In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA, **Respondent,** **v.** **LAM THANH NGUYEN,** **Appellant.**	**CAPITAL CASE** Case No. S076340

Orange County Superior Court Case No. 95WF0682
Honorable F.C. Briseno, Judge

RESPONDENT'S BRIEF

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STATEMENT OF THE CASE

An amended information filed in Orange County Superior Court charged appellant with conspiracy to commit murder (Pen. Code, §§ 182, subd. (a) and 187, subd. (a), counts one, eight), attempted deliberate and premeditated murder (Pen. Code, §§ 664, subd. (a), 187, subd. (a), counts two, four, nine), street terrorism (Pen. Code, § 186.22, subd. (a), counts three, five, seven, ten, twelve, fourteen) and murder (Pen. Code, § 187, subd. (a), counts six, eleven, thirteen). The information specially alleged: appellant personally inflicted great bodily injury (Pen. Code, § 12022.7, counts one through five, eight and nine); appellant personally used a firearm (Pen. Code, § 12022.5, subd. (a), counts one and four through fourteen); appellant was vicariously armed with a firearm (Pen. Code, § 12022, subd. (a)(1), count two); and all counts were committed for the benefit of a criminal street gang (Pen. Code, § 186.22, subd. (b)). The information alleged the special circumstance of multiple murder (Pen. Code, § 190.2, subd. (a)(2), counts six, eleven and thirteen). (2 CT 750-754; 6 RT 1032-1040.)

The prosecutor dismissed the personal infliction of great bodily injury allegation for counts two and three. (17 RT 3388.) Appellant successfully moved for acquittal (Pen. Code, § 1118.1) of the conspiracy charges (counts one and eight). (3 CT 896, 929.) The jury found appellant not guilty of counts ten and eleven and the underlying special allegations but found appellant guilty of the remaining counts and special allegations, found both remaining murders to be murders in the first degree, and found true the special circumstance of multiple murder. (4 CT 1108-1231; 28 RT 5454-5469.)

Following the penalty phase of the trial, the jury found the appropriate penalty to be death. (4 CT 1306; RT 5860-5861.) The trial court sentenced appellant to death on January 28, 1999, after denying appellant's automatic

motion for modification (Pen. Code, § 190.4, subd. (e)) and appellant's motion for a new trial. (6 CT 1814-1824; 31 RT 6092-6110.)

Appellant filed notice of appeal on February 3, 1999. (6 CT 1831.)

STATEMENT OF THE FACTS

I. GUILT PHASE[1]

A. Prosecution case

In 1994 and 1995, Asian criminal street gangs in Orange County hunted rival gangs and engaged in deadly gang battles in order to promote or regain gang respect or else to retaliate against perceived challenges, slights or attacks from the rival gangs. (7 RT 1233-1234; 10 RT 1905-1907; 16 RT 3180-3217.) Appellant belonged to one such Asian criminal street gang (16 RT 3178-3179), the Nip Family gang (10 RT 2010-2011; 16 RT 3143, 3160, 3203-3205; 22 RT 4289).

On the afternoon of July 21, 1994, appellant rode with another Nip Family gangster in a car driven by a girl named My Tran (8 RT 1522). Tony Nguyen, an Orange Boy gangster (9 RT 1664), drove another car carrying Cheap Boys gangsters (6 RT 1110, 1126-1127; 9 RT 1631) and associates (6 RT 1110), gangsters who were deadly rivals and enemies of the Nip Family gang (6 RT 1127, 1132; 9 RT 1628-1629, 1632; 10 RT 1887, 1905-1907, 2021; 16 RT 3197, 3210-3211). About 2 p.m., Tran's car followed Tony's to the intersection of Palm and Garden Grove Boulevard in Garden Grove. (8 RT 1514-1517; 9 RT 1624-1625.) As the street lights changed from red to green, appellant's Nip Family accomplice stuck his gun out the right front passenger's window of Tran's car (6 RT 1125; 7 RT 1526, 1534), and fired his gun into Tony's car (6 RT 1099, 1101-1102; 8

[1] Respondent discusses the pertinent guilt phase facts in more detail in respondent's arguments.

RT 1626-7), hitting Tony in the left side of the neck (6 RT 1104, 1127-1128; 8 RT 1520, 1532; 9 RT 1627) and paralyzing Tony from the neck down (6 RT 1128; 8 RT 1526-1532, 3149; 3 CT 879). Sitting directly behind the shooter as one of the rear passengers in the shooter's car (9 RT 1641-1644, 1734-1738), appellant aided and abetted the shooting by helping to spot the rival gangsters and by "backing up" his accomplice in the shooting (16 RT 3185-3186, 3198). (Counts two and three.)

On the evening of November 24, 1994, after asking if he belonged to the Tiny Rascals gang (7 RT 1303, 1311, 1355-1356), appellant punched Tiny Rascals gang associate (7 RT 1311-1312; 8 RT 1582, 1584) Huy Nguyen in the face in front of the Mission Control video game arcade in Garden Grove (7 RT 1304, 1355-1356; 8 RT 1422, 1434). In the course of an ensuing gang fight between appellant, Huy and their respective gang associates (8 RT 1486-1487), appellant (7 RT 1362-1364, 1373-1374, 1384-1385; 8 RT 1442-1443, 1488, 1495, 1545-1547) pulled a gun and shot Huy (7 RT 1305-1306, 1357-1358, 1392; 8 RT 1438). Although Huy was able to get up and stumble back inside the arcade (7 RT 1305-1306, 1392; 8 RT 1559-1560), appellant ran after him and shot him again (7 RT 1358-1360, 1393-1394, 1396; 8 RT 1438-1440, 1484-1485, 1561-1566, 1584), paralyzing Huy from the neck down (7 RT 1307-1310; 16 RT 3148-3149; 3 CT 877-878). The Tiny Rascals gang was another deadly rival of the Nip Family gang. (8 RT 1582; 16 RT 3198.) (Counts four and five.)

On the evening of February 5, 1995, Sang Nguyen, a Cheap Boys gangster (7 RT 1206-1207; 11 RT 2108), was waiting for his food at the Dong Khanh Restaurant in Westminster when appellant and two other Nip Family associates approached on foot (7 RT 1216-1221). Sang's older brother belonged to the Natoma Boys gang (7 RT 1222; 10 RT 2075; 3 CT 887), a gang whose original members had younger brothers in the Nip Family gang (7 RT 1222-1223; 16 RT 3196). When Sang went outside the

restaurant and extended his hand to shake hands with appellant, appellant (7 RT 1229, 1238-1239, 1244-1245, 2142-2144; 11 RT 2146, 2265-2266) grabbed Sang in a headlock and pulled him to the ground (7 RT 1223-1224; 11 RT 2138-2140). As Sang lay on the ground appellant shot him in the head (7 RT 1225-1227; 10 RT 2071, 2093-2094; 11 RT 2105, 2224, 2229-2232), killing Sang (10 RT 2070; 13 RT 2559-2561). (Counts six and seven.)

On March 11, 1995, Khoi Huynh and his friends, all Cheap Boys gangsters (9 RT 1882-1887), spotted a group of Nip Family gangsters while exiting the Rack and Cue pool hall in Stanton. A gang battle ensued. (9 RT 1608-1609, 1752-1761, 1803; 10 RT 1869-1872; 13 RT 2472-2473.) Appellant (9 RT 1765-1766, 1790-1791; 13 RT 2484-2487, 2497-2500) shot Khoi several times (9 RT 1611-1614, 1753-1757, 1767-1674, 1806; 10 RT 1892, 1902; 13 RT 2474; 15 RT 2895) before a bystander pulled Khoi to safety inside a nearby liquor store (9 RT 1609-1611; 10 RT 1895, 2063; 13 RT 2476). (Count nine.) The gunshot wounds required extensive surgery and hospitalization (13 RT 2470) to save Khoi Huynh's life (CT 854-855).

On the night of May 6, 1995, Tuan Pham, a Cheap Boys gangster (13 RT 2575, 2582-2585), drove a car belonging to Huu Tran (16 RT 3150; 3 CT 881), one of the Cheap Boys gangsters involved in the March 11,1995, gang incident. Khai Vo, a Cheap Boys gangster, rode with them. (16 RT 3150; 3 CT 885.) When Tuan saw appellant and some Nip Family associates sitting in a white car (16 RT 3117) stopped at the intersection of Brookhurst and Westminster in Garden Grove, Tuan got out of his car and approached the white car on foot with a gun in his hand (13 RT 2595-2601). Smiling (9 RT 1718; 13 RT 2715-2716; 14 RT 2723), appellant (14 RT 2755-2756; 16 RT 3104, 3168-3171; 17 RT 3328-3329) opened fire along with another Nip Family gangster, hitting Tuan in the side, back and head

and killing Tuan (13 RT 2573-2580, 2601-2605, 2608-2610, 2644-2645; 14 RT 2669-2672, 2677-2682, 2690, 2700-2703, 2718-2721; 15 RT 2868-2870, 2883, 2893). (Counts thirteen and fourteen.) Tuan's associate, Cheap Boys gangster Khai Vo, fired a shotgun at the white car (13 RT 2613; 15 RT 2862-2863, 2926), shattering the back window of the white car (16 RT 3148) with bird shot (13 RT 2574, 2578-2579, 2703-2704, 2722-2723; 15 RT 2883, 2888-2889), some of which hit appellant in the right forearm and left hand (15 RT 2896-2901, 2969-2973; 16 RT 3177-3178).

B. Defense case

Appellant claimed he socialized with Nip Family members but was not a member himself. (21 RT 4011-4012.) Appellant claimed he lived in Alabama with his sister from July through September of 1994. (21 RT 4017-4018; 23 RT 4408-4411; 24 RT 4627-4629.) Appellant allegedly spent several more months in Alabama and Louisiana, not returning to California until December of 1994. (21 RT 4018-4023; 23 RT 4411-4414.) Appellant would therefore have been out of the state when the July 21,1994, shooting and the November 24, 1994, shooting occurred. (21 RT 4027.)

A witness to the July 21, 1994, shooting saw only three people in the victim's car (19 RT 3710), which would have left the witness who identified appellant unaccounted for.

Appellant bought presents and helped friends celebrate Tet, the Vietnamese New Year, when the February 5, 1995, murder took place. (21 RT 4027-4032.) He did not know, and never met, the victim. (21 RT 4032-4033.) Appellant testified he was not at the Rack and Cue when the shooting took place there on March 11, 1995. (21 RT 4035.)

Appellant claimed he was at a coffee shop when the charged May 3, 1995, Westminster Laundromat murder of Duy Vu took place. (21 RT 4036-4040.) Jurors acquitted appellant of the charged murder of Duy Vu

(count eleven) and the street terrorism count based on that murder (count twelve). (Respondent's statement of the case, *ante*.)

Appellant claimed sat in the back seat of the car stopped at Brookhurst and Westminster on May 6, 1995, when a shotgun blast shattered the back window and struck his back, arm and hand. (21 RT 4043-4045.) He ducked down in the back seat during the ensuing gun battle. (21 RT 4045-4047.) He only sat up as the car drove away from the scene. (21 RT 4047-4048.)

II. PENALTY PHASE

A. Prosecution case

On September 3, 1992, appellant was convicted of aiding and abetting an assault with a firearm. (Pen. Code, § 245, subd. (a)(2).) (29 RT 5651-5652.)

Sang Nguyen's murder (count six) devastated Sang's parents, leaving Sang's mother unable to walk or sleep (29 RT 5655-5656) and leaving Sang's father subject to continual headaches (29 RT 5656). When Sang's mother last saw Sang in the hospital, Sang's head was bandaged and tears seemed to be coming from his eyes. (29 RT 5658-5659.) While not objecting to the death penalty, Sang's mother would prefer that appellant be spared the death penalty only so appellant's family would not have to go through what Sang's family went through. (29 RT 5659-5662.)

B. Defense case

Appellant was born on a small island just south of South Vietnam in 1974. (29 RT 5667.) He had seven older brothers and sisters and one younger brother. (29 RT 5665-5667.) The freedoms once enjoyed on the island disappeared when the Communists took over in 1975. (29 RT 5669.) Life became so intolerable that appellant's oldest sister took appellant and four other brothers and sisters on a small boat, fleeing Vietnam in 1980.

(29 RT 5669-5670.) Twenty-six other refugees packed the boat. (29 RT 5670.)

After they arrived in Thailand, appellant and his siblings spent several months in refugee, or relocation, camps, where life was hard, food was scarce and crime was rampant. (29 RT 5671-5677.)

After they came to the United States, appellant's siblings shunted appellant back and forth. (29 RT 5682-5684, 5687-5693.)

Appellant's descent into gangsterism stemmed from his linguistic impairment (29 RT 5704-5705) and the fact that he was suddenly thrust into a technological, urban environment after a harsh and primitive rural upbringing (29 RT 5709-5710). Appellant's parents, who remained behind in Vietnam, were unavailable to provide the necessary support and supervision. (29 RT 5688, 5693, 5709.) Appellant's siblings had neither the time nor the skills to assist appellant in his struggle to survive in an alien culture. (29 RT 5687-5693.) Appellant only found the acceptance he needed among the Vietnamese gangsters who exerted such a disastrous influence on his life. (29 RT 5710.)

Murder victim Sang Duc Nguyen stole a car on two occasions, once in 1989 and a second time in 1991, and twice fled a juvenile custodial institution. (29 RT 5735.)

ARGUMENT

I. THE TRIAL COURT PROPERLY ADMITTED TESTIMONY BY GANG EXPERT MARK NYE DESCRIBING COMMON EXCUSES USED BY PEOPLE AT THE SCENE OF A GANG CRIME WHO DO NOT WANT TO COOPERATE WITH POLICE

Appellant argues that this Court must reverse counts six and seven – the counts convicting appellant of murdering Sang Duc Nguyen on February 5, 1995 (count six) and thereby actively participating in the Nip Family criminal street gang (count seven) – because the trial court

erroneously overruled his objections to testimony by prosecution gang expert Mark Nye describing common excuses used by people at the scene of the gang crime who do not want to cooperate with police. (17 RT 3324-3325, 3350, 3357-3363.) Appellant contends that the trial court thereby allowed the prosecutor to use inadmissible opinion evidence to explain the failure of witnesses at the scene of the crimes to identify appellant as the perpetrator of the crimes. (AOB 82-95.)

Appellant specifically references the following testimony by Detective Nye. When the prosecutor asked Nye if there was "one common thing that people seem to say when they don't want to cooperate with you[]" (17 RT 1324), Nye responded, "Usually say they didn't see anything." (17 RT 3325). (AOB 83-84.) When the prosecutor asked Nye what is the most common excuse used by people when the crime occurs "at a public place like [a] restaurant or café[]" Nye responded that, "In my experience with investigating gang crimes in the cafes and restaurants, the number one answer is, 'I was in the bathroom at the time.'" (17 RT 3325; AOB 84, 88.)

Appellant contends that the trial court abused its discretion by admitting Nye's expert opinion testimony (AOB 85) for the following reasons: (1) Nye's expert opinion testimony was not based on a matter perceived by Nye, personally known by Nye, or made know to Nye at or before the trial (AOB 86, 90-91); (2) insofar as it sought to assess the credibility of others, Nye's opinion testimony was not based upon a matter that could be reasonably relied upon, was outside the scope of permissible expert testimony, and did not involve a subject beyond common experience (AOB 86-89, 95 fn. 66); (3) if Nye's expert opinion testimony had any probative value at all, it should have been excluded under Evidence Code, section 352, because its probative value was substantially outweighed by the substantial danger of its undue prejudicial effect (AOB 88); and (4) the

admission of Nye's expert opinion testimony violated appellant's Sixth, Eighth and Fourteenth Amendment rights to due process, to confrontation of witnesses, to a fair trial by an unbiased jury, and to a reliable determination of guilt and penalty in a capital case (AOB 89-90).

This Court should reject appellant's argument as meritless because the trial court did not abuse its discretion by admitting the challenged testimony. Nye did not state an opinion, but rather described his personal experience investigating gang crimes. (17 RT 3324.) Assuming arguendo that Nye's testimony amounted to an expert opinion, the trial court did not in any event abuse its discretion by admitting it as expert opinion testimony and by declining to find that its probative value was substantially outweighed by a substantial danger of creating undue prejudice.

The trial court does not abuse its discretion by admitting the expert opinion testimony unless the proffered testimony would add nothing at all to the jury's common fund of information. (*People v. Prince* (2007) 40 Cal.4th 1179, 1223; *People v. Farnam* (2002) 28 Cal.4th 107, 163.) Expert witnesses may base their opinions on any matter known to them upon which they may reasonably rely, including hearsay not otherwise independently admissible. (Evid. Code, § 801, subd. (b); *People v. Hallquist* (2005) 133 Cal.App.4th 291, 295-296.) Even if jurors have some knowledge of the subject matter of the testimony, trial courts may admit expert opinion testimony sufficiently beyond common experience that the opinion would assist the trier of fact. (*People v. Lindberg* (2008) 45 Cal.4th 1, 45; *People v. Prince*, *supra*, 40 Cal.4th at p. 1222.)

The trial court does not abuse its discretion (*People v. Valencia* (2008) 43 Cal.4th 268, 285-286) admitting evidence challenged under Evidence Code section 352, as unduly prejudicial, unless the probative value of the evidence is substantially outweighed by the substantial danger that it will uniquely tend to evoke an emotional bias against defendant as an individual

while bearing little or no relevance to the material issues in the case (*People v. Felix* (1994) 23 Cal.App.4th 268, 285-286).

This Court should reject as forfeited appellant's contention that the trial court violated his federal constitutional rights with its ruling because it is being made for the first time in this Court. (*People v. Tafoya* (2007) 42 Cal.4th 147, 166; *People v. Geier* (2007) 41 Cal.4th 555, 609; *People v. Halvorsen* (2007) 42 Cal.4th 379, 413-414.) The contention is in any event meritless because a state trial court's application of state evidence rules when admitting challenged evidence does not implicate any federal constitutional right unless it violates due process by rendering the trial fundamentally unfair. (*People v. Lindberg*, *supra*, 45 Cal.4th at p. 26; *People v. Partida* (2005) 37 Cal.4th 428, 439; *People v. Kraft* (2000) 23 Cal.4th 978, 1035.)

In the case at hand, Westminster Police Detective Martin Nye developed his expertise as a gang crime investigator throughout the decade preceding his testimony. He began working at the Little Saigon Substation following his first two years in the police department. (16 RT 3152.) The substation broke down communication barriers between the Vietnamese community and the police department. (16 RT 3152-3153.) Nye contacted business owners and gang members regarding crime problems. (16 RT 3153.) He contacted several hundred to close to one thousand Asian gang members from Vietnamese, Cambodian and Laotian gangs during this period. (16 RT 3153.) While working for the F.B.I., he interviewed over 100 persons regarding Vietnamese organized crime, witness intimidation, and homicide and related crimes. (16 RT 3153.) Returning to the police department, he became a member of the target gang unit as an Asian gang specialist. (16 RT 3154.) He belonged to the Orange County Gang Investigators Association, the International Association of Asian Crime

Investigators, and the Asian Gang Investigators Association of California. (16 RT 3154.)

Nye had over 300 hours in advanced officer training in gangs with an emphasis on Vietnamese and Asian street gangs. (16 RT 3155.) He was a regular instructor at police academies, teaching a four-hour class on Asian crime and Asian suspects to advanced gang investigators from throughout the United States and California. (16 RT 3155.) He also taught a two-hour course on Asian street gangs for advanced gang investigators. (16 RT 3155.)

Nye's duties when investigating gang crimes included talking to witnesses of gang crimes as well as gang members. (16 RT 3155.) Nye talked to several thousand Asian gang members during his twelve years on the police department. (16 RT 3157.) Due in part to the large Vietnamese population in Westminster, Nye became known throughout the United States as a contact person for officers investigating Asian crime. (16 RT 3156-3157.)

By expressly basing his challenged testimony on his own experience investigating gang crimes, talking to suspected gang members, and talking to witnesses of gang crimes (17 RT 3324), Nye based his challenged testimony on matters perceived by or personally known to him, or made known to him at or before the hearing. (Evid. Code, § 801, subd. (b).) And by describing common excuses given by witnesses at the scene of a violent gang crime who do not want to become involved in the investigation of the gang crime (17 RT 3324-3325), Nye's challenged testimony described a subject matter sufficiently beyond common experience to assist the trier of fact. (Evid. Code, § 801, subd. (b).)

Nye's testimony did not amount to an inadmissible personal opinion regarding a particular witness's veracity at trial. (See: *People v. Padilla* (1995) 11 Cal.4th 891, 947, distinguishing *People v. Melton* (1988) 44

Cal.3d 713, 744, relied upon by appellant at AOB 87, 89.) And the trial court specifically instructed jurors that: "If anything an expert has said has seemed to indicate an opinion that the expert believes or disbelieves any witness, you will disregard it and form your own conclusions." (CALJIC No. 280 Supplement 1; 3 CT 994; 27 RT 5253.)

Nor was the probative value of Nye's challenged testimony substantially outweighed by the substantial danger of undue prejudice, i.e. the unique tendency to evoke an emotional bias against defendant as an individual while bearing little or no relevance to the material issues in the case. When she responded to appellant's trial counsel objections to Nye's challenged testimony (17 RT 3357-3363), the prosecutor pointed out that appellant's trial counsel previously raised the material issue discussed in Nye's challenged testimony (17 RT 3360-3362). Appellant's trial counsel did so by earlier examining Nye regarding prior inconsistent statements made by prosecution witnesses shortly after the shooting, statements which included claims that they did not see the shooting and claims that a percipient witness to the shooting was in the bathroom immediately before the shooting occurred. (16 RT 3233-3239.) The probative value of Nye's challenged testimony on the material issue of whether or not a prosecution witness had actually seen the shooting described in his trial testimony was therefore not substantially outweighed by any substantial danger that it would evoke an emotional bias against appellant as an individual while bearing little or no relevance to any material issue in the case. (17 RT 3324.)

Appellant contends the erroneous admission of Nye's expert opinion testimony requires the reversal of counts six and seven either because: 1) it was federal constitutional error not harmless beyond a reasonable doubt (*Chapman v. California* (1967) 386 U.S. 18 [87 S.Ct. 824, 17 L.Ed.2d 705]; AOB 92); or 2) it was state error and more favorable verdicts would have

been reasonably probable in its absence (*People v. Watson* (1956) 46 Cal.2d 818, 836). (AOB 92.)

The trial court's admission of Nye's challenged testimony did not implicate the Federal Constitution because it did not render appellant's trial fundamentally unfair. (*People v. Lindberg*, *supra*, 45 Cal.4th at p. 26; *People v. Partida*, *supra*, 37 Cal.4th at p. 439; *People v. Kraft*, *supra*, 23 Cal.4th at p. 1035.) The matters upon which Nye could rely in rendering an expert opinion (Evid. Code, § 801, subd. (b)) were not testimonial for purposes of the Sixth Amendment right to confront witnesses. (*People v. Geier, supra,* 41 Cal.4th at pp. 597-607.) Appellant's trial counsel could freely cross-examine Nye regarding his opinion and the factual basis for his opinion if they chose to do so. And the trial court appropriately instructed the jurors as follows: (1) They could consider the qualifications and believability of any expert witness, the facts and materials upon which each expert opinion was based, and the reasons for each expert opinion when deciding what weight to give the expert opinion; (2) an expert opinion was only as good as the facts and reasons on which it was based; (3) they could consider whether or not any fact relied upon by the expert had been proved or disproved in determining the value of the opinion; and; (4) they could disregard any expert opinion they found unreasonable, were not bound by any expert opinion, and could give each expert opinion the weight they found it deserved. (CALJIC Nos. 2.80, 2.81; 3 CT 992-993, 995; 27 RT 5252-5253.)

And appellant cannot show that different verdicts would have been reasonably probable had the trial court excluded the challenged testimony. The independent evidence of appellant's guilt of counts six and seven did not depend on Nye's challenged testimony. That evidence showed that victim Sang Nguyen was a Cheap Boy on February 5, 1995. (11 RT 2108-2109.) He had been close friends with Linda Vu for several years. (11 RT

2107.) They occasionally went to the church and the mall together. (11 RT 2108.) While Linda Vu had previously been with the Southside Scissors, a female Asian gang that associated with the Cheap Boys (11 RT 2196; 17 RT 3340), she was no longer with the Southside Scissors on February 5, 1995 (11 RT 2108-2109). Vu left the Southside Scissors when her child Kali was born. (17 RT 3315.) Kali was more than two years old on February 5, 1995. (17 RT 3315.)

Sang drove to Linda Vu's house on the afternoon of February 5, 1995. (11 RT 2109.) Linda Vu had her daughter Kali with her throughout the afternoon and night. (11 RT 2111-2112.) At about 5:00 or 5:30 p.m. (11 RT 2110), they drove to a friend's house and then to church in Sang's car (11 RT 2109-2111). They attended mass until 6:30 or 7:30 p.m. (11 RT 2111.) After mass, they went to another house to pick up Trieu Binh Nguyen, another friend who was visiting California with his girlfriend Bich (Michelle) To. (11 RT 2112; 19 RT 3571.)

Trieu Binh Nguyen, aka Temper, had known Sang Nguyen for three years. (7 RT 1206-1207.) He had been living in Texas with his girlfriend Michelle To for about two years, but was visiting his friends and family in California on February 5, 1995, for Tet, the Vietnamese New Year. (7 RT 1207-1209.) While Trieu Binh Nguyen still associated with Cheap Boys (7 RT 1206-1207), he was no longer a Cheap Boy gang member on February 5, 1995 (7 RT 1269). Trieu recalled that Sang - accompanied by Linda Vu and her baby daughter Kali - arrived at the house where he was staying on February 5, 1995, having just come from church. (7 RT 1209-1210.)

They then went to the Dong Khanh Restaurant on Bolsa Avenue in Westminster in order to eat together and celebrate the Tet New Year. (7 RT 1210.) Trieu's friend Binh Tran (19 RT 3571) drove Trieu Binh Nguyen, Trieu's girlfriend Michelle To (19 RT 3570), Trieu's younger brother Trieu Hai Nguyen (7 RT 1267-1268) and Trieu Binh Nguyen's 3- or 4-year old

nephew Binh Rasalvo to the restaurant (7 RT 1276; 19 RT 3571). Sang Nguyen drove Linda Vu and her baby daughter Kali to the restaurant; one or two other girls Sang had known also joined the group at the restaurant. (7 RT 1272-1278; 19 RT 3574.)

They all took the same table at the restaurant and ordered their food. (7 RT 1212, 1277; 11 RT 2118-2119.) The restaurant was crowded with people celebrating Tet. (11 RT 2116-2117.) It took them about ten minutes to get a table. (11 RT 2118.) Someone came to take their orders about five minutes after they got the table. (11 RT 2119.) After their orders were taken, Trieu Binh Nguyen and Binh Tran stepped outside (7 RT 1212-1213; 11 RT 2121), Binh keeping Trieu company as Trieu smoked outside the front door of the restaurant. (7 RT 1213.) Linda Vu recalled that Trieu Binh Nguyen took a cigarette from a cigarette pack on the table when he went outside to smoke. (11 RT 2217.) The restaurant banned smoking inside. (11 RT 2217.)

Linda Vu remembered looking out the window of the restaurant and seeing appellant's face looking inside the restaurant. (11 RT 2132-2133.) Two or three other men were with appellant outside the restaurant. (11 RT 2135-2136.) She recognized appellant's face (11 RT 2212) because she remembered appellant staring or mad-dogging her on several previous occasions (11 RT 2216, 2133, 2135). When he was cross-examined later in the guilt phase trial, appellant acknowledged knowing Linda Vu from church (22 RT 4256), seeing her there two or three times (22 RT 4256) and seeing her at church carnivals when they were younger (22 RT 4257).

