the instant crimes. (See 11RT 1405 [prosecutor stated in rebuttal closing argument that just because appellant was a gang member did not mean that he killed the two victims].) Thus, any alleged error regarding admission of the complained-of gang evidence was harmless. For the same reasons, any federal constitutional error was harmless beyond a reasonable doubt. (See *Chapman v. California*, *supra*, 386 U.S. at p. 24.)

IV.

THE COURT DID NOT ABUSE ITS DISCRETION IN EXCLUDING THIRD PARTY CULPABILITY EVIDENCE CONCERNING VASHAUN; ANY ALLEGED ERROR WAS HARMLESS

Appellant contends that he was denied his rights to a fair trial and to present a defense when the trial court erroneously excluded evidence of third party culpability for the murders of Harding and Jackson and evidence that appellant was not angry at Harding because of the theft of his drugs. (AOB 108-138.) Respondent submits that the trial court (Judge Smith) did not abuse its discretion in excluding third party culpability evidence concerning Vashaun. Moreover, any alleged error was harmless.

> you, the jury, to find from all the evidence whether or not the facts assumed in a hypothetical question have been proved. If you should find that any assumption in such a question has not been proved, you are to determine the effect of that failure of proof on the value and weight of the expert opinion based on the assumed facts.

(XCT 2998; 11RT 1435.)

A. Factual Background

1. The Court's Ruling Regarding Third Party Culpability Concerning Donte Vashaun

On July 14, 1997, outside the jury's presence, the trial court (Judge Smith), the prosecutor (Deputy District Attorney Ratinoff), counsel Garber, and counsel Taylor discussed Donna Meekey's statement that Donte Vashaun had asked her to take off her clothing. (5RT 525-526.) The prosecutor said,

> . . . [T]here is a statement from one of the witnesses that another witness - - and the witness is Donna Meekey, for the record - - and the statement is that Donte Vashaun comes into the room and tells her to take off his clothes - - her clothes, excuse me, to take off her clothes. And the motion is that it doesn't have any relevance to the conviction of this man here on trial and, therefore, I am going to ask the Court to limit inquiry, that there not be inquiry into whether another witness asked another witness to take off her clothes.

(5RT 525-526.)

The following exchange occurred regarding this issue:

> [Counsel Taylor]: . . . I guess the last thing would be the statement with respect to Donna Meekey and Donte Vashaun.
>
> [Judge Smith]: Who is going to elicit this statement about the dressing? [¶] What relevance does it have?
>
> [Deputy District Attorney Ratinoff]: I'm sorry, who is going to elicit which statement?
>
> [Judge Smith]: Who is going to take the stand and say this? If she takes the stand, you are going to call her?
>
> [Deputy District Attorney Ratinoff]: I am going to call her.
>
> [Judge Smith]: What relevance does it have that someone asked her to take her clothes off?

[Deputy District Attorney Ratinoff]: I believe it has no relevance.

[Counsel Garber]: May we answer that, Judge? It is extremely relevant.

[Counsel Taylor]: Since Mr. Garber is - -

[Judge Smith]: I am just getting a history here.

[Counsel Taylor]: - - so wired up, he can respond.

[Counsel Garber]: She will testify that - -

[Judge Smith]: "She" is who?

[Counsel Garber]: Donna Meekey will testify that Donte Vashaun, the People's witness, took her into a room, made her get undressed and told her he wanted her to go outside and screw - - that isn't the word. The word was a different word, a four-letter word - - and while she was in the process of doing that, he was going to steal [appellant's] drugs; that when she told him she wouldn't do that, he beat her up and told her he would do things to her if she didn't go out and do it. The motivation is obvious. The people who have the most - - who had the most to gain from the death of the victims in this case was not [appellant]. But the fact that these - -

[Judge Smith]: Who is Donte Vashaun?

[Counsel Garber]: He is a fly-by-night narcotics dealer.

[Judge Smith]: What do you know about that?

[Deputy District Attorney Ratinoff]: He is a witness to the things that occurred in December of 1994, your Honor, and he discovered the bodies.

[Judge Smith]: When did this undressing - -

[Deputy District Attorney Ratinoff]: The homicides happened December 26th.

[Judge Smith]: The request to undress?

[Counsel Taylor]: December 25th - - December 24th.

[Deputy District Attorney Ratinoff]: December 24th.

[Judge Smith]: Is this in the form of third-party culpability? Is that what you are saying?

[Counsel Garber]: It may very well be, your Honor.

[Judge Smith]: Third-party culpability, it can't come in. There is no way you can get it in this time. [¶] When is this person going to testify?

[Deputy District Attorney Ratinoff]: He was ordered back for this afternoon. She is going to be here, though. She is here now.

[Judge Smith]: Let me take a look at that aspect of it. Right now I don't see any relevance, but I will hold it. I will talk to you about that. [¶] Right now let's get this trial started. . . .

(5RT 535-537; see XCT 2819.)

During the cross-examination of Meekey, the following exchange occurred at the bench:

[Deputy District Attorney Ratinoff]: Your Honor, there is a relevance objection. The line of questioning is, as we talked about before, that Donte Vashaun came in, that he said something about taking the defendant's dope, that she should get undressed and so on and so forth. [¶] I don't see the relevance to whether or not this defendant, who is totally different than Donte Vashaun, whether this defendant killed Fontain and J.J.

[Counsel Garber]: Judge, the testimony will reveal that she was beaten up by Donte Vashaun and was told to keep [appellant] occupied while he stole - - while he took the dope that [appellant] allegedly had. And when she refused to do it, he told - - he threatened her and beat the hell out of her. [¶] And this is a link in the chain of circumstances which will clearly indicate that the people who had the - - who had the

motive for killing Fontain were Donte Vashaun and Jerry Haywood, who is the next People's witness.

[Counsel Taylor]: Your Honor, if I may interject. It also connects up with what Darlene Miller was saying yesterday when she was on the stand about Donte going to the room and then seeing [appellant] and then Donte going back into the room and seeing the bodies.

[Judge Smith]: I don't know what all that was about yesterday. The bodies were decomposing. What is that going to show, a burglary committed on the body of the dead? [¶] This has to be relevant to show why they would kill him. It is [appellant's] dope, as the evidence is now. It is his dope, he has a motive to get it back and kill somebody. [¶] I don't see any motivation or any relevance for this guy to tell her that he is going to beat her up so they can steal his dope. I don't know how it goes to the murder. [¶] I will sustain the People's objection. [¶] If you want to put on a defense, do it some other way. [¶] Sustained.

[Counsel Garber]: Judge - -

[Judge Smith]: That is third-party culpability.

[Counsel Garber]: For the record, Judge, are you excluding - -

[Judge Smith]: It is third-party culpability. [¶] Unless you can show something, you are not in the ball game.

[Counsel Garber]: Judge, are you excluding our cross-examination?

[Judge Smith]: Yes, I am. [¶] Does that make sense to you?

(6RT 687-689.)

During the recross-examination of Meekey, the following exchange occurred:

[Counsel Garber]: Didn't you talk to Fontain about Donte?

[Meekey]: No, I didn't.

[Counsel Garber]: Was there anything mentioned, as best you can recall, on the morning of the 25th about the incident which had occurred the evening before with Donte?

[Meekey]: No, I didn't. I didn't have a chance to tell him.

[Counsel Garber]: And did Fontain mention to you or discuss with you the fact that you had any marks on you the evening before and wanted to know about them?

[Meekey]: No.

[Counsel Garber]: Did you ever tell - - did you ever have any discussion with him about the incident you had with Donte?

[Deputy District Attorney Ratinoff]: Objection. We have gone over this already, your Honor.

[Judge Smith]: Not only that, I made a ruling three times. I made it rather clearly so everyone could hear it.

(6RT 720.)

During Vashaun's cross-examination, the following exchange occurred:

[Counsel Garber]: On the evening of December 24 did you have occasion to go into room 415 after seeing Darlene?

[Vashaun]: I probably did.

[Counsel Garber]: Okay. And when you went upstairs, wasn't Donna Meekey in the room?

[Counsel Garber]: Soul Train. [¶] Wasn't she in the room?

[Vashaun]: I don't remember offhand.

[Counsel Garber]: You don't remember Soul Train being present in the room that evening?

[Vashaun]: It's a lot of stuff back then I don't remember. I don't.

[Counsel Garber]: Well, isn't it true, sir, that on that evening when you returned, after seeing Darlene Miller, you went back up to room 415

and Donna, Donna Meekey, Soul Train, was in that room? Isn't that right?

[Vashaun]: I don't remember that. I don't really remember. I don't remember that part, to be honest.

[Counsel Garber]: You don't remember that?

[Vashaun]: No.

[Counsel Garber]: Okay. Do you remember the fact that you had a conversation with her in room - - in room - - after you sent Frank out of room 415 into room 416?

[Vashaun]: No.

[Counsel Garber]: And you do know Soul Train, do you not, and you knew her before then?

[Vashaun]: Yeah, I know her. Yeah.

[Counsel Garber]: And isn't it true that you got - - you had an altercation with her that day?

[Deputy District Attorney Ratinoff]: Objection, hearsay; relevance.

[Judge Smith]: Sustained.

[Counsel Garber]: Didn't you threaten - -

[Deputy District Attorney Ratinoff]: Objection.

[Judge Smith]: Sustained. [¶] That is in direct contempt. I told you three times that is an area to stay away from. I told you at sidebar. That is a direct contempt. [¶] Stay away from it, Mr. Garber. [¶] He said he recognized her.

[Counsel Garber]: Do you recall what she was wearing that night?

[Vashaun]: No.

(6RT 812-813.)

Also during Vashaun's cross-examination, the following exchange occurred:

[Counsel Garber]: . . . [¶] When Frank [appellant] was selling the drugs in the Pacific Grand Hotel, he was selling a higher quality of drugs at less price; isn't that true?

[Vashaun]: I don't know. I guess, yeah.

[Counsel Garber]: Well, didn't you tell - - didn't you tell us [referring to Vashaun having spoken to counsel Garber and defense investigator on July 7, 1997] that that's what pissed you off and the other individuals off because it was making it difficult for you to sell drugs in the Pacific Grand because Frank was selling good dope at a cheap price?

[Deputy District Attorney Ratinoff]: Objection, argumentative. [¶] May we approach, your Honor?

[Judge Smith]: I don't know what the relevance is based on my previous order. [¶] It is third-party culpability. That is what it goes to. I have already made a ruling on that. [¶] You sell dope; Frank sold dope; is that what you are telling us?

[Vashaun]: Yeah.

[Judge Smith]: We have heard this several times.

[Counsel Garber]: And he sold a higher quality dope at less price; is that correct?

[Vashaun]: No.

[Counsel Garber]: That's not true?

[Vashaun]: No.

[Counsel Garber]: Isn't that what you told us?

[Vashaun]: I can't recall.

(6RT 833-834.)

During appellant's direct examination, the following exchange occurred:

[Counsel Garber]: And when you returned to room 415, was anyone in the room?

[Appellant]: Yes.

[Counsel Garber]: Who was that?

[Appellant]: In the room was Donte Vashaun, Tyrell, a girl named Pat and a girl named Nadine.

[Counsel Garber]: And did Donna return to room 415 with you?

[Appellant]: Yes.

[Counsel Garber]: And did anything unusual occur at that time?

[Deputy District Attorney Ratinoff]: Objection, relevance. This has been ruled on by the Court.

[Counsel Garber]: It is merely preliminary, your Honor.

[Deputy District Attorney Ratinoff]: Same objection.

[Counsel Garber]: Do you want me to rephrase it, Judge?

[Judge Smith]: If it is something I ruled on several times, I don't want to hear it again. [¶] Go ahead.

(9RT 1141.)

The defense motion for a new trial (see XCT 3111- 3126) included the argument that the trial court erred in excluding evidence of third party culpability concerning Vashaun (XCT 3111-3117). In arguing the defense motion for a new trial, counsel Garber discussed the issue regarding third party culpability (16RT 1955). The prosecutor also discussed the third party culpability issue. (16RT 1954.)

2. The Court's Ruling Regarding Appellant's Anger

During appellant's redirect examination, the following exchange occurred:

[Counsel Garber]: In reference to the incident at the bus stop, you were questioned by the district attorney as to if you were angry at Fontain at that time. [¶] Do you recall that?

[Appellant]: Prior to taking Donna to the bus stop?

[Counsel Garber]: Yes.

[Appellant]: Yes, I was questioned by the district attorney about that.

[Counsel Garber]: And you indicated that you were angry at Fontain at that time; is that correct?

[Appellant]: I was very angry at Fontain, very mad.

[Counsel Garber]: Would you please explain to the jury why you were so angry at Fontain at that time.

[Appellant]: I was mad at Fontain because - -

[Deputy District Attorney Ratinoff]: Objection - -

[Appellant]: - - Donte pulled - -

[Judge Smith]: Just a moment. It is not that difficult. If someone interrupts with an objection, just stop, all of you. [¶] The objection is based on what?

[Deputy District Attorney Ratinoff]: I believe that the Court has already ruled on this area.

[Counsel Garber]: Your Honor, she opened up the area - -

[Deputy District Attorney Ratinoff]: No.

[Counsel Garber]: - - of why he was angry, he was so angry at a particular time; and he has an absolute right to explain why. I am anxious to find out, too.

[Deputy District Attorney Ratinoff]: May we approach, your Honor? (10RT 1291-1292.)

At this point, the trial court sent the jury out on their lunch hour and the following exchange occurred in chambers:

[Judge Smith]: We are in chambers. [¶] There is a question by Mr. Garber regarding the issue of why [appellant] on the stand said five times he was not mad, he was very, very mad when he took - - [¶] Whatever the hell her name is.

[Counsel Garber]: Donna.

[Judge Smith]: - - Donna to the bus stop. [¶] Your objection?

[Deputy District Attorney Ratinoff]: The objection is counsel brought it up by asking the question whether [appellant] and Fontain had an argument. That was in his direct. [¶] I did not ask about the content of the argument specifically; I only asked about what his reaction was to this argument, was he mad, was he angry, in fact didn't he have an argument with J.J., not Fontain. He answered that that was incorrect, that he didn't even see J.J. and that Donna was there.

[Judge Smith]: You are just dying to get into this. [¶] What do you want to get into?

[Counsel Garber]: Judge, she has been asking questions and putting statements on the record that are not consistent with what the testimony has been; and now she went over it four or five times, she said specifically in reference to the time on the morning of the 25th, that is what she is talking about, they were in Fontain's room - -

[Judge Smith]: I know. [¶] What is it you want to get in?

[Counsel Garber]: I want him to be able to tell us - -

[Judge Smith]: Tell me what you want him to say.

[Counsel Garber]: Well, he is going to discuss he had an argument and what the argument was about.

[Judge Smith]: What is the relevance of that argument and what it is about? What is the relevance when I have already ruled the only thing that is relevant here is the fact he was mad? [¶] She is trying to show his anger, he has a propensity to get angry. The reason he is angry is not material. Why she keeps going over it is a mystery to me. [¶] The fact that you people want to get something in that I already ruled on is not going to change my position. Whether she opened the door or you opened the door is not going to change my position. It is not relevant; it is not coming in. It is offered for one limited purpose. I told you that before. [¶] Stay the hell away from it. If you insist on going over this stuff, both of you, you are stuck with it.

[Counsel Garber]: Judge, we haven't gone over anything on this.

[Judge Smith]: You are not going to. I am not going to change my ruling because you don't object when she asks a question or you say she opened the door and it snuck in. You opened the door originally; you baited her.

[Counsel Garber]: Judge, she has been opening the door, for example, about the statement - -

[Judge Smith]: Mr. Garber, your client opened the door; and he has been well trained. That's the end of that issue. [¶] Let's get on with it. If I hear one more time how much dope he took, I am going to step in. [¶] We are not going to get into this. I have already ruled. The fact you guys open the door; that is your problem. You think she opened the door; you opened the door. You stay away from the door.

(10RT 1292-1295.)

B. Appellant's Claims Regarding His Right To Present A Complete Defense And His Right To A Reliable Sentencing Determination Are Forfeited

Appellant makes several federal constitutional claims based on the trial court's rulings regarding third party culpability concerning Vashaun beating Meekey and concerning appellant's anger about Vashaun beating Meekey, including his Fourteenth Amendment right to a fair trial, his Sixth and Fourteenth Amendment right to present a complete defense, his Eighth Amendment right to a reliable sentencing determination, and his right to testify in his own defense and present relevant testimony pursuant to Fourteenth Amendment due process, the compulsory clause of the Sixth Amendment, and the privilege against self-incrimination under the Fifth Amendment. (See AOB 108, 114, 119, 121-122, 124-125, 127-128.) In his motion for a new trial (see XCT 3111- 3126), appellant argued that the trial court erred in excluding evidence of third party culpability concerning Vashaun (XCT 3111-3117). Appellant specifically said in his motion, "The above authority, along with the basic recognition that the defendant's constitutional rights to due process of law and a fair trial have been violated, compel the conclusion that the trial court has erred in grievous fashion and that only a new trial, wherein defendant's aforementioned rights are scrupulously preserved, can remedy the error." (XCT 3117.) Respondent submits that appellant's claims regarding his right to present a defense, his right to a reliable sentencing determination, and his right to testify in his own defense and present relevant testimony are forfeited because he failed to object based on those grounds at the trial level. (See *People v. Partida*, *supra*, 37 Cal.4th at p. 431; *People v. Carter*, *supra*, 30 Cal.4th at p. 1196, fn. 6; *People v. Burgener*, *supra*, 29 Cal.4th at pp. 869, 886; *People v. Millwee*, *supra*, 18 Cal.4th at pp. 128-129.)

C. Relevant Law

> To be admissible, the third-party evidence need not show "substantial proof of a probability" that the third person committed the act; it need only be capable of raising a reasonable doubt of defendant's guilt. At the same time, we do not require that any evidence, however remote, must be admitted to show a third party's possible culpability. . . . [E]vidence of mere motive or opportunity to commit the crime in another person, without more, will not suffice to raise a reasonable doubt about a defendant's guilt: there must be direct or circumstantial evidence linking the third person to the actual perpetration of the crime.

(*People v. Hall* (1986) 41 Cal.3d 826, 833; see also *People v. DePriest* (2007) 42 Cal.4th 1, 43; *People v. Geier* (2007) 41 Cal.4th 555, 581; *People v. Robinson* (2005) 37 Cal.4th 592, 625.)

> . . . [C]ourts should simply treat third-party culpability evidence like any other evidence: if relevant it is admissible ([Evid. Code,] § 350) unless its probative value is substantially outweighed by the risk of undue delay, prejudice, or confusion ([Evid. Code,] § 352).

(*People v. Hall*, *supra*, 41 Cal.3d at p. 834; see also *People v. Geier*, *supra*, 41 Cal.4th at p. 581; *People v. Robinson*, *supra*, 37 Cal.4th at p. 625.) "In reviewing an assessment made by a trial court under Evidence Code section 352, [appellate courts] shall not disturb the ruling on appeal absent a finding that the trial court abused its discretion. [Citation.]" (*People v. Robinson*, *supra*, 37 Cal.4th at p. 625.) Moreover, in assessing prejudice, this Court in *Hall* referred to the *Watson* standard, stating: "In these circumstances, we conclude it is not reasonably probable that a result more favorable to defendant would have been reached in the absence of the error. [Citation.]" (*People v. Hall*, *supra*, 41 Cal.3d at p. 836, citing *People v. Watson*, *supra*, 46 Cal.2d at p. 837; see also *People v. Geier*, *supra*, 41 Cal.4th at p. 583; *People v.*

Robinson, *supra*, 37 Cal.4th at p. 627; *People v. Bradford* (1997) 15 Cal.4th 1229, 1325 [trial court's ruling excluding evidence concerning third party culpability "did not constitute a refusal to allow defendant to present a defense, but merely rejected certain evidence concerning the defense" and "proper standard of review is that enunciated in *People v. Watson*"].)

D. The Court Did Not Abuse Its Discretion In Ruling Regarding Third Party Culpability; Any Alleged Error Was Harmless

Appellant states that he "sought to introduce evidence that in the evening hours of December 24, 1994, while Donte Vashaun and Donna Meekey were alone in room 415, Vashaun ordered Meekey to seduce appellant so that Vashaun could steal the cocaine he believed had been returned to appellant by Miller. (5RT 536.)" (AOB 108.) Appellant continues, stating that "[w]hen Meekey refused, Vashaun stripped off her clothes and began to beat her about her face and body, ultimately pushing her naked, bruised body into room 416, where she stood crying before appellant. (6RT 686.)" (AOB 108.)[15/]

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15. At trial, Meekey testified that on the evening of December 24, 1994, she was initially alone in Harding's room, number 415. Around 7:00 p.m. or 8:00 p.m., Vashaun was in room 415, and other people, including appellant, were in the next room, number 416. Meekey remained in room 415 with Vashaun for about 30 minutes. After that 30 minutes, Harding was coming in and out of the room. Appellant, Harding, and Meekey "partied together" with "dope." Then, Meekey went to appellant's room, number 304, with appellant. (6RT 685-686, 689-691.)

At trial, appellant testified that on December 24, 1994, he was in room 415 with Vashaun, Meekey, and Tyrell. Vashaun wanted to speak to Meekey alone so appellant and Tyrell went to the adjoining room, number 416. Appellant remained in room 416 for about 45 minutes to an hour. Around midnight, appellant and Meekey left room 415 and went to appellant's room, number 304. In appellant's room, appellant calmed Meekey down because she was nervous and crying. After calming her down for about half an hour, appellant and Meekey partied by smoking rock cocaine. Appellant and Meekey spent about 12 hours together in appellant's room, from around midnight through about noon on December 25, 1994. (9RT 1145-1147.)

Appellant states that he sought to introduce evidence of Vashaun's beating of Meekey for two purposes: (1) "to show Vashaun's culpability for the murders of Harding and Jackson," and (2) "to prove, through [appellant's] own testimony, that he was angry at Harding not because of the earlier theft of his drugs, but because Harding had allowed Meekey to be brutally beaten by Vashaun without intervening." (AOB 108-109.)

1. Regarding Vashaun Beating Meekey

Regarding appellant's first purpose, he is claiming that the trial court abused its discretion by excluding third party culpability evidence, concerning Vashaun's beating of Meekey in his attempt to obtain appellant's cocaine. (See AOB 108-109, 114-124.) Appellant specifically argues that the third party culpability evidence concerning Vashaun was "relevant to the motive behind the murders of Harding and Jackson," this evidence "circumstantially linked Vashaun to the actual killings," and this evidence's probative value would not be outweighed by factors set forth in Evidence Code section 352. (See AOB 115.)

Appellant is essentially claiming that third party culpability evidence concerning Vashaun's beating of Meekey should have been allowed because this proffered evidence showed Vashaun had the motive and opportunity to kill Harding and Jackson. (See AOB 116, 119.) Regarding motive, appellant argues that Vashaun had motive to kill Harding and Jackson in order to obtain the remainder of appellant's cocaine that Vashaun believed was still in Harding's possession. (See AOB 116.) However, evidence at trial showed that almost everybody at the Pacific Grand Hotel, including Vashaun, would have shared this same motive since they all believed that Harding was or had been in possession of appellant's cocaine.

At trial, Miller testified that after she and Harding obtained the bag of cocaine, Harding went to the ninth floor of the hotel, "bragging that [Miller] and [Harding] had found some dope." (5RT 589-590.) Miller also testified:

> [O]n the 9th floor everyone was talking about [Harding] said [Miller] and [Harding] had found some dope. And [Miller] told them, 'I haven't found anything.' [Harding] was up there splurring [meaning] giving dope to everybody, selling the dope to everybody. . . .

(5RT 593.)