While Linda Vu was making her observations through the restaurant window Trieu Binh was just outside the front door of the restaurant, where he observed appellant and two other Nip Family gang members (7 RT 1217) walk aggressively toward the restaurant (7 RT 1214), look toward the open front door, and look at people inside the restaurant in a mad, stern or mean

manner (7 RT 1214-1215). Appellant had a gun in his waistband while walking behind on Nip Family gang member and walking in front of another. (7 RT 1215-1216.) (A witness to the November 24 1994, shooting of Huy "Pee Wee" Nguyen (counts four and five) described appellant pulling a gun from his waistband. (8 RT 1435-1436, 1438).)

Because Linda believed Nip Family gang members were outside (11 RT 2216), Linda Vu told Sang she thought she saw Nip Family gang members outside (11 RT 2136). Sang replied, "So?" (11 RT 2121, 2125.) When Sang then asked where Trieu Binh Nguyen was, Linda Vu said he was outside smoking. (11 RT 2136.) After telling Vu to wait for him, Sang struggled to get out of the restaurant through the crowd now standing in a line which stretched through the front door of the restaurant. (11 RT 2137.)

About the same time, Trieu Binh Nguyen asked Binh Tran to go back inside the restaurant in order to warn Sang that Nip Family gang members were approaching the restaurant with a gun. (7 RT 1218.) But because so many people were now in line at the front door, Binh got stuck in the line while trying to walk inside . (7 RT 1218-1219.) Meanwhile Sang managed to push his way through the line and walk outside of the restaurant through the front door. (7 RT 1219-1220.)

Sang's older brother Minh Duc Nguyen was a Natoma Boy gang member. (16 RT 3150-3151.) The Natoma Boys were older brothers and relatives of Nip Family gang members. (7 RT 1217.) As Sang got in front of Trieu Binh Nguyen, Sang therefore extended his hand in order to shake hands with appellant. (7 RT 1220-1221.) Appellant moved towards Sang as Sang attempted to shake his hand. (7 RT 1220-1221.)

Trieu then heard a gunshot and saw Sang grab his stomach and fall to the ground. (7 RT 1223.) After Sang fell to the ground, Trieu saw appellant bend down, place the gun a few inches from Sang's head, and shoot Sang in the head. (7 RT 1225.) Everyone in the area started running

after the gunshots. (7 RT 1226.) After appellant ran off, Trieu saw white brain matter and blood pouring through the hole in Sang's head. (7 RT 1226-1227, 1244-1245.)

Linda Vu recalled that immediately before hearing the gunshots, she saw Sang get through the crowd and exit the restaurant through the front door. Through the restaurant window, she saw Sang start to shake hands with appellant. (11 RT 2123, 2138.) As Sang did so, appellant put Sang in a headlock. (11 RT 2123.) A quick struggle between the two men preceded the gunshots. (11 RT 2123, 2138, 2140.) The struggle immediately preceding the first gunshot took place on the concrete walkway just outside the restaurant and a few feet from some shrubbery. (11 RT 2174.)

Police responding to the scene saw Sang lying on the concrete walkway outside the front door of the restaurant, showing no signs of life. (10 RT 2070-2071.) Blood and brain matter were visible from a gunshot wound to his head. (10 RT 2071-2072.) Sang's autopsy revealed he died from a single gunshot to the left side of his head. (13 RT 2555-2571.) A shell casing lay two to three feet from his body. (10 RT 2072.) A second shell casing was found in the shrubbery lining the concrete walkway. (11 RT 2105.) Both shell cases were head stamped Winchester .380 caliber. (11 RT 2105.)

Appellant contends his convictions under counts six and seven were premised entirely upon an eventual identification of appellant by two Cheap Boys' gang associates who had been among Sang's dinner companions that evening: Trieu Binh "Temper" Nguyen (a fellow Cheap Boy), and Linda Vu (a member of a female Asian gang that frequently associated with the Cheap Boys). (AOB 82.)

But Trieu Binh Nguyen was no longer a Cheap Boy on February 5, 1995. (7 RT 1269.) And Linda Vu was no longer with the Southside

Scissors on February 5, 1995. (11 RT 2108-2109; 17 RT 3314.) Vu left the Southside Scissors when her child Kali was born. (17 RT 3315.) Kali was more than two years old on February 5, 1995. (17 RT 3315.)

Appellant contends that Charles Hall, the only eyewitness without ties to the Cheap Boys, did not recognize anyone in the courtroom as the shooter. (11 RT 2103; AOB 92 fn. 62.) When the shooting occurred, Hall was waiting for a return telephone call as he stood by the pay phone just outside the Dong Khanh Restaurant doorway. (11 RT 2089-2090.) Hall turned to his right to see the victim fall after hearing the first gunshot. (11 RT 2093.) Hall saw the gunman step over the victim, hold a gun down, and say something like "mother fucker" before shooting the victim in the head. (11 RT 2094.) Hall described the gunman as a male Asian (11 RT 2093) in his mid- or early twenties, wearing a plaid shirt and dressed casually (11 RT 2094). Hall was stunned as the gunman walked away after firing the second shot into the victim's head. (11 RT 2094-2096, 2099.) One could understand why Hall, who had never seen the gunman before the shooting, could not recognize him in court three years after the shooting. (11 RT 2103.)

Appellant nevertheless contends that Hall testified that the shooter was about five-ten or maybe an inch or two shorter (11 RT 2093-2094, 2100), whereas appellant was only about five feet two inches tall. (Muni.CT. 17; 15 CT 4825; AOB 92 fn. 62.) But Hall also testified that he was just guessing about the gunman's height and did not know how much shorter the gunman was than himself. (11 RT 2100.)

Appellant points out that ten days after the shooting, when shown a six-person photo lineup, Hall quickly selected the photo of one Bao Quoc Tran as "look[ing] like the guy who did the shooting." (23 RT 458, 4460.) But Hall explained on redirect-examination that while he thought the photo looked kind of like the shooter, he was unsure of his selection. (11 RT

2102-2103.) And Hall stated during a subsequent June 2, 1995, police interview - when he failed to select appellant's photo from another photo lineup that contained appellant's photograph but not the photograph of Bao Quoc Tran - that he only got a side profile view of the shooter when the shooting occurred and could only recognize the shooter from a side profile photograph. (23 RT 4461-4464.)

Appellant contends that on the night Sang Nguyen was killed, all five of Sang's dinner-companion witnesses not only denied seeing the shooting, but also told the same basic story. (AOB 92-93.) They all placed Trieu Binh Nguyen (Temper) in the bathroom, nearly all put Binh Tran there (although Trieu Binh Nguyen did not say one way or the other whether anyone else was with him when he went to the bathroom), and none placed Trieu Hai Nguyen there. They all told their consistent stories without any opportunity to consult one another. (17 RT 3290, 3293; 19 RT 3586-3587; AOB 93 fn. 64.) While four of Sang's dinner companions later changed their stories, one of them (Amy Pech) did not. Those who did alter their stories did so after one of their number (Temper) had weekly discussions with one of the leaders of the Cheap Boys gang. (AOB 93.)

Appellant overstates the degree to which the police statements given by Sang's dinner companions undermined the prosecutor's case. The record reveals that Trieu Binh Nguyen acknowledged lying to the police on February 5, 1995, by telling them he had been inside the bathroom at the time of the shooting. (7 RT 1228, 1246-1247, 1254-1255.) He lied to the police so they would leave him alone and stop asking him about the shooting. (7 RT 1228.) Because Trieu was confused, in a state of panic, and depressed at having just seen his friend murdered, he had no chance to think properly. (7 RT 1228, 1236, 1247.) By using the word "confused," Trieu meant he was caught between the alternatives of (1) obeying gang

subculture code by refusing to become a "rat" and (2) helping his friend. (7 RT 1346-1347.)

Having been a Cheap Boy gang member for several years (7 RT 1259, 1269-1270), Trieu knew that people in the gang subculture who "rat" or inform on others are brought down, beaten and killed for talking to the police (7 RT 1229-1231). Gang members have the same feelings about informants as they do about gang members of a rival gang. (7 RT 1235.) Running into a rival gang member - like running into someone who knows you are an informant - endangers one's life. (7 RT 1234-1235.) Fellow gang members would be just as hard on a gang member who informs on a rival gangster as they would on a gang member who informs on one of their own gang. (7 RT 1235-1236.)

Trieu therefore flew back to Texas with his girlfriend a few days after the shooting without having told police the truth about the shooting. (7 RT 1262.) Trieu nevertheless told the police who did the shooting when he talked to them by telephone from Texas several months later. (7 RT 1236, 1238, 1258.) He decided to tell the police because "It get to a point that I heard lot of my friend went down from what happened, the same guy killed my friend, get to a certain point I can't stand it anymore." (7 RT 1238, 1348.)

Before phoning the police, Trieu phoned Khoi Huynh, a senior Cheap Boy and a friend, in order to get the phone number of Detective Nye, one of the officers who had interviewed Trieu after the shooting. (7 RT 1259-1261, 1270.) Khoi participated in the ensuing three-way telephone conversation between Trieu and the police when Trieu phoned the police. (7 RT 1259-1261.) But Khoi in no way influenced Trieu to talk to the police. (7 RT 1268.) Trieu, who was no longer a Cheap Boy gang member on February 5, 1995, the date Sang was shot, did not know whether or not

Khoi was still a Cheap Boy on the date Trieu phoned the police from Texas. (7 RT 1269.)

Khoi and Trieu had talked on the phone on a weekly basis after Trieu returned to Texas following the shooting. (7 RT 1262.) Khoi - who was himself shot by appellant on March 11, 1995 (counts nine and ten; RT 1764-1765, 1784-1795; 13 RT 2484, 2494-2496) - told Trieu about the killings of Trieu's Cheap Boy friends Duy Vu, Tuan Pham, and Dai Hong (7 RT 1263-1265). Trieu also got a phone call from Tuan Pham before Tuan was killed. (7 RT 1265.) Other friends had also told Trieu what was going on. (7 RT 1267.)

When Trieu told the police who did the shooting, he also told police he did not want anyone to know he was an informant. (7 RT 1237.) Although he told police he was concerned about keeping his job when they asked him if he was willing to testify, Trieu also told them he was concerned because he had never informed on anyone before and was afraid about something happening to him if he talked. (7 RT 1341, 1344-1345.) But he explained to the police that, "It got to a point before my friend went down, I can't take that, you know. That kind of person, you know, especially your homeboy, you know, your childhood friend." (7 RT 1345.)

When Trieu later looked at a photo lineup sent by Nye to Grand Prairie Police Detective Dennis Clay in Texas, Trieu positively identified appellant's photo as the photograph of the man who shot Sang in the head. (7 RT 1238-1239.) He picked the photo in about five seconds, after looking at the picture and scanning the rest of the lineup. (11 RT 2266.)

Trieu Hai Nguyen - Trieu Binh Nguyen's younger brother - also acknowledged lying to police when he was interviewed following the February 5, 1995, shooting by telling police the his brother and Binh Tran were in the men's room when the shooting took place. (17 RT 3284, 3289.) He did not have the time to get together with others and plan the lie because

the police came so quickly after the shooting to interview them. (17 RT 3290.) But he recalled that he and his brother were interviewed by the police side by side. (17 RT 3294.) His brother could therefore hear what he was saying when he told police that his brother and Binh Tran were in the bathroom when the gunshots were fired. (17 RT 3294.)

Trieu Hai Nguyen lied to the police because of the ongoing gang conflict and his desire "not to interfere" with anything. (17 RT 3283.) Trieu Hai Nguyen lied so he and his brother would not have to "go to court and all that stuff." (17 RT 3283-3284.) Trieu Hai Nguyen never talked to any of the others as part of a plan to lie to the police. (17 RT 3289-3290.)

Trieu Hai recalled that his brother went to the bathroom before he did, immediately after they ordered the food. (17 RT 3283.) The last time Trieu Hai saw his brother before hearing the gunshots was when his brother went to the restroom before him. (17 RT 3286.)

Trieu Hai truthfully told police that he went to the restroom to wash his hands and had returned to the table from the restroom when he heard the gunshots. (17 RT 3284.) He was in the bathroom about two to three minutes before returning to sit down. (17 RT 3287.) If he told the police that Trieu Binh went to the bathroom after he did, he lied. (17 RT 3286-3287.) Trieu Binh Nguyen was outside the restaurant when Trieu Hai returned to the table from the rest room. (17 RT 3284.) When Trieu Hai asked Michelle To or one of the other girls (17 RT 3289) where Sang was upon his return to the table, they told him Sang had gone out to look for Binh (17 RT 3287-3288). When Trieu Hai heard the gunshots minutes later, he ducked down with everyone else. (17 RT 3287-3288.)

Trieu Binh Nguyen's girlfriend Michelle To heard Trieu Binh Nguyen and Binh Tran say they had to go outside and smoke shortly before the February 5, 1995, shooting. (19 RT 3576-3577.) Although she did not recall seeing Binh Tran or Sang Nguyen get up and go outside after the

group ordered food (19 RT 3577), she recalled seeing Binh Tran and Trieu Binh Nguyen come back inside the restaurant after the shooting (19 RT 3577).

Michelle To acknowledged lying to the police when they interviewed her after the shooting by telling the police that Trieu Binh Nguyen and Binh Tran were in the bathroom rather than outside when the shooting occurred. (19 RT 3576, 3578-3579.) She also acknowledged responding in the affirmative on April 27, 1998, when the defense investigator asked her by phone if Binh and Trieu were in the bathroom when the shooting took place (19 RT 3582) and when Detective Nye asked her by phone if her statements were true (19 RT 3582-3583). But Michelle To told both the prosecutor and defense counsel in June 1998, before she testified, that her statements to the police on the night of the shooting were false. (19 RT 3589.) And while she phoned the prosecutor only to discuss whether the prosecutor could limit her testimony to one day so she could get back to work (19 RT 3599), she told the prosecutor she would tell the truth when the prosecutor asked her if she would tell the truth (11 RT 3580; 19 RT 3599).

Michelle To lied to the police on the night of the shooting because she and Trieu and been in California on vacation and Trieu might be kept back in California if she told police the truth. (19 RT 3583.) Although Michelle talked to Trieu before she phoned the prosecutor, she did not discuss her testimony with Trieu. (19 RT 3584-3585.) She did, however, tell Trieu Binh Nguyen's brother, Trieu Hai Nguyen, that she was going to tell the truth. (19 RT 3584.)

Linda Vu acknowledged lying to Detective Nye when she was interviewed on the night of the shooting by telling him she had no idea who shot Sang and making no mention of seeing any handshake or headlock outside the restaurant. (11 RT 2208-2209.) Although she started laughing and said she was not afraid of gangs when Nye asked her if she was

intimidated by gangs (11 RT 2234-2236), she knew that in the gang subculture it was not good to become an informant by talking to the police (11 RT 2258-2259). People who did so got hurt or lost their reputation. (11 RT 2259.) Although she told Nye on the night of the shooting that she would tell him the truth if she knew it (11 RT 2236), Linda Vu told him she did not know who killed Sang Nguyen because she feared retaliation and feared something would happen to her daughter (11 RT 2223).

When detective Nye interviewed Malay Amy Pech at 1:06 a.m. on February 6, 1995 (20 RT 3813), Pech told them they were ordering their food when Sang went out to smoke (20 RT 3814-3815, 3819). She thought Binh and the "local" Trieu brother (Trieu Hai Nguyen) went to the bathroom. (20 RT 3816-3817.) She was not sure whether or not the Trieu from Texas (Trieu Binh Nguyen) was still sitting at the table. (20 RT 3816-3819.) When she heard the gunshots, everyone panicked and started pushing and shoving. (20 RT 3823.) She remembered grabbing "Christopher" (Trieu Binh Nguyen's 3- or 4- year old nephew Binh Rasalvo) as everyone began ducking under the table. (20 RT 3820.) She recalled Linda Vu asking, "Where's Sang?" (20 RT 3821.) Everyone was back at the table at that point. (20 RT 3822.) She was in a state of shock following the gunshots. (20 RT 3823.)

When she took the witness stand, Amy Pech could not remember sitting at a table during the February 5, 1995, shooting. (19 RT 3671-3672.) She doubted the events were fresh in her mind when she spoke to police after the shooting, but she was trying to be honest with them. (19 RT 3673.)

The foregoing testimony shows that contrary to appellant's contention, Sang's dinner companions did not make identical statements regarding the whereabouts of Trieu Binh Nguyen on the night of the shooting, and gave credible explanations for their prior inconsistent statements on that date.

Appellant nevertheless contends there were additional problems with the testimony of the two purported eye witnesses, Trieu Binh (Temper) Nguyen and Linda Vu. Appellant contends Trieu Binh's explanation for why he lied to the police on the night of Sang Nguyen's death was inconsistent and implausible: He testified he lied because he had been "frustrated[]"; "confused and frustrated[]"; and "frustrated" but "not confused." (7 RT 1253-1255; AOB 93 fn. 65.)

But read in its entirety, Trieu's explanation was both consistent and logical. He explained that he lied to the police so they would leave him alone and stop asking him about the shooting. (7 RT 1228.) He was in a state of panic, depressed at having just seen his friend murdered, and confused because he had no chance to think properly. (7 RT 1228, 1236, 1247.) By using the word "confused," Trieu meant he was caught between the alternatives of not violating the gang code by becoming an informant or helping his friend. (7 RT 1346-1347.)

Appellant contends that Trieu Binh Nguyen acknowledged that when he first told Detective Nye his new story when he phoned Nye from Texas, he gave a different account of how the shooting came about than the account he gave in the story he recited at trial. (7 RT 1318-1319.) (AOB 93 fn. 65.) But Trieu's first language was Vietnamese (7 RT 1343) while Nye's was English. The alleged discrepancy involved whether or not appellant and his companions went inside the restaurant before Sang attempted to shake his hand. (7 RT 1317-1318.) And the pertinent cross-examination to which appellant refers, when viewed in its entirety (7 RT 1317-1319), shows that there was no real discrepancy between the account Trieu gave Nye and his trial testimony. Although he was clearly confused by the cross-examination questioning, Trieu explained that when he spoke to Nye and when he testified at trial, he recalled on both occasions that appellant and his companions had walked up to the front door of the

restaurant, rather than through the front door of the restaurant, when Sang attempted to shake appellant's hand. (7 RT 1317-1319.)

Appellant contends Linda Vu insisted at trial that she had positively chosen appellant's photograph from a pretrial photo lineup, even though she had not been positive at all. (11 RT 2201-2205, 2231, 2238-2239; 17 RT 3332.) Appellant contends Linda Vu gave police a bodily description of the shooter that did not fit appellant, and she told police the shooter's name was "Chinh" although she claimed at trial that she had been told the shooter's name was "Lam" on the night of Sang's death. (11 RT 2193, 2223, 2225; 17 RT 3315.) But the trial record reveals there were no significant discrepancies between her testimony identifying appellant and her pretrial identification of appellant.

Linda Vu saw a man's face outside when she looked through the restaurant window. (11 RT 2132-2133.) She recognized the man as someone she had seen before because she recognized his face. (11 RT 2212, 2216, 2133, 2135.) Vu picked out the photo of the face of the man she had seen through the window when shown a photo lineup by Detective Nye. (11 RT 2142.) Vu acknowledged telling Nye, "I don't know if it's -- I don't know if I identified the right one, but the closest one out of the six, I thing that's definitely him, if you put a light complexion on him." (11 RT 2202.) At the same time, Vu made a comment to Nye about the photos looking yellow. (11 RT 2204.) Vu commented, "the (photographs) look yellow in here." (11 RT 2230.)

When she pointed to appellant's photograph, she did so within seconds by putting her thumb on the photograph. (11 RT 2229.) When asked, "That's him[?] Okay now, that's the person that you saw kill Sang," Vu answered, "Yes." (11 RT 2230.) When asked, "But this is the person that you saw," Vu answered, "Yes." (11 RT 2230.) When asked, "But this is the person that you saw," Vu answered, "That was the person. I don't

know what his name is." (11 RT 2231-2232.) When asked, "Is that the person you called Lam," Vu answered, "Yes." (11 RT 2229.)

Immediately after attending to Sang outside the restaurant following the shooting, Linda Vu ran back into the restaurant saying she thought the shooter was Chinh. (11 RT 2223-2224.) She thought the shooter's name was Chinh (11 RT 2179) because she thought Sang had a friend from the California Youth Authority named Chinh (11 RT 2163-2165). But Vu had only recognized the shooter because she had seen his face before (11 RT 2216) and therefore had just been guessing about the shooter's name (11 RT 2210). She had never known Chinh and had just guessed the name Chinh when she saw Sang attempt to shake the hand of the man she saw outside. (11 RT 2210.) When she said she thought the shooter was Chinh upon running back into the restaurant, it was Trieu Binh Nguyen who informed her that the shooter's name was Lam rather than Chinh. (11 RT 2223-2225.) It was at that time that Trieu explained to her that he had seen Sang being shot. (11 RT 2227.)

Appellant contends Linda Vu's new story contradicted Trieu Binh's new story by placing Trieu Binh inside the jammed restaurant immediately after the shooting which occurred outside, and by attributing to Trieu Binh the statement that he merely "thought" Sang had been shot. (11 RT 2141, 2176, 2242-2243; AOB 93 fn. 65.)

But the referenced testimony was ambiguous and viewed in its proper context, did not contradict Trieu Binh Nguyen's testimony describing how he witnessed the shooting while standing just outside the front door of the restaurant.

Linda Vu had recalled on direct-examination that right after the gunshots, people outside the restaurant had tried to run inside the restaurant while people inside the restaurant tried to go outside. (11 RT 2139.) She then testified on both direct and cross-examination that when she got up

from under the table and asked someone where Sang was, someone said Sang was outside and thought Sang had been shot. (11 RT 2141, 2242.) She then went outside with her daughter Kali and saw Sang laying on the ground. (11 RT 2141.) While someone went to call 911, she stayed with Sang for about two minutes until additional help arrived. (11 RT 2141.)

When cross-examined, Linda Vue testified she did not know Trieu Binh Nguyen's whereabouts when she heard the first gunshot and ducked underneath the table with Kali and Michelle To. (11 RT 2174.) She estimated she stayed under the table five to ten seconds. (11 RT 2175.) She agreed with defense counsel's suggestion that she asked Trieu Binh Nguyen where Sang was when she looked up from the table. (11 RT 2175-2176.) She then guessed that she asked Trieu Binh Nguyen (11 RT 2242-2243), but further explained that she was getting up from the table rather than merely looking up from the table when she asked the question (21 RT 2176). She also added that Trieu Binh Nguyen was by the cash register when she asked him where Sang was. (11 RT 2176.)

She agreed with defense counsel's suggestions that appellant said he thought Sang was shot. (11 RT 2176-2177, 2242.) She did not recall whether or not Trieu Binh Nguyen also told her he was standing outside when the shooting took place. (11 RT 2176, 2178, 2243.)

But when Linda Vu identified appellant's photograph from the photo lineup shown her by Detective Nye, she explained that Trieu Binh Nguyen told her the shooter's name was Lam right after the shooting. (11 RT 2223-2225.) It was then that Trieu explained to her that he had seen Sang being shot. (11 RT 2227.)

Appellant contends that since the case was a close one depending on the credibility of the pertinent witnesses, any substantial error tending to discredit the defense or corroborate the prosecution was prejudicial. (AOB 94.) Appellant asserts Nye's expert opinion testimony qualified as

substantial by providing key, objective-sounding support for the prosecution's contention that the "bathroom" stories told by the dinner-companion witnesses on the night of the shooting were untrue. (AOB 94.)

But the dinner companion witnesses – with the exception of Amy Pech – all independently testified that they lied to the police on the evening of the shooting and all explained in their own words why they lied. And the following independent testimony corroborated Nye's challenged testimony insofar as Trieu Binh Nguyen and Linda Vu were both former gang members, and their dinner companions had been enveloped in the gang subculture, on the night of the shooting: (1) gang members have an unwritten rule not to cooperate with police or talk to police (16 RT 3187); (2) "rats" – those who talk to police or testify in court – get severely beaten, violently jumped out, or killed, and are in any event shunned by the gang (8 RT 1481-1482; 9 RT 1635-1636, 1661-1662; 16 RT 3189-3191; 18 RT 3491).

Because the trial court did not abuse its discretion by admitting Nye's challenged testimony, because it did not implicate appellant's federal constitutional right to a fair trial by doing so, and because appellant cannot show a different result reasonably probable had the challenged testimony been excluded, this Court should reject appellant's argument that the admission of Nye's testimony warrants the reversal of counts six and seven.

II. THE TRIAL COURT PROPERLY SUSTAINED THE PROSECUTOR'S OBJECTION TO APPELLANT'S PROPOSED REDIRECT-EXAMINATION INQUIRY OF DEFENSE WITNESS TIN DUC PHAN ABOUT THE SHOOTING OF NIP FAMILY GANG MEMBER KY NGUYEN BY CHEAP BOY LAP NGUYEN

Appellant argues that the trial court violated his federal constitutional rights to present a defense, to compel the testimony of witnesses, and to confront adverse witnesses (AOB 97), by erroneously sustaining the prosecutor's objection to the following proposed direct-examination inquiry

of defense witness Tin Duc Phan: Did Phan knew about the charged January 1995 shooting of Nip Family gang member Ky Nguyen by Cheap Boy Lap Nguyen and Ky's subsequent identification of Lap as the shooter? (20 RT 3834-3835, 3841-3844; AOB 96-107.)

The record shows that immediately before the direct examination of Tin Duc Phan, the trial court clerk noted that Phan was an add-on witness on the defense witness list. (20 RT 3832.) The prosecutor asked to approach the bench. (20 RT 3832.) When the parties approached the bench, defense counsel Robison Harley acknowledged a previous agreement with the prosecutor to limit the scope of Phan's direct-examination to a paragraph within the discovery materials which the parties had discussed earlier. (20 RT 3832.)

Pham's direct-examination then began with Phan's acknowledgment that he had been a Cheap Boy from 1991 to 1995 and Phan's acknowledgment that he had been interviewed by the defense investigator on September 19, 1997, when the defense investigator came to Phan's house with a Vietnamese interpreter. (20 RT 3833.) Phan then testified he did not remember making the following statements during the interview. Cheap Boys were "setting up" Nip Family because Nip Family were "ratting on" Cheap Boys. (20 RT 3833.) The Cheap Boy motive for setting up Lam Nguyen was to teach the Nip Family that Cheap Boys will "rat off" Nip Family gang members in order to retaliate for any Nip Family ratting on Cheap Boys. (20 RT 3833-3834.)

Defense counsel then elicited Phan's acknowledgement that Phan remembered Lap Nguyen. (20 RT 3834.) At that point the prosecutor objected and again asked to approach the bench. (20 RT 3834.) When the parties approached the bench, the prosecutor noted that defense counsel had agreed to restrict himself to the previously-referenced discovery paragraph when questioning Phan. (20 RT 3834.) Defense counsel Harley then

explained his theory that Lap Nguyen was a Nip Family member who "ratted off" Cheap Boy Ky Nguyen and thereby initiated the cycle of retaliatory "ratting" by the Cheap Boys. (20 RT 3834.) The trial court sustained the prosecutor's objection after the prosecutor noted that she stood by her objection and that "we need some 402's on this." (20 RT 3835.)

The remaining direct and cross-examination of Tin Duc Phan concerned the topic covered before the prosecutor's objection was sustained. (20 RT 3836-3839.) On cross-examination, Phan acknowledged he was also known as Luck (20 RT 3836) and testified that as far as he knew, neither he nor other Cheap Boys got together and decided to make up stories in order to set up appellant (20 RT 3837). Phan did not remember talking to the prosecutor and her investigator minutes before his testimony; nor did he remember telling them at that time that he had never told anyone that the Cheap Boys were "setting up" Nip Family in retaliation for Nip Family "ratting on" Cheap Boys. (20 RT 3836-3837.)