Meekey testified that on December 24, 1994, in a hotel room on the ninth floor, Harding showed her a large amount of cocaine, and he was "so excited and happy." Harding went out and started selling the cocaine. Harding sold some cocaine to the hotel security guard. Harding said that he was going to sell some cocaine to other people who dealt drugs in the building. (See 5RT 659-664.) Later, after Meekey went to Harding's room, number 415, a man came into room 415 and said that "someone was looking for the cocaine and that they were going to kill whoever had it." When Harding returned to his room, both Meekey and Harding's friend Tony tried to convince Harding to return the cocaine because "a lot of people knew [Harding] had it," and "people were saying that they were going to kill whoever had the drugs." (See 5RT 664-667.)

Detective Long also testified that the Pacific Grand Hotel was "for single room occupancy technically, which means it's kind of a low-end residential hotel for the residents of downtown Los Angeles." (8RT 898-899.) Narcotics were readily sold and used at the Pacific Grand Hotel. (8RT 899.)

Since the Pacific Grand Hotel served as a residence or workplace for many individuals who used and/or sold narcotics (see 8RT 898-899), then every user and/or seller at the hotel would have had the motive to obtain appellant's cocaine from Harding. Appellant testified that many African Americans, including Vashaun, Jerry Haywood, and "Lisa," were selling narcotics in the

Pacific Grand Hotel. A majority of the hotel personnel, including security guard Tony Williams, was also selling narcotics. Appellant had verbal altercations with Berry, Haywood, Tony Williams, and other major narcotics sellers in the hotel about the sale of appellant's narcotics. (See 9RT 1152-1154; see also 5RT 584 [Miller testified that a hotel security guard sold narcotics]; 5RT 581-582 [Miller testified that a "connection" named "Tony" sold narcotics in hotel]; 8RT 969-970 [hotel resident Berry testified that he was using and selling narcotics in December 1994].) As such, the proffered third party evidence concerning Vashaun's beating of Meekey constituted mere motive and not "direct or circumstantial evidence linking [Vashaun] to the actual perpetration of the crime." (See *People v. Hall*, *supra*, 41 Cal.3d at p. 833.)

Regarding opportunity, appellant notes that Vashaun's beating of Meekey occurred just two days before and in the same location (Pacific Grand Hotel) as the murders of Harding and Jackson. (See AOB 114, 117.) However, evidence at trial showing Vashaun's presence at the Pacific Grand Hotel from December 24, 1994 through December 28, 1994, only showed mere opportunity and did not show direct or circumstantial evidence linking Vashaun to the actual murders of Harding and Jackson. (See *People v. Hall*, *supra*, 41 Cal.3d at p. 833.)

Vashaun testified as follows: Vashaun arrived at the Pacific Grand Hotel on December 24, 1994, between 10:00 p.m. and 12:00 a.m. (6RT 755, 807, 809-810.) Vashaun had arranged to occupy room 415 because Harding was Vashaun's friend. (6RT 807.) Vashaun did not have a key to room 415, but the security guard, who was called the "passkey," would let Vashaun into someone's room. (6RT 808.) On December 24, Vashaun went to room 415, appellant answered the door, and appellant was in the room with Meekey. (6RT 756, 810.) Vashaun was "partying" and "getting high" on December 24, with appellant, Meekey, Vashaun's cousin Tyrell, and Nadine Stevens. Vashaun did

not have any conversations with Meekey while they were partying. (6RT 778-779, 814-815.) Vashaun did not see Harding on December 24. (6RT 810, 814.) While Vashaun was in room 415, the telephone rang in the adjoining room, number 416, and the caller was Miller. While Vashaun was on the telephone with Miller, appellant told Vashaun that McPherson was tied up in order to scare Miller to return. (6RT 760, 790-791, 810-811, 830-831.) Vashaun and Miller met appellant, and Miller returned the "dope" to appellant. (6RT 760-762, 791-792, 811-812.) Appellant asked Miller about the rest of his narcotics, and Miller told appellant that Harding had the rest it of it. (6RT 798-800.)

Vashaun did not remember but probably saw Harding on December 25, 1994 (Sunday). (6RT 824.) Vashaun was not sure but probably went to room 415 at 11:00 a.m. on December 26, 1994 (Monday), and entered the room, but nobody was there. (6RT 762, 824.)

On the evening of December 27, 1994, between 10:00 p.m. and midnight, Vashaun found Harding and Jackson dead in Harding's room at the Pacific Grand Hotel. Upon discovering the bodies, Vashaun told the hotel's security guard Terry Smith, and Vashaun and Terry, along with "Red," went to Harding's room. Vashaun called the police. The police eventually arrived, and Vashaun spoke to the police. (6RT 747-749, 753-754, 800-803, 821-822, 826, 829-830.)

Miller testified as follows: When Miller returned to the Pacific Grand Hotel to find that her fourth-floor room that she shared with McPherson had been ransacked, Miller, Vashaun, and Miller's friend were in the room. Miller also noticed that the cord from her hot plate had been cut. (5RT 601, 605, 607-608.) At some earlier point, Vashaun had gone to Harding's room looking for Herman Jackson and knocked, but no one responded. Vashaun would also visit Harding because they were good friends. Vashaun returned to Miller's room. During the evening, Miller and Vashaun left Miller's room and were about to

go up the steps when they saw appellant go to Harding's room. The door of Harding's room "slammed." Miller and Vashaun "peeked around the corner and waited." Appellant came out of Harding's room and went back down the hallway. After appellant left Harding's room, Vashaun went to Harding's room. Miller heard the noise of a door being pushed. (5RT 601-605, 627-628, 643-647.) Vashaun came back to Miller, who was still around the corner from Harding's room, and told her that Harding and Jackson were dead. Vashaun was "depressed" and "just sad." (5RT 603-604, 608, 643.) About 10 minutes had passed from the time Miller and Vashaun had seen appellant go in and out and Harding's room and the time that Vashaun found the dead men in Harding's room. (5RT 603-604.)

After the discovery of the bodies, Vashaun went up the stairs to Red's room on the ninth floor and told him that Harding and Jackson were dead. Miller and "Nadine" followed Vashaun. Red went to Harding's room. Vashaun and Miller went to the hotel's front desk and had them call the police. The police arrived about 20 minutes later. When the police arrived, Miller saw appellant, who was by the hotel lobby, leave the hotel "in a hurry." Both Miller and Vashuan spoke to the police. (5RT 608-609.)

Such evidence of a third party's mere motive or opportunity is not sufficient to raise a reasonable doubt about a defendant's guilt. (See *People v. Hall*, *supra*, 41 Cal.3d at p. 833; see also *People v. Geier*, *supra*, 41 Cal.4th at p. 582 ["While it could be generously construed as possible evidence that Sloan had the opportunity to commit the crimes, as noted, evidence of mere opportunity without further evidence linking the third party to the actual perpetration of the offense is inadmissible as third party culpability evidence."]; *People v. Gutierrez* (2002) 28 Cal.4th 1083, 1137 ["Although defendant's testimony may have raised a suggestion that Pablo or some other third party involved in drug trafficking had a motive or possible opportunity to murder

Jones, additional direct or circumstantial evidence was required to link Pablo or some other third party to the actual perpetration of the crime. [Citation.]"]; *People v. Kaurish* (1990) 52 Cal.3d 648, 684-686 [trial court did not abuse its discretion in excluding proposed defense evidence that victim and her mother had stolen money and a painting from the third party, who then said he would "get even," because the third party's motive for being angry with victim and her mother did not link the third party to the actual perpetration of the crime]; *People v. Edelbacher* (1989) 47 Cal.3d 983, 1017-1018 [In response to defense counsel's argument that "'people who are dealing in narcotics frequently end up injured or shot,'" the trial court properly excluded proposed defense evidence that murder victim was dealing in narcotics because "evidence showing only a third party's possible motive is not capable of raising a reasonable doubt of a defendant's guilt and is thus inadmissible."].)

Appellant also points to Vashaun's violence in beating Meekey as showing that Vashaun would use violence to obtain appellant's cocaine from Harding and murder both Harding and Jackson. (See AOB 116.) Even assuming that Vashaun did beat Meekey because she refused to help him steal appellant's cocaine, it is speculative to conclude that Vashaun's desire to steal cocaine from appellant showed that Vashaun would kill Harding, who was Vashaun's good friend, and Jackson for the cocaine. To make the leap from theft to murder is speculative and, on this record, unsupported by the facts.

Appellant refers to Vashaun's testimony where Vashaun stated, "'Fontain broke a law in our world, our world is different from your world . . . in our world people [murder] every day[,]'" to claim that Vashaun "was not opposed to violence as such as that exhibited in these murders." (See AOB 111-112, citing 6RT 758.) At trial, Vashaun testified that he did not want to be involved in appellant's case because he was nervous about being labeled a snitch and believed that snitches got killed. Vashaun worried that he would be

"murder[ed]" when he returned to his "environment" after leaving the courtroom. (See 6RT 757, 772-774, 806, 822-823.) It was in this context that Vashaun testified about his "different" "world." (6RT 758.) Vashaun also testified, "It's not okay for anybody to murder anybody; but . . . if he didn't take anything from anybody, he wouldn't be on that floor." (6RT 759.) Thus, this testimony did not demonstrate that Vashaun was a particularly violent person but rather explained the attitude of Vashaun and others in his "different" "world" concerning the likely repercussions of certain acts in that world. In fact, Berry testified that if a person has taken narcotics from a narcotics seller, the seller was almost "duty bound to do something to them physically." (8RT 974-975.)

In sum, appellant fails to point to any "direct or circumstantial evidence linking [Vashaun] to the actual perpetration of the crime." (See *People v. Hall*, *supra*, 41 Cal.3d at p. 833.) For the same reasons, appellant's claim regarding his due process right to a fair trial regarding the third party culpability evidence concerning Vashaun (see AOB 108, 114, 121, 124) should be rejected. (See *People v. Robinson*, *supra*, 37 Cal.4th at pp. 626-627, quoting *People v. Hall*, *supra*, 41 Cal.3d at p. 834 ["We similarly reject defendant's various claims that the trial court's exclusion of the proffered evidence violated his federal constitutional rights to present a defense, to confront and cross-examine witnesses, and to receive a reliable determination on the charged capital offense. There was no error under state law, and we have long observed that, '[a]s a general matter, the ordinary rules of evidence do not impermissibly infringe on the accused's [state or federal constitutional] right to present a defense.' [Citations & footnote.]"]; *People v. Panah*, *supra*, 35 Cal.4th at p. 482, fn. 31 ["Assuming, without deciding, that defendant's offers of proof preserved these [federal constitutional] claims [asserted for the first time on appeal] [citation],

because we conclude the trial court's rulings were correct, the constitutional claims fail."]; see also *People v. Prince* (2007) 40 Cal.4th 1179, 1243.)

In order to further support his argument, appellant relies on *Holmes v. South Carolina* (2006) 547 U.S. 319 [126 S.Ct. 1727, 164 L.Ed.2d 503]. (See AOB 109, 119-121.) In *Holmes v. South Carolina, supra*, 547 U.S. 319, the United States Supreme Court evaluated the South Carolina Supreme Court's application of an "evidence rule under which the defendant may not introduce proof of third-party guilt if the prosecution has introduced forensic evidence that, if believed, strongly supports a guilty verdict." (*Id.* at pp. 321, 329.) In affirming the defendant's conviction after a second trial, the South Carolina Supreme Court had held that the trial court did not err in excluding the defendant's third party culpability evidence because "'where there is strong evidence of an appellant's guilt, especially where there is strong forensic evidence, the proffered evidence about a third party's alleged guilt does not raise a reasonable inference as to the appellant's own innocence.' [Citation.]" (*Id.* at pp. 322-324.)

The United States Supreme Court explained:

> While the Constitution . . . prohibits the exclusion of defense evidence under rules that serve no legitimate purpose or that are disproportionate to the ends that they are asserted to promote, well-established rules of evidence permit trial judges to exclude evidence if its probative value is outweighed by certain other factors such as unfair prejudice, confusion of the issues, or potential to mislead the jury. . . . [T]he Constitution permits judges "to exclude evidence that is 'repetitive . . . , only marginally relevant' or poses an undue risk of 'harassment, prejudice, [or] confusion of the issues.'" [¶] A specific application of this principle is found in rules regulating the admission of evidence proffered by criminal defendants to show that someone else committed

> the crime with which they are charged. Such rules are widely accepted, [footnote citing *People v. Hall*, *supra*, 41 Cal.3d 826, and cases from other states]. . . .

(*Holmes v. South Carolina*, *supra*, 547 U.S. at pp. 326-327, citations omitted.) The United States Supreme Court concluded that the specific rule applied by the South Carolina Supreme Court violated a criminal defendant's right to have a meaningful opportunity to present a complete defense because the rule evaluated the strength of only the prosecution's evidence, the rule was "arbitrary" in that it did not "rationally serve the end" that "other similar third-party guilt rules were designed to further," and the State had not "identified any other legitimate end that the rule serves." (*Id.* at pp. 329-331.)

Appellant's reliance on the case of *Holmes v. South Carolina* is misplaced because California's rule regarding the admission of third party culpability evidence (see *People v. Hall*, *supra*, 41 Cal.3d at p. 833), is not the same as the specific South Carolina evidentiary rule disapproved of in *Holmes v. South Carolina*. (See *People v. Robinson*, *supra*, 37 Cal.4th at p. 627, fn. 17 [In addressing the defendant's reliance on the United States Supreme Court's grant of certiorari in *State v. Holmes* (2004) 361 S.C. 333, which would later result in *Holmes v. South Carolina*, *supra*, 547 U.S. 319, this Court stated that South Carolina's "very restrictive rule" "apparently prelud[ing] a criminal defendant from introducing evidence of a third party's culpability whenever other evidence, especially forensic evidence, strongly supports the defendant's guilt," "does not apply in California," and thus the "high court's grant of certiorari in *Holmes* [did] not affect [this Court's] analysis [of defendant's claims]."].) While disapproving of the rule applied by the South Carolina Supreme Court, the United States Supreme Court in *Holmes* cited *People v. Hall*, *supra*, 41 Cal.3d at p. 833, with approval. (See *Holmes v. South Carolina*, *supra*, 547 U.S. at p. 327, fn. *)

In addition, contrary to appellant's assertion (see AOB 129-135, 137-138), respondent submits that even assuming that the trial court abused its discretion regarding the third party culpability evidence concerning Vashaun, any alleged error was harmless under *Watson*. (See *People v. Bradford*, *supra*, 15 Cal.4th at p. 1325; *People v. Hall*, *supra*, 41 Cal.3d at p. 836; *People v. Watson*, *supra*, 46 Cal.2d at p. 837.) As addressed above, there was strong evidence of appellant's guilt of the instant crimes. (See Argument II, E.)

Moreover, despite exclusion of the third party culpability evidence proffered by the defense, counsel Taylor argued in his closing argument that others in the hotel who were narcotics users and/or sellers had the motive and opportunity to commit the murders if they believed Harding possessed appellant's cocaine. (See 11RT 1380-1381, 1384-1385.) Counsel Taylor argued in his closing argument:

> How about a what if situation where we have a situation where someone loses a whole amount of drugs and everybody in the hotel who is a drug user or a seller - - and you know that from all the witnesses - - finds out about it. The drugs are returned to what appears to be the rightful owner, but unfortunately not everybody in the hotel knows that. And what they hear is that in this case [Harding] has a whole bunch of drugs.

(11RT 1380.)

Counsel Taylor also argued in his closing argument:

> . . . Just think about all the people that lived in that hotel and all the people that knew about the fact that [Harding] had found this large amount of drugs. It's an opportunity. Think about that theory. Think about that what if. . . . [¶] [Sergeant] Valdemar wasn't asked about whether or not if other individuals knew about the drugs that were found by Mr. Harding and Darlene Miller, whether or not they had any incentive or motive to commit these murders.

(11RT 1381.)

Counsel Taylor also stated in his closing argument:

> Donna Meekey supports the theory that everyone in that building knew that [Harding] had recovered a large amount of dope. And it certainly shows or indicates or suggests that other people in that building may have had the motive to kill those two individuals, or at least [Harding] and perhaps . . . Jackson, was in the wrong place at the wrong time.

(11RT 1384-1385.) For the same reasons, any alleged error was also harmless beyond a reasonable doubt. (See *Chapman v. California*, *supra*, 386 U.S. at p. 24.) Therefore, appellant's contention should be rejected.

2. Regarding Appellant's Anger About Vashaun Beating Meekey

Appellant also complains that the trial court erred in not allowing appellant to testify that he was angry at Harding because Harding did not stop Vashaun from allegedly beating Meekey. (See AOB 124-128.) This proposed testimony by appellant was directly linked to the third party culpability evidence concerning Vashaun's alleged beating of Meekey. Appellant could not explain that he was angry at Harding for not stopping Vashaun from beating Meekey unless evidence that Vashaun had beaten Meekey was allowed. Since the trial court did not abuse its discretion in excluding third-party culpability evidence concerning Vashaun (see Argument IV, D, 1), the trial court also did not err in excluding evidence that appellant was angry due to Harding's failure to prevent Vashaun from beating Meekey.

The evidence at trial clearly showed that appellant was angry at Harding because Harding had taken appellant's cocaine. Meekey testified that on December 24, 1994, after Harding had returned the cocaine to appellant, the three of them were in Harding's room, number 415. Harding went in and out

of the room, selling narcotics for appellant. Appellant and Meekey stayed in the room. (See 5RT 661, 664, 667-669.) When Harding returned to the room, appellant "started to get angry with [Harding] and he kept mentioning [to Meekey] that he was going to kill [Harding]." (5RT 669.) Appellant told Meekey that "he didn't like what [Harding] did and that he was going to kill him." (5RT 669.) When Meekey tried to convince appellant not to harm Harding, appellant replied, "'Well, maybe I will just break his leg or arm or something just to show him, you know, you can't do something like that to me.'" (5RT 669.) During the evening of December 24, appellant kept making these death threats to Harding about killing him. (5RT 670.) Appellant kept mentioning that he did not believe that Harding had returned all the drugs to appellant. (6RT 694, 702, 705.) While in Harding's room, appellant told Meekey at least four times that appellant wanted to kill Harding because Harding had not returned all the drugs. (6RT 702-705.)

Appellant and Meekey left Harding's room and slept in appellant's room, number 304. (5RT 670, 672-673; 6RT 684, 712.) The following morning, on December 25, 1994, appellant told Meekey that he would walk her to the bus stop. (5RT 674, 692.) "Then [appellant] seemed angry again and he started talking about [Harding] again." (5RT 674; 6RT 715.) "He started talking about he still wanted to kill him, he was going to kill him still." (5RT 674.) Appellant "seemed really angry and kind of nervous, and he was like he still wants to kill [Harding], he still wants to hurt him and stuff." (6RT 705.) Appellant "wanted to rush to the room where [Harding] was," but Meekey told him that she had to be at her friend's house before noon to cook Christmas dinner. (5RT 674.) Appellant and Meekey went to Harding's room. Initially, Harding was not there, but he later arrived. (5RT 674; 6RT 706.) Appellant "seemed very, very upset at him, real agitated" and "really angry." (5RT 674; 6RT 706.) Harding acted "nervous" and "apologetic" while appellant was "very agitated" and "real

angry" at Harding. (5RT 674-675; 6RT 714, 721.) Meekey told appellant to walk her to the bus stop. (5RT 675.) Appellant walked Meekey towards the bus stop. On the way to the bus stop, appellant was still angry at Harding and "still saying he was going to kill him." (5RT 675.) Meekey told appellant that everything should be okay since Harding had returned the drugs to appellant. (5RT 675.)

Appellant himself testified that after Harding returned the cocaine to him, appellant told Harding that appellant was "going to fucking kill [Harding]." (9RT 1174-1175.) Appellant testified that he threatened to kill Harding if Harding did not return the drugs because appellant was "very angry." (10RT 1286.) Appellant acknowledged that he maybe told Meekey "out of frustration and being mad" that appellant would kill Harding. (9RT 1158.) Appellant testified:

> I lost a large quantity of drugs. I was very mad, and I was very frustrated. I did threaten him in many ways, mostly to get him to return the drugs back to me, not that I meant the threat. [¶] But I did threaten him, and I threatened him in many ways. I told him that I wanted my drugs back and that if he did not pay for them that he will work and sell drugs for me until he paid off what he owed me, and I'd kick his butt and etcetera.

(9RT 1158.) Appellant also testified that he was not angry at Harding for selling the drugs for appellant since appellant told Harding he would have to sell for appellant because of the missing drugs that had not been returned to appellant. Appellant said Harding had disrespected appellant by taking appellant's cocaine but not for selling drugs for appellant. (10RT 1285.)

Contrary to appellant's claim (see AOB 129-130, 135-137), even assuming that the trial court abused its discretion regarding its ruling concerning appellant's anger about Vashaun beating Meekey, any alleged error was

harmless under *Watson* (see *People v. Hall*, *supra*, 41 Cal.3d at p. 836, citing *People v. Watson*, *supra*, 46 Cal.2d at p. 837) because any evidence that appellant was angry at Harding due to Vashaun beating Meekey did not contradict the evidence that appellant was angry at Harding because Harding had taken appellant's cocaine. Rather, any evidence of appellant's anger at Harding regarding Vashaun beating Meekey was merely an additional reason why appellant was angry at Harding - additional to the reason concerning Harding having taken appellant's cocaine. Moreover, there was strong evidence of appellant's guilt of the instant crimes. (See Argument II, E.) For the same reasons, any alleged error would also be harmless beyond a reasonable doubt. (See *Chapman v. California*, *supra*, 386 U.S. at p. 24 .) Therefore, appellant's contention should be rejected.

V.

APPELLANT'S CLAIM IS FORFEITED; WENDY CLEVELAND'S EXPERT TESTIMONY REGARDING THE COMPLAINED-OF PRINTS WAS RELEVANT; ANY ALLEGED ERROR WAS HARMLESS

Appellant contends that the trial court erred in admitting speculative and irrelevant expert testimony that unreadable fingerprints at the murder scene might possibly belong to appellant. (AOB 139-148.) Respondent submits that appellant's claim is forfeited. In any event, Wendy Cleveland's expert testimony regarding three complained-of prints was relevant evidence. Moreover, any alleged error in admission of Cleveland's expert testimony regarding these prints was harmless.

A. Factual Background

During the direct examination of Wendy Cleveland, the following exchange occurred:

[Deputy District Attorney Ratinoff]: So did you compare these 11 lifts in this case?

[Cleveland]: Yes.

[Deputy District Attorney Ratinoff]: And what did you find?

[Cleveland]: That two of the 11 lifts were fingerprints lifted that match [appellant].

[Deputy District Attorney Ratinoff]: And we are going to mark those here as People's 6-A and People's 6-B. [¶] And I will just take a moment and mark that so we don't get them confused. [¶] May the record reflect that I am marking a very small People's 6-A on the lower right-hand corner of one of the lifts and People's 6-B on the lower right-hand corner of the second one? [¶] [People's 6-A and 6-B, each a latent print lift card, were marked for identification.] [¶] Now, looking at People's 6-A, that was a positive match to [appellant]; is that correct?

[Cleveland]: That's correct.

[Deputy District Attorney Ratinoff]: And where was that lift taken from?

[Cleveland]: According to the notation, inside living area on a lamp with a glass table, on the table.

[Deputy District Attorney Ratinoff]: What about People's 6-B?

[Cleveland]: This was inside the living area from a trash can, empty 12-ounce Pepsi can.

[Deputy District Attorney Ratinoff]: What other analysis did you do?

[Cleveland]: Well, I had analyzed the rest of the lifts also to see if I could make any other matches to [appellant].

[Deputy District Attorney Ratinoff]: And what did you find?

[Cleveland]: Just that the two lifts that I just mentioned, 6-A and 6-B, matched [appellant].

[Deputy District Attorney Ratinoff]: Now, the other prints that you have there - - there were 11 in total, so the nine others, were all of them comparable? In other words, were all of them readable?

[Cleveland]: *Some of them were really not clear enough to make a definite decision about whether they would be able to match someone.* And a couple of the lifts belonged to Mr. Harding, James Harding, the victim.

[Deputy District Attorney Ratinoff]: Okay. Of those that you have just talked about, other than the victim, are there some that you could rule out are definitely not [appellant's]?

[Cleveland]: Yes, there are some.