After Phan's testimony the trial court held another conference out of the jury's presence in order to make a complete record of the discovery paragraph referenced in the prosecutor's objection. (20 RT 3841.) The prosecutor then read the following discovery paragraph from the defense investigator's report, the paragraph to which defense counsel had agreed to restrict himself when examining Phan:

> I [the defense investigator] asked Tin if it was not unusual that gang members spoke to the police about their street affairs with rival gangs. Tin told me that the Cheap Boys are setting up Nip Family, because it's okay to rat on them since they are ratting on us. I explained to Tin that to set up someone to get the death penalty was wrong. Tin claims that the motivation for the Cheap Boys getting Lam Nguyen is to teach the Nip Family that they [Cheap Boys] will rat off any Nip Family gang member in retaliation for any Nip Family ratting on them.

(20 RT 3840.)

The trial court then gave defense counsel Harley a chance to further explain why he sought to question Phan about Phan's knowledge of Lap Nguyen, notwithstanding Harley's agreement with the prosecutor to restrict his examination of Phan to the foregoing discovery paragraph. Harley explained that he had understood from his investigator that Nip Family gang member Ky Nguyen was shot on January 6, 1995. (20 RT 3841.) When Ky Nguyen identified Cheap Boy Lap Nguyen in court as a perpetrator of the shooting, Ky Nguyen initiated the ratting retaliation war that encompassed the alleged plot to set up appellant. (20 RT 3841.) Harley therefore sought to explore whether or not Phan knew that Cheap Boy Lap Nguyen had been accused of attempted murder by a Nip Family gang member. (20 RT 3842.) Harley acknowledged that no portion of the foregoing inquiry was in the defense investigator's report of his September 19, 1997, interview with Tin Duc Phan. (20 RT 3842.) But Harley referenced page 3464 of the discovery he received from the prosecutor as an apparent independent basis for his inquiry. (20 RT 3842-3843.)

The trial court ultimately reaffirmed its initial ruling sustaining the prosecutor's objection to the inquiry on the ground that the defense had adequate time before the trial to explore all the parameters of what it could achieve through defense witness Tin Duc Phan. (20 RT 3843-3844.) The defense should therefore have conducted the proposed inquiry with Phan prior to trial and disclosed any pretrial report of Phan's statements on the proposed subject if it planned to elicit Phan's testimony on the subject at trial. (20 RT 3842-3844.)

This Court should reject as forfeited appellant's contention that the trial court's ruling violated his federal constitutional rights because he makes the contention for the first time in this Court. (*People v. Tafoya*, *supra*, 42 Cal.4th at p. 166; *People v. Geier*, *supra*, 41 Cal.4th at p. 609;

People v. Halvorsen, *supra*, 42 Cal.4th at pp. 413-414.) The contention is in any event meritless because the the Federal constitution does not bar a state court from applying ordinary rules of evidence to determine whether evidence proffered by the defense is admissible. (*People v. Watson, supra,* 43 Cal.4th at p. 693; *People v. Smithey* (1999) 20 Cal.4th 936, 995.) Defendant does not have an unfettered right to offer evidence otherwise inadmissible under standard rules of evidence. (*Montana v. Egelhoff* (1996) 518 U.S. 37, 42 [116 S.Ct. 2013, 135 L.Ed.2d 361].)

In the case at hand, the trial court's ruling did not violate appellant's federal constitutional rights to present a defense, to compel the attendance of witnesses or to confront adverse witnesses because it did not prevent appellant from introducing impeachment evidence supporting his theory that the Cheap Boy witnesses were falsely accusing appellant of the charged crimes in retaliation for Nip Family "ratting" against the Cheap Boys. Appellant presented that theory when defense investigator Dan Watkins testified that during his interview with Cheap Boy Tin Duc Phan (21 RT 298), Phan had indeed made the following statements: (1) Cheap Boys would rat on the Nip Family in retaliation for the Nip Family ratting on the Cheap Boys (21 RT 3976); and (2) the Cheap Boy motive for getting appellant was to teach the Nip Family that Cheap Boys will rat off any Nip Family gang members in retaliation for the Nip Family ratting on the Cheap Boys (21 RT 3976).

Appellant supplemented this impeachment evidence with the following evidence during the course of the guilt phase trial, evidence which arguably supported his theory. Former Cheap Boy Trieu Binh Nguyen told police that appellant was the shooter of Sang Nguyen (counts six and seven) after Cheap Boy Khoi Huynh talked to Trieu by phone on a weekly basis and discussed the shootings of Cheap Boy friends Duy Vu (counts eleven and twelve), Tuan Pham (counts thirteen and fourteen) and

Dai Hong. (7 RT 1263-1265.) Khoi Huynh participated in the three-way phone call in which Trieu Binh Nguyen first told Detective Nye that appellant shot Sang Nguyen. (7 RT 1259-1261.) Cheap Boy Khoi Nguyen also showed up uninvited at the Duy Vu crime scene (counts eleven and twelve; 12 RT 2351-2352) and at the Tuan Pham crime scene (counts thirteen and fourteen; 15 RT 2894). Khoi Huynh volunteered to police at the Tuan Pham crime scene that appellant shot him several times in front of the Rack and Cue billiard parlor in Stanton on March 11, 1995. (Counts nine and ten; 15 RT 2895.)

Channthae (Cindy) Pin, a witness to the shooting of Huy "Pee Wee" Nguyen (counts four and five) answered, "Probably," when asked the following question: "If one gang member lies on another gang member, isn't it true that the other gang members, the rival gang members, would retaliate by lying against the original gang members?" (8 RT 1502.) Natoma Boy Andy Nguyen (18 RT 3504) testified that it would be good to "rat" on a rival gang member committing a crime (18 RT 3509), whether or not the proffered information was a lie (18 RT 3512).

And as appellant observes (AOB 106), Westminster Police Investigator Janet Strong testified on direct-examination that Cheap Boy Khoi Huynh told her that the Nip Family "just didn't play fair" when she told Khoi that Nip Family members had testified in several cases against Cheap Boys. (13 RT 2495.) And when she was cross-examined, Strong testified that Nip Family gang members had testified against Cheap Boys (13 RT 2509) and that it has happened that a gang retaliates by testifying against a gang that has testified against it (13 RT 2514; AOB 106).

The additional inquiry of Tin Duc Phan unsuccessfully proposed by defense counsel Harley was only marginally relevant and highly speculative. The trial court could therefore have acted within its discretion by excluding the proposed inquiry under Evidence Code section 352, since

any probative value in the inquiry was substantially outweighed by the danger that it would confuse the issues, confuse the jury and consume an undue amount of time. (*People v. Mills* (2010) 48 Cal.4th 158, 195-196.)

As appellant tacitly acknowledges (AOB 107-108 fn. 71) the probative value of the inquiry depended on whether or not a Nip Family gang member named Ky Nguyen ever testified that Lam Nguyen shot him; whether or not Phan knew about the alleged 1995 shooting of Ky Nguyen; whether or not Phan heard about Ky Nguyen's alleged testimony identifying Lam Nguyen as the shooter; and whether or not Lam Nguyen's testimony preceded the date on which Cheap Boy witnesses told the police about appellant. It also depended upon whether or not the following inferences could be reasonably drawn from the inquiry: (1) Other Cheap Boys learned about Ky Nguyen's testimony; (2) Cheap Boys who gave information about appellant learned about Ky Nguyen's testimony; and (3) that testimony motivated them to falsely accuse appellant of the charged crimes.

The following circumstances further diminish the probative value of the proposed inquiry. (1.) the only active Cheap Boy who identified appellant as the perpetrator of a charged crime was Khoi Huynh, who identified appellant as the perpetrator of a charged crime when he told Westminster Police Investigator Strong on March 21, 1995, that appellant was the one who shot him outside the Rack and Cue billiard hall on March 11, 1995 (counts nine and ten; 13 RT 2484-2487); and when he told Garden Grove Homicide Detective Robert Donahue at the Tuan Pham crime scene on May 6, 1995, that he had been shot several times at a billiard parlor in Stanton by a man named Lam Nguyen (15 RT 2895). (2.) Jurors would find preposterous any theory suggesting that in order to retaliate against the Nip Family for "ratting" on the Cheap Boys, Khoi Huynh sought to protect the man who really shot him by falsely accusing appellant of the crime.

The only other identification witnesses connected with the Cheap Boys were no longer active gang members when they made their identifications. Vinh Kevin Lac, who identified appellant as a back seat passenger immediately behind the man who shot Tony Nguyen on July 21, 1994 (counts two and three), was an active Cheap Boy between 1993 and 1995. (9 RT 1638, 1660-1661.) But Lac withdrew from active Cheap Boy gang membership after his wife became pregnant in January 1995. (9 RT 1638, 1652, 1658-1659.) Lac did not identify appellant for another seven months, during an August 23, 1995, police interview in which he first identified appellant as the "downstairs neighbor at his apartment" who sat immediately behind the man who shot Tony Nguyen when Tony Nguyen was shot. (9 RT 1641-1642.)

Trieu Binh Nguyen, who identified appellant as the shooter of Cheap Boy Sang Nguyen, associated with Cheap Boys on February 5, 1995, the date Sang was shot. But he was no longer a Cheap Boy gang member when Sang Nguyen was shot. (7 RT 1269.) And he did not know whether or not Khoi Huyhn was still a Cheap Boy when he phoned Detective Nye from Texas and first identified appellant as the shooter. (7 RT 1269.)

Linda Vu, who identified appellant as the man who struggled with Sang immediately before the gunshots, dropped out of the Southside Scissors gang, a female gang which had associated with the Cheap Boys, when her daughter Kali was born. Her daughter Kali was born two years before the shooting. (11 RT 2108-2109; 17 RT 3315.)

Appellant nevertheless contends that since the prosecution presented its own testimony in an effort to rebut any inference supporting the "ratting retaliation" theory of the defense, due process required the defense be provided with the same opportunity to introduce defense testimony on the same issue. (AOB 103.) Appellant references the following prosecution testimony on the subject: (1) redirect-examination testimony by Sheriff's

Investigator Janet Strong that she knew of no cases where gang members retaliated against another gang by testifying, and she had never heard of or worked on such a case in her career (13 RT 2545-2546; AOB 106); (2) Investigator Strong's redirect-examination testimony that gang members who do so "are looked down on" by other gang members as "snitches" or "rats" and "can be murdered" or subjected to "severe assaults or assaults by deadly weapons, up to homicide[]" (13 RT 2548, 2549; AOB 106-107); (3) Detective Nye's testimony that no "Asian gang member" would "ever regain face by testifying against the other gang" because "this is against their rules of engagement[;] [t]hey're not supposed to testify[]" (16 RT 3199); and (4) Detective Nye's testimony that the "only way" to regain face is "by committing another act of violence, by killing another gang member, from the gang" (16 RT 3199; AOB 107).

At the same time however, appellant also references the previously-discussed testimony by Investigator Strong which fell on defendant's side of the "ratting retaliation" question: (1) Strong's direct-examination testimony that Khoi said that the Nip Family "just didn't play fair" when Strong told Khoi that Nip Family members had testified in several cases against Cheap Boys (13 RT 2495; AOB 106); and (2) Investigator Strong's cross-examination testimony that Nip Family gang members had testified against Cheap Boys (13 RT 2509) and that it has happened that a gang retaliates by testifying against a gang that has testified against it (13 RT 2514; AOB 106). That testimony and the additional evidence respondent has previously summarized belies appellant's assertion that the trial court's ruling allowed a one-sided presentation of the issue favoring the prosecution.

Appellant contends that the trial court erred by excluding the proposed inquiry insofar as it based its ruling upon a perceived discovery violation by the defense, to wit: defense investigator Watson's failure to

make the proposed inquiry when interviewing Tin Duc Phan nine months prior to trial and the resultant failure include the proposed inquiry in the report of the defense interview turned over to the prosecutor prior to trial. (20 RT 3843-3844; AOB 99-105.) Appellant alleges for the following reasons that there was no discovery violation: (1) the prosecution's right to discovery was limited by Penal Code section 1054.3, subd. (a), which requires the defense to disclose the names and addresses of intended witnesses together with any relevant written or recorded statements of those persons, or reports of statements of those persons that have not been reduced to writing; (AOB 100); and (2) the defense has no duty to affirmatively obtain information from witnesses before asking about it at trial (AOB 101-102).

Appellant further alleges that the trial court erroneously imposed the ultimate discovery sanction of excluding the testimony of a witness because: (1) the record did not demonstrate a willful and deliberate discovery violation motivated by a desire to obtain a tactical advantage, such as a plan to present fabricated testimony (AOB 103-104); (2) the federal constitution precludes the ultimate sanction against the defense absent such a scenario (AOB 103-104); (3) the sanction could only be imposed after all other sanctions had been exhausted (Pen. Code, § 1054.5, subd. (c); AOB 104); and (4) there was no possibility of prejudice to the prosecutor since (a) Tin Phan was still available to testify, as were all the Cheap Boys witnesses produced by the prosecutor, and since (b) the prosecutor had ready access to the police officers and court records regarding Ky Nguyen and his cooperation in the prosecution of Cheap Boy Lap Nguyen (AOB 104-105; AOB 105 fn. 70).

But the record does not clearly establish that the trial court excluded the testimony of a witness as a discovery sanction when it reaffirmed its ruling (20 RT 3843-3845) sustaining the prosecutor's objection (20 RT

3834-3835) to defense counsel Harley's proposed inquiry of defense witness Tin Duc Phan. The trial court did not exclude the testimony of witness Tin Duc Tran in its entirety but only sustained the prosecutor's objection to the additional line of inquiry proposed by defense counsel Harley. The record in any event shows that after giving Harley a chance to further explain the reasons for his proposed inquiry (20 RT 3841-3842), the trial court reaffirmed its earlier ruling sustaining the prosecutor's objection to that line of inquiry based upon all the following grounds: (1) The proposed inquiry violated the parties' agreement that the direct-examination of defense witness Tin Duc Pham would not exceed the matters covered in the previously-discussed paragraph of the pretrial defense report discovered to the prosecution (20 RT 3832, 3834-3835, 3839-3840, 3842); (2) defense counsel had an adequate time to explore all the parameters of what they could achieve through the anticipated defense testimony of Tin Duc Pham prior to putting Tin Duc Phan on the witness stand as a defense witness. (20 RT 3843-3844); (3) while the trial court "didn't want to stop . . . [defense counsel Harley] from putting on admissible evidence[]" . . . , it proposed "to excuse the witness because we're done with him[]" (20 RT 3844); and (4) the trial court nevertheless told defense counsel Harley that "I need to keep him [Tin Duc Tran] on call just technically, because you may call a witness to present a prior statement[]" (20 RT 3845).

The foregoing record does not show that the trial court precluded the defense from introducing direct evidence that Cheap Boys engaged in retaliatory efforts to make up false accusations against Nip Family gang members in order to retaliate for Nip Family member Ky Nguyen's testimony that Cheap Boy Lap Nguyen shot him. Instead, the trial court sustained the prosecutor's objection to that proposed line of inquiry for defense witness Tin Duc Phan in light of the parties' agreement to restrict Phan's examination to the pretrial defense report discovered to the

prosecutor. By keeping Tin Duc Phan on call, the trial court apparently anticipated appellant might seek to present direct evidence that Ky Nguyen triggered a "ratting" retaliation war by testifying against Lap Nguyen.

Even if the trial court's ruling sustaining the prosecutor's objection amounted to a discovery sanction, the trial court neither abused its discretion under state law (*People v. Ayala* (2000) 23 Cal.4th 225, 299; *People v. Lamb* (2006) 136 Cal.App.4th 575, 581) nor violated the Federal Constitution by sustaining the objection. Notwithstanding appellant's contention to the contrary, the descriptions of materials subject to discovery in Penal Code sections 1054.1 and 1054.3, do not exclude other types of materials from the reach of criminal discovery. (See: *Verdin v. Superior Court* (2008) 43 Cal.4th 1096, 1104-1105.) Penal Code section 1054, subdivisions (a) and (c), provide:

> The statutory discovery chapter shall be interpreted to promote the ascertainment of truth in trials by requiring timely pretrial discovery and to save court time in trial and avoid the necessity for frequent interruptions and postponements.

These objectives reflect the judicially recognized principle that timely pretrial disclosure of all relevant and reasonably accessible information, to the extent constitutionally permitted, facilitates the true purpose of a criminal trial, the ascertainment of the facts. (*In re Littlefield* (1993) 5 Cal.4th 122, 130-131; *Roland v. Superior Court* (2004) 124 Cal.App.4th 154, 162.) One objective of the discovery statutes is to permit the prosecution a reasonable opportunity to investigate prospective defense witnesses before trial so as to determine the nature of their anticipated testimony and to discover any matter that might reveal a bias or otherwise impeach the witness's testimony. (*In re Littlefield*, *supra*, 5 Cal.4th at p. 131; *Roland v. Superior Court*, *supra*, 124 Cal.App.4th at p. 167.)

In the case-at-hand, defense counsel's attempted inquiry of Tin Duc Lamb suggested a type of gamesmanship (*People v. Littlefield*, *supra*, 5 Cal.4th at p. 133; *People v. Lamb*, *supra*, 136 Cal.App.4th at p. 580; *Roland v. Superior Court*, *supra*, 124 Cal.App.4th at p. 165) designed to gain an advantage over the prosecutor by leaving her unprepared to respond to the inquiry in light of the parties' agreement to restrict themselves to the paragraph referenced in the defense investigator's interview report discovered to the prosecutor. While parties have no affirmative duty to seek out, obtain, and disclose all evidence that might be beneficial to the other side (*People v. Zambrano* (2007) 41 Cal.4th 1086, 1163; *People v. Panah* (2005) 35 Cal.4th 395, 460; *In re Littlefield*, *supra,* 5 Cal.4th at p. 135; *People v. Sanchez* (1998) 62 Cal.App.4th 460, 474; AOB 101-102), the proposed inquiry in the case-at-hand suggested an attempt to achieve a tactical advantage over a prosecutor unprepared to rebut it, a tactical advantage that would have necessitated an additional delay in the proceedings which would not have been required absent defense counsel's agreement with the prosecutor to restrict himself to the previously noticed paragraph in the defense investigator's interview report.

The trial court ruling sustaining the prosecutor's objection was nevertheless narrow in scope insofar as it only limited rather than excluded the testimony of a defense witness. (*People v. Lamb*, *supra*, 136 Cal.App.4th at p. 582.) And the trial court never barred defense counsel from introducing evidence that Cheap Boy Ky Nguyen testified that Nip Family gang member Lap Nguyen shot him and thereby instigated a "ratting" retaliation war between the two gangs.

Appellant cannot show that the trial court's ruling violated his federal constitutional rights because he cannot show that the trial court thereby precluded him from introducing admissible probative evidence and because the Sixth Amendment does not confer the right to present testimony free

from the legitimate demands of the adversarial system. (*Michigan v. Lucas* (1991) 500 U.S. 145, 152 [111 S.Ct. 1743, 114 L.Ed.2d 205].) Appellant cannot show that the proposed inquiry of Tin Duc Phan would have led to any probative defense evidence given Phan's testimony that he did not remember any of the statements attributed to him by the defense investigator (20 RT 3832-3833) and given his testimony that as far as he knew, Cheap Boys never got together to decide to make up a story and get appellant (20 RT 3837-3838).

The trial evidence showed Phan himself was not a member of any such conspiracy. Despite Khoi Huynh's March 14, 1995, hospital statement to Investigator Strong that Tin Duc Phan was one of his companions when he was shot on March 11, 1195 (counts nine and ten; 13 RT 2471-2473), Phan himself never identified anyone involved in the shooting. And the trial court never precluded appellant from introducing direct, and therefore more reliable evidence of the information defense counsel sought with his proposed inquiry of Phan.

Appellant contends the alleged error requires reversal of counts two, three, six, seven and nine – counts which depended upon identifications of appellant by Cheap Boys witnesses – because the testimony precluded by the trial court would have given substance to what otherwise was defense speculation that the Cheap Boys had conspired to frame appellant (AOB 105-107.)

But the alleged error was harmless under any standard. The inquiry itself sought speculative evidence. And Khoi Huynh, the only active Cheap Boy gang member who identified appellant, would not have protected the man who shot him by falsely identifying appellant as the shooter.

III. THE TRIAL COURT PROPERLY SUSTAINED THE PROSECUTOR'S OBJECTIONS TO EVIDENCE OF A JANUARY 29, 1995, POLICE RAID ON A CHEAP BOYS' "CRASH PAD"

Appellant argues that the trial court erroneously rejected defense efforts (10 RT 1946-1947; 11 RT 2187; 16 RT 3005; 17 RT 3393-3395; 24 RT 4567) to introduce proposed defense testimony that on January 29, 1995, police raided an El Monte "crash pad," found guns and among other Cheap Boys, Linda Vu, Khoi Huynh, and Kevin Lac. The proposed testimony allegedly included opinion testimony that at such a crash pad, the gang members would talk about gang politics and the identity of their next target. (10 RT 1945, 1965; 11 RT 2187; 15 RT 2948; 16 RT 3001-3004; 17 RT 3393-3394.) The alleged purpose of the excluded testimony was to show that Khoi, Linda, and Kevin had "considerable opportunity" and "motive" to fabricate and to engage in acts of "testimonial" retaliation. (10 RT 1945; 16 RT 3004.) (AOB 96-107.)

The pertinent trial record shows that during defense counsel Robison Harley's cross-examination of Khoi Huynh, the trial court overruled the prosecutor's relevance and Evidence Code section 352, objections before Huynh acknowledged that he was with about eight other Cheap Boys when contacted by Westminster police at a known Cheap Boys "hangout" (the Mission Control video arcade on Brookhurst) on May 14, 1992. (10 RT 1943-1944.) The trial court called a chambers conference after the prosecution objected to Harley's next question, "Isn't it also true that you were violating the terms of probation on May 14, 1992?" (10 RT 1943-1944.)

During the chambers conference the trial court asked where defense counsel Harley was going with his inquiry. (10 RT 1994.) Harley explained the following defense theory: The accusations against appellant only arose after the March 11, 1995, shooting of Khoi Huynh (10 RT 1945);

Khoi Huynh masterminded a campaign of false accusations against appellant which included the charged murders on May 3, 1995 and May 6, 1995 (10 RT 1945); Cheap Boys talked about gang politics together and had the opportunity to formulate the false accusation campaign every time they got together (10 RT 1945-1946, 1949, 1953); and these gatherings included an El Monte crash pad gathering on January 29, 1995 (10 RT 1945).

Expressing concerns about the limited probative value of the proposed offer of proof (10 RT1948) and the possibility it would necessitate an undue consumption of time (10 RT 1947), the trial court nevertheless declined to make an immediate ruling on the offer of proof. It noted it would keep the witness on call should additional testimony increase the probative value of the offer of proof or should Harley more fully develop his offer of proof. (10 RT 1947-1948, 1954-1955.)

Defense counsel Harley repeated his offer of proof in another chambers conference during a recess in his cross-examination of prosecution witness Linda Vu. (11 RT 2187.) Harley explained that Linda Vu was in the El Monte "crash pad" with Khoi Huynh on January 29, 1995, six days before the February 5, 1995, shooting of Sang Nguyen (counts six and seven). (11 RT 2187.) Harley asked the trial court if it was still keeping its ruling on the issue "on the back burner" and if he should therefore avoid examining witnesses on the issue for the time being. (11 RT 2187.) The trial court answered both questions in the affirmative. (11 RT 2187.)

During a later trial court conference which concerned the proposed guilt phase defense witnesses (16 RT 3001), defense counsel Harley detailed his offer of proof regarding the January 29, 1995, incident in which the El Monte Police Department raided a "crash pad" and there found Linda Vu, Cheap Boy Khoi Huynh, and many other Cheap Boys whose names

had surfaced in the trial, including Kevin Lac (16 RT 3002-3004). Police found two loaded .357 magnum handguns, one located under the right passenger seat of Khoi Huynh's black Cadillac. (16 RT 3002-3003.) Cheap Boys typically got together at "crash pads" and discussed gang politics, including their next targets. (16 RT 3003.) Appellant first became a potential defendant when Trieu Binh Huynh phoned Detective Nye from Texas in May of 1995 in order to name appellant as the shooter of Sang Nguyen. (16 RT 3004.) The Cheap Boys had a motive to fabricate accusations against appellant because he was a member of a rival gang. (16 RT 3004.) The well-orchestrated campaign of lies was part of the ongoing war between the Cheap Boys and Nip Family. (16 RT 3004.)

Responding to a question from the trial court, defense counsel Harley admitted he had no evidence of any statements made between the people found at the alleged "crash pad" on January 29, 1995. (16 RT 3004.) While defense counsel Harley asserted that jurors could reasonably infer that retaliatory lying was discussed at the alleged "crash pad" (16 RT 3004-3005), the prosecutor noted that the raid on the "crash pad" occurred before any of the shootings charged in the case (16 RT 3305).

After hearing from the parties, the trial court concluded that its prior tentative ruling excluding the evidence would stand, but that it would revisit the issue as the defense evidence developed before making any final ruling. (16 RT 3005.)

During a subsequent trial court conference during the presentation of the guilt phase defense case, the trial court once again broached the topic of the January 29, 1995, El Monte "crash pad" incident in order to make sure it had not missed anything. It thereupon gave defense counsel another chance to further detail their offer of proof regarding the incident. (17 RT 3393.) Both defense counsel Harley and defense counsel Gregory Parkin responded by explaining that the defense sought to show the Cheap Boys

were falsely accusing appellant of the charged crimes. (17 RT 3394.) The Cheap Boy plan to falsely accuse appellant was hatched between Cheap Boys such as Khoi Huynh and Kevin Lac, and Cheap Boy associates such as Linda Vu. (17 RT 3393-3394.) The plan was hatched at some "crash pad" somewhere. (17 RT 3394.) Khoi Huynh was a shot caller, if not the leader of the Cheap Boys. (17 RT 3394.) Junior gang members were under his control. (17 RT 3394.) The trial evidence showed that Khoi Huynh was no friend of appellant. (17 RT 3394.) The plan could therefore have been hatched in El Monte. (17 RT 3394.)

The trial court ruled that the latest offer of proof did not change its ruling, especially since the identity of Khoi Huynh and the other Cheap Boys was already before the jury in the evidence previously admitted at trial. (17 RT 3394-3395.)

Near the end of the guilt phase defense case, defense counsel Harley again broached the subject of the El Monte "crash pad" in order to make sure that the trial court's ruling was definitive. (24 RT 4567.) Harley did not offer any further offer of proof. (24 RT 4567.) The trial court responded that its ruling excluding the evidence proffered through the previous offers of proof was definitive. (24 RT 4567.)

Appellant contends that the trial court erred because the excluded evidence was relevant for the following reasons outlined by defense counsel: (1) It would have shown that the very Cheap Boys who provided the prosecution with its case against appellant regarding the killing of Sang Nguyen would congregate together at a "crash pad" where they could plan their activities; (2) it would have shown they had the opportunity they required for concocting their similarly-altered stories; (3) it would have established as fact rather the speculation the existence of a Cheap Boys "crash pad;" (4) it would have established the involvement of Linda Vu in the "crash pad," one of the two identification witnesses to the San Nguyen

murder, and Khoi Huynh, the Cheap Boys leader who procured the testimony of the other identification eyewitness, Trieu Binh (Temper) Nguyen. (AOB 109-110.)

Appellant acknowledges that the proffered defense focused on a police raid occurring in El Monte in January 29, 1995, before the shooting of Cheap Boys Sang Nguyen, Khoi Huynh, Duy Vu, and Tuan Pham. (AOB 110.) Appellant nevertheless contends that the proffered testimony – taken together with Detective Nye's testimony about how a "crash pad" functioned - would have led to the strong inference that Cheap Boys and Cheap Boy associates continued to carry on the activities suggested by a "crash pad" through the period covering the shootings, notwithstanding the January 1995 police raid. (AOB 110.)