[Deputy District Attorney Ratinoff]: *And are there some that you cannot rule out are definitely not* [*appellant's*]*?*

[Cleveland]: *Yes.*

[Deputy District Attorney Ratinoff]: Okay. *Is it possible, with regards to three of those lifts, that three additional lifts belong to* [*appellant*]*?*

[Counsel Garber]: I am going to object to the form of the question. Anything is possible, your Honor.

[Judge Smith]: Overruled.

[Cleveland]: *Yes, it's possible.*

[Deputy District Attorney Ratinoff]: And of those three, could you just put those three aside so that we can mark them for identification.

[Cleveland]: Yes.

[Deputy District Attorney Ratinoff]: I am going to ask that those three be marked as People's 7-A, B and C.

[Cleveland]: Pardon me. Wait a second. There was another one here. [¶] I'm sorry. Okay.

[Deputy District Attorney Ratinoff]: I am going to ask that - - it says 2 of 11, I am going to ask that that be marked as People's 7-A. I am going to ask to mark as People's 7-B the card that says 3 of 11, and People's 7-C the card that says 6 of 11. [¶] [People's 7-A, 7-B, and 7-C, each a latent print lift card, are marked for identification.] [¶] *Now, of those three where it's possible that those belong to* [*appellant*], *can you tell us, based on the notations, where each of those was*?

[Cleveland]: Yes. People's 7-A - -

[Counsel Garber]: Just a minute, your Honor. I am going to object to all of this. She isn't the one who made those entries. How can she testify?

[Judge Smith]: Were those made in the course and scope of the employment of the employee there?

[Cleveland]: Yes.

[Judge Smith]: Is this a business document? Someone was called to the scene, responded to the call and took fingerprints?

[Cleveland]: Yes.

[Judge Smith]: And they put the powder on it, taped it and put it in the records?

[Cleveland]: Yes, that's right.

[Judge Smith]: Put it in the file under this case number; is that right?

[Cleveland]: Yes.

[Judge Smith]: You examined them here in court now?

[Cleveland]: Yes.

[Judge Smith]: What is the problem? [¶] Overruled.

[Deputy District Attorney Ratinoff]: We will start with People's 7-A.

[Cleveland]: Okay. *People's 7-A, 2 of 11, says inside living area, lamp with glass table, and it's on the stem of the lamp.* [¶] *People's 7-*

B, inside living area near bed, a fan, the top portion. [¶] *People's 7-C, 6 of 11, is inside the front door near the doorknob.*

[Deputy District Attorney Ratinoff]: Thank you. [¶] Now, of the others you found - - strike that. [¶] Of those cards that you have of the lifts that were taken, were there both fingerprints and palm prints?

[Cleveland]: Yes, there were.

[Deputy District Attorney Ratinoff]: Now, you mentioned the system that you have. Which system is that?

[Cleveland]: The automated fingerprint identification system.

[Deputy District Attorney Ratinoff]: What is that?

[Cleveland]: It is actually a computer database where we have all the fingerprint arrests, approximately a million-and-a-half fingerprints, in our database; and it is used to sort through and try to attempt to make matches to fingerprints when you don't know who a suspect is.

[Deputy District Attorney Ratinoff]: How many fingerprints are in the database?

[Cleveland]: Approximately a million and a half.

[Deputy District Attorney Ratinoff]: And does it go back in time quite a while?

[Cleveland]: To - - actually it came on line in 1986, so it is a fairly new system.

[Deputy District Attorney Ratinoff]: Okay. Did you run - - strike that. [¶] When using the A.F.I.S. system can you run both fingerprints and palm prints through the system?

[Cleveland]: No, we cannot at this time. Fingerprints only.

[Deputy District Attorney Ratinoff]: Okay. Did you run the fingerprints that were readable and comparable through the A.F.I.S. system?

[Cleveland]: Yes, I did.

[Deputy District Attorney Ratinoff]: And what did you find?

[Cleveland]: There were no match to those fingerprints.

[Deputy District Attorney Ratinoff]: With regard to the palm prints, were you asked to compare the palm prints that were readable and comparable to a number of people, witnesses in this case?

[Cleveland]: Yes, I was.

[Deputy District Attorney Ratinoff]: Did you compare the palm prints to Jerry Haywood, Demond Martin, Tony Williams, Donte Vashaun, Donna Meekey and Wilson Berry?

[Cleveland]: Yes - - excuse me, I'm checking my notes. [¶] Jerry Haywood, Demond Martin, Tony Williams, Donte Vashaun, Donna Meekey and Wilson Berry, yes.

[Deputy District Attorney Ratinoff]: And when you compared those prints to the palm prints that you have there in front of you, what were your results?

[Cleveland]: That there were no matches to those people.

[Deputy District Attorney Ratinoff]: Were the only matches that you found in this case, from what you were asked to do, the only matches were to [appellant], other than the victim himself; is that correct?

[Cleveland]: Yes, that's right.

(6RT 728-734, italics added.)

During Cleveland's cross-examination, the following exchange occurred:

[Counsel Garber]: . . . [¶] Other than the fingerprint which you found on the lamp and on a Pepsi-cola can, nothing in that room identifies [appellant]?

[Cleveland]: Just those two lifts, yes.

[Counsel Garber]: Okay. And when you talk about him, about prints that were not positive but they could be, essentially, is that what you are talking about, 7-A, B and C?

[Cleveland]: Yes.

[Counsel Garber]: Okay. As an expert and with your experience in the police department, such an identification is not acceptable, is it, in order to identify an individual?

[Cleveland]: Oh, I would never identify someone without enough characteristics to form an opinion.

[Counsel Garber]: So that the jury understands, as far as 7-A, 7-B and 7-C are concerned, there is no - - there is nothing that identifies [appellant] as having anything to do with those prints?

[Cleveland]: I could not make a comparison to make that judgment.

(6RT 735.) Later during Cleveland's cross-examination, this exchange occurred:

[Counsel Garber]: And you certainly can't tell us, as far as 7-A, 7-B, 7-C are concerned, who those prints are from?

[Cleveland]: No, I cannot.

(6RT 742.)

During the redirect examination of Cleveland, the following exchange occurred:

[Deputy District Attorney Ratinoff]: Just to clarify briefly, on People's 7-A, B, and C you cannot exclude the defendant; is that correct?

[Cleveland]: No, I cannot exclude him.

(6RT 742.)

B. Appellant's Claim Is Forfeited

First, appellant claims that Cleveland improperly based her expert opinion, regarding the three prints in People's Exh. Nos. 7-A, 7-B, and 7-C, on

matter that "*may not* reasonably 'be relied upon by an expert in forming an opinion upon the subject to which his testimony relates,'" in violation of Evidence Code section 801, subdivision (b). (See AOB 140-141.) This claim based on Evidence Code section 801, subdivision (b) is forfeited because appellant did not object to Cleveland's complained-of testimony on that specific basis at trial. (See *People v. Gonzalez*, *supra*, 38 Cal.4th at pp. 948-949 [Defendant noted that expert testimony must be based on material of a type that is reasonably relied upon by experts in the particular field in forming their opinions and argued that Sergeant Garcia's expert gang testimony was based on unreliable material, but defendant did not specifically object on that basis before defendant moved to disqualify him as an expert, so this Court concluded that defendant may not challenge Sergeant Garcia's qualifications on appeal since defendant did not challenge his qualifications at trial.].)

During Cleveland's testimony, counsel Garber first objected only to the form of a question posed by the prosecutor. The prosecutor asked Cleveland, "Is it possible with regards to three of those lifts, that three additional lifts belong to [appellant]?" Counsel Garber objected, stating: "I am going to object to the form of the question. Anything is possible, your Honor." The trial court overruled the objection. (See 6RT 730.)

Later during Cleveland's testimony, counsel Garber objected that Cleveland was not the person who had made notations concerning where these three prints had been located. The prosecutor asked Cleveland, "Now, of those three where it's possible that those belong to [appellant], can you tell us, based on the notations, where each of those was?" Counsel Garber objected, stating: "I am going to object to all of this. [Cleveland] isn't the one who made those entries. How can she testify?" The trial court asked Cleveland some questions, including whether the notations concerning these three prints were made in the course of scope of the employee's duties and whether the document was a

business document. Cleveland answered in the affirmative to these questions. The trial court overruled the defense objection. (See 6RT 731-732.) Counsel Garber did not object to Cleveland's testimony on the specific ground that Cleveland based her expert opinion on matter that may not be relied upon, within the meaning of Evidence Code section 801, subdivision (b).

Second, appellant claims that Cleveland's testimony, regarding the three prints in People's Exh. No. 7-A, 7-B, and 7-C, was not relevant, within the meaning of Evidence Code section 210. (See AOB 140, 144.) This claim based on Evidence Code section 210 is also forfeited because, as shown above, appellant did not object to Cleveland's complained-of testimony on relevance grounds. (See *People v. Farman* (2002) 28 Cal.4th 107, 159 [Defendant claimed, among other things, that allowing evidence of police department's computerized database for fingerprint matching (CAL-ID system) was error under Evidence Code section 352, and that allowing jurors to be shown an unauthenticated brochure concerning this CAL-ID system was error, but this Court found that defendant's failure to object at trial on Evidence Code section 352 and lack of authentication grounds barred defendant from asserting such claims on appeal].)

Moreover, appellant makes several related federal constitutional claims, including his rights to a fair trial under the Fourteenth Amendment, to a reliable determination of guilt and penalty under the Eighth Amendment, and Fourteenth Amendment due process. (See AOB 139, 145-146, 146, fn. 35.) However, respondent submits that, with the arguable exception of a narrow due process claim, the other federal constitutional claims are forfeited because he failed to object based on those grounds at the trial level. (See *People v. Partida*, *supra*, 37 Cal.4th at p. 431; *People v. Carter*, *supra*, 30 Cal.4th at p. 1196, fn. 6; *People v. Burgener*, *supra*, 29 Cal.4th at pp. 869, 886; *People v. Millwee*, *supra*, 18 Cal.4th at pp. 128-129.)

C. Relevant Law

As noted above, Evidence Code section 801, subdivision (b) states:

> If a witness is testifying as an expert, his testimony in the form of an opinion is limited to such an opinion as is: [¶] . . . . [¶] (b) *Based on matter* (including his special knowledge, skill, experience, training, and education) perceived by or personally known to the witness or made known to him at or before the hearing, whether or not admissible, *that is of a type that reasonably may be relied upon by an expert* in forming an opinion upon the subject to which his testimony relates, unless an expert is precluded by law from using such matter as a basis for his opinion.

(Italics added.)

Moreover, as noted above, Evidence Code section 210 states:

> "Relevant evidence" means evidence, including evidence relevant to the credibility of a witness or hearsay declarant, having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action.

(See *People v. Heard* (2003) 31 Cal.4th 946, 972.) Finally, "[t]he erroneous admission of expert testimony only warrants reversal if 'it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error.' [Citations.]" (*People v. Prieto* (2003) 30 Cal.4th 226, 247, citing *People v. Watson*, *supra*, 46 Cal.2d at p. 836.)

D. Cleveland's Expert Opinion Regarding The Complained-Of Prints Was Relevant; Any Alleged Error Was Harmless

Initially, assuming that appellant's claim based on Evidence Code section 210 is not forfeited, respondent submits that Cleveland's testimony regarding the three complained-of prints was relevant to show that law enforcement personnel conducted a proper investigation and specifically made efforts to identify the perpetrator through the collection of print evidence, especially in light of the

defense suggestion that law enforcement personnel did not conduct a proper investigation. During his closing argument, counsel Taylor stated that the police did "sloppy police work" and "a sloppy investigation." (See 11R 1368, 1372, 1392.)