This Court should reject appellant's argument as meritless. The trial court did not abuse its discretion by excluding evidence of the proffered January 29, 1995, police raid on a Cheap Boy "crash pad" in El Monte because the probative value of the proffered evidence was substantially outweighed by the substantial danger that it would confuse the issues, confuse the jury, or result in the undue consumption of time. (Evid. Code, § 352; *People v. Mills*, *supra*, 48 Cal.4th at pp. 195-196.)

Numerous factors supported the trial court's ruling by diminishing any probative value the proffered evidence may have had while increasing the danger that the proffered evidence would confuse the issues, confuse the jury, or consume an undue amount of time.

First, the El Monte crash pad raid occurred before the shootings of Sang Nguyen (counts six and seven), Khoi Vu (counts nine and ten), Duy Vu (counts eleven and twelve) and Tuan Pham (counts thirteen and fourteen). Second, only one of the two charged shootings prior to the El Monte crash pad raid involved any Cheap Boy witnesses, to wit: the July 21, 1994, shooting of Tony Nguyen (counts two and three). Third, the

proffered evidence did not include any evidence of statements between the Cheap Boys at the crash pad, leaving jurors to speculate about what if anything had been planned there.

Additionally, Khoi Vu, the only Cheap Boy who identified appellant in any of the charged crimes, identified appellant as the man who shot him on March 11, 1995. (Counts nine and ten.) Any theory that Khoi falsely identified appellant as his shooter in order to retaliate against the Nip Family was preposterous since to do so, he would have to be protecting the man who really shot him.

Kevin Lac stopped being a Cheap Boy gang member when his wife became pregnant seven months before he identified appellant (counts two and three). Trieu Binh Nguyen was no longer a Cheap Boy when he witnessed the Sang Nguyen shooting (counts six and seven.) Linda Vu stopped being a Southside Scissor's gang member two years before the Sang Nguyen shooting, when her daughter Kali was born. Both Trieu Binh Nguyen and Linda Vu spent February 5, 1995, with Sang Nguyen as old acquaintances celebrating Tet rather than as Cheap Boys or Cheap Boy associates.

Further, proffered evidence that Cheap Boys gathered together at "crash pads" in order to discuss gang politics and potential targets cumulated evidence already before the jury. For example, Detective Nye testified that gang members congregate at crash pads in order to plan criminal activity, hide out fugitives and other wanted persons or runaways, and hold or stash weapons and other criminal evidence. (17 RT 3310.) And jurors already knew that Khoi Huynh spent time at a known Cheap Boy hangout with eight other Cheap Boys before police contacted him there on May 14, 1992. (10 RT 1943-1944.)

In any event, appellant's own defense testimony contradicted the defense theory that Cheap Boys sought to falsely accuse him for the

charged crimes in retaliation for Nip Family gang members "ratting" against Cheap Boy gang members. According to appellant, appellant was not a Nip Family gang member at all, but only associated with childhood friends who happened to be Nip Family gang members. (21 RT 4011-4012.)

Appellant nevertheless contends the alleged error amounted to federal constitutional error which could not have been harmless beyond a reasonable doubt because it deprived the defense of crucial evidence tending to undermine the Cheap Boys' eyewitness testimony identifying appellant as the killer of Sang Nguyen. (AOB 110.) Appellant further contends that the alleged error had the same adverse impact on: (1) counts two and three (the shooting of Tony Nguyen) since the sole identification testimony for those counts came from Kevin Lac, one of those found at the Cheap Boys "crash pad;" and (2) counts nine and ten (the shooting of Khoi Nguyen himself), where Khoi provided essential identification evidence. (AOB 111.)

This Court should reject appellant's constitutional claim as forfeited because it is being made for the first time in this Court. (*People v. Tafoya*, *supra*, 42 Cal.4th at p. 166; *People v. Geier*, *supra*, 41 Cal.4th at p. 609; *People v. Halvorsen*, *supra*, 42 Cal.4th at pp. 413-414.) The claim is in any event meritless because the Federal Constitution does not bar the state from applying ordinary rules of evidence to determine whether proffered defense evidence is admissible. (*Montana v. Egelhoff*, *supra*, 518 U.S. at p. 42; *People v. Watson*, *supra*, 43 Cal.4th at p. 693; *People v. Smithey*, *supra*, 20 Cal.4th at p. 995.) And even had appellant shown that the trial court abused its discretion under Evidence Code section 352, by excluding the proffered evidence he cannot show different verdicts would have been reasonable probable had the proffered evidence been admitted. (*People v. Watson*, *supra*, 46 Cal.2d at p. 836.)

For the reasons stated above, the probative value of the evidence was minimal. The evidence was cumulative of evidence already admitted insofar as it established that gang members plan criminal deeds and select targets at "crash pad" gatherings. The evidence was also cumulative of other admitted evidence that Khoi Huynh was a Cheap Boy leader or "shot caller" who gathered with other Cheap Boys at Cheap Boy gatherings. The "ratting" retaliation theory upon which the offer of proof was based contradicted appellant's own defense testimony that he was not a Nip Family gang member. No Cheap Boys other than Khoi Huynh identified appellant as a shooter in any of the charged crimes. And any theory that Khoi Huynh falsely identified appellant in order to retaliate against the Nip Family was preposterous because in order to do so, he would have to protect the man who really shot him.

Appellant contends in any event that the cumulative effect of the alleged errors of precluding the further proposed questioning of Tin Duc Phan, and excluding the proposed evidence of the police raid on the Cheap Boys crash pad, warrants the reversal of counts six and seven, even if either error individually does not. (AOB 111.) But appellant has not shown the trial court erred in either alleged instance. And the alleged errors do not in any event warrant reversal either singly or cumulatively because – for reasons previously discussed – they were harmless under any standard.

IV. THE TRIAL COURT DID NOT ERR BY DENYING APPELLANT'S REQUEST TO ASK WITNESS MICHELLE TO IF SHE WAS LIVING AT THE SAME ADDRESS AS WITNESS TRIEU BINH NGUYEN

Appellant argues that the trial court erred when it refused his request to ask defense witness Michelle To whether she and prosecution witness Trieu Binh Nguyen were living at the same address. (19 RT 3596; AOB 112-115.) The refusal followed a hearing outside the presence of the jury at which Michelle To testified that she did not remember the date when she

broke up with Trieu Binh Nguyen. (19 RT 3593.) She also testified at the hearing that they did not have a child together. (19 RT 3593.) The evidentiary ruling took place during the following colloquy:

> THE COURT: Did counsel want to inquire anything else before we bring the jury back in?
>
> MS. PARK [the prosecutor]: No, not before we bring the jury back in.
>
> THE COURT: All right, let's bring the jury back.
>
> (THE FOLLOWING PROCEEDINGS WERE HELD IN OPEN COURT IN THE PRESENCE OF THE JURY:)
>
> MR. HARLEY [defense counsel]: Your honor, while there's a little – could I just approach one more time?
>
> THE COURT: Sure.
>
> (THE FOLLOWING PROCEEDINGS WERE HELD AT THE BENCH:)
>
> MR. HARLEY: If they were living at the same address?
>
> THE COURT: No.
>
> MS. PARK: Well, Judge –
>
> THE COURT: The answer is no.
>
> MR. HARLEY: You won.
>
> (DISCUSSION BETWEEN MR. PARKIN [THE SECOND DEFENSE COUNSEL], MR. HARLEY AND MS. PARK OFF THE RECORD.)
>
> (THE FOLLOWING PROCEEDINGS WERE HELD IN OPEN COURT IN THE PRESENCE OF THE JURY:)
>
> THE COURT: All right, as a result of conferring outside the presence of the jury, and conferring at the bench, Mr. Harley, you don't have any additional questions, do you?
>
> MR. HARLEY: I was just going to have about three or four.
>
> THE COURT: Okay.
>
> DIRECT-EXAMINATION (CONTINUED)

(19 RT 3595-3596.)

Michelle To had previously testified in her direct-examination that Trieu Binh and Binh Tran were outside smoking at the time of Sang

Nguyen's shooting. (19 RT 3576-3577.) She lied to the police on the night of the shooting on February 5, 1995 - and she lied to the defense investigator on April 27, 1998 (three weeks before Trieu Binh's trial testimony) – when she said that Trieu Binh and Binh Tran were in the bathroom at the time of the shooting. (19 RT 3576, 3581-3582.) While she admitted having discussions with Trieu Binh Nguyen, she denied ever discussing her testimony with him. (19 RT 3589, 3591.) She denied having an opportunity to discuss any changes in her testimony with him (19 RT 3584-3586).

Michelle had broken up with Trieu Binh Nguyen, although she did not remember when. (19 RT 3593.) She never saw Trieu Binh on a regular basis after the night of the shooting in 1995. (19 RT 3585.) She did not remember how often they had seen each other in 1995, 1996, or 1997 (19 RT 3596-3597.) Asked about 1997 in particular, she denied that they saw each other weekly or annually. (19 RT 3597.) Later, however, she acknowledged they had been married in 1997 for "... a couple of months. A few months. About seven or eight." (19 RT 3605.)

Appellant contends for the following reasons that the trial court erred by denying his request to ask Michelle whether she and Trieu Binh were living at the same address (19 RT 3596); (1) the inquiry was relevant to show Michelle's bias in favor of Trieu Binh Nguyen and her motive for corroborating his new story (AOB 114 fn. 74); (2) the inquiry was relevant to impeach Michelle's testimony about the extent of her relationship with Trieu Binh Nguyen and her claim they had broken up (AOB 114); and (3) the inquiry was relevant to impeach her testimony that she had not had any opportunity to discuss any changes in her testimony with Trieu Binh Nguyen (AOB 114).

This Court should reject appellant's argument as meritless. The trial court did not abuse its discretion by excluding the proffered impeachment

inquiry about whether or not Michelle had lived together with Trieu Binh Nguyen at the same address. (*People v. Mills*, *supra*, 48 Cal.4th at p. 192.) It did not abuse its discretion because the impeachment inquiry did not tend to prove or disprove the disputed material fact (Evid. Code, § 210) of whether or not Michelle had gotten together with Trieu Binh Nguyen in order to concoct false testimony contradicting her February 5, 1995, police statement that Trieu Binh Nguyen and Binh Tran were in the bathroom when Sang Nguyen was shot. The impeachment inquiry was irrelevant to this issue because if Michelle lived with Trieu Binh Nguyen at the same address, she most likely did so before they broke up. Additionally, Michelle To's testimony established she broke up with Trieu Binh long before she decided to tell the truth by recanting her February 5, 1995, police statement.

More specifically, Michelle testified that she lied when she was interviewed on February 5, 1995, because she and Trieu had been visiting California on a vacation and Trieu might be kept back in California if she told the truth. (19 RT 3583.) She repeated the lie to the defense investigator on April 27, 1998 (three weeks before Trieu Binh's trial testimony) when she repeated the statement she had made on the night of February 5, 1995, shooting, to wit: that Trieu Binh and Binh Tran were in the bathroom at the time of the shooting. (19 RT 3576, 3581-3582.) Before she came to court, however, she decided to tell the truth because she knew she would be testifying in court after swearing to tell the truth. (19 RT 3599-3601.) And she told Trieu Binh's brother Trieu Hai before she testified that she was going to tell the truth. (19 RT 3584.) Even though Michelle To acknowledged that she and Trieu Binh Nguyen had been married for a period of months in 1997 before they broke up (19 RT 3605), her own testimony established that they broke up before 1998, and

therefore long before she decided to tell the truth when she came to court to testify.

Appellant contends the ruling violated California Constitution, article I, section 28, subdivision (f)(2); his Sixth and Fourteenth Amendment rights to due process, to confront the witnesses against him, to present a defense, to compulsory process and to a fair jury trial; and his Eighth Amendment right to a reliable determination of guilt and penalty in a capital case. (AOB 114-115.) This Court should reject the contention as forfeited because appellant is making it for the first time in this Court. (*People v. Tafoya*, *supra*, 42 Cal.4th at p. 166; *People v. Geier*, *supra*, 41 Cal.4th at p. 609; *People v. Halvorsen*, *supra*, 42 Cal.4th at pp. 413-414.)

The contention is in any event meritless because the trial court's ruling violated neither California Constitution, article I, section 28, subdivision (f)(2), nor any of his federal constitutional rights. By its own terms California Constitution, article I, section 28, subdivision (f)(2) only discusses the admission of relevant evidence (Evid. Code, § 210; *People v. Alvarez* (2002) 27 Cal.4th 1161, 1173, 1174 fn. 11) and does not implicate the trial court's discretion to exclude relevant evidence when the probative value of that evidence is substantially outweighed by the substantial danger of confusion of the issues or the jury, the creation of undue prejudice or the undue consumption of time (Evid. Code, § 352; *People v. Alvarez*, *supra*, 27 Cal.4th at p. 1173; *People v. Castro* (1985) 38 Cal.3d 301, 306). And the federal constitution does not bar state courts from applying ordinary rules of evidence to determine whether proffered defense evidence is admissible. (*Montana v. Egelhoff*, *supra*, 518 U.S. at p. 42; *People v. Watson*, *supra*, 43 Cal.4th at p. 693; *People v. Smithey*, *supra*, 20 Cal.4th at p. 995.) Because the alleged error does not implicate the Federal Constitution, this Court should reject appellant's contention that it requires reversal of counts six and seven, whether considered individually or

cumulatively with the previous alleged errors, unless harmless beyond a reasonable doubt. (AOB 117, 121.)

This Court should also reject appellant's alternative contention that the alleged error requires reversal of counts six and seven, whether considered individually or cumulatively with the previous alleged errors, because it is reasonably probable more favorable verdicts would have resulted absent the error. (*People v. Watson*, *supra*, 46 Cal.2d at p. 836.) Even had the trial court abused its discretion by excluding appellant's proffered inquiry, appellant cannot show a reasonable probability that the verdicts would have been different had the trial court allowed the inquiry. Appellant's cross-examination revealed that Michelle To had been married to Trieu Binh Nguyen for seven or eight months in 1997 and that they therefore had ample opportunity to concoct a new story together had they chosen to do so. The proffered cross-examination question asking if they had lived together would have added little if anything probative to Michelle To's cross-examination testimony, especially considering the evidence that that she only decided to recant her February 5, 1995, statement some time after talking to the defense investigator on April 27, 1998. (19 RT 3576, 3581-3582.)

V. THE TRIAL COURT DID NOT ERR BY REFUSING TO GIVE A LIMITING INSTRUCTION FOR TESTIMONY BY TRIEU BINH NGUYEN

Appellant argues that the trial court erroneously refused his request for a limiting instruction (Evid. Code, § 355; 7 RT 1238; AOB 115-117) for the following testimony by Trieu Binh Nguyen. When the prosecutor asked why Trieu went to the police with his new story identifying appellant as the shooter of Sang Nguyen, Trieu answered: "It get to a point that I heard lot of my friend went down from what happened, the same guy killed my friend, get to a certain point I can't stand it anymore." (7 RT 1237; AOB

16.) Appellant contends that the trial court erroneously rejected appellant's request for a limiting instruction by overruling without further comment defense counsel's objection to the testimony as hearsay "unless the court instructs that that's not coming in for the truth of the matter asserted therein." (7 RT 1237-1238.)

Appellant observes that the trial court overruled his second objection during the ensuing direct-examination colloquy between the prosecutor and Trieu Binh Nguyen.

> Q. So when you felt that you just couldn't stand it anymore that he was killing your friends, that's when you told the detective?
>
> MR. HARLEY [defense counsel]: Object. Asked and answered.
>
> A. Correct.

(7 RT 1238; AOB 115.)

Appellant observes that he objected a third time when the prosecutor returned to the subject at the end of Trieu Binh Nguyen's redirect examination in the following colloquy.

> Q. At some point in time did you just decide, regardless of all of those [gang] rules, that because your friends were dying from a rival gang, and largely from one person, that you were going to stand up and break all those rules and come forward?
>
> A. Yes.
>
> MR. HARLEY: I object, 352, move to strike. And ask the Court admonish the jurors on that question.
>
> THE COURT: I'll sustain the objection to the form of the question. The way the question is structured.
>
> BY MS. PARK [the prosecutor]: Q. With these rules from the gang and knowing that you're going to lose respect from fellow gang members, or going to lose respect from even rival gang members, you're going to lose respect, you own gang is going to lose respect if you come forward, could you explain to the jury why you went to a police detective and then came into this Court to tell them what happened?

A. Well, it gets to a point that you can't stand it no more, you know. It's hard. My feeling. Losing somebody, you know, killing. Because losing somebody you know really good, it hurts. It gets to a point that you have to say – can you ask me another question, please?

Ms. Park: I have no other questions.

(7 RT 1348.)

Appellant contends that the trial court should have admonished the jury pursuant to Evidence Code section 355, that while the Trieu Binh's testimony may have been admissible for the non-hearsay purpose of explaining why Trieu Binh came forward with a new story, it was inadmissible hearsay if considered for the purpose of proving the truth of the matter asserted, namely that "the same guy" was responsible for the shootings of Trieu Binh's friends. (AOB 116.)

This Court should reject appellant's argument as meritless because the requested limiting instruction was unnecessary. The prosecutor asked the first two referenced questions solely to establish Trieu Binh Nguyen's state of mind when he chose to recant his February 5, 1995, police statement and for no other purpose. (7 RT 1237-1238.) Neither the prosecutor nor Trieu Binh Nguyen ever suggested that he witnessed any shootings other than the shooting of Sang Nguyen on February 5, 1995. When the trial court properly sustained appellant's objection at the end of the redirect examination, the answer to the rephrased question by the prosecutor made no hearsay assertions regarding appellant's alleged involvement in other gang killings. (7 RT 1348.)

Appellant contends that the trial court's error violated his Fifth, Sixth and Fourteenth Amendment rights to due process of law; freedom from the arbitrary denial of a state law entitlement (AOB 117 fn. 75); a fair jury trial; confrontation of witnesses; and reliable determinations of guilt and penalty in a capital case (AOB 116-117). This Court should reject the contention as

forfeited because appellant is making it for the first time in the Court. (*People v. Tafoya*, *supra*, 42 Cal.4th at p.166; *People v. Geier*, *supra*, 41 Cal.4th at p. 609; *People v. Halvorsen*, *supra*, 42 Cal.4th at pp. 413-414.)

The contention is in any event meritless.T he trial court did not violate his federal constitutional rights by not giving the requested instruction because unless it violates a defendant's due process right to a fair trial, the application of ordinary rules of evidence – here the hearsay rule and the limited purpose of which hearsay evidence is introduced – does not implicate the federal constitution. (*People v. Lindberg*, *supra*, 45 Cal.4th at p. 26; *People v. Patida*, *supra*, 37 Cal.4th at p. 439; *People v. Harris* (2005) 37 Cal.4th 310, 336; *People v. Kraft*, *supra*, 23 Cal.4th at p. 1035.) And the state evidentiary rules applied by the trial court did not create a mandatory entitlement implicating appellant's due process rights. (*Chambers v. Mississippi* (1990) 494 U.S. 738, 746-747 [110 S.Ct. 1441, 108 L.Ed.2d 725].)

Appellant contends the alleged error requires reversal of counts six and seven, whether considered individually or cumulatively with the other alleged errors related to those counts, either because it was not harmless beyond a reasonable doubt (AOB 117, 121) or because it is reasonably probable more favorable verdicts would have resulted absent the error (AOB 117, 121).

But because it did not implicate the Federal Constitution appellant has not shown a miscarriage of justice resulted from the alleged error, i.e., that it is reasonably probable that absent the error, he would have enjoyed a different outcome. (*People v. Watson*, *supra*, 46 Cal.2d at p. 836.) Appellant cannot make such a showing because he cannot show different verdicts were reasonably probable had the trial court given the requested limiting instruction and had the trial court not committed the other errors alleged in his earlier arguments. The context of Trieu Binh Nguyen's

challenged testimony made its purpose clear, even without the limiting instruction. The testimony was only proffered to explain Trieu's state of mind when he chose to identify appellant. And respondent has previously discussed why the verdicts would not have changed in the absence of the other claimed errors.

VI. APPELLANT CANNOT PROVE HIS TRIAL COUNSEL WERE CONSTITUTIONALLY INEFFECTIVE FOR FAILING TO PRESERVE THE FOREGOING CLAIMS

Appellant contends that in the event his trial counsel failed to preserve any of the foregoing claims, his trial counsel deprived him of his Sixth and Fourteenth Amendment right to the effective assistance of counsel because there could be no reasonable explanation for trial counsel's professionally unreasonable inaction. (AOB 119-120.)

This Court should reject the contention because appellant cannot meet his dual burdens of proving from the state record that his trial counsel failed to act in a professionally reasonable manner and that different verdicts would have been reasonably probable had they acted differently. (*Strickland v. Washington* (1984) 466 U.S. 668, 679-684 [104 S.Ct. 2052, 80 L.Ed.2d 675]; *People v. Jennings* (1991) 53 Cal.3d 334, 376.)

Appellant alternatively contends that constitutional issues are not waived by inadequate objection. (*People v. Yeoman* (2003) 31 Cal.4th 93, 117-118, 133; *People v. Coddington* (2000) 23 Cal.4th 529, 632; AOB 120.) But this Court has found constitutional claims forfeited when they were not preserved with with adequate objections in the trial court. (*People v. Tafoya*, *supra*, 42 Cal.4th at p. 166; *People v. Geier*, *supra*, 41 Cal.4th at p. 609; *People v. Halvorsen*, *supra*, 42 Cal.4th at pp. 413-414.) It should find the constitutional arguments made in appellant's first five arguments forfeited since appellant has made those arguments for the first time in this Court.

VII. SUFFICIENT EVIDENCE SUPPORTS APPELLANT'S CONVICTIONS OF MURDERING TUAN PHAM (COUNT THIRTEEN) AND THEREBY ACTIVELY PARTICIPATING IN THE NIP FAMILY CRIMINAL STREET GANG (COUNT FOURTEEN)

Appellant argues that insufficient evidence supports his conviction of murdering Tuan Pham (count thirteen) and thereby actively participating in the Nip Family criminal street gang (count fourteen). Appellant contends the evidence established as a matter of law that if he was the driver of the Honda who fatally shot Tuan Pham (AOB 126 fn. 81), he shot Tuan Pham in self-defense (AOB 123-197).

Appellant contends that both federal due process and California Constitution, article I, section 1, require reversal of counts thirteen and fourteen for insufficiency of the evidence because the pertinent provisions of the Federal and State Constitutions embody appellant's right to defend his life, a right he argues was undeniably exercised by the shooter of Tuan Pham. (AOB 127-131.) Appellant alleges that given the evidence surrounding the shooting, this Court must reject any anti-self-defense theories offered to justify the challenged verdicts (counts 13 and 14) in order to avoid serious questions of the constitutional infringement of defendant's right to defend himself. (AOB 126 fn. 80.) Appellant alleges reversal for insufficiency of the evidence is also required given the judicial duty to construe penal statutes as favorably to the defendant as their language and the circumstances of their application reasonably permit (AOB 130-131, 156 fn. 108).

This Court should reject appellant's argument as meritless because viewing the record as a whole in the light most favorable to the verdicts, and drawing all reasonably inferences the jurors could have drawn in favor of the verdicts (*People v. Farnam, supra,* 28 Cal.4th 107, 143; *People v. Kraft, supra,* 23 Cal.4th at p. 1053), substantial direct and circumstantial evidence shows that as the driver of the Honda stopped at the red light at

Westminster and Brookhurst in Garden Grove, appellant murdered Cheap Boy Tuan Pham (count thirteen) in order to benefit Nip Family in its ongoing war with the Cheap Boys (count fourteen). That evidence shows that appellant never thought of fleeing the scene but rather lay in wait for Cheap Boy Tuan Pham in order to murder him once Phan exited his own car in order to approach appellant's car. The supporting trial court evidence includes the entire history of appellant's activities as a Nip Family gang member, the part appellant played in the Nip Family-Cheap Boy war leading up to the shooting of Tuan Pham, and all the circumstances surrounding appellant's shooting of Tuan Pham and its immediate aftermath.

A. The Factual History Leading up to the Shooting of Tuan Pham

Westminster Police Detective and gang expert Mark Nye opined that by May 1995, Nip Family had more than 50 members. (16 RT 3178.) Primary activities of Nip Family in 1994 and 1995 included homicide, attempted homicide, assault, (16 RT 3178), and assault with a deadly weapon (16 RT 3178-3179). Asian Street gangs did not consider turf important. (16 RT 3180-3181.) Instead, they involved themselves in street warfare wherever they happened to be at the time. (16 RT 3181.) If they encountered rivals they would shoot it out at the site of the encounter. (16 RT 3181.) Asian gangs sought to be number one. (16 RT 3183.) Shooting rivals enhanced the status of the gang and the gang member within the gang by creating fear of the gang. (16 RT 3183-3185.)

Asian gang members had to support other members of the same gang. (16 RT 3183.) Non-shooters traveling in the same car as the shooter would intimidate witnesses or victims by their numbers. (16 RT 3185.) They would look out for rivals and for police. (16 RT 3186.) They would step in if something happened to the driver or shooter. (16 RT 3185-3186.) Gang

members would do whatever it took to overcome the rival. (16 RT 3216.) Planning and preparation preceded gun battles between the gangs. (16 RT 3216.) Someone who bailed out of the gun battle would not be acting as a gang member should. (16 RT 3185.) Somebody who ran from the scene of a confrontation would be" jumped out of the gang," i.e., forced to leave the gang by means of a serious beating administered by other gang members. (16 RT 3184.)

In order to find out about rivals, gang members had cell phones and pager networks, and wrote letters to each other while in custody. (16 RT 3193. They talked in the streets. (16 RT 3193.) Females sometimes supplied information about rival gangs and associate gangs. (16 RT 3193.) Gang members had to know their rivals at any given moment in order to protect themselves and ready themselves for retaliation. (16 RT 3194.) Nip Family rivals in 1994 and 1995 included Cheap Boys, T.R.G. (Tiny Rascals Gang) and V. (16 RT 3196-3197.) The Nip Family-Cheap Boy rivalry was deadly in 1994 and 1995, as was the Nip Family-Tiny Rascals Gang rivalry. (16 RT 3197, 3208-3211.) Each side would try to kill the other on sight. (16 RT 3197.) Any gang member killing a rival gang member would expect retaliation. (16 RT 3214.) Retaliation for an assault had to be equal or greater to the assault in order to restore face or respect. (16 RT 3186-3187.) Anything less than murder would not regain face for a murder. (16 RT 3195.) Gangs retaliated against other gangs. (16 RT 3188.) But they did not need to retaliate against the same person that did the killing or assault. (16 RT 3188-3189.)

Asian gang members rarely spent time in the street by themselves. (16 RT 3198.) Doing so was called "slipping." (16 RT 3198.) If a gang member "slipped" by getting caught by himself with no backup, he wound up dead. (16 RT 3198.) Asian gang members took close associates or other gang members in order to look for rival gang members and to

increase their status in the gang community. (16 RT 3198.) Hunting rivals was a major gang activity. (16 RT 3199.) Gang members traveling in cars in order to hunt for rivals had ready access to firearms if they spotted their rivals. (16 RT 3201.) Not everyone was armed because weapons were hard to come by. (16 RT 3202.) Therefore, one or two good guns in a car generally sufficed. (16 RT 3202.)

Given the state of war existing between the Nip Family and Cheap Boys in 1994 and 1995, gang members traveling together could agree to shoot a rival gang member within a very short period of time as soon as the rival gang member was spotted. (16 RT 3210-3212.) Both gangs sought rivals of the other gang. (16 RT 3212-3213.) Gang members commonly acted together to ensure success. (16 RT 3211.) Nip Family gang members spotting Cheap Boys would attempt to kill them and vice versa. (16 RT 3211.)

Detective Mark Nye met appellant in 1990 in the company of other members of the Nip Family gang. (16 RT 3203.) Nye later contacted appellant while visiting appellant's residence with his partner, Probation Officer Steve Gotts, in late 1993 and early 1994. (16 RT 3202-3203.) When Nye visited appellant at his house, appellant claimed gang membership by admitting he was part of the gang. (16 RT 3203.) Other NIP FAMILY gang members, rival gang members, confidential informants, and investigators informed Nye appellant was a Nip Famly gang member. (16 RT 3205.) On a few occasions, appellant self-admitted his gang membership to Nye. (16 RT 3205-3206.) Appellant was with another Nip Family gang member, Huy Pham, when he was ultimately arrested for the charged crimes on May 25, 1995. (16 RT 3205.)

Nye personally contacted Tuan Pham, a self-admitted Cheap Boy. (17 RT 3308-3309.) Vinh Kevin Lac was another self-admitted Cheap Boy. (17 RT 3308.) Tin Duc Phan was a Cheap Boy in 1994 and 1995 (17 RT

3311-3312), as were Huu Thien Tran (17 RT 3312), Viet Quoc Tran (17 RT 3312), Sang Duc Nguyen (17 RT 3313), and Khoi Huynh (17 RT 3315). Binh Quan Tran admitted being a Cheap Boy during the investigation of the February 5, 1995 Sang Nguyen homicide (17 RT 3312-3313).

Khoi Huynh joined the Cheap Boys gang in 1990 or 1991. (10 RT 1883.) He was with the gang six or seven years. (10 RT 1883.) Huu Tran was a Cheap Boy in 1995. (10 RT 1884.) He was a Cheap Boy when Khoi joined Cheap Boys. (10 RT 1884.) Khoi knew Duy Vu, another Cheap Boy. (10 RT 1884-1885, 1904.) Khoi knew Tuan Pham, another Cheap Boy. (10 RT 1885.) Duy Vu had also been a Cheap Boy when Khoi was "jumped in," i.e., brought into the gang by means of a physical beating (usually a token beating) administered by other Cheap Boys. (10 RT 1885.) Khoi knew Sang Nguyen, another Cheap Boy. (10 RT 1886-1887.) The Cheap Boys and Nip Family did not get along in 1995. (10 RT 1887.) They engaged in warfare. (10 RT 1887.)

Vinh Kevin Lac, aka Doughboy, was an active Cheap Boys gang member between 1993 and 1995. (9 RT 1638, 1660-1661.) Lac was an active member of the Cheap Boy gang on July 21, 1994. (9 RT 1638, 1659.) Lac was active in the Cheap Boy gang about 1 ½ years during the period between 1993 and 1995 and associated with the Cheap Boys gang about 6 years, a 6-year period which included his active gang membership. (9 RT 1637.) He knew the Nip Family gang members were enemies of Cheap Boy gang members. (9 RT 1628.) He knew the two gangs were at war. (9 RT 1629.)

Lac knew Khoi Hyunh as a friend (9 RT 1696), knew Hyunh associated with the Cheap Boys (9 RT 1697), knew Sang Nguyen as a friend (9 RT 1699), knew Tuan Pham as a friend, and knew Tuan Pham was a Cheap Boys gang member (9 RT 1699). Lac withdrew from active membership in the Cheap Boys gang after his wife became pregnant with

his child in January of 1995. (9 RT 1638, 1652, 1658-1659.) Lac testified at appellant's trial even though he recalled from his life in the gang culture that "ratting" or informing was against gang rules and dangerous to his well-being. (9 RT 1635-1636, 1661-1662.)

1. The July 21, 1994, shooting of Tony Nguyen (counts two and three)

In the Asian gang culture, a gang member must know who his enemies are in order to be safe in the streets. (9 RT 1632.) If a gang member learns someone is in a rival gang, he will tell fellow gang members. (9 RT 1632.) Some time before the July 21, 2004, shooting of Tony Nguyen, appellant had been Lac's "downstairs neighbor" in the 21st Street apartment building in Westminster, where Lac used to live. (9 RT 1629-1620.) Lac lived upstairs in the apartment building while appellant lived downstairs. (9 RT 1630.) Lac remembered bumping into appellant several times before he found out that appellant was associated with the Nip Family, a discovery Lac made about a month and a half after moving into the apartment building. (9 RT 1630.)

As Lac walked upstairs on a Saturday, a group of appellant's friends were leaving the apartment building. (9 RT 1631.) One of appellant's friends called out Lac's name. (9 RT 1631.) Lac believed appellant's friends (and therefore appellant) knew Lac was a Cheap Boy because in the gang culture, when someone calls out your name, they know your gang. (9 RT 1631.) Lac's friend, Cheap Boy Tinh Dam, told Lac, sometime before the July 21, 1994, shooting of Tony Nguyen, that appellant was a Nip Family gang member. (9 RT 1633-1634.)

On July 21, 1994, Tony Nguyen - an Orange gang member nicknamed Chubby Cheeks (9 RT 1619-1620) - and Cheap Boy Viet Quoc Tran were driving Cheap Boy gang members and associates home in separate cars. (9 RT 1667.) Viet Tran drove an Oldsmobile and Tony Nguyen followed Viet

Tran in a car belonging to Cheap Boy Tinh Dam (9 RT 1620), aka Little Elvis (9 RT 1682). Viet Tran's girlfriend Linda Vu, a former Southside Scissors gang member who associated with Cheap Boys, rode in Viet Tran's Oldsmobile along with some other passengers. (9 RT 1667-1669.)

Tony Nguyen drove Tinh Dam's car. (9 RT 1620.) Lac rode as the right front seat in the car driven by Tony Nguyen. (9 RT 1619-1620.) Tin Dam sat in the back seat of the car along with his girlfriend Chynna (Thoa) Vu and Truong Nguyen. (9 RT 1620.) Chynna Vu was Linda (Thoa) Vu's sister. (9 RT 1668.) Truong Nguyen, aka Trippy, "kick[ed] back" with the Lonely Viets. (9 RT 1663.)

Shortly before 2:00 pm. a carload of people (three or more) passed Tony Nguyen's car at the intersection of Trask and Harbor in Garden Grove as Tony Nguyen drove down Harbor. (9 RT 1619, 1621.) Lac recalled the car that passed them as a "carload of Asians." (9 RT 1624.) Lac recalled the back seat passengers of that car looking back at them as the car passed them. (9 RT 1621-1622.) The car that passed them drove through the intersection while the light was still yellow. (9 RT 1621-1622.) Tony Nguyen stopped at the intersection for the red light. (9 RT 1621.)

After the light turned green, Tony Nguyen continued driving down Harbor. (9 RT 1622.) Lac saw the car that had passed them inside the enter-exit area of a fast food restaurant parking lot as Tony Nguyen neared the corner of Harbor and Garden Grove Boulevard. (9 RT 1622-23.) The car exited the fast food restaurant parking lot and followed Tony Nguyen's car as Nguyen turned right on Garden Grove Boulevard. (9 RT 1624-1625.) Tony Nguyen said he knew the girl driving the car because his friend used to date her. (9 RT 1625, 1674-1676.) When Tony Nguyen stopped at the stop light at the intersection of Garden Grove and Palm, the girl's car pulled next to them in the lane immediately to their left. (9 RT 1625-1626.) Tony Nguyen's car and the girl's car were second in line in their respective lanes.

(9 RT 1672-1673.) Viet Tran's Oldsmobile was immediately ahead of the girl's car. (9 RT 1673.)

Tony Nguyen and the girl smiled at each other. (9 RT 1625.) A man wearing a hat and seated in the right front passenger's seat of the girl's car looked at Tony Nguyen's car and smiled. (9 RT 1626, 1702.) Other male passengers in the girl's car also smiled. (9 RT 1628.) The male passengers in the girl's car looked familiar to Lac. (9 RT 1677-1678.) Lac therefore asked Tinh if he knew any of the passengers in the girl's car. (9 RT 1678-1679.)

At that point, the light turned green and four or five gunshots immediately rang out. (9 RT 1626, 1679.) Lac closed his eyes and took cover. (9 RT 1627.) The car Tony Nguyen had been driving took off as if Nguyen had slammed on the gas pedal. (9 RT 1627.) The car repeatedly crashed into the curb. (9 RT 1627.) Tinh yelled that Tony had been shot. (9 RT 1627.) Tinh and Lac tried to steer the car. One of them succeeded in pulling the key from the ignition in order to stop the car. (9 RT 1627.) Tony Nguyen lay across the front seat; he had been shot in the neck and could not move. (9 RT 1627.)

Lac recalled that Viet Tran's Oldsmobile and the girl's car both drove away eastbound on Garden Grove Boulevard when the light turned green, the girl's car following Viet Tran's car. (9 RT 1681-1682.) While Tinh Dam and Chynna (Thoa) Vu stayed with Tony Nguyen, Lac followed Thoa Vu and Truong Nguyen to a nearby pay phone, where Thoa phoned the police. (9 RT 1683.) As Thoa phoned the police, Lac left the scene on foot, walking eastbound on Garden Grove to Fairfield Avenue. (9 RT 1684.) Before he left, Lac told Thoa not to tell the police he had been at the scene. (9 RT 1694.)

A few days after the shooting, appellant came to the front door of Lac's residence and asked Lac, "What's up with the cops?" (9 RT 1634.)

When someone comes up and asks, "What's up with the cop[s]," he generally means, "Have you talked to the police?" (9 RT 1635.) Lac said he had not said anything to the police. (9 RT 1635.) Appellant and others who accompanied appellant then left. (9 RT 1635.)

Lac recalled that at the time of the shooting, the back seat passenger immediately behind the shooter looked familiar. (9 RT 1634.) Lac now realized that appellant was the back seat passenger immediately behind the shooter. (9 RT 1629, 1634, 1641-1644, 1733-1738.) Lac told police he believed the males in the girl's car were Nip Family gang members. (9 RT 1628, 1700.) He identified Nghia Phan's photo as the photo of the shooter, but told police he did so only because he had heard from others that he was the shooter and because he had seen Nghia Phan a few times after the shooting. (9 RT 1729-1730, 1735-1736.) He also identified Nghia Phan from a live lineup. (25 RT 4696.)

Monica Tran told detectives she had been at Chi Phuong's house, appellant's street sister's address. (10 RT 2019.) She told detectives that when she was at the house, appellant, Nghia, Long, Hiep Vinh, and were also there. (10 RT 2019.) She saw weapons when she was there. (10 RT 2019.) She told a detective or probation officer that she saw appellant show Chi Phuong three different handguns, a TEK 9, a .45, and a .380. (10 RT 2020.) Friends told her Cheap Boys and T.R.G. were enemies of Nip Family. (10 RT 2021.) People who associated with the gangs knew how hot the war was in February, March, April and May of 1995. (10 RT 2023.)

Tony Nguyen recalled driving some Cheap Boys and Cheap Boy associates home on July 21, 1994. (8 RT 1511.) He remembered Tinh Dam riding in the back seat directly behind him and Tinh Dam's girlfriend Chynna (Thoa) Vu sitting next to Tinh in the middle of the back seat. (8 RT 1511-1512.) He remembered others in the car but did not know their names. (8 RT 1511.) He recalled he had one front seat passenger and three

back seat passengers. (8 RT 1537.) After leaving from Tinh Dam's house (8 RT 1512) and dropping of one of Tinh's friends at Fifth and Harbor (8 RT 1512-1513), he drove down Harbor towards Garden Grove Boulevard (8 RT 1513). Another car accompanied Nguyen when he was driving the Cheap Boys home because there were too many people for one car. (8 RT 1538.)

When he passed a fast food restaurant just before turning right onto Garden Grove Boulevard, he saw a girl driving a car out of the fast food restaurant parking lot. (8 RT 1514-1515.) He recognized the girl from seeing her twice at the Bicycle Club Casino. (8 RT 1515.) He told Tinh he knew the girl. (8 RT 1516.) The girl (My Tran) began following Nguyen's car. (8 RT 1517, 1523.)

As Tony Nguyen stopped for the red light on Garden Grove Boulevard, My Tran pulled up next to Nguyen's car in the lane to the left of Nguyen's car. (8 RT 1517.) About seven feet separated the passenger's side of the Tran's car from the driver's side of Nguyen's car. (8 RT 1518.) When he turned to smile at Tran, Nguyen noticed a male passenger wearing a hat in the front passenger's seat of Tran's car. (8 RT 1519.) Nguyen thought there were two or three passengers in the back seat of Tran's car. (8 RT 1518-1519.) Nguyen then looked back at the signal light. (8 RT 1520.) As soon as it turned green, he heard five or six gunshots. (8 RT 1521, 1532.) The man with the hat in the front passenger's seat of the Tran's car had shot Nguyen. (8 RT 1522.) Immediately before the gunshots Nguyen thought he heard the front passenger in My Tran's car say something like, "Hey, what's up? (8 RT 1537.) Nguyen fell to his right. (8 RT 1521.) He tried to sit up and grab the steering wheel when he thought he heard the car spinning out, but he could not move. (8 RT 1526.) Nguyen remembered someone in the back seat jumping up and pulling the emergency brake. (8 RT 1527.) He also remembered the car bouncing off

the curb because no one was holding the steering wheel. (8 RT 1527.) The parties stipulated that Tony Nguyen remains paralyzed from his neck to his feet as a result of the gunshot wound to his neck, with some ability to move his arms but not his fingers. (16 RT 3149.)

After the parties stipulated that Tinh Dam died on May 16, 2006, from injuries received in another auto accident (6 RT 1123-1124; see also 9 RT 1800) Tinh Dam's prior testimony was read to the jury (6 RT 1124). Dam rode in the car driven by shooting victim Tony Nguyen on July 21, 1994. (6 RT 1124-1125.) He sat in the back seat behind Tony Nguyen. (6 RT 1129.) Tinh Dam's girlfriend was also in the car. (6 RT 1125.) Tinh Dam did not remember if there were other people in the car. (6 RT 1125-1126.) Some other people accompanied them in another car. (6 RT 1126.) The people in Tony Nguyen's car and in the accompanying car associated with the Cheap Boys gang. (6 RT 1126.) Tinh Dam associated with the Cheap Boys. (6 RT 1127.) The Cheap Boys were rivals of the Nip Family gang. (6 RT 1127.) Cheap Boys gang members and Nip Family gang members were enemies. (6 RT 1127.)

Tony Nguyen was stopped at a red light when a car pulled up beside Tony Nguyen's car (6 RT 1125) in the lane to the left of Tony Nguyen's car (6 RT 1133). Tinh Dam saw two people in the front seat of the car that pulled up next to Tony Nguyen's car. (6 RT 1125.) Someone - Tinh Dam thought the front seat passenger - shot at them from the car that pulled up next to them. (6 RT 1125.) The car from which the shots were fired left the scene. (6 RT 1129.) The car that had accompanied Tony Nguyen's car also left the scene. (6 RT 1130.) Tinh Dam did not remember any shots being fired from the car that accompanied Tony Nguyen's car. (6 RT 1131.)

Linda Vu, a witness called by the defense, was a passenger in the Oldsmobile driven by Cheap Boy Viet Quoc Tran which accompanied Tony Nguyen's car when the cars were stopped at the red light at the

intersection of Garden Grove Boulevard and Palm on July 21, 1994. (21 RT 3955-3958.) She recalled that her sister and Tinh Dam road in Tony Nguyen's car. (21 RT 3958.) She ducked down when she heard the gunshots (21 RT 3956.) When she glimpsed at the car from which the shots were fired she remembered seeing three or four people inside the car but could not identify them. (21 RT 3959-3960.) Viet Tran made a u-turn after Linda Vu heard the gunshots, but she could not remember where they went after that (21 RT 2961), could not remember if they picked anyone up who had been in Tony Nguyen's car (21 RT 3962), and could not remember if there were other people in Viet Tran's car (21 RT 3963) or in Tony Nguyen's car (21 RT 3964). Although she told defense counsel that nothing could refresh her recollection concerning the details of the events of that day (21 RT 3959, 3961-3962, 3964), a report shown her on cross-examination (discovery p. 473) refreshed her recollection that "Trippy" and "Doughboy" were both passengers in Tony Nguyen's car (21 RT 3965-3967).

After police arrived at the scene of the shooting, Chynna Vu gave police a description of the Cheap Boys car that had accompanied them to the scene of the shooting. (6 RT 1113.) After getting a description of the car, and after getting the license plate number of the car from a sergeant at the scene, Investigator Fischer ran a registration check on the number and ascertained that the registered owner of that car was one Viet Quoc Tran, who resided at 805 North Mountain View Street, Santa Ana. (6 RT 1113-1117.) After driving to that address, Fischer saw the car in question - an Oldsmobile license plate 1FEA968- parked there. (6 RT 1115-1116.)

2. The November 24, 1994, shooting of Huy Nguyen (counts four and five)

Huy "Pee Wee" Nguyen drove to the Mission Control video game arcade in Garden Grove on the evening of November 24, 1994. (7 RT

1297-1301.) He took his girlfriend Vicky with him. (7 RT 1300.) He parked near a telephone by Mission Control. (7 RT 1300, 1367.) He and Vicky then went into Mission Control to watch people playing games. (7 RT 1300-1301.) He recognized someone who had gone to his school but did not know his name. (7 RT 1302.)

Huy went outside a short time later. (7 RT 1302.) After he finished smoking a cigarette, a man approached him and asked, "Are you in a gang? Do you belong to T.R.?" (7 RT 1302-1303.) Huy had heard that T.R. stands for a gang named Tiny Rascals. (7 RT 1303.) Huy had a friend in T.R. but was not a gang member. (7 RT 1303.)

Huy therefore told the man only that he had friends in the gang. (7 RT 1303.) The man nevertheless hit him in the face. (7 RT 1305.) Huy ran back inside Mission Control after hearing gunshots. (7 RT 1306-1307.) He saw blood on his body after falling to the floor inside Mission Control. (7 RT 1306.) The blood came from his nose, ear, and "everywhere." (7 RT 1306.) He felt no pain and could not move his body. (7 RT 1306-1307.) He asked a Mission Control employee to call the ambulance before losing consciousness. (7 RT 1307.) As he lost consciousness, he felt someone was leading him up into the sky. (7 RT 1308.)

He regained consciousness later in the hospital. (7 RT 1308.) He could not move. (7 RT 1308.) Doctors examined him and talked to his family. (7 RT 1309.) He remained in the hospital for five months. (7 RT 1309.) He regained motion in his neck after four months. (7 RT 1309.) By the time of trial Huy could not walk or move his fingers, but could move his arms a little. (7 RT 1309-1310.) Huy could not remember the face of the man who approached him and asked if he belonged to T.R. (7 RT 1310.) Huy did not want to testify. (7 RT 1310.) Huy could not pick anyone from a pretrial photo lineup shown him by Officer Davis. (7 RT 1315-1316.)

Binh Vo drove Anh Truong and Phuc Lu to Mission Control in Garden Grove on the evening of November 24, 1994. (6 RT 1144-1146.) After they arrived there, Phuc Lu got out of the car to smoke. (6 RT 1147.) Suddenly he heard gunshots and saw people running from Mission Control. (6 RT 1148, 1152.) He saw someone running out of Mission Control with a gun. (6 RT 1154.) The man with the gun ran to a car (6 RT 1155) parked in the Mission Control parking lot. (6 RT 1156.) The man with the gun was about 23 feet from Phuc Lu when he passed him. (6 RT 1155-1156.) When he went inside to see what had happened, Phuc Lu saw his friend Huy "Pee Wee" Nguyen on the floor with bloody injuries to his body. (6 RT 1149-1151.) As Phuc Lu held him, Pee Wee said he thought he was going to die. (6 RT 1150.)

Chamroeun (Shannon) Choeun walked to Mission Control with her friends Chris Nguyen and Cindy (Channthai) Pin on the evening of November 24, 1994. (7 RT 1352-1354.) After spending a little time inside, they walked back outside to smoke. (7 RT 1353-1354.) Five or ten minutes later, Choeun saw Pee Wee Nguyen arguing with another man in Vietnamese (7 RT 1355-1356), a language she does not speak (7 RT 1355). A fight broke out which others attempted to stop. (7 RT 1357.)

Choeun then saw a man aim and fire a gun twice as everyone began running. (7 RT 1358-1359.) When her recollection was refreshed with her preliminary hearing testimony, Choeun recalled observing that the gun was black when she saw the gun being fired; she also recalled seeing Pee Wee fall to the ground outside Mission Control when he was shot. (7 RT 1391-1392.) She then saw Pee Wee get to his feet and walk back into Mission Control. (7 RT 1392-1393.) Cheoun heard at least two more gunshots after Pee Wee fled back into Mission Control. (7 RT 1393.) Choeun ran towards a café shop across the street following the gunshots. (7 RT 1360.)

Choeun saw the gunman running away towards the gas station. (7 RT 1396-1397.)

The police had arrived when Choeun returned to Mission Control. (7 RT 1361.) When they asked if she could identify the person she saw shooting the gun, Cheoun said she could. (7 RT 1361.) Choeun later identified appellant as the shooter at a live lineup. (7 RT 1361.) When she identified appellant at the live lineup, she wrote down that he was "the one who I saw who shoot the guy." (7 RT 1384.) Choeun also identified appellant as the shooter in court. (7 RT 1361-1362, 1364.)

Choeun had seen appellant a few days before the shooting when she was invited by Cindy Pin to a gathering at a hotel (referenced elsewhere as motel). (7 RT 1362-1363.) Cindy had known someone who knew appellant and had invited Choeun to the hotel so they could "kick it" by visiting with friends there. (7 RT 1363.) At that gathering, Choeun remembered one of Cindy's friends showing her two guns. (7 RT 1364.) Choeun told police that she saw appellant showing off the guns in the motel room on Tuesday, November 22, 1994. (7 RT 1374.) When Choeun saw the shooting, she recognized appellant as the person she had seen two days before at the motel room. (7 RT 1374.)

Channthae (Cindy) Pin testified that when she was outside of Mission Control with Choeun (8 RT 1407-1409), she saw Pee Wee yell something in Vietnamese (8 RT 1409-1411) to a man Pin had seen a few nights earlier at the "mo" (motel) (8 RT 1413, 1415-1417). Cindy Pin recalled seeing the man who had been entering Mission Control at earlier motel gatherings and recalled him displaying two handguns at the motel gatherings. (8 RT 1420-1421.) She described the handguns as a black handgun and a grey handgun (8 RT 1420). She had seen the man over a period of four to five hours during two gatherings she attended at the motel (8 RT 1415, 1417, 1437, 1487, 1493-1494). She recalled seeing two men named Andy at the

gatherings, one nicknamed "Mexican Andy" and the other named Andy Ja. (8 RT 1417-1418, 1421, 1464.)

Cindy Pin saw a man who had been entering Mission Control (8 RT 1413) stop and turn around to look at Pee Wee after Pee Wee yelled at him (8 RT 1413, 1492). Pee Wee approached the man and punched him. (8 RT 1422-1423.) When the man punched back (8 RT 1424), several men joined Pee Wee in his fight with the man (8 RT 1425). Pee Wee pushed the man against a pillar. (8 RT 1430.) The man fell to the ground. (8 RT 1430.) Pee Wee and the others who joined the fight punched and kicked the man when he fell to the ground. (8 RT 1431.) One of them pulled the man's hair in an effort to keep the man on the ground. (8 RT 1433.) Pee Wee grabbed the man by the neck. (8 RT 1433.)

The man nevertheless got to his feet and punched back. (8 RT 1434.) He knocked Pee Wee and a second assailant to the ground. (8 RT 1434.) A few seconds later, the man drew a gun from his waistband with his right hand, and shot Pee Wee in the stomach. (8 RT 1435-1436, 1438.) The gun looked like one of the guns Pin had seen at the motel. (8 RT 1436.)

Pin heard three or four more gunshots as Pee Wee got to his feet and stumbled back into Mission Control. (8 RT 1438-1440.) The man followed Pee Wee into Mission Control holding the gun in his right hand. (8 RT 1439-1440, 1484.) Pin heard two or three more gunshots from inside Mission Control. (8 RT 1440, 1484-1485.) Everyone then started running from Mission Control. (8 RT 1440.)

Pin attended a live lineup at the County Jail on May 31, 1995. (8 RT 1441.) She picked out appellant as the man who shot Pee Wee, writing, "The number five shot the guy." (8 RT 1442-1443.) Pin identified appellant as the shooter at the preliminary hearing. (8 RT 1448.)

In her preliminary hearing testimony and her redirect examination trial testimony, Pin testified that several men backed up appellant in his

fight with Pee Wee and Pee Wee's friends. (8 RT 1485-1487.) But there were more men on Pee Wee's side than on appellant's side. (8 RT 1500-1501). Pin also testified that one or more men entered the fight in an attempt to break up the fight before the gunshots were fired. (8 RT 1487, 1501.) Pin recalled testifying in an earlier proceeding that Pee Wee was shot two or three times before he stumbled into Mission Control. (8 RT 1483.)

Pin knew that Pee Wee associated with the Tiny Rascals Gang (8 RT 1412.) Pee Wee had also introduced himself as a Tiny Rascals gang member when Pin had and/or her friends had seen him in the past. (8 RT 1445-1445.)

Joseph-Vu Song Tran and his friend Adrian Hyunh were playing video games inside Mission Control when the gunshots were fired outside Mission Control. (8 RT 1554-1555.) People began running and screaming when the shots were fired outside. (8 RT 1555.) Joseph got under a pinball machine and pulled Adrian down with him. (8 RT 1557-1559.)

From his spot under the pinball machine, Joseph saw a man limp into Mission Control before collapsing onto the floor. (7 RT 1559-1561.) The man lay on his back or his side. (8 RT 1563.) Seconds to minutes later, a second man ran into Mission Control, stood over the man who had collapsed onto the floor, and shot him two or three times. (8 RT 1561-1566.)

Hoan Ngoc Bui was playing a video game inside the Mission Control video game arcade at about 9:00 p.m. on November 24, 1994, when he heard two or three gunshots outside Mission Control. (14 RT 2765-2766.) He turned around to see someone lying on the floor inside Mission Control next to the front desk (14 RT 2767-2768), then briefly turned away (14 RT 2768). When Bui looked back in that direction, he saw a gunman standing over the man lying on the ground and pointing his gun down at the man.

(14 RT 2768-2769.) The gunman shot the man three or four times. (14 RT 2769-2770.) Bui only saw the back of the gunman's head (14 RT 2768) and never got a look at the gunman's face (14 RT 2770). The gunman held the gun in his right hand. (14 RT 2768.)

Garden Grove Police Officer Robert Campbell responded to the Mission Control Arcade at 8:30 p.m., November 24, 1994, immediately following the shooting. (8 RT 1579-1580.) When he questioned Phuc Lu, Lu told Campbell that he saw the gunman run out of Mission Control and get into the back seat of a 1991 or 1992 Toyota-type car. (8 RT 1580-1581.) Lu told Campbell that when he found Pee Wee lying injured inside Mission Control, Pee Wee told Lu, "Can't breathe. I'm going to die." (8 RT 1581.) Lu told Campbell that Pee Wee associated with the Tiny Rascals Gang. (8 RT 1582.) Lu told Campbell that he knew people from the Tiny Rascals Gang and the Nip Family gang, but did not get along with the people from Nip Family. (8 RT 1582.)

When Campbell questioned Anh Truong, Truong told Campbell she heard gunshots and saw the shooting victim turn and run towards Mission Control. (8 RT 1584.) She saw the victim fall down by a coke machine just outside the Mission Control door. (8 RT 1584.) The gunman then approached the gunman and fired four or five gunshots, all apparently missing the victim. (8 RT 1585.) The victim then got up and ran inside Mission Control. (8 RT 1585.) She heard two more gunshots before seeing the gunman run out of Mission Control. (8 RT 1585.) Speaking Vietnamese, the gunman said, "If anyone is against me, I'll shoot them too." (8 RT 1585.)