Assuming that appellant's Evidence Code section 801(b) claim is not forfeited, regardless of whether Cleveland properly gave her opinion that appellant could not be excluded as to the three complained-of prints (see *People v. Gonzalez*, *supra*, 38 Cal.4th at pp. 948-949 [since gang expert never said that he based his opinion solely on unreliable information (i.e., information he had "received in the street" which may not always be truthful and accurate), the trial court did not abuse its discretion in denying defendant's request to strike the expert gang testimony]; *People v. Mickey* (1991) 54 Cal.3d 612, 686-688 [the "matter" that an expert, specifically a psychiatrist, derived from an interview with an individual about the defendant's drug history was of a type that may reasonably be relied upon by a psychiatrist to form a psychiatric opinion]), any alleged error in admission of her expert testimony regarding these prints was harmless under *Watson*. (See *People v. Prieto*, *supra*, 30 Cal.4th at p. 247, citing *People v. Watson*, *supra*, 46 Cal.2d at p. 836.) Contrary to appellant's assertion (see AOB 146-148), even without Cleveland's expert testimony regarding the three complained-of prints, there was strong evidence of appellant's guilt of the instant crimes. (See Argument II, E.) Additionally, there was evidence that Cleveland did find two prints that matched appellant's, and counsels' examination of Cleveland at trial, both on direct and cross-examination, assured that the jury would not misunderstand the limited identification value of the three prints. For the same reason, any alleged error was also harmless beyond a reasonable doubt. (See *Chapman v. California*, *supra*, 386 U.S. at p. 24 .) Therefore, appellant's contention should be rejected.

VI.

APPELLANT'S CLAIM IS FORFEITED; CALJIC NO. 2.62 WAS PROPERLY GIVEN; ANY ALLEGED ERROR WAS HARMLESS

Appellant contends that the trial court's instruction to the jury that it could draw adverse inferences from appellant's failure to explain or deny evidence against him was prejudicial error. (AOB 149-160.) Respondent submits that appellant's instructional claim is forfeited. In any event, CALJIC No. 2.62 was properly given. Moreover, any alleged error was harmless.

A. Factual Background

CALJIC No. 2.62 was given to the jury, as follows:

> In this case defendant has testified to certain matters. [¶] If you find that defendant failed to explain or deny any evidence against [him] introduced by the prosecution which [he] can reasonably be expected to deny or explain because of facts within [his] knowledge, you may take that failure into consideration as tending to indicate the truth of such evidence and as indicating that among the inferences that may reasonably be drawn therefrom those unfavorable to the defendant are the more probable. [¶] The failure of a defendant to deny or explain evidence against [him] does not, by itself, warrant an inference of guilt, nor does it relieve the prosecution of its burden of proving every essential element of the crime and the guilt of the defendant beyond a reasonable doubt. [¶] If a defendant does not have the knowledge that [he] would need to deny or to explain evidence against [him,] it would be unreasonable to draw an inference unfavorable to [him] because of [his] failure to deny or explain such evidence.

(XCT 2994; 11RT 1432-1433.) Appellant did not object to CALJIC No. 2.62. (See 11RT 1432-1433; see also 11RT 1332-1334.)

B. Relevant Law

"It is entirely proper for a jury, during its deliberations, to consider logical gaps in the defense case, and the jury is reminded of this fact by [CALJIC No. 2.62]." (*People v. Redmond* (1981) 29 Cal.3d 904, 911.) In *People v. Saddler* (1979) 24 Cal.3d 671, this Court held that CALJIC No. 2.62 "suffers no constitutional or other infirmity," was improperly given in defendant Saddler's case "for lack of evidentiary support," and "the error was not prejudicial." (*Id.* at p. 675.)

> It is claimed that the instruction [CALJIC No. 2.62] denies to a defendant the presumption of innocence and places in its stead an "inference of guilt." Since principles of due process protect the accused against conviction except upon proof beyond a reasonable doubt, an instruction to the jury which has the effect of reversing or lightening the burden of proof constitutes an infringement on the defendant's constitutional right to due process. CALJIC No. 2.62 does not violate these principles. After stating the circumstances under which adverse inferences may be drawn, the instruction cautions that "The failure of a defendant to deny or explain evidence against him does not create a presumption of guilt or by itself warrant an inference of guilt, nor does it relieve the prosecution of its burden of proving every essential element of the crime and the guilt of defendant beyond a reasonable doubt."

(*People v. Saddler*, *supra*, 24 Cal.3d at pp. 679-680, citations omitted; see also *People v. Lamer* (2003) 110 Cal.App.4th 1463, 1471.) The Court in *Saddler* stated that "CALJIC No. 2.62 suffers no constitutional or other infirmity and may be given in an appropriate case." (*People v. Saddler*, *supra*, 24 Cal.3d at p. 681; see also *People v. Lamer*, *supra*, 110 Cal.App.4th at p. 1471.)

> "'It is an elementary principle of law that before a jury can be instructed that it may draw a particular inference, evidence must appear

in the record which, if believed by the jury, will support the suggested inference.'" An appellate court's duty in reviewing a claim that CALJIC No. 2.62 was improperly given is "to ascertain if [the] defendant . . . failed to explain or deny any fact of *evidence that was within the scope of relevant cross-examination.*" In order for the instruction to be properly given "[t]here [must be] facts or evidence in the prosecution's case within [the defendant's] knowledge which he did not explain or deny." A contradiction between the defendant's testimony and other witnesses' testimony does not constitute a failure to deny which justifies giving the instruction.

(*People v. Lamer*, *supra*, 110 Cal.App.4th at p. 1469, citing *People v. Saddler*, *supra*, 24 Cal.3d at pp. 681-682, citations omitted, original italics.)

Although the "test for giving [CALJIC No. 2.62] is not whether the defendant's testimony is believable" (*People v. Kondor* (1988) 200 Cal.App.3d 52, 57),

"[i]f the defendant tenders an explanation which, while superficially accounting for his activities, nevertheless seems bizarre or implausible, the inquiry whether he reasonably should have known about circumstances claimed to be outside his knowledge is a credibility question for resolution by the jury."

(*People v. Belmontes* (1988) 45 Cal.3d 744, 784, citations omitted.)

Citing *People v. Watson*, *supra*, 46 Cal.2d at p. 836, the Court in *Saddler* addressed the "question whether the instructional error was prejudicial." (*People v. Saddler*, *supra*, 24 Cal.3d at p. 683; see also *People v. Lamer*, *supra*, 110 Cal.App.4th at pp. 1471-1472; *People v. Roehler* (1985) 167 Cal.App.3d 353, 393.) In concluding that the instructional error was harmless, the Court in *Saddler* added:

> Furthermore, the jurors were instructed in accord with CALJIC No. 17.31 that they were to "disregard any instruction which applies to a state of facts which you determine does not exist." While such an instruction does not render an otherwise improper instruction proper, it may be considered in assessing the prejudicial effect of an improper instruction.

(*People v. Saddler*, *supra*, 24 Cal.3d at p. 684; see also *People v. Lamer*, *supra*, 110 Cal.App.4th at p. 1472.) In addition,

> [o]ne reason courts have found the improper giving of CALJIC No. 2.62 to be harmless is that the text of the instruction itself tells the jury that it would be *unreasonable* to draw an adverse inference if the defendant lacks the knowledge needed to explain or deny the evidence against him.

(*People v. Lamer*, *supra*, 110 Cal.App.4th at p. 1472, original italics; see also *People v. Ghent* (1987) 43 Cal.3d 739, 763.)

C. Appellant's Claim Is Forfeited; CALJIC No. 2.62 Was Properly Given; Any Alleged Error Was Harmless

Initially, respondent submits that appellant's claim regarding CALJIC No. 2.62 is forfeited by his failure to object to this instruction at the trial level. (See 11RT 1332-1334, 1432-1433; see also *People v. Valdez* (2004) 32 Cal.4th 73, 137; *People v. Farman* (2002) 28 Cal.4th 107, 165.) Although section 1259 allows review of an instruction issue without a trial court objection if the substantial rights of the defendant are affected, this Court has found forfeiture on appeal by failure to object to an instruction below. In addition, appellant's related due process claim based on CALJIC No. 2.62 (see AOB 149-150, 158-160) is also forfeited.

In any event, CALJIC No. 2.62 was properly given because there were instances in appellant's testimony where he failed to explain or deny evidence in the prosecution's case within his knowledge.

For instance, during his cross-examination, appellant stated that he had been a member of the 18th Street gang since 1986, and was a member in 1994. Appellant said that he was familiar with the downtown Los Angeles area and had used drugs in that area prior to 1993. (See 9RT 1178-1179.) When the prosecutor asked, "And you know the areas that 18th Street controls with regard to drug sales," appellant replied, "Yes." (9RT 1179.) When the prosecutor asked, "And you know how drug sales work with 18th Street," appellant responded, "No." (9RT 1180.) The following exchange occurred:

> [Deputy District Attorney Ratinoff]: Okay. So is it your testimony that since 1986, when you've been 18th Street, and you've smoked drugs down there many times that 18th Street - - you don't know anything about how 18th Street operates?
>
> [Appellant]: 4th and Spring is not 18th Street.
>
> [Deputy District Attorney Ratinoff]: That wasn't my question. [¶] Do you know anything about how 18th Street handles their drug sales in the downtown area?
>
> [Appellant]: No, I don't.

(9RT 1180.)

During cross-examination, appellant also stated that he did not know what would happen once he stole drugs from his connection Augie. (See 10RT 1226-1228.) The prosecutor asked appellant, "And when you stole his cocaine, what did you think? You thought that was okay with him?" Appellant replied, "I didn't know if anything was going to happen to me. If it was, I didn't know." (10RT 1226.) The prosecutor asked, "Did you think there would be any repercussions, anything would happen as a result of you stealing a quarter to a half a kilo of cocaine?" Appellant responded, "I don't know. I stealed (sic) it." (10RT 1228.) In another instance, appellant stated that he did not know the true name of fellow 18th Street gang member and friend Lefty although they had

known each other for about 11 years since around 1986. (See 10RT 1248-1249.)

During her closing argument, the prosecutor stated:

> It is illogical, it is not credible, for [appellant], who'd been downtown for quite a while, at least off and on, been an 18th Street gang member for a whole long time, to get on that stand and say, "You know what, I just don't know certain things." He knows, as well as now all of you know, what happens when someone's cocaine is taken from them in this manner. There are repercussions, people are disrespected, and there are results. There are killings that happen.

(11RT 1340.)

Thus, CALJIC No. 2.62 was properly given since appellant failed to explain how the 18th Street gang operated pertaining to narcotics sales in downtown Los Angeles although appellant was a longtime 18th Street gang member who was familiar with the downtown area where he used and sold narcotics (see 9RT 1181-1182). The instruction was also properly given since appellant indicated he did not know what would happen once he stole Augie's drugs although appellant himself was a user and seller or narcotics and would presumably be aware of what kind of repercussions would follow from stealing drugs from a narcotics seller.

Appellant also claims that CALJIC No. 2.62 created an irrational permissive inference in violation of due process. (See AOB 158-160.) Assuming that this due process claim is not forfeited, it fails because contrary to appellant's assertion (see AOB 160), CALJIC No. 2.62 was properly given in appellant's case, as explained above. Thus, giving CALJIC No. 2.62 in appellant's case did not result in an irrational permissive inference since the record showed instances where appellant failed to explain or deny facts or

evidence within his knowledge. (See also *People v. Saddler*, *supra*, 24 Cal.3d at pp. 679-681.)

Finally, any alleged error in giving CALJIC No. 2.62 was harmless under *Watson*. (See *People v. Saddler*, *supra*, 24 Cal.3d at p. 683, citing *People v. Watson*, *supra*, 46 Cal.2d at p. 836.) The jury was instructed with CALJIC No. 17.31, which stated in part, "Disregard any instruction which applies to facts determined by you not to exist." (See XCT 3028; 11RT 1452-1453.) Moreover, there was strong evidence of appellant's guilt of the instant crimes. (See Argument II, E.) For the same reasons, any alleged instructional error was harmless beyond a reasonable doubt. (See *Chapman v. California*, *supra*, 386 U.S. at p. 24 .)

VII.