As she started to run away following the gunshots defense witness Me Young Kim saw the victim struggle following the gunshots in order to get into Mission Control. (18 RT 3472-3474.) She heard two additional shots

after the victim tried to flee the shooter by going back into Mission Control. (18 RT 3473-3474.)

Kim was at the Hospitality Inn with Cindy and Shannon for a few hours. (18 RT 3461.) She remembered seeing a revolver belonging to one of the men. (18 RT 3461.) She remembered from the report that two men were named Andy and one was named Jimmy. (18 RT 3462.)

Kim told a Garden Grove police detective that she recognized the shooter as somebody she knew from the motel the night before. (18 RT 3465.) She told the detective that Andy Ja, Andy May, and Jimmy began assisting the shooter by pulling the victim away from the shooter before the shooter shot the victim. (18 RT 3466.) She told the detective that the two Andys and Jimmy later said they were supposed to help the shooter during the fight. (18 RT 3467.) She told the detective she recognized the shooter as someone she met the night before at a local motel. (18 RT 3468.) She believed the shooter was with Nip Family when she spoke with the detective. (18 RT 3468-3469.)

When she was shown pictures while speaking to the detective, she pointed out the two Andys and Jimmy. (18 RT 3469.) Ja and May were nicknames. (18 RT 3469.) She also new Andy May as Mexican Andy. (18 RT 3469.) They were friends with "White Boy" and White Boy was friends with the shooter. (18 RT 3470.) She did not remember whether White Boy's name was Nghia Phan. (18 RT 3470.) The men used their nicknames at the Hospitality Inn. (18 RT 3470.) She remembered that White Boy was at the motel and remembered hearing that the shooter was White Boy's friend. (18 RT 3467.) She believed the shooter was Nip Family and a friend of White Boy by hearing it from Cindy and Shannon, who told her what they heard from others. (18 RT 3483-3484.) She told police Andy Ja got involved in the fight based on all she heard. (18 RT 3483.) Cindy told Kim what White Boy said. (18 RT 3452.) During her

discussions with Shannon and Cindy, Cindy and Shannon told her they heard the same thing from White Boy. (18 RT 3459.)

Mexican Andy acknowledged belonging to the Notorious Viet gang and having once belonged to the Natoma Boys gang back in 1994. (18 RT 3498.) He estimated spending 1 1/2 years as a gang member. (18 RT 3498.) He joined Notorious Viets in 1995. (18 RT 3498.) Four males "jumped him" into the Natoma Boys in mid 1994 by beating him up for about a minute. (18 RT 3499.) Natoma Boy enemies included Cheap Boys. (18 RT 3499.) Their friends included Dragon Family. (18 RT 3500.) The Natoma Boys and Nip Family did not have a problem in 1994. (18 RT 3500.) He would let Nip Family members into the motel if they came. (18 RT 3500.) He heard a lot of Nip Family members had brothers in Natoma Boys. (18 RT 3500-3501.) Mexican Andy did not know who rented the motel room. (18 RT 3501.) He and Andy Ja spent time there after someone else rented it. (18 RT 3501.)

While a Natoma Boy in 1994 had a duty to jump in and help a homeboy involved in a fight (18 RT 3502-3503), Mexican Andy claimed he owed no such duty to allies or Nip Family members (18 RT 3503). He claimed did not help anyone in a fight at Mission Control. (18 RT 3503-3504.)

Mexican Andy knew that in jail and in the gang subculture language a "rat" is someone who tells on somebody. (18 RT 3502.) It is not good to tell police a gang member committed the crime because it is not your problem. (18 RT 3502.) It is important for Asian gang members and the gang to be respected. (18 RT 3508.) He never "ratted" on a rival gang member. (18 RT 3511.) Ratting does not bring the gang or the gang member respect. (18 RT 3511-3512.) He never knew a gang member to be a "rat." (18 RT 3512.)

Defense witness Khanh Troung Nguyen (nicknamed Andy Ja [19 RT 3551]) knew appellant from Westminster High School and Westminster Church. (19 RT 3550-3551.) Andy Ja met some runaways in a motel room along with his friends Jimmy and Mexican Andy the day before. (19 RT 3551.) Andy Ja acknowledged he was a Natoma Boy in 1994. (19 RT 3552.) Two older members let him walk in. (19 RT 3553.) Natoma Juniors were about 16 or 17 whereas Natoma Boys were about 21, 25, 26. (19 RT 2565.) The Juniors get along with everyone. (19 RT 3566.) He explained that gang wars start when respect is not shown to a gang. (19 RT 3565.)

Andy Ja had heard of the Nip Family. (19 RT 3562.) He did not know whether Nip Family member were older brothers of Natoma Boys members because he was a Junior Natoma Boy who did not hang around with, and were not related to, Natoma Boys. (19 RT 3563.) He had known appellant quite awhile before that date. (19 RT 3567.)

Andy Ja was currently in custody on charges regarding a criminal street gang. (19 RT 3564.) He had two guns in his house. (19 RT 3562.) A gang allegation charged he had those guns to assist the gang in felony conduct. (19 RT 3564-3566.) He was charged with assisting Natoma Boys, Jr., earlier in the year that he testified (1998). (19 RT 3569.)

The parties stipulated that Huy Nguyen underwent surgery from 9:30 p.m. to 12:30 a.m. at the University of California, Irvine, Medical Center after being taken there on November 24, 1994. (16 RT 3148.) There were four bullet wounds to his front torso, two near his right shoulder and one in his right chest below his right nipple. (16 RT 3149.) There were two bullet wounds in his right leg, one above the knee and one in his thigh. (16 RT 3149.) He would have died without medical assistance. (16 RT 3149.) He remains paralyzed from his neck to his feet, with some ability to move his arms, but not his fingers. (16 RT 3149.)

3. The February 5, 1995, shooting of Sang Nguyen (counts five and six)

On February 5, 1995, appellant shot and killed Cheap Boy Sang Nguyen just outside the front door of the Dong Kahn Restaurant in Westminster as Sang Nguyen attempted to shake his hand. (See respondent's summary of that crime in respondent's argument I, *ante.*) Gang expert Nye opined that a person shooting and killing a Cheap Boy in public actively participates in the Nip Family and benefits the Nip Family by gaining face for himself as an individual and the Nip Family as a gang insofar as he is seen by witnesses and other rivals in public. (16 RT 3207-3208.) He further gains face by intimidating witnesses insofar as the plain view killing shows he does not fear the witnesses. (16 RT 3209.) He gains face by shooting the Cheap Boy in plain view of others while showing no remorse for the deed. (16 RT 3209.)

4. The March 11, 1995, shooting of Khoi Huynh (counts nine and ten)

Jeremy Lenart was playing pool with some friends inside the Rack and Cue Pool Hall in Stanton at about 9:30 p.m. on March 11, 1995. (9 RT 1750-1751.) A few young male and female Asians who had been playing pool began leaving the pool hall about that time. (9 RT 1752-1753.) None of them were carrying weapons or causing any problems. (9 RT 1753, 1774.) About five minutes later, Lenart saw one of the young Asian males get shot right outside the pool hall window. (9 RT 1751-1754, 1761.) One of his companions had been standing by him when another Asian male approached the victim and shot him for no apparent reason. (9 RT 1754-1757.) The victim had not drawn any weapons and had not been fighting with or threatening anyone. (9 RT 1756, 1770-1771.) The shooter stood right under a light when he shot the victim, so Lenart got a good look at the

shooter through the window. (9 RT 1784, 1790-1791.) Lenart positively identified appellant as the shooter. (9 RT 1764-1765, 1791.)

The victim ran after being shot. (9 RT 1753-1757.) Appellant ran after the victim, firing seven or eight more shots at him. (9 RT 1757.) Appellant chased the victim 25 to 30 feet, from one set of double doors to the next. (9 RT 1765.) At the same time, two other Asians outside the pool hall started firing their guns at the victim. (9 RT 1752, 1755-1756, 1764.) Lenart estimated hearing 30 to 40 gunshots. (9 RT 1752.) Appellant appeared to trap the victim in a corner outside the pool hall because the second set of double doors were locked. (9 RT 1766.) Lenart saw several Asians who had remained inside the pool hall start to go outside. (9 RT 1755.) He saw one of them kick open the front door and fire three gunshots at the gunmen outside (9 RT 1755) in an effort to defend the escaping victim (9 RT 1759, 1798-1799). The gun fired by the Asian who had kicked open the front door looked like a 9 millimeter handgun. (9 RT 1758.) Although return fire appeared to hit that individual, he got up and ran outside after temporarily falling back into the pool hall. (9 RT 1759-1760, 1788.)

Lenart helped herd the remaining pool hall patrons into the pool hall bathrooms while the gunfire continued. (9 RT 1760-1761.) The pool hall owner then phoned the police to report the shooting. (9 RT 1762.) Lenart identified appellant as the shooter after viewing a later live lineup. (9 RT 1784-1785.) The parties stipulated that appellant was in the number five position in the live lineup held at the Orange County Jail on May 31, 1995, the lineup shown in Defense Exhibit I. (17 RT 3336.)

Ignacio Raygoza was facing the back of the Rack and Cue pool hall, sitting out a game, at about 9:30 p.m. on March 11, 1995, when he heard gunshots outside the front of the pool hall. (9 RT 1801-1805, 1814.) When he turned around, he saw one young male Asian shooting at the back of a

second young male Asian outside the window in the front of the pool hall. (9 RT 1804-1807.) The shooter stood underneath the Rack and Cue sign outside the billiard hall. (9 RT 1805.) The fluorescent lighting where the shooter stood gave Raygoza a good view of the shooter. (9 RT 1810.)

Raygoza then saw several Asians inside the pool hall run towards the front door of the pool hall. (9 RT 1807-1808.) One of the Asians pulled a semiautomatic handgun from underneath his shirt. (9 RT 1808.) Raygoza thought he saw him exchange more gunfire with the gunman outside as Raygoza's companion pulled him underneath the table. (9 RT 1808-1809.) Raygoza did not remember how many gunshots he heard. (9 RT 1810.) Raygoza later attended a live lineup at the Orange County Jail and positively identified appellant (suspect five) as the shooter he saw underneath the Rack and Cue sign. (9 RT 1810-1812, 1821.)

Staci Murray (who later married Ignacio Raygoza) went to the Rack and Cue on March 11, 1995, with Ignacio Raygoza and Chris and Gail Power, a married couple. (10 RT 1866-1867.) They arrived at 8:00 p.m. (10 RT 1867.) They played pool at the front table right by the window. (10 RT 1867.) They were about two feet from the window. (10 RT 1868.) Everything was normal. (10 RT 1068.) There was no yelling and there were no problems. (10 RT 1868.)

Staci turned around when she heard some noises liked firecrackers and saw through the window an arm with a gun. A flash of light came out of the gun as she heard a gunshot. (10 RT 1869.) She heard two or three gunshots before turning around. (10 RT 1869.) She freaked out. (10 RT 1869.) The shooter was a male Asian. (10 RT 1869.) She got down under the pool table behind one of her friends, who was a lot bigger than her. (10 RT 1869.) She could not see past him. (10 RT 1870.) Her head now faced in the opposite direction. (10 RT 1870.)

Someone in the back who had been playing pool now ran towards the front and started to shoot outside through the front door. (10 RT 1870-1871.) A gun battle followed as the person shooting from inside knelt down five to ten feet from the door. (10 RT 1871.) Many shots were fired. (10 RT 1872.)

She went to a live lineup at the Orange County Jail in May 1995. (10 RT 1873-1874.) She wrote, "Number five looked familiar, but I'm not sure if it was from this case." (10 RT 1875.)

David Arnold was getting out of his truck in front of a nearby liquor store when he heard 25 to 30 gunshots from multiple weapons around the Rack and Cue pool hall. (9 RT 1608-1609.) He then saw a male run around the corner from the Rack and Cue, run around some cars, and collapse in the parking lot. (9 RT 1609.) The man was bleeding and clearly had been shot. (9 RT 1610.) Arnold grabbed him under the arms and began dragging him into the liquor store in order to protect the man from the shooters. (9 RT 1610.) The man had no weapons. (9 RT 1613.)

The people inside the liquor store wanted to close the doors objected because they did not want to get involved. (9 RT 1610-1611.) Arnold persuaded them that it was better to let him drag the man behind the liquor store counter than leave him where everyone could see him. (9 RT 1611.)

Arnold pulled paper towels off the shelf and put them beneath the man's head. (9 RT 1611.) Arnold attempted to stop the bleeding. (9 RT 1611.) Arnold noticed what looked like through and through gunshot wounds to the man's elbow and shoulder and another gunshot wound in the man's right buttock. (9 RT 1611.) The man was agitated and afraid, and asked Arnold how bad his wounds were. (9 RT 1612, 1614.) Arnold reassured the man by telling him he was still in good shape and was lucky considering the fact he had been shot three times. (9 RT 1611.) Medical personnel arrived within minutes. (9 RT 1612.)

Khoi Huynh went to the Rack and Cue in Stanton on March 11, 1995, with Cheap Boy Huu Tran. (10 RT 1887.) Khoi was driving his sister's black Cadillac that night. (10 RT 1916.) He parked the black Cadillac on the right side of the pool hall door. (10 RT 1890.) The black Cadillac was unique in the gang community. (10 RT 1890.) Rival gangs know the cars their rivals drive. (10 RT 1890.)

Khoi and his friends went there to play pool. (10 RT 1887.) They were not looking for trouble. (10 RT 1887.) Three or four friends joined them playing pool, one of whom was a female. (10 RT 1887-1888.) The male friends were Cheap Boys, as was Khoi. (10 RT 1888.) They were played at a table in the back. (10 RT 1888.) After they finished playing, Khoi walked out towards his car with a friend. (10 RT 1889-1890.) Khoi walked to the right when he walked out of the Rack and Cue after playing pool there. (10 RT 1917.)

After Khoi walked outside he was shot seven times. (10 RT 1902.) He was shot in his ankle, his thigh, his back, under his arm pit, and his elbow. (10 RT 1902.) He spent about a week in the hospital and had one or two surgeries. (10 RT 1903.) He never pulled a weapon, never fired a gun at anyone, and never fought with anyone before being shot on March 11, 1995. (10 RT 1903.) Neither he nor his friends had any problems inside the pool hall. (10 RT 1902.) None of his friends started shooting before he was shot. (10 RT 1903.)

Khoi recalled that the rivalry between the Nip Family and Cheap Boys started with a shooting in front of the Can Restaurant. (10 RT 1906.) Drawn blood brought retaliation in the gang culture. (10 RT 1906-1907.) Gang members found out about rivalry attacks from others in the gang. (10 RT 1907.) Tuan Pham, Sang Nguyen and someone he cannot remember "jumped him into" the gang. (10 RT 1923.) Khoi acknowledged Minh Kgoc Le and Binh Quan Tran were Cheap Boys. (10 RT 1942.)

On September 27, 1993, Khoi pled guilty to grand theft auto and to possessing stolen property, offenses he committed with Cheap Boys Tuan Van Pham, Vu Thai Ha and Tin Duc Pham; Tin Duc Pham was also with Khoi in the Rack and Cue on March 11, 1995. (10 RT 1987.)

Orange County Sheriff's Investigator Janet Strong interviewed Khoi Huyhn on March 14, 1995, at the U.C. Irvine Medical Center, and on March 21 and March 22, 1995, at Khoi's house, where Khoi continued to recuperate from his gunshot injuries. (13 RT 2469-2470, 2477, 2482, 2495-2496.) In his hospital interview, Khoi told Strong that on March 11, 1995, he played pool in the back of the Rack and Cue with Tin Pham, Huu Tran, and a girl named Teresa. (13 RT 2471.) When they finished the last game, Khoi Huynh walked towards the front exit followed by Tin Pham and Huu Tran, who stayed behind to pay for their game. (13 RT 2471-2472.) When Khoi got outside he recognized two Nip Family gang members with guns in their hands and knew he was in trouble. (13 RT 2472-2473.) As he started to run away from the gunmen around some parked cars, Tin Pham ran back into the pool hall. (13 RT 2473.) Khoi heard gunshots and felt pain in his buttocks and lower back as the two Nip Family gunmen chased him. (13 RT 2476.) Khoi nevertheless continued running west until he collapsed in front of a liquor store. (13 RT 2476.) He remembered being pulled inside before the liquor store door was locked behind him so no one else could get in. (13 RT 2476.) Khoi estimated 20 to 30 shots were fired. (13 RT 2476.)

Before the commencement of the March 21, 1995, interview at his house, Khoi asked Investigator Strong if they had the shooter in custody. She told him they did not and did not yet know the shooter's identity. (13 RT 49.) Having come to Khoi's house to get more information regarding the identity of the shooters, Strong showed Khoi photographs of Nip Family gang members or associates (People's Exhs. 69 through 81 marked

for identification). (13 RT 2496-2497.) When he made no identification from after looking at these photographs (13 RT 2497), Strong asked Khoi if he knew who it was that had shot him (13 RT 2484).

Khoi told Strong he did know the man who shot him and told Strong that the shooter's name was Lam. (13 RT 2484, 2494-2495.) Khoi knew Lam carried a gun when Khoi started to run from the gunmen. (13 RT 2486-2487.) Khoi knew Lam previously and they had once been friends. (13 RT 2486.) Khoi explained that he recognized the first gunman as Lam, a Nip Family gang member, as soon as Khoi came out the door of the Rack and Cue. (13 RT 2485.) Khoi said he recognized the second gunman with Lam as another Nip Family Gang member, but did not know that person's name. (13 RT 2486.) The second gunman had a gun which looked like a .9 millimeter or .45 caliber handgun. (13 RT 2487.)

When Strong returned to Khoi's house the next day, March 22, 1995, she showed him a six-pack photo lineup that included appellant's photograph (People's Exh. No. 82) in order to see whether or not Khoi could identify the photograph. (13 RT 2496-2497.) Khoi identified photo number six (appellant's photograph) as Lam Nguyen. (13 RT 2498.)

When Strong asked Khoi if he would testify in court regarding the shooting, Khoi initially said that he could not do so because of his association with a gang and the stigma attached to gang members who testified. (13 RT 2495, 2508-2509.) Khoi Huynh later showed up at the May 6, 1995, Tuan Pham crime scene in a pair of pajamas at about 11:00 p.m. (15 RT 2894), accompanied by victim Tuan Pham's brother (15 RT 2895). Khoi told Donahue he'd been shot several times at a billiard parlor in Stanton by a man named Lam Nguyen. (15 RT 2895.)

Defense witness Warren Fujinaka pulled into the Rack and Cue parking lot about 9:00 p.m. (20 RT 3798.) He saw a man shooting a gun while running east from the Rack and Cue. (20 RT 3799-3800.) Fujinaka

was about 50 yards from the running gunman. (20 RT 3800.) He told police the gunman wore a thigh-length beige coat. (20 RT 3802.)

Gang expert Mark Nye opined that a person who goes to a billiard hall when a distinctive car of a Cheap Boy gang member is outside the billiard hall, waits for that Cheap Boy with fellow gang members and opens fire on the rival gang member when he exits the billiard hall actively participates in the Nip Family, and benefits the Nip Family by committing an act of violence against the Cheap Boys, by retaliating against the Cheap Boys, and by committing an act of violence. (16 RT 3210.)

5. The May 3, 1995, shooting of Duy Vu[2]

Monica Tran had been associating with the Nip Family for about six months by May 1995. (10 RT 2010.) She hung out with the Nip Family and coffee shops like the Di Vang coffee shop on Westminster and Euclid. (10 RT 2012.) She told Detective Mark Nye and her probation officer that she was associating with the Nip Family in May of 1995. (10 RT 2012.) Monica Tran had appellant's pager number in May 1995, and gave it to the detectives. (10 RT 2015.) She got it from a friend whose name she could not remember. (10 RT 2015.) Monica Tran had appellant's pager number in 1995 and would page appellant when she wanted to see him. (16 RT 3118.) When she paged appellant she generally met him either at Brookhurst and Westminster or at Trask and Hoover. (16 RT 3118.) She

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[2] The jury acquitted appellant of counts eleven (the murder of Duy Vu) and count twelve (the street terrorism count based upon that murder). This Court may nevertheless consider the evidence surrounding the May 3, 2005, shooting of Huy Vu – along with the rest of the history of the gang war preceding the May 6, 1995, shooting of Tuan Phan - when considering apellant's claim that as a matter of law, the man who shot Tuan Phan on May 6, 1995, did so in self-defense. It may do so because the acquittal of one count shall not be deemed an acquittal of another count. (Pen. Code, § 954; *People v. Abilez* (2007) 41 Cal.4th 472, 512; *People v. Avila* (2006) 38 Cal.4th 491, 598; *People v. Pahl* (1991) 226 Cal.App.3d 1651, 1656.)

frequently met him at a liquor store at Trask and Hoover. (16 RT 3119.) She heard from a friend that Cheap Boy Duy Vu (10 RT 1973; 16 RT 1320) had been murdered. (10 RT 2017.)

On May 9, 1995, Monica Tran was arrested by Westminster Police Officer Mark Frank. (10 RT 2024.) She thereafter talked to police officers after telling them she was willing to talk about recent activities of the Nip Family. (10 RT 2024-2025.) Refreshing her recollection by reviewing a transcript of her interview with Detectives Nye and Proctor in May 1995, Monica Tran recalled appellant sometimes drove a Nissan Maxima (16 RT 3117), two-toned brown and cream (16 RT 3128) And appellant also wore a brown leather jacket (16 RT 3117-3118). Among the items found in a May 23, 1995, search of the 13401 Amarillo apartment appellant had apparently been sharing with Cheap Boy Huy Tran, a search discussed in more detail, *post,* was a brown leather jacket, the photo of which was marked Defense Exhibit R. (16 RT 3168-3169.)

Detective Mark Nye described his May 9, 1995, interview with Monica Tran. (16 RT 3158.) She identified a photo of appellant shown her by Detectives Nye and Proctor as the person she knew as Lam. (16 RT 3159.) Tran told Nye appellant was with Nip Family. (16 RT 3160.) Tran had last seen appellant two weeks before the May 9, 1995, interview when appellant was in his car at the Asian Gardens Mall, located at 9200 Bolsa in Westminster. (16 RT 3160, 3163.) Appellant was with friends Tran believed were also Nip Family. (16 RT 3163.) They saw Duy Vu at that time. (16 RT 3164.) Duy Vu was from the Cheap Boys gang. (16 RT 3164.) Tran recalled that when appellant saw Duy Vu he said "One day he gonna get him." (16 RT 3165.) Tran described the car appellant was in at the time as a two-toned brown and cream Nissan Maxima. (16 RT 3167.)

Monica Tran told Nye she paged appellant's pager number in order to get in touch with appellant. (16 RT 3165.) She told Nye they usually met

at Brookhurst and Westminster and if not there, at Hoover and Trask. (16 RT 3166.) She thought appellant lived in the area of Hoover and Trask in Westminster because this was the location that she met him most frequently. (16 RT 3166.) They would meet at a liquor store on the northeast corner of Hoover and Trask. (16 RT 3166.) The Trask Market liquor store, next door to the Laundromat, was the only liquor store at the intersection. (16 RT 3167.)

Jeanette Mandy was in that same Laundromat washing her clothes on May 3, 1995, when a man strolled very slowly in front of the Laundromat from the direction of the liquor store. (12 RT 2355-2356.) The man was Asian. (12 RT 2357.) He walked towards the end of a driveway near the cleaners before turning around and walking back at a quicker pace. (12 RT 2357.) He sat down inside the Laundromat. (12 RT 2357-2358.) He passed the first door, He sat down on the second of three chairs. (12 RT 2359.) He looked over his left shoulder a few times to see if anyone was outside. (12 RT 2359.)

Two men then entered, also of Asian dissent, between 20 and 25 years of age. (12 RT 2360, 12 RT 4006.) The first man who entered stood in front of the man sitting in the chair. (12 RT 2361.) The second man stood to his right. (12 RT 2361.) The first man slapped the man sitting in the chair following a brief conversation, with the second man standing by. (12 RT 2363.) Their voices were raised after the right hand slap. (12 RT 2364.) The two men then went back outside and the sitting man remained seated in the chair. (12 RT 2366.) The second man led the first man outside. When the first man got in the driver's seat of a parked car outside the Laundromat, the second man stood outside the passenger side of the car. (12 RT 2367-2369.) The second man leaned through the open passenger window and conversed with the first man. (12 RT 2371.) After a minute or two, the second man walked back into the Laundromat, pulled back his brown jacket

and drew a gun from his waistband. (12 RT 2371.) The gun was dark gray or black. (12 RT 2372.) Mandy ducked under a table when the man began shooting the man in the chair. (12 RT 2372-2373.) Three to six shots were fired. (12 RT 2373.) Mandy identified appellant as the shooter. (12 RT 2373.)

After the gunshots, Mandy ran out the rear of the Laundromat but later returned. (12 RT 2374.) When she came back inside, she saw the man who had been seated in the second chair lying on the floor next to the chairs. (12 RT 2374-2375.) She saw blood on the chair and around the victim. (12 RT 2375.)

Mandy recalled drawing composite pictures of the suspects (People's Exhs. 61 and 62) with People's Exhibit 61 representing the shooter. (12 RT 2388.) Mandy recalled viewing close to 100 loose photographs and two six packs at the police station. (People's Exh. 60; 12 RT 2388-2389.) She recalled identifying People's Exhibits 60-A and 60-B as the photos which looked most like the two suspects. (12 RT 2389.) She recalled identifying People's Exhibit 60-A (a photo of appellant) as the photo looking most like shooter. (12 RT 2389-2390.) She recalled identifying appellant as the shooter at the preliminary hearing. (12 RT 2390.)

When shown a photograph of a brown leather jacket (Defense Exh. R), discussed *ante* and *post,* Mandy stated that was not the jacket worn by the shooter because the jacket worn by the shooter was longer and had a string in the waste area. (20 RT 3870-3871.)

Mary Martina was driving by the Laundromat about 7:30 and 7:45 p.m., on May 3, 1995, when she heard a gunshot. (12 RT 2378-2380.) When she turned her head towards the Laundromat (12 RT 2380-2381), she saw a man standing inside the Laundromat pointing a handgun down towards a man seated inside the Laundromat (12 RT 2381). She saw him shoot the seated man about five more times before he exited the

Laundromat, walked westbound around the liquor store and disappeared northbound on Hoover. (12 RT 2382-2383.) She described the shooter as a Vietnamese male with slicked-back black hair, and wearing a long tan or brown coat. (12 RT 2384-2385.) Martina backed into a driveway and dialed 911 after witnessing the shooting. (12 RT 2383.)

Scott Dalton was buying cigarettes in the Trask Market liquor store next door to the Laundromat when he heard six to nine gunshots. (12 RT 2412-2414.) When he stepped outside, a 19 to 20 year-old Asian male ran him and turned right after passing the liquor store. (12 RT 2414-2416.) The Asian male wore a brown jacket. (12 RT 2415-2416.) Dalton saw him stuff a handgun back into his waist band as he ran. (12 RT 2418.)

Juan Hernandez was buying a pack of cigarettes near 7521 Trask in Westminster at 7:30 to 7:45 p.m. on May 3, 1995. (11 RT 2271-2272.) The store where he bought cigarettes was in a strip mall near a public Laundromat. (11 RT 2272.) When he went back to his car in front of the liquor store where he bought the cigarettes, the liquor store lights were on and the public Laundromat was well lit inside. (11 RT 2273.) He got in his car parked 10 feet outside the liquor store, started the engine and lit a cigarette. (11 RT 2273-2274.) He heard four a five gunshots (11 RT 2275) and people screaming inside the Laundromat (11 RT 2275). He then saw a male wearing a long brown leather jacket almost to his knee (11 RT 2275) walking out of the Laundromat. (11 RT 2276.) The man was Asian, 19 to 21 years old. (11 RT 2277.) The man walked past the liquor store and around the corner of the strip mall before disappearing from view. (11 RT 2278.) Hernandez did not get a good look at the man's face and told officers he did not think he could identify anyone. (11 RT 2279.)

Defense witness Johnny Gammoh worked at Trask Market liquor store at 7511 Trask Avenue, on the corner of Trask and Hoover, Westminster, on 8:30 or 9:00 p.m. on May 3, 1995, next door to the

Laundromat. (20 RT 3765.) He heard five or six gunshots while working behind the counter. (20 RT 3766.) When he walked out the door and turned to his left he saw someone walking towards him from the Laundromat (20 RT 3766), a male Asian between 20 and 21 years old (20 RT 3767), black shoulder length hair, clean shaven, boyish face, good looking, wearing a tan waist length leather jacket and pants of an unknown type (20 RT 3768). When cross-examined Gammoh added that he saw the man straighten his jacket with a "pulling down motion" before he got to the end of the store and started running. (20 RT 3774-3775.) The man ran north on Hoover. (20 RT 3775.)

Defense witness Sarah Benigno heard the gunshots in the Laundromat while standing outside Trask Market with Scott Dalton as they waited for a friend still inside Trask Market. (21 RT 3915-3917.) After she looked towards the Laundromat, she saw a man come out of the Laundromat and run past her and Scott Dalton before turning right on Hoover and disappearing from view. (21 RT 3919-3920.) She described him as a thin dark-haired Vietnamese male with a zip-up brown jacket and baggie pants. (21 RT 3920-3921.) She saw him stuff a gun into his waistband of his pants as he ran past them. (21 RT 3921.)

Defense witness Susan White heard the gunshots coming from the Laundromat while at her house directly behind the Trask Market liquor store on the night of May 3, 1995. (20 RT 3860-3861.) Thirty seconds to a minute after the gunshots she saw a thin man get into a brownish, gray-brownish, or rust-colored Toyota or Honda, an older model, perhaps 1985, a block northeast of the liquor store. (20 RT 3861, 3863.) She only saw the man for a few seconds as he got into the car. (20 RT 3861.) After the man got in, the car drove off in the direction of Amarillo Street. (20 RT 3865.)

The parties stipulated that on May 3, 1995, at about 7:45 p.m., Sally White was in her car facing eastbound on Trask waiting to make a left turn from eastbound Trask to northbound Hoover, when she saw a male Asian running from the front of the liquor store. She described the male Asian as slender, shaved or closed cropped hair around the sides, longer on top, wearing a white t-shirt and khaki pants. As White began her left turn, she saw the male Asian run to an awaiting car parked cockeyed at Brooklawn and Hoover. The car had its motor running and its lights on. The male Asian dropped something, possibly from his waist area. The male Asian bent down and picked up the object as someone pushed open the passenger door to let the male Asian into the car. The car was an older model, beige Nissan Sentra. White could not see the face of the subject who ran from the liquor store. (13 RT 2448.)

After receiving an 8 p.m. call on May 3, 1995 (12 RT 2313) in which the station commander advised him of the shooting near Hoover and Trask, Westminster (12 RT 2314), Westminster Police Detective Terry Seleinske drove to the station to meet up with his partner Detective Mike Proctor. They then proceeded to the scene of the shooting. (12 RT 2314.) The Laundromat at the scene was in a strip mall at the northeast corner of Hoover and Trask which included a liquor store. (12 RT 2314.) The Laundromat was well lit inside. (12 RT 2314.) The victim lay on his right side just inside and to the right of the west entry door. (12 RT 2314-2315.) The victim was dead. (12 RT 2315.) A .9 millimeter shell casing was found in the parking lot just off of the front sidewalk area by the Laundromat, and another .9 millimeter shell casing was found just west of the victim. (12 RT 2316.) A third .9 millimeter shell casing lay north of the victim near some dryers. (12 RT 2316.) Bullet fragments lay underneath a set of fiberglass chairs next to the victim and also north and east of the victim. (12 RT 2316.) A shattered sliding glass door connected

the coin operated laundry to a cleaners to the right (or east). (12 RT 2316.) There was damage to the three fiberglass chairs next to the victim and a pool of blood in the center chair. (12 RT 2316.)

A cigarette pack was found next to the news rack on the front sidewalk, just west of the west entry door. (12 RT 2319.) A bullet strike mark was found on the aluminum window frame just inside the front door and three bullet strike marks were found on the fiberglass chairs next to the victim. (12 RT 2320.) A bullet strike mark broke the bottom of the sliding glass door between the coin laundry and the cleaners next door. (12 RT 2321.)

The victim was Duy Vu, a Cheap Boys gang member. Duy Vu had bullet wounds to the back of his left arm, and three bullet wounds along his upper left side, in his right front shoulder area, and in his lower left back area. (12 RT 2321.) Du Vuy's autopsy revealed he died from multiple gunshot wounds to the torso. (13 RT 2449-2461.) Duy Vu had been only been back from Vietnam a couple of months before he was murdered. (10 RT 1905.) Duy Vu had not been around Cheap Boys in public for a year to two years except for the two month period before he was killed. (10 RT 1905.)

Gang expert Nye opined that a person actively participates in the Nip Family for the benefit of the Nip Family by helping a companion confront a Cheap Boy seated inside a business establishment, retrieving a loaded gun from a car outside while the companion starts the car, and going back inside an establishment in order to shoot the Cheap Boy. (16 RT 3212.)

The jurors most likely acquitted appellant of the murder and street terrorism counts arising from the May 3, 1995, shooting of Cheap Boy Duy Vu (counts eleven and twelve) for the following reasons: (1) the witnesses to the shooting described the shooter as taller than appellant (11 RT 2279-2280, 2285; 12 RT 2338-2339, 2361, 2390-2391, 2414-2416; 13 RT 2448,

20 RT 3767, 3862-3863; 21 RT 3920); (2) witness Jeannette Mandy said the leather jacket worn by the shooter did not look like the leather jacket recovered from the 13401 Amarillo Street apartment which appellant appeared to have shared with fellow Nip Family gang member Huy Tran (a circumstance discussed *post*), because the jacket worn by the shooter was longer and had a string in the waist area (20 RT 3870-38712); (3) while Jeannette Mandy identified appellant as the shooter at the preliminary hearing and at trial, she was not 100% certain he was the shooter but believed he was to the best of her memory (12 RT 2390, 2401, 2405-2406, 2411); and (4) eyewitnesses including Mandy either failed to pick appellant from a pretrial, six-pack photo lineup (12 RT 2419-2420; 20 RT 3778-3780, 3866-3869) or from the May 31, 1995, live lineup at the County Jail (12 RT 2409-2410; 20 RT 3771-3774, 3776-3777).

As the prosecutor nevertheless explained in her rebuttal argument (27 RT 5165, 5202-5203) that when Jeannette Mandy testified that the brown leather jacket depicted in the photograph (Defense Exh. R) looked longer than the brown leather jacket worn by the shooter, she likely expected that the jacket would fit the shooter (27 RT 5165). She did not see appellant wearing the jacket. (27 RT 5165, 5202-5203.) The brown leather jacket from the 13401 Amarillo Street apartment (Defense Exh. NN) looked like it was gathered at the waist. (22 RT 4280.) And it would have fallen almost to appellant's knees had he worn it at the time of the shooting when he was twenty pounds thinner. (22 RT 4270-4271, 4279-4280, 4282-4283.)

Eyewitness Juan Hernandez had described the shooter's jacket as a long brown leather jacket which extended almost to his knee. (11 RT 2277.) Eyewitness Mary Martina had described the shooter as wearing a long tan or brown coat. (12 RT 2384-2385.) And eyewitness Johnny Gammoh saw the shooter straighten his jacket with a "pulling down motion" before he ran

around the corner of the Trask Market liquor store onto Hoover Boulevard. (20 RT 3774-3775.)

The prosecutor reasonably observed that it would have been logical for appellant put on an oversize leather jacket when he retrieved the gun in order to hide the gun before and after he shot Duy Vu. (27 RT 5164.) And if appellant wore the oversized brown leather jacket when he shot Duy Vu and ran from the scene, the oversize jacket explained why appellant seemed taller to the eyewitnesses that he actually was.

The prosecutor additionally linked appellant to the Duy Vu shooting with the following rebuttal argument observations. (1.) Only a senior Nip Family gang member like appellant would have spotted Duy Vu as a Cheap Boy, since Duy Vu had only recently returned home from Vietnam before he was shot. (27 RT 5203.) (2.) The shooter in the Duy Vu murder kept the gun in his waistband (12 RT 2418, 21 RT 3921), just as appellant had done before he shot Sang Nguyen and before and after he shot Huy "Pee Wee" Nguyen. (27 RT 5206.) (3.) Eyewitnesses to the shooter's flight from the shooting further linked appellant to the shooting when they observed the shooter flee to a brown Nissan-type car which drove away on Hoover towards Amarillo Street immediately after the shooting. (27 RT 5202-5203.)

Monica Tran told Detectives Nye and Proctor during her May 1995 interview that appellant sometimes drove a two-toned brown and cream Nissan Maxima.

(16 RT 3117.) She told them that he was in the two-tone brown and cream Nissan Maxima when they saw Duy Vu before days before the shooting and when appellant said "One day he gonna get him." (16 RT 3165-3167.) Eyewitness Sally White saw the probable shooter run to an older model beige Nissan Sentra parked "cockeyed" at Brooklawn and Hoover, around the corner from the Trask Market liquor store. The car still

had its lights on and motor running. The probable shooter dropped something from his waist area, then bent down and picket it up again, before someone opened the passenger door to let him into the car. (13 RT 2448.) Thirty seconds to a minute after the shooting, eyewitness Susan White saw a thin man get into an older brownish, gray-brownish, or rust-colored Toyota or Honda a block northeast of the Trask Market liquor store. (20 RT 3860-3863.) She then saw the car drive off in the direction of Amarillo Street (20 RT 3856) where appellant and Cheap Boy Huy Tran appeared to have shared an apartment (discussed *post*).

B. The Factual Circumstances Surrounding the May 6, 1995, Shooting of Tuan Pham and Its Aftermath

Shawn Burchell recalled talking with her boyfriend Michael Gomez as Michael sat on a fire exit step on the south wall of a Blockbuster video store on the northwest corner of Brookhurst and Westminster Avenue in Garden Grove, minutes before 9:00 p.m. on May 6, 1995. (13 RT 2588-2591.) Gomez suddenly exclaimed "Oh my god, he's going to hit him!" (13 RT 2591.) He pointed to the southwest. (13 RT 2592.) Burchell turned to see that a dark brown/maroon car had backed to within a few inches of the car behind it in the left turn lane for eastbound traffic. (13 RT 2592-2594.) The signal light had just turned red. (13 RT 2593.) One or two cars were ahead of the dark colored car. The driver of the dark colored car opened the driver's door, stepped outside the car and briefly turned to face the car behind him. (13 RT 2594-2595.) Shawn recalled he appeared angry. (13 RT 2595.) The driver of the dark-colored car then turned back around to face the open driver's door, appeared to get something from the car, and then walked between the front of his car and the car in front of his car with a gun in his hand. (13 RT 2596-2597.) He left his driver's door open. Burchell believed the barrel of the gun was about six inches. (13 RT

2598.) Burchell exclaimed to Gomez, "My God! He's going to kill somebody!" (13 RT 2598.)

The man approached a white or silver car stopped in one of the two middle lanes of eastbound traffic. (13 RT 2599-2601.) The white/silver car was the first car behind the stop light. It was therefore a car or two ahead of the dark brown/maroon car from which the man had emerged. (13 RT 2600.) He approached the white/silver car in a slow jogging gate. (13 RT 2601.) As the man began to raise his shooting arm while standing a short distance behind the driver's door of the white/silver car, two gunmen in the white/silver car shot the man. (13 RT 2601-2608.) The white/silver car gunmen shot the man from the driver's seat position and from the passenger's side of the white car, the passenger shooting over the top of the white/silver car. (13 RT 2608-2609.) One of the gunshots aimed at the man who had approached the white/silver car shattered the Blockbuster video store window next to Shawn Burchell. (13 RT 2610-2611.) Gomez pulled her down off the stairs and away from the gunshot. (13 RT 2610.)

Traffic started moving again after the light turned green and after a final gunshot from the white/silver car. (13 RT 2612-2613.) The white/silver car left with the other cars. (13 RT 2612.) Burchell saw another man come back to the open driver's side door of the dark brown/maroon car and lean into the car through the open driver's side door. (13 RT 2613.) He emerged with a shotgun in one hand and a handgun in the other. After running across traffic in a southwesterly direction, he cut through some bushes and trotted between a Mobile gas station and a restaurant in the direction of another light blue/gray car before he disappeared. (13 RT 2618, 2634-2636, 2641.) When she was later shown a photo lineup (People's Exh. 92), Burchell selected photo number five as depicting the man who fled the scene with a handgun and a shotgun. (13 RT 2618-2619.) The parties stipulated that photo number five depicted

(Cheap Boy) Minh Ngoc Vo. (16 RT 3150.) The fingerprints of Minh Ngoc Vo, aka Khai Vo, were recovered from the front hood and exterior passenger door of the Buick Regal on May 6, 1995. (16 RT 3150.) They were also recovered on the chamber housing of a .357 magnum revolver located by Investigator Fischer during his May 6, 1995 search for evidence regarding Tuan Pham's homicide. (16 RT 3150.)

Robert Murray was seated in the driver's seat of his van at the stoplight at Westminster and Brookhurst on the night of May 6, 1995, when he noticed the man in the car behind his van get out of the driver's side of his car. (14 RT 2710-2711.) The man started to move around the front of his car, changed his mind, and got back into the driver's seat of his car. (14 RT 2711.) The man tried to turn his steering wheel to the left, then got out of his car again. (14 RT 2711.) The man then walked around the front of his car, between the car and the back of Murray's van. (14 RT 2713.) Murray then saw him approach the driver's side of a white Honda. (14 RT 2714-2715.) Refreshing her recollection with transcripts of her May 1995 interview with Detectives Nye and Proctor, Monica Tran had recalled that appellant drove a white Honda Accord. (16 RT 3117.)

The man faced the driver while slightly turned away from the driver. (14 RT 2715.) Murray never saw a gun in the hands of the man who approached the Honda. (14 RT 2732.) Murray could not see below the man's arms. (14 RT 2733.)

The driver of the Honda looked in Murray's direction, smiled and brought up a handgun even with his chest. (14 RT 2715, 2718, 2748.) The driver held the handgun with his right hand while resting it in front of his left shoulder. (14 RT 2717.) The handgun looked like a .38 caliber gun. (14 RT 2737.) One or more passengers moved around inside the white Honda. (14 RT 2716.) The driver then fired the handgun at the man who had approached the white Honda. (14 RT 2719.) The driver fired three to

five shots before Murray heard another gun go off. (14 RT 2719-2720.) Murray recalled seeing one of the passengers in the Honda getting out of the passenger's side of the Honda and leaning over the top of the Honda before the other gun went off. (14 RT 2720-2721.)

Murray drove quickly away in order to escape the gunfire. (14 RT 2721.) He heard a shotgun blast as he turned left in order to drive away northbound on Brookhurst. (14 RT 2721-2722.) The shotgun blast occurred 15 to 20 seconds after the initial gunfire. (14 RT 2723.) He heard more gunfire as he pulled into a Target parking lot a short distance up the street. (14 RT 2722.)

Murray recalled the driver of the Honda as a clean cut, nice looking young man. (14 RT 2723.) On May 17, 1995 (14 RT 2757), Murray selected photo number six from a photo lineup (People's Exh. 82) as looking most like the shooter (14 RT 2724-2725, 2755). Murray said the picture looked like the shooter insofar as he was clean shaven, had a clean complexion, was young-looking, and had short, combed-back black hair. (14 RT 2755-2756.) Photo six depicted appellant. (14 RT 2756.)

After the shooting, Murray discovered two bullet holes in the passenger's side of his van, one bullet hole near the jamb where the passenger window would shut and the other bullet hole in the sliding back door and bottom step of the van. (14 RT 2725-2726.)

Hoang Nguyen recalled that he was working at the Mobil gas station on the corner of Brookhurst and Westminster in Garden Grove, and across the street from the Blockbuster video store corner, on the evening of May 6, 1995. (13 RT 2644.) By the time he put on his glasses, the gunfire had stopped. (13 RT 2645.) Hoang then saw a man get out of his car, walk to another man lying in the street and pick something up. (13 RT 2646-2649.) The man then walked back to the car and retrieved a shotgun from the car.

(13 RT 2647, 2649.) The man walked calmly past the gas station with the shotgun. (13 RT 2650.)

Hoang Viet Nguyen, who worked with her husband Hong Nguyen at the Mobile gas station on the corner of Brookhurst and Westminster, heard the gunshots while on the phone inside the gas station. (24 RT 2700-2701.) She looked out the window and saw gunfire. (24 RT 2700-2701.) Her husband told her to lie down on the floor. (24 RT 2701.) When she looked back up, she saw someone firing a gun towards Brookhurst while standing in front of an old American car. (24 RT 2703-2704, 2707.) She later saw a man bend down over something lying in the street, walk back to the old American car, then walk to the back of the gas station carrying a shotgun. (24 RT 2701-2702, 2708.) Another car blocked her view of the thing lying on the street. (24 RT 2703.) Hoang Viet Nguyen told Garden Grove Police Officer Peter Vi that when she looked outside after hearing gunshots, she saw a male on Westminster Avenue firing four rounds from a shotgun. (15 RT 2926.) She then ducked behind the counter. (15 RT 2926.)

Jai Choi heard five to twelve gunshots while stopped at the traffic light on Brookhurst and Westminster. (24 RT 2667-2669.) Choi was in the middle northbound lane on Brookhurst. (24 RT 2668.) Choi ducked down when he heard the gunshots. (24 RT 2670.) When Choi got back up after the gunshots, he saw a body on Westminster (24 RT 2670) at least 100 feet away (24 RT 2671). A man ran back towards the body, checked the body, then ran away between some cars and behind a gas station. (24 RT 2671-2672.) The man had something long like a rifle in his hands. (24 RT 2672-2673.)

Choi recalled two cars at the scene, an older model American car and a white 4-runner two or three cars in front of the American car. The 4-runner made a u-turn and drove away westbound on Westminster. (24 RT 2674-2675.)

The parties stipulated that Thiep Vinh Duong was about to turn eastbound on Westminster from Brookhurst when he heard three to four gunshots coming from the southwest corner of Brookhurst and Westminster. (16 RT 3147.) Turning his head in the direction of the gunshots, he saw a man fire several shots from a shotgun at a new two-door vehicle. (16 RT 3147-3148.) The man then ran southbound toward the Mobil gas station while someone yelled, "Go, go!" (16 RT 3148.) The car the man had shot at turned northbound on Brookhurst at a low rate of speed while swerving from side to side. (16 RT 3148.) The rear window of the car had been shot out. (16 RT 3148.)

Garden Grove Police Investigator James Fisher arrived at Brookhurst and Westminster two minutes after receiving a dispatch call. (24 RT 2676-2677.) Several cars were traveling north and southbound on Brookhurst and several cars were attempting to make a left-hand turn from westbound Westminster to northbound Brookhurst. (24 RT 2677.) Other cars were creating a traffic jam on Westminster near that intersection. (24 RT 2677.)

A body lay in the westbound left turn lane of Westminster approximately two car lengths in front of a 1983 Buick Regal Buick. (24 RT 2677-2678.) The body showed no signs of life. (24 RT 2679.) There were no weapons around the body. (24 RT 2679.) The victim had a gunshot wound to the head. (2679.) A white glove was on the victim's right hand. (24 RT 2679-2680.) Fisher put out a call for other officers to secure the scene. (24 RT 2680.)

Fisher noticed a shattered window at the top of the stairs on the south side of a Blockbuster video store on the northwest corner of Brookhurst and Westminster. (24 RT 2681.) He also notice shattered glass on the eastbound lane of Westminster closest to the left turn lane where the body lay. (24 RT 2681-2682.) Fischer and Reserve Officer Castagna then walked between a Mobil gas station and the Trieu Chow Restaurant on the

southwest corner of Brookhurst and Westminster, searching for additional evidence. (24 RT 2682.) They found a Mossburg .20 gauge pistol grip sawed-off shotgun (People's Exh. 101) and a handgun (People's Exh. 100) in some shrubbery in that area. (14 RT 2684-2686.) Behind 9902 Westminster they found the other white gardener's glove (14 RT 2686-2688), a glove which matched the glove on the victim's right hand (24 RT 2689-2691).

Garden Grove Police Officer Michael Martin arrived at the scene of the shooting at Westminster and Brookhurst in Garden Grove within a minute of the 9:00 p.m., May 6, 1995, dispatch reporting the shooting. (13 RT 2572.) He found the deceased, Tuan Pham, a member of the Cheap Boys gang (13 RT 2574-1575, 2580), lying on his right side in a northwesterly direction (13 RT 2573-2574) in front of a gold 1983 Buick Regent (13 RT 2581) registered to another Cheap Boy gang member, Huu Thien Tran (13 RT 2581-2582). The parties stipulated that Huu Tran was the registered owner of the Buick Regal. His fingerprints were located in the Buick Regal, but he was in custody on May 6, 1995. (16 RT 3149-3150.) The Buick was stopped in the left turn lane with its engine still running. (13 RT 2573.) The Buick's lights were on and its left turn signal light was blinking. (13 RT 2573.) The driver's door of the Buick was open. (13 RT 2573.)

Phan had been shot in the head and back. (13 RT 2574, 2577, 2581.) He wore a white cotton glove (13 RT 2574) on his left hand (13 RT 2586). The other glove was later recovered elsewhere. (13 RT 2579.) The intersection was well-lit from street lights and the overhead lights of the surrounding businesses. (13 RT 2575.) Shattered glass lay near Pham's body. (13 RT 2574, 2577-2578.) Five shotgun shells and shotgun wadding also lay nearby. (13 RT 2574, 2576-2578.) The front window of a

Blockbuster Video Store had been shattered (13 RT 2579) and had a hole through it (13 RT 2587).

Phan's autopsy revealed he died from the gunshot wound to the head. (14 RT 2776.) The remaining gunshot wounds in the back (14 RT 2774) could have been fatal if left untreated (14 RT 2776). A large caliber handgun inflicted Tuan Pham's head wound, while a smaller caliber handgun inflicted his back wounds. (15 RT 2893-2894.) There were no shotgun pellets in Phan's body. (25 RT 4817.)

Garden Grove Crime Scene Investigator Denise Cowan responded to the May 6, 1995, homicide scene at Brookhurst and Westminster. (15 RT 2862.) Five shotgun cases were near the brown car. (15 RT 2863.) Shotgun wadding was found near the body. (15 RT 2863.)

A bullet entered the brown car just above the driver's side head lamp. (15 RT 2866.) The bullet was recovered just inside the head lamp area. (15 RT 2867.) It had penetrated the Buick just above the left front headlight and come to rest in the engine compartment of the car under the wheel well. (15 RT 2903-2904.) Another bullet was found in the lane to the right of the brown car and in front of the brown car and labeled D.C.-13. (15 RT 2867-2868.)

Garden Grove Homicide Detective Robert Donahue arrived at Westminster and Brookhurst at 10:05 p.m. on May 6, 1995. (15 RT 2882-2883.) The bullet in the brown Buick Regal engine compartment in the left front head light area was collected by D. Cowan. (15 RT 2884.) The bullet (People's Exh. 110) was analyzed at the crime lab. (15 RT 2885.) Another bullet in the number one lane for eastbound traffic, recovered where some glass lay, caused windshield damage to a car driven by a witness to the shooting. (15 RT 2886.) The shotgun shell casings utilized bird shot. (15 RT 2887-2890.)

Dr. Dinh V. Dinh saw a patient who called himself "John Nguyen" on May 11, 1995. (15 RT 2966-2968.) Nguyen complained of pain to his hands and arm. (15 RT 2968.) Nguyen said his friend accidentally pulled the trigger of a shotgun which Nguyen had been cleaning at home for hunting. (15 RT 2968-2969, 2977-2978.) Nguyen said the accident occurred five days previously. (15 RT 2969.) Dr. Dinh found metallic foreign bodies in the right and left hands with X-rays. (People's Exhs. 127-128; 15 RT 2969-2971.) Dr. Dinh prescribed the antibiotic medicine to treat and prevent infection. (15 RT 2972.)

"John Nguyen" was appellant. (15 RT 2972.) Appellant came in for visits on May 11, May 17 and May 24, 1995. (15 RT 2973.)

On May 23, 1995, at 6:48 p.m., twelve days after Phan was shot, Garden Grove Police Officer Mike Smith was dispatched to 13401 Amarillo in Westminster, ¼ mile from the intersection of Hoover and Trask, in a marked police unit. (15 RT 2825-2827.) Parked 50 to 75 yards from the front yard of the residence (15 RT 2827-2828), he saw three men leave the front yard about five minutes later while talking together (15 RT 2828). They walked to a silver Ford Escort parked on the east side of the street facing north. (15 RT 2828.) They were Asian, the tallest about six feet, 180 lbs, the second tallest about five-seven, and the shortest five-two to five-five. (15 RT 2829.) The tallest was wearing a white long-sleeved buttoned-down shirt with black dress slacks. (15 RT 2829.) The second tallest was wearing a white short-sleeved polo type pullover shirt and black pants. (15 RT 2829.) The shortest was wearing a light brown long-sleeved baggie shirt and pants that were slightly darker than his shirt. (15 RT 2829-2830.)

The tallest of the three was Tuan Nguyen and the second tallest was Nip Family gang member (16 RT 3206) Cuong Le (15 RT 2830), an acquaintance of appellant (21 RT 4065). Both men were taken into custody

when the car was stopped by other officers a few minutes later. (15 RT 2833.) After they entered the Ford Escort, the Escort made a u-turn and proceeded south. (15 RT 2830.) It then turned westbound on Brooklawn towards Hoover and out of Smith's sight. (15 RT 2831.) Another marked police unit from Westminster, within view of the Escort, followed the Escort westbound on Brooklawn. (15 RT 2831.) Smith radioed the other police unit and followed the other officers in time to see one of his partners, Officer On, covering two men in the Escort after it was stopped. (15 RT 2833.) The passenger's door of the Escort was open and the front passenger's seat was vacant. (15 RT 2933.) The tallest of the three men was seated in the back passenger seat and the second tallest was seated in the driver's seat. (15 RT 2833.) The shortest of the three men - who had been seated in the front passenger's seat - was gone. (15 RT 2834.) The three men had been seated in these same positions when they entered the Escort. (15 RT 2834.)

Garden Grove Police Officer Vincent On was within a block from 13401 Amarillo, on the corner of Hoover and Trask, at 6:48 p.m. on May 23, 1995. (15 RT 2838-2839.) Smith radioed On to make a car stop. (15 RT 2839.) On saw the silver Fort Escort going northbound on Hoover. (15 RT 2839.) On activated the light bar on his patrol unit to stop the Ford Escort. (15 RT 2839-2840.) When he did so, the Ford Escort pulled over and stopped. (15 RT 2840.) The passenger side door of the Fort Escort flew open and a man ran out. (15 RT 2840-2841.) Three men were left in the Escort, the driver, a front seat passenger, and a rear seat passenger. (15 RT 2841.) The man fleeing the scene ran fast, around the front of the Escort and away from On. (15 RT 2841-2842.) The man who fled was five-two to five-four, thinly built, and a male Asian. (15 RT 2842.) He ran towards the railroad tracks west of Hoover. (15 RT 2842.) Garden Grove

Police Officer Wagner chased him. (15 RT 2842.) The fleeing man never returned while On was at the scene. (15 RT 2842.)