APPELLANT CANNOT RAISE HIS CLAIMS OF INSTRUCTIONAL ERROR DUE TO INVITED ERROR; APPELLANT'S INSTRUCTIONAL CLAIMS SHOULD BE REJECTED; ANY ALLEGED ERROR WAS HARMLESS

Appellant contends that a series of guilt phase instructions undermined the requirement of proof beyond a reasonable doubt, in violation of appellant's right to due process, a trial by jury, and reliable verdicts, and requires reversal of the judgment. (AOB 161-173.) Respondent submits that appellant cannot raise his claims regarding CALJIC Nos. 2.02, 2.21.2, 2.22, 2.27, 2.51, and 8.20, because he invited any alleged error by requesting each of these complained-of instructions. In any event, this Court has previously rejected similar claims regarding these instructions. Finally, any alleged instructional error was harmless.[16/]

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16. Respondent has already addressed appellant's claims regarding CALJIC No. 2.62 (see AOB 161) above. (See Argument VI.)

A. Factual Background

Before closing arguments, the following exchange occurred outside the jury's presence concerning jury instructions:

> The Court: We are back in session, no jury present. [¶] Counsel yesterday afternoon worked on the jury instructions. This morning the Court met with them in chambers on the jury instructions. It appears that both counsel - - all counsel have gone over the instructions with the Court and agreed to all except for this: On the original package submitted by the district attorney and reviewed by the defense, there was missing from the packet 2.01 slash 1, sufficiency of circumstantial evidence generally. I will have the clerk pull a copy immediately, and I will put it in there and I will put it in right after 2.00. [¶] Also, there was pulled from the package that had been gone over by the district attorney and counsel, defense counsel, 8.80, 1 of 2, special circumstance introduction. That has been replaced by another instruction. This has been pulled. I pulled it in front of counsel. So we have the new one, which is 8.80.1, the new replacement, special circumstance introduction. [¶] Is that agreeable, Mr. Garber?
>
> [Counsel Garber]: Yes.
>
> The Court: Mr. Taylor?
>
> [Counsel Taylor]: Yes, your Honor.
>
> The Court: That is pulled. [¶] Then the other issue is whether or not aiding and abetting should be in there. Counsel can make a record here. The Court thinks it is probably appropriate. It is a two-way argument, I think, for both sides. [¶] If there is any objection, I will note it now. What is the number of the instruction?
>
> [Counsel Garber]: 3.00, 3.01.
>
> The Court: I'm sorry, 3 - -

[Deputy District Attorney Ratinoff]: 3.00 and 3.01.

(Interruption in the proceedings.)

The Court: 3 point what is it?

[Deputy District Attorney Ratinoff]: 3.00 and 3.01.

The Court: The Court has it in the packet. If there is any objection, I will note the objection. [¶] We will start our argument now. We will try and do it in some sequence where we don't have to break, but I do want to finish it today.

[Counsel Garber]: Do you intend to instruct today or tomorrow?

The Court: Probably today. I would think we will be done today, and I will make a determination on tomorrow based on your arguments here. [¶] The jurors could certainly come in, if they want to, in the morning and counsel could be relieved at noon. [¶] Bring the jury in, please.

(11RT 1332-1334; see XCT 2860-2862 [appellant's requested CALJIC jury instructions]; see also 11RT 1420-1457; XCT 2871-3036 [given guilt phase jury instructions].)

B. Appellant Cannot Raise His Instructional Claims Due To Invited Error; His Instructional Claims Should Be Rejected; Any Alleged Error Was Harmless

Appellant cannot raise his claims of instructional error because he invited any alleged error by requesting each of these complained-of instructions. In any event, this Court has previously rejected similar claims regarding each of these complained-of instructions. Finally, any alleged instructional error was harmless in light of the strong evidence of appellant's guilt. (See Argument II, E.)

1. CALJIC No. 2.02:

CALJIC No. 2.02 was included in the jury instructions that were specifically requested by appellant. (See XCT 2860.)

The jury was given CALJIC No. 2.02 (1992 Revision), as follows:

> The [specific intent] [or] [mental state] with which an act is done may be shown by the circumstances surrounding the commission of the act. However, you may not find the defendant guilty of the crime charged [in Count[s] 1, 2, and 3[,] unless the proved circumstances are not only (1) consistent with the theory that the defendant had the required [specific intent] [or] [mental state] but (2) cannot be reconciled with any other rational conclusion. [¶] Also, if the evidence as to [any] such [specific intent] [or] [mental state] is susceptible of two reasonable interpretations, one of which points to the existence of the [specific intent] [or] [mental state] and the other to the absence of the [specific intent] [or] [mental state], you must adopt that interpretation which points to the absence of the [specific intent] [or] [mental state]. If, on the other hand, one interpretation of the evidence as to such [specific intent] [or] [mental state] appears to you to be reasonable and the other interpretation to be unreasonable, you must accept the reasonable interpretation and reject the unreasonable.

(XCT 2882; 11RT 1426-1427.) Appellant did not object to CALJIC No. 2.02, presumably because he had requested this instruction. (See 11RT 1426-1427; see also 11RT 1332-1334.)

Initially, respondent submits that appellant cannot raise his claim regarding CALJIC No. 2.02 because he invited any alleged error by requesting the instruction himself. (See *People v. Gallego* (1990) 52 Cal.3d 115, 182 ["At both the prosecutor's and defendant's request, the court instructed the jury pursuant to CALJIC No. 2.62, which concerns inferences to be drawn from the defendant's failure to explain or deny evidence against him in his own testimony. He now asserts the court erred in giving the instruction because it was assertedly unsupported by the evidence. Although we have serious doubts

about the latter proposition, we need not address it because defendant invited the instruction - and any resulting assumed 'error' - and cannot raise the issue now. [Citation.]"].)

In any event, this Court has previously rejected similar claims against CALJIC No. 2.02. (See *People v. Guerra* (2006) 37 Cal.4th 1067, 1138-1139 [rejecting the defendant's argument that CALJIC No. 2.02, along with CALJIC Nos. 2.01 and 8.83.1, "misled the jury into believing it could find him guilty if he 'reasonably appeared guilty' regardless of any reasonable doubt they may entertain as to his guilt" and also "effectively reversed the burden of proof and required the jury to find him guilty unless he came forward with evidence of his innocence"]; *People v. Nakahara* (2003) 30 Cal.4th 705, 713-714 [rejecting the defendant's contentions that CALJIC No. 2.02, along with CALJIC Nos. 2.01 and 8.83, "were contrary to the basic 'beyond a reasonable doubt' principle and enabled the jurors to find him guilty 'if he reasonably appeared guilty,' regardless of any reasonable doubt they might entertain," created "'an impermissible mandatory conclusive presumption of guilt,' in cases in which a reasonable interpretation of evidence points toward guilt," and "'had the effect of reversing the burden of proof,' requiring the jury to find him guilty unless he came forward with reasonable evidence of his innocence"]; *People v. Millwee* (1998) 18 Cal.4th 96, 160; *People v. Crittenden* (1994) 9 Cal.4th 83, 144.)

2. CALJIC No. 2.21.2:

CALJIC No. 2.21.2 was included in the jury instructions that were specifically requested by appellant. (See XCT 2860.)

The jury was given CALJIC No. 2.21.2, as follows:

> A witness, who is willfully false in one material part of his or her testimony, is to be distrusted in others. You may reject the whole testimony of a witness who willfully has testified falsely as to a material

point, unless, from all the evidence, you believe the probability of truth favors his or her testimony in other particulars.

(XCT 2889; 11RT 1430.) Appellant did not object to CALJIC No. 2.21.2, presumably because he requested that instruction. (See 11RT 1430; see also 11RT 1332-1334.)

Initially, respondent submits that appellant cannot raise his claim regarding CALJIC No. 2.21.2, because he invited any alleged error by requesting the instruction himself. (See *People v. Gallego*, *supra*, 52 Cal.3d at p. 182.) In any event, this Court has rejected similar claims against CALJIC No. 2.21.2. (See *People v. Guerra*, supra, 37 Cal.4th at p. 1139 [noting that the defendant's contention that CALJIC No. 2.21.2 "impermissibly lightened the prosecution's burden of proof, because it allowed the jury to assess prosecution witnesses by seeking only a probability of truth in their testimony," has been recently rejected]; *People v. Nakahara*, *supra*, 30 Cal.4th at p. 714 [defendant argued that CALJIC No. 2.21.2 "'impermissibly lightened' the People's proof burden by telling the jury it should distrust, and could reject, the entire testimony of a witness who has given willfully false material testimony, unless the jury believes that 'the probability of truth' favors the testimony" and also "'allowed the jury to assess prosecution witnesses by seeking only a probability of truth in their testimony," but this Court stated it has held CALJIC No. 2.21.2 "says no such thing"]; *People v. Hillhouse* (2002) 27 Cal.4th 469, 493.)

3. CALJIC No. 2.22:

CALJIC No. 2.22 was included in the jury instructions that were specifically requested by appellant. (See XCT 2860.)

The jury was given CALJIC No. 2.22, as follows:

You are not bound to decide an issue of fact in accordance with the testimony of a number of witnesses, which does not convince you, as against the testimony of a lesser number or other evidence, which

appeals to your mind with more convincing force. You may not disregard the testimony of the greater number of witnesses merely from caprice, whim or prejudice, or from a desire to favor one side against the other. You must not decide an issue by the simple process of counting the number of witnesses [who have testified on the opposing sides]. The final test if not in the [relative] number of witnesses, but in the convincing force of the evidence.

(XCT 2890; 11RT 1430-1431.) Appellant did not object to CALJIC No. 2.22, presumably because he requested this instruction. (See 11RT 1430-1431; see also 11RT 1332-1334.)

Initially, respondent submits that appellant cannot raise his claim regarding CALJIC No. 2.22, because he invited any alleged error by requesting the instruction himself. (See *People v. Gallego*, *supra*, 52 Cal.3d at p. 182.) In any event, this Court has rejected similar claims against CALJIC No. 2.22. (See *People v. Guerra*, *supra*, 37 Cal.4th at p. 1139 ["We also have recently rejected defendant's claim that CALJIC No. 2.22 (weighing conflicting testimony) directed the jurors to evaluate the evidence by looking at its 'convincing force' rather than the 'relative number' of testifying witnesses and in doing so, improperly 'replaced' the beyond reasonable doubt standard with a standard akin to a preponderance of evidence standard. [Citation.]"]; *People v. Nakahara*, *supra*, 30 Cal.4th at pp. 714-715 ["[W]e 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). [Citations.]"].)

4. CALJIC No. 2.27:

CALJIC No. 2.27 was included in the jury instructions that were specifically requested by appellant. (See XCT 2860.)

The jury was given CALJIC No. 2.27, as follows:

> You should give the testimony of a single witness whatever weight you think it deserves. However, testimony by one witness which you believe concerning any fact is sufficient for the proof of that fact. You should carefully review all the evidence upon which the proof of such fact depends.

(XCT 2992; 11RT 1431.) Appellant did not object to CALJIC No. 2.27, presumably because he requested this instruction. (See 11RT 1431; see also 11RT 1332-1334.)

Initially, respondent submits that appellant cannot raise his claim regarding CALJIC No. 2.27, because he invited any alleged error by requesting the instruction himself. (See *People v. Gallego*, *supra*, 52 Cal.3d at p. 182.) In any event, this Court has rejected similar claims against CALJIC No. 2.27. (See *People v. Montiel* (1993) 5 Cal.4th 877, 941; *People v. Turner* (1990) 50 Cal.3d 668, 697.)

5. CALJIC No. 2.51:

CALJIC No. 2.51 was included in the jury instructions that were specifically requested by appellant. (See XCT 2860.)

The jury was given CALJIC No. 2.51, 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 guilt. Absence of motive may tend to establish innocence. You will therefore give its presence or absence, as the case may be, the weight to which you find it to be entitled.

(XCT 2993; 11RT 1432.) Appellant did not object to CALJIC No. 2.51, presumably because he requested the instruction. (See 11RT 1432; see also 11RT 1332-1334.)

Initially, respondent submits that appellant cannot raise his claim regarding CALJIC No. 2.51, because he invited any alleged error by requesting the instruction himself. (See *People v. Gallego*, *supra*, 52 Cal.3d at p. 182.) In any event, this Court has rejected similar claims against CALJIC No. 2.51. (See *People v. Guerra*, *supra*, 37 Cal.4th at p. 1139 [rejecting the defendant's claim that CALJIC Nos. 2.51 and 1.00 "misled the jury because they undercut the prosecution's burden of proof by failing to emphasize the central issue in a criminal trial is not simply guilt or innocence but whether guilt had been established beyond a reasonable doubt"]; *People v. Nakahara*, *supra*, 30 Cal.4th at p. 714; *People v. Frye* (1998) 18 Cal.4th 894, 957-958.)

6. CALJIC No. 8.20:

CALJIC No. 8.20 was included in the jury instructions that were specifically requested by appellant. (See XCT 2860.)

The jury was given CALJIC No. 8.20, as follows:

> All murder which is perpetrated by any kind of willful, deliberate and premeditated killing with express malice aforethought is murder of the first degree. [¶] The word "willful," as used in this instruction, means intentional. [¶] The word "deliberate" means 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. The word "premeditated" means considered beforehand. [¶] If you find that the killing was preceded and accompanied by a clear, deliberate intent on the part of the defendant to kill, which was the result of deliberation and premeditation, so that it must have been formed upon pre-existing reflection and not under a sudden heat of passion or other condition precluding the idea of deliberation, it is murder of the first degree. [¶] The law does not undertake to measure in units of time the length of the period during which the thought must be pondered before it can ripen

into an intent to kill which is truly deliberate and premeditated. The time will vary with different individuals and under varying circumstances. [¶] The true test is not the duration of time, but rather the extent of the reflection. A cold, calculated judgment and decision may be arrived at in a short period of time, but a mere unconsidered and rash impulse, even though it include an intent to kill, is not such deliberation and premeditation as will fix an unlawful killing as murder of the first degree. [¶] To constitute a deliberate and premeditated killing, the slayer must weigh and consider the question of killing and the reasons for and against such a choice and, having in mind the consequences, [he] decides to and does kill.

(XCT 3007-3008; 11RT 1440-1441.) Appellant did not object to CALJIC No. 8.20, presumably because he requested this instruction. (See 11RT 1440-1441; see also 11RT 1332-1334.)

Initially, respondent submits that appellant cannot raise his claim regarding CALJIC No. 8.20, because he invited any alleged error by requesting the instruction himself. (See *People v. Gallego*, *supra*, 52 Cal.3d at p. 182.) In any event, this Court has rejected similar claims against CALJIC No. 8.20. (See *People v. Nakahara*, *supra*, 30 Cal.4th at p. 715 ["Defendant suggests that the word 'precluding' is too strong and could be interpreted as requiring him to absolutely preclude the possibility of deliberation, as opposed to merely raising a reasonable doubt on that issue. . . . We think that, like CALJIC No. 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."]; see also *People v. Catlin* (2001) 26 Cal.4th 81, 148, 151.)

VIII.

APPELLANT'S CHALLENGES TO CALIFORNIA'S DEATH PENALTY STATUTE SHOULD BE REJECTED

Appellant contends that California's death penalty statute, as interpreted by this Court and applied at appellant's trial, violates the United States Constitution. (AOB 174-191.) Respondent submits that appellant's various challenges to California death penalty statute should be rejected.

First, appellant's claim that instruction on section 190.3, factor (a), as applied, allowed arbitrary and capricious imposition of the death penalty (AOB 174-175) 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; *People v. Maury* (2003) 30 Cal.4th 342, 439; *People v. Hughes* (2002) 27 Cal.4th 287, 404-405; see *Tuilaepa v. California* (1994) 512 U.S. 967, 976 [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 argues that the death penalty statute and accompanying jury instructions fail to set forth the appropriate burden of proof. (See AOB 176-187.) Although appellant argues that his death sentence is unconstitutional because it is not premised on findings made beyond a reasonable doubt (see AOB 176-177), the standard of proof beyond a reasonable doubt does not apply to finding aggravating factors (see *People v. Smith* (2003) 30 Cal.4th 581, 641-642), to finding that aggravating factors outweigh mitigating factors (see *People v. Jones* (2003) 30 Cal.4th 1084, 1126-1227), or to finding that death is the appropriate punishment (see *People v. Snow*, *supra*, 30 Cal.4th at p. 126). Moreover, this Court has expressly rejected the argument that *Apprendi v. New Jersey* (2000) 530 U.S. 466 [120 S.Ct. 2348, 147 L.Ed.2d 435], *Ring v. Arizona* (2002) 536 U.S. 584 [122 S.Ct. 2428, 153 L.Ed.2d 556], and/or *Blakely v.*

Washington (2004) 542 U.S. 296 [124 S.Ct. 2531, 159 L.Ed.2d 403], affect California's death penalty law or otherwise justifies reconsideration of this Court's prior decisions. (*People v. Gray* (2005) 37 Cal.4th 168, 237; *People v. Ward* (2005) 36 Cal.4th 186, 221; *People v. Morrison* (2004) 34 Cal.4th 698, 730-731; *People v. Prieto* (2003) 30 Cal.4th 226, 262-263; *People v. Snow*, *supra*, 30 Cal.4th at p. 126, fn. 32; *People v. Smith*, *supra*, 30 Cal.4th at p. 642.)

Regarding appellant's claim that some burden of proof was required, or the jury should have been instructed that there was no burden of proof (see AOB 178-179), the "absence of a burden of proof, except for proof of prior criminal acts under section 190.3, factor (b), does not render the California law unconstitutional. [Citations.]" (*People v. Michaels* (2002) 28 Cal.4th 486, 541; see *People v. Jones*, *supra,* 30 Cal.4th at p. 1127.) Regarding appellant's complaint that his death verdict was not premised on unanimous jury findings (see AOB 179-180), this Court has previously rejected this claim. (See *People v. Prieto*, *supra*, 30 Cal.4th at p. 275 [no jury unanimity required as to existence of any aggravating factor].) Despite appellant's assertion to the contrary (see AOB 180-181), "the jury may consider prior unadjudicated criminal activity under section 190.3, factor (b). [Citations.]" (*People v. Snow*, *supra*, 30 Cal.4th at p. 126; see *People v. Maury*, *supra*, 30 Cal.4th at p. 439.) Although appellant claims that the instructions, specifically CALJIC No. 8.88, cause the penalty determination to turn on an impermissibly vague and ambiguous standard (see AOB 181-182), this claim has been previously rejected. (See *People v. Carter* (2003) 30 Cal.4th 1166, 1226.) Appellant's claim (see AOB 182-183) that the instructions failed to inform the jury that the central determination is whether death is the appropriate punishment, has also previously been rejected. (See *People v. Boyette* (2002) 29 Cal.4th 381, 465.) Appellant also complains that the instructions failed to inform the jurors that if they determined that mitigation outweighed aggravation, they were required to return a sentence of life without

the possibility of parole (see AOB 183-184), but this claim has already been rejected. (See *People v. Catlin* (2001) 26 Cal.4th 81, 174.) Appellant's claim that the instructions failed to inform the jurors that even if they determined that aggravation outweighed mitigation, they still could return a sentence of life without the possibility of parole (see AOB 184-185) has been rejected as well. (See *People v. Smith* (2005) 35 Cal.4th 334, 370.) Appellant's claim that the instructions violated the Sixth, Eighth, and Fourteenth Amendments by failing to inform the jury about the standard of proof and lack of need for unanimity as to mitigating circumstances (see AOB 185-186) has previously been rejected. (See *People v. Hillhouse* (2002) 27 Cal.4th 469, 510-511; *People v. Box* (2000) 23 Cal.4th 1153, 1216.) Appellant's claim that the penalty jury should be instructed on the presumption of life (see AOB 186-187) has also been rejected. (See *People v. Prieto*, *supra*, 30 Cal.4th at p. 271.)

Third, appellant argues that failing to require that the jury make written findings violates his right to meaningful appellate review. (See AOB 187-188.) However, this claim has been previously rejected. (See *People v. Snow*, *supra*, 30 Cal.4th at p. 126; *People v. Prieto*, *supra*, 30 Cal.4th at p. 275.) Fourth, appellant claims that the instructions to the jury on mitigating and aggravating factors violated his constitutional rights because of the use of restrictive adjectives in the list of potential mitigating factors, the failure to delete inapplicable sentencing factors, and the failure to instruct that statutory mitigating factors were relevant solely as potential mitigators. (See AOB 188-189.) Each of these claims has previously been rejected. (See *People v. Prieto*, *supra*, 30 Cal.4th at p. 276; *People v. Farman*, *supra*, 28 Cal.4th at p. 191; *People v. Taylor* (2001) 26 Cal.4th 1155, 1179-1180.)

Fifth, appellant argues that the prohibition against intercase proportionality review guarantees arbitrary and disproportionate impositions of the death penalty. (See AOB 189-190.) However, "the absence of intercase

proportionality review does not make the imposition of death sentences arbitrary or discriminatory or violate the equal protection and due process clauses [citation]." (*People v. Prieto*, *supra*, 30 Cal.4th at p. 276.) Sixth, although appellant argues that the California capital sentencing scheme violates equal protection (see AOB 190), this claim has previously been rejected. (See *People v. Roberts* (1992) 2 Cal.4th 271, 341.) Finally, appellant's claim that California's use of the death penalty as a regular form of punishment falls short of international norms (see AOB 191) should be rejected. (See *People v. Snow* (2003) 30 Cal.4th 43, 127; *Buell v. Mitchell* (6th Cir. 2001) 274 F.3d 337, 370, 376; see also *Medellin v. Texas* (2008) __ S.Ct. __ [2008 WL 762533].)

IX.

APPELLANT'S CLAIM OF CUMULATIVE ERROR SHOULD BE REJECTED

Appellant contends that reversal is required based on the cumulative effect of errors that undermined the fundamental fairness of the trial and the reliability of the death judgment. (AOB 192-195.) Respondent submits that appellant's claim of cumulative error should be rejected.

As set forth above, several of appellant's claims were forfeited due to his failure to object below. However, even 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* (2006) 37 Cal.4th 774, 837; *People v. Panah*, *supra*, 37 Cal.4th at p. 1165; *People v. Burgener*, *supra*, 29 Cal.4th at p. 884.) Even a capital defendant is entitled to only a fair trial, not a perfect one. (*People v. Box*, *supra*, 23 Cal.4th at pp. 1214, 1219.) The record shows that appellant received a fair trial.

Nothing more is required. This Court should, therefore, reject appellant's claim of cumulative error.

CONCLUSION

Accordingly, respondent respectfully requests that the judgment of conviction and sentence of death be affirmed.

Dated: April 4, 2008

Respectfully submitted,

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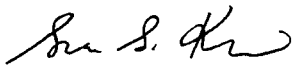

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CERTIFICATE OF COMPLIANCE

I certify that the attached RESPONDENT'S BRIEF uses a 13 point Times New Roman font and contains 63,821 words.

Dated: April 4, 2008

Respectfully submitted,

EDMUND G. BROWN JR.
Attorney General of the State of California

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DECLARATION OF SERVICE

Case Name: People v. Becerra Case No.: S065573

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the Bar of this Court at which member's direction this service is made. I am 18 years of age or older and not a party to the within entitled cause; 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 APR 4 2008, I placed two (2) copies of the attached

RESPONDENT'S BRIEF

in the internal mail collection system at the Office of the Attorney General, 300 S. Spring Street, Los Angeles, California, 90013, for deposit in the United States Postal Service that same day in the ordinary course of business, in a sealed envelope, postage thereon fully prepaid, addressed as follows:

Michael J. Hersek
State Public Defender
Alison Bernstein
Deputy State Public Defender
221 Main Street, 10th Floor
San Francisco, CA 94105

In addition, I placed one (1) copy in this Office's internal mail collection system, to be mailed to California Appellate Project (CAP) in San Francisco, addressed as follows:

California Appellate Project
Attention: Michael Millman
101 Second Street, Suite 600
San Francisco, CA 94105-3672

That I caused a copy of the above document to be deposited with the Clerk of the Court from which the appeal was taken, to be by said Clerk delivered to the Judge who presided at the trial of the cause in the lower court; and that I also caused a copy to be delivered to the appropriate District Attorney.

I declare under penalty of perjury the foregoing is true and correct and that this declaration was executed on APR 4 2008, at Los Angeles, California.

L. Luna L. Luna
Signature

SSK:ll
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