On had been twenty feet from the fleeing man and described him in his report as a "male Viet." (15 RT 2849.) On was Vietnamese himself. (15 RT 2840.) Fifteen to twenty minutes before he was at that location, On had seen a picture of somebody name Lam Thanh Nguyen. (15 RT 2849.) The fleeing man looked similar to the picture, so On believed the fleeing man to be Lam Thanh Nguyen. (15 RT 2849.) The photograph was a photograph of Lam's face along with a body description. (15 RT 2851.)

The police called for a helicopter and K-9 units and set up a perimeter. (15 RT 2842.) Garden Grove K-9 Officer Mike Scalese was called to the scene about 9:00 p.m. (15 RT 2854.) Scalese's dog alerted at some bushes on the west side of a nursery. (15 RT 2857.) The dog alerted to a gun recovered from the bushes because the gun had recently been dropped in the bushes and therefore still had a human scent (15 RT 2858.) The gun was a .380 Colt (15 RT 2858), serial number RC68502 (15 RT 2859) People's Exhibit 109 (15 RT 2860). The gun fired the bullet found in the engine compartment of the Buick Regal following the May 6, 1995, shooting of Tuan Phan. (16 RT 3103-3105, 3131, 3135, 3138.)

Tam Nguyen lived in one room of the house at 13401 Amarillo and rented out the remaining three rooms in May of 1995. (15 RT 2871.) Everyone in the four rooms of the house had to enter through the front door. (15 RT 2872.) A studio apartment attached to the back of the residence had a side entry. (15 RT 2872.) Tam heard through the police that the renter of the attached studio apartment in May of 1995 was Lam Thanh Nguyen. (15 RT 2872.) Tam only had two or three contacts with the renter of the attached studio apartment, who rented it for only one month. (15 RT 2873.) The renter called him "uncle" and Tam called the renter "nephew." (15 RT 2873.) The renter was thin and bout five two to five four. (15 RT 2873.)

Westminster Police Officer Tom Finley found some weapons inside the studio apartment attached to the back of the residence at 13401 Amarillo, Westminster, when assisting the service of a search warrant there on May 23, 1995. (15 RT 2931-2932.) It had a separate doorway from the primary residence. (15 RT 2932.) Two .357 caliber pistols were located on the top of the bed covered by a blanket in the southwest bedroom of the studio apartment. (15 RT 2932, 2962-2963.) Both pistols were loaded. (15 RT 2932, 2963.) An AK-47 type weapon was located in a closet. (15 RT 2932-2933, 2963.) An ampicillin prescription bottle for Huy Pham was also found in the bedroom (15 RT 2933), in the closet on the floor where the gun was found (15 RT 2936-2937). A Cephalexin prescription bottle prescribed to John Nguyen from the Dr. Dinh Do (15 RT 2964) and containing some medicine (15 RT 2965) was found in the living room area of the studio apartment (15 RT 2933) on the television set (15 RT 2936). Also found at the 13401 Amarillo studio apartment in the May 23, 1995, search was a brown leather jacket (Defense Exh. NN), the photo of which was marked Defense R. (16 RT 3168-3169.)

Dr. Dinh identified appellant's photograph from a six pack shown him by one of the officers accompanying Detective Nye as they waited for appellant to show up for his 2:00 p.m., May 25, 1995, appointment with Dinh. (16 RT 3169-3170.) An officer spotted appellant just before 3:30 p.m., just as Nye had released other surveillance officers. (16 RT 3171-3172.) They arrested appellant and his companion Huy Pham as they entered the waiting room. (16 RT 3172-3173.) Huy Pham was also a Nip Family gang member. (16 RT 3173.) People's Exhibits 113-115 depicted the injuries on appellant's hands and arms on that date. (16 RT 3177-3178.)

Westminster Police Detective Mark Nye arrested appellant in Dr. Dinh's office by grabbing his arm, throwing him to the floor, getting on his back and handcuffing him. (17 RT 3326.) Nye and a court officer also

took Huy Pham to the floor and handcuffed Pham. (17 RT 3326.) Appellant said, "Let Huy go, he didn't do anything, you got me." (17 RT 3327.)

Responding to Nye's questions, appellant admitted he was Lam Thanh Nguyen, born 10/25/74, who had been given a ride to the location by Huy. (17 RT 3326-3327.) While he was being booked later on at the police station, appellant asked, "Are you guys going to book Huy?" (17 RT 3327-3328.) Appellant then said, "Huy didn't do anything, and the gun is mine." (17 RT 3328.) When Nye asked, "What gun," appellant replied, "The .380." (17 RT 3328.)

When asked to describe the gun, appellant said it was a black gun with seven rounds of ammunition in it. (17 RT 3328.) Appellant said it was in the glove box of Huy's car. (17 RT 3328.) Sergeant Davidson thereafter retrieved the gun and a semi-round smooth stone from Huy's car. (17 RT 3328-3329.) The parties stipulated that the KBI .380 semiautomatic handgun recovered from the glove compartment of the silver Nissan Stanza belonging to Huy Pham at the time of appellant's May 25, 1995, arrest had not been connected to any of the crimes scenes involved in the case. (21 RT 4007.)

When appellant was arrested, the little pellet marks depicted in the photograph taken of his back (People's. Exh. 140) were the only sign of injury to appellant's back. (23 RT 4472-4473.) Detective Donahue saw appellant following appellant's arrest on May 25, 1995, and recalled he had injuries to his left hand and right forearm. (15 RT 2896.) Donahue also recalled that appellant wore the same tan shirt on that occasion (during his interview with Donahue) that he wore in court. (15 RT 2896.) The injuries to appellant's inside right arm (People's. Exh. 113) and right hand (People's Exhs. 114 and 115) were consistent with getting shot with bird shot from a distance. (15 RT 2898-2898.) They were inconsistent with

getting accidentally shot while cleaning a shotgun when a friend accidentally pulls the trigger. (15 RT 2899-2901.)

Gang expert Nye opined that armed rival gang members stopped at a public intersection would engage in a gun battle whether or not there were a lot of innocent citizens around the intersection. (16 RT 3213, 3215.) Any gang member leaving the scene without confronting their rival would lose face for themselves and their gang. (16 RT 3214.) Smiling and shooting a Cheap Boy who approaches one's car that is stopped at an intersection constitutes action consistent with a gang warrior who actively participates and benefits Nip Family in its war with the Cheap Boys. (16 RT 3216-3217.)

Testifying on his own behalf, appellant acknowledged that when he pled guilty to assaulting a Mexican person in 1992 (21 RT 4012-4013) - before any of the charged crimes occurred - he also admitted committing the crime with the specific intent of benefitting a criminal street gang (21 RT 4068; 22 RT 4161-4163). He explained that he was a back seat passenger in the car from which the shots were fired in the incident which resulted in his guilty plea. (21 RT 4068.) He recalled there were five people in the car from which the shots were fired (21 RT 4068) and that the other four were Nip Family gang members he had named previously in his testimony (21 RT 4073-4074). He knew what the term "backup" meant and described it as standing ready to act in another's place when the other can no longer do so. (21 RT 4069-4070.) Despite his guilty plea, appellant claimed he was a victim of circumstance when that assault occurred since he did not know that anyone in the car had a gun. (22 RT 4206.)

Appellant claimed that he was a backseat passenger in a white Toyota Camry stopped at the intersection of Westminster and Brookhurst when the May 6, 1995, shooting of Tuan Phan occurred. (22 RT 4041-4042.) His friend Hoan Viet Tran sat in the front passenger's seat and Hoan's brother

sat in the driver's seat. (22 RT 4225.) Hong was not a Nip Family gang member. (22 RT 4225.) Appellant did not have a gun and had no idea that either Hong or Hong's brother had a gun. (22 RT 4228.) Hong's brother looked in the rear view mirror and exclaimed, "Look in the back!" (22 RT 4043, 4228.) Appellant turned to see a man standing behind their car raising a shotgun. (22 RT 4229-4230.) The man fired the shotgun as appellant ducked down onto the rear passenger's seat. (22 RT 4231.) The shotgun pellets and the shattered glass fragments from the rear window injured appellant. (22 RT 4232-4237.) Appellant heard more gunshots while lying down on the backseat but had no idea what Hong and Hong's brother did with their guns after the gun battle. (22 RT 4246.) Appellant lied to Dr. Nguyen about the cause of his injuries because he was on probation and did not want anyone to know he had been involved in a gun battle. (22 RT 4237.)

C. The Foregoing Substantial Evidence Supports the Jurors' Verdicts Rejecting the Defense Claim That Appellant Justifiably Shot Cheap Boy Tuan Pham in Self-Defense

Jurors could reasonably infer from the foregoing substantial evidence that appellant murdered Cheap Boy gang member Tuan Phan on May 6, 1995, and did so for the benefit of the Nip Family. Appellant drove a white four-door Honda as he had on other occasions. Jurors could reasonably conclude that appellant armed himself before he drove himself and at least one other armed passenger in an expedition in search of rival gang members to shoot. Also looking for ga-ng rivals that night was Cheap Boy gang member Tuan Pham who was driving one or more armed Cheap Boys in an Oldsmobile registered to a another Cheap Boy.

The gangsters spotted each other at some point before they approached the intersection of Westminster and Brookhurst. When the light turned red, Tuan Pham almost backed into the car behind him, then

partially reentered the Oldsmobile in an unsuccessful effort to steer it out of the left turn lane, in order to remove himself and his passengers from the direct line of fire in the anticipated gun battle. Only when he failed in these attempts did he exit the Oldsmobile with a firearm in order to approach appellant's car on foot.

Appellant smiled when he saw Phan rounding the front of the Oldsmobile in order to approach his car because appellant and one of his passengers now "had the drop" on Phan. Unbeknownst to Phan, they had both grabbed their guns and were ready to shoot Phan as soon as he came into view. Appellant rested his own firearm on the base of the open driver's side window before shooting Phan three to five times from the driver's seat of his car. Appellant's armed passenger then shot Phan by firing his weapon at Phan over the roof of appellant's car.

The fact Phan had not yet raised his gun when he was shot shows he was taken unawares by appellant and his armed passenger. Another Cheap Boy nevertheless exited the passenger's side of the Oldsmobile and fired at the rear window of appellant's car about fifteen seconds after Phan was shot. Appellant shot back at the Oldsmobile, accounting for the bullet found in the engine compartment of the Oldsmobile behind the left headlight of the Oldsmobile. Birdshot and broken glass from one of the shotgun blasts hit appellant in his back, in his right arm and in his hands and fingers. With its driver partially immobilized by the birdshot, appellant's car slowed and swerved as it drove north on Brookhurst and away from the shooting scene.

D. Jurors Rejected the Defense Claim That Appellant Justifiably Shot Tuan Pham Under the Trial Court's Self-Defense Instructions.

The trial court instructed jurors that,

> The killing of another person in self-defense is justifiable and not unlawful when the person who does the

> killing actually and reasonably believes: (1) That there is imminent danger that the other person will kill him or cause him great bodily injury; and (2) That it is necessary under the circumstances for him to use in self-defense force or means that might cause the death of the other person, for the purpose of avoiding death or great bodily injury to himself.
>
> A bare fear of death or great bodily injury is not sufficient to justify a homicide. To justify taking the life of another in self-defense, the circumstances must be such as would excite the fears of a reasonable person placed in a similar position, and the party killing must act under the influence of those fears alone. The danger must be apparent, present, immediate and instantly dealt with, or must so appear at the time to the slayer as a reasonable person, and the killing must be done under a well-founded belief that it is necessary to save oneself from death or great bodily harm.

(CALJIC No. 5.12; 3 CT 1047-1048; 27 RT 5281.)

Viewing the record as a whole in the light most favorable to the verdicts, and drawing all reasonable inferences jurors could have drawn in favor of the verdicts (*People v. Farnam*, *supra*, 28 Cal.4th at p. 143; *People v. Kraft*, *supra*, 23 Cal.4th at p. 1053), jurors could reasonably infer from the evidence that appellant and at least one of his passengers armed themselves in order to hunt for Cheap Boys on the evening of May 6, 1995. They and the Cheap Boys in the Oldsmobile driven by Tuan Pham spotted each other sometime before reaching the intersection of Westminster and Brookhurst. When the cars reached the intersection of Westminster and Brookhurst and the light turned red, Cheap Boy Tuan Pham unsuccessfully attempted to get out of the line of fire by trying to back the Oldsmobile up and by trying to steer it out of the left turn lane. Already armed, appellant and his passenger lay in wait for Phan so they could carry out their plan of hunting Cheap Boys by shooting him at close range. They did so in order

enhance their own gang status and the gang status of the Nip Family rather than to protect themselves from the imminent danger of death or great bodily injury.

The trial court instructed jurors that,

> The right of self-defense is not available to a person who seeks a quarrel with the intent to create a real or apparent necessity of exercising self-defense.

(CALJIC No. 5.55; 3 CT 1058; 27 RT 5285-5286.)

Viewing the record as a whole in the light most favorable to the verdicts and drawing all reasonable inferences jurors could have drawn in favor of the verdicts (*People v. Farnam*, *supra*, 28 Cal.4th at p. 143; *People v. Kraft*, *supra*, 23 Cal.4th at p. 1053), jurors could reasonably infer that appellant sought a quarrel with Cheap Boys with the intent to create a real or apparent necessity of exercising self-defense by arming himself and one or more of his passengers in order to hunt for similarly-armed Cheap Boys.

The trial court instructed jurors that the right of self-defense is only available to a person who engages in mutual combat if he has done all the following:

> 1. He has actually tried, in good faith, to refuse to continue fighting;
> 2. He has clearly informed his opponent that he wants to stop fighting;
> 3. He has clearly informed his opponent that he has stopped fighting; and
> 4. He has given his opponent the opportunity to stop fighting.
>
> After he has done these four things, he has the right to self-defense if his opponent continues to fight.

(CALJIC No. 5.56; 3 CT 1059; 27 RT 5286.)

Viewing the record as a whole in the light most favorable to the verdicts and drawing all reasonable inferences jurors could have drawn in

favor of the verdicts (*People v. Farnam*, *supra*, 28 Cal.4th at p. 143; *People v. Kraft*, *supra*, 23 Cal.4th at p. 1053), jurors could reasonably infer that appellant engaged in mutual combat with Cheap Boys and other deadly enemies of the Nip Family, such as Tiny Rascal Gang members, by acting as a Nip Family warrior in the gang wars of 1994 and 1995. Appellant and his passengers, and Tuan Pham and his passengers, engaged in the mutual combat between the Nip Family and Cheap Boys on May 6, 1995, by spotting each other while hunting for rival gangs at some point before the two cars arrived at the intersection of Westminster and Brookhurst.

Appellant and his armed passenger never attempted to break off the impending fight, never made any attempt to inform the Cheap Boys they were breaking off the fight, and never gave the Cheap Boys any opportunity to stop the fight. When the light turned red at the intersection of Westminster and Brookhurst, Tuan Pham sought to move out of the anticipated line of fire by attempting to back up the Oldsmobile and by attempting to steer the Oldsmobile out of the left turn lane. Appellant and his armed passenger lay-in-wait for Pham when Pham exited the Oldsmobile after unsuccessfully attempting to back up the Oldsmobile and steer it out of the left turn lane.

The trial court instructed jurors that,

> The right of self-defense is only available to a person who initiated an assault if he has done all the following:
>
> 1. He has actually tried, in good faith, to refuse to continue fighting;
>
> 2. He has clearly informed his opponent that he wants to stop fighting; and
>
> 3. He has clearly informed his opponent that he has stopped fighting. After he has done these three things, he has the right to self-defense if his opponent continues to fight.

(CALJIC No. 5.54; 3 CT 1057; 27 RT 5285-5286.)

Viewing the record as a whole in the light most favorable to the verdicts and drawing all reasonable inferences jurors could have drawn in favor of the verdicts (*People v. Farnam*, *supra*, 28 Cal.4th at p. 143; *People v. Kraft*, *supra*, 23 Cal.4th at p. 1053), jurors could reasonably infer that appellant initiated the assault on May 6, 1995. Appellant had previously initiated the assaults on July 21, 1994, February 5, 1995, March 11, 1995, and May 3, 1995. Huy "Pee Wee" Nguyen testified that his assailant initiated the November 24, 1994, assault by punching him in the face after asking him if he belonged to T.R (the Tiny Rascals Gang). (7 RT 1305.)

On May 6, 1995, appellant and his passenger precipitated the gun battle resulting in Tuan Phan's death by spotting the Cheap Boys before the Cheap Boys spotted them. Evidence suggested they armed themselves first since Tuan Phan only emerged from the Oldsmobile with a firearm after unsuccessfully attempting to back the Oldsmobile up and steer it out of the left turn lane. (13 RT 2592-2598; 14 RT 2711.) Appellant and his passenger shot Phan down before he was able to raise his weapon. (13 RT 2608-2609; 14 RT 2719-2721.) Phan's passenger was only able to fire his shotgun at appellant's car fifteen to twenty seconds after Phan was shot down. (14 RT 2723.)

As an initial aggressor, appellant never refused to fight, never backed away from the impending fight, never sought to inform any of the Cheap Boys he wanted to stop fighting, and never informed any of the Cheap Boys he had stopped fighting, before he and his passenger fired the fatal shots on May 6, 1995.

E. The Trial Record Does Not Support Appellant's Claim That As A Matter of Law, Tuan Pham's Killer Justifiably Killed Tuan in Self-Defense

Appellant relies on the following references to the trial record to support his claim that a matter of law, Tuan Pham's killer justifiably killed

Tuan in self-defense: (1) "Oh my God," eyewitness Shawn Burchell exclaimed as she watched Tuan Pham approach the Honda with gun in hand, "he's going to kill somebody[]" (13 RT 2598; AOB 123, 193); (2) when Tuan Pham arrived at the side of the Honda slightly behind the driver's window and started to raise his gun hand, it was – as eyewitness Robert Murray assessed the situation – a matter of "survival[]" (14 RT 2718; AOB 123, 193); (3) the driver refrained from acting as long as he possibly could and did not fire his weapon until Tuan actually started to raise his gun hand (13 RT 2602-2603; AOB 124, 193-194); (4) the trial judge said at sentencing that Tuan "was actively seeking to kill the defendant[]" (31 RT 6082; AOB 123).

But none of these circumstances support appellant's claim that as a matter of law Tuan Pham's killer justifiably killed Tuan in self-defense. They do not support appellant's claim because they are consistent with the following scenario. Appellant had no intention of declining battle or attempting to escape the impending confrontation. Instead, appellant and appellant's armed passenger lay in wait for Tuan Phan while Phan approached appellant's car on foot, unaware of the fact that they were ready and waiting to kill him before he could raise his own weapon. Appellant smiled and waited to fire until Phan had come close enough to shoot at close range. Like the Cheap Boys, appellant had been looking for an opportunity to kill a rival gang member. Unlike Cheap Boy gang member Tuan Phan, however, appellant and his passenger found such an opportunity.

Appellant contends that even if he believed that members of the Cheap Boys gang would be out looking to kill him, he had a right to be in a car on a public street on the day Tuan Pham attacked him. (AOB 133-134.) But appellant's right to be in a car on a public street did not justify his act of shooting Tuan Pham if appellant and his armed passenger were also

looking for rival gangsters to kill and carried out their plan by lying in wait in order to kill Tuan Pham after spotting the Cheap Boys an another car.

Appellant contends that even if he previously intended to kill Tuan Pham, the fact he was defending his life when he killed Tuan Pham meant he was acting in self-defense. (AOB 134.) But the opinion appellant cites for this proposition does not stand the proposition cited. It only holds that a defendant who kills the victim in order to defend himself from the victim's attack acts in self defense even though he intentionally kills the victim in order to defend himself. (*People v. Barry* (1866) 31 Cal. 357, 358, cited at AOB 357, 358.)

Appellant contends that the suddenness of Tuan Pham's attack justified the shooting even if appellant might otherwise have resorted to alternative means of securing his safety. (AOB 134.) But substantial evidence set forth above shows the attack by Tuan Pham was anticipated rather than sudden. By establishing that appellant and his passenger were ready for Phan's despite Phan's unsuccessful efforts to back up the Oldsmobile and steer it out of the left turn lane, the evidence circumstantially established that appellant and his armed passenger had spotted the Cheap Boys before the Cheap Boys spotted them.

Appellant contends that because the events immediately surrounding the May 6, 1995 shooting show appellant was not engaged in mutual combat, he was not required to decline any further struggle before killing Pham. (AOB 135, 155.) Appellant asserts that the prosecutor failed to support her closing argument that there was no right to self-defense in the mutual combat situation triggered by the gang war (26 RT 4972, 4977, 4979, 5002; AOB 136) despite her reliance on the following opinion testimony from Detective Mark Nye: The gang war between the two Vietnamese gangs meant all members of each gang would seek rivals each time they went out and would attempt to kill rival gang members any time

they saw them (16 RT 3181, 3188-3189, 3195, 3197-3199, 3212-3213, 3211; AOB 136, AOB 136 fn.88, AOB 149 fn. 101).

Appellant contends the prosecutor could not rely on Nye's testimony because it was inherently incredible. (AOB 137-138, 155.) Appellant alleges Nye's testimony was inherently incredible because it relied upon two inherently incredible propositions: (1) although the Nip Family and Cheap Boys each had a fluid membership and each had approximately 50 members living across a wide area, all the members of each gang believed every member of the opposing gang must be shot on sight (16 RT 3178, 3180-3181, 3218; AOB 148-149 fn. 100); and (2) all members of each gang sought rivals to shoot every time they went out (AOB 138-140).

But when referencing the cited pages, appellant overstates what Nye said. Nye never claimed the sole activity of every gang member was killing a member of a rival gang or that no gang member left his home unless he did so for the purpose of killing another gang member. As noted in respondent's summary of the factual history leading up to the shooting of Tuan Pham, Nye instead described an ongoing and deadly gang war between the Nip Family and the Cheap Boys in which armed gang members from one gang would regularly hunt gang members from another gang. Gang members could therefore plan and premeditate murders and attempted murders within a very short time after spotting rival gang members. (Respondent's argument VII(A), *ante*.)

Gang members and former gang members corroborated Nye's testimony about the deadly, ongoing gang war between Nip Family and the Cheap Boys. (See: Kevin Lac, 9 RT 1632; Tinh Dam, 6 RT 1127; Andy Ja, 19 RT 3565; Khoi Huynh, 10 RT 1906-1907.) So did appellant's deadly actions on July 21, 1994, February 5, 1995, March 11, 1995, and May 3, 1995. (See respondent's factual summary, *ante*.) And appellant's attempted murder of Huy "Pee Wee" Nguyen on November 24, 1994, corroborated

Nye's testimony that the Nip Family and Tiny Nip Gang were also involved in a deadly gang war in 1994 and 1995. (16 RT 3197, 3208-3211.)

Appellant nevertheless contends the following trial evidence refutes Detective Nye's testimony: (1) Kevin Lac (a Cheap Boy) testified that he had "bumped into" appellant at least five or six times (9 RT 1630), and on none of those occasions did appellant make any effort to shoot him (AOB 140); (2) Nor did either man attempt to shoot the other when appellant allegedly came to Lac's apartment after the shooting of Tony Nguyen (9 RT 1634; AOB 140); (3) neither Sang Nguyen nor his fellow Cheap Boys sought rivals on the day that Sang was shot outside the Dong Khanh Restaurant; and (4) even when they saw rival gang members approaching on that day, Cheap Boys Trieu Binh Nguyen, Binh Tran and Sang Nguyen took no steps to try to shoot them. (AOB 140).

But the cited testimony did not contradict Nye's testimony that Nip Family and the Cheap Boys were engaged in a mutual gang war which involved gang members regularly hunting for rival gang members. Lac recalled bumping into appellant several times before he found out that appellant was associated with the Nip Family, a discovery Lac made about a month and a half after moving into the apartment building. (9 RT 1630.) Only later did one of appellant's friends call out Lac's name, signaling their discovery that Lac was a Cheap Boy. (9 RT 1631.) Shortly thereafter, as one of the back seat passengers in My Tran's car, appellant triggered the July 21, 1994, shooting of Tony Nguyen by helping to spot Cheap Boys Lac and Tin Dam (9 RT 1620) in the car driven by Tony Nguyen. (9 RT 1621-1622.) When appellant showed up with his friends at Lac's front door a few days after the July 21, 1994, shooting and asked, "What's up with the police" (9 RT 1634), he did so for the self-evident purpose of intimidating Lac and thereby preventing him from cooperating with the police and from testifying against the Nip Family. Lac himself had no

opportunity to kill appellant when appellant and his friends showed up at Lac's front door.

Testimony that Sang Nguyen went to church and went to the Dong Khanh restaurant in order to celebrate Tet on February 5, 1995 (11 RT 2109-2112) did not contradict Detective Nye's testimony that the Cheap Boys and Nip Family were engaged in a deadly gang war in which gang members regularly hunted members of the rival gang. As explained above, Nye did not say that gang members never did anything else. As noted in respondent's first argument, *ante,* when Trieu Binh Nguyen spotted appellant and Nip Family companions walking toward the front door of the Dong Khan Restaurant on February 5, 1995, Trieu was no longer a Cheap Boys gang member. (7 RT 1269.) Trieu nevertheless told Cheap Boys gang member Binh Tran (10 RT 1942; 17 RT 3312-3313) to go back inside the restaurant and warn Trieu's friend Sang Nguyen about the approach of armed Nip Family (7 RT 1218).

Several reasons likely prompted Cheap Boy Sang Nguyen's final act of attempting to shake appellant's hand after exiting the restaurant. Binh Tran had not been able to give Sang the news that Nip Family outside the restaurant was armed. It was also Tet. Sang's older brother Minh Duc Nguyen was a Natoma Boy gang member. (16 RT 3150-3151.) Moreover, the Natoma Boys were older brothers and relatives of Nip Family gang members. (7 RT 1217.)

Appellant contends the surprise attack by Tuan Pham eliminated any plausible theory that Tuan Pham and appellant were engaged in mutual combat on May 6, 1995, and that appellant therefore had any duty to decline in good faith any further struggle before shooting Pham. (AOB 141-145.) Appellant contends that faced with a surprise attack like the one in the case-at-hand, he had no opportunity to decline further struggle or withdraw but rather had to shoot his assailant in order to save his own life.

(AOB 143-145, 155.) But Tuan Pham's attack was not a surprise, since appellant and appellant's passenger anticipated it and were armed and waiting for Pham before Pham could fire his first shot. And Pham's own unsuccessful actions - attempting to back the Oldsmobile up and steer the Oldsmobile out of its position in the left turn lane before retrieving his firearm from the Oldsmobile - suggests both sides anticipated a shoot out before Pham exited the Oldsmobile in order to approach the Honda on foot.

Appellant contends that a gang war did not constitute mutual combat unless the warring gangs agree ahead of time to meet at a particular time and place for combat. He asserts that no such agreement preceded either the Tuan Pham shooting or any of the other serial retaliations between the Nip Family and Cheap Boys. (AOB 145-150.) But appellant takes an overly narrow view of the words "mutual combat."

As Detective Nye explained, criminal Asian Street gangs did not consider turf important (16 RT 3180-3181) but rather involved themselves in street warfare wherever they happened to meet (16 RT 3181). Asian gangs sought to be number one. (16 RT 3183.) Shooting rivals enhanced the status of the gang and the gang member within the gang. (16 RT 3183-3185). Members of Asian criminal street gangs took close associates or fellow gang members with them in order to look for rival gang members and so increase their status in the gang community. (16 RT 3198.) Hunting rivals was a major gang activity. (16 RT 3199.) Gang members traveling in cars in order to hunt for rivals had ready access to firearms if they spotted their rivals. (16 RT 3201.) Gang members traveling together could agree to shoot a rival within a very short period of time as soon as the rival gang member was spotted. (16 RT 3210-3212.) Each rival gang sought gang members of the other gang, and gang members commonly acted together to ensure success. (16 RT 3211.) Nip Family gang members

spotting Cheap Boys would attempt to kill them and vice versa. (16 RT 3211.)

Such a scenario involved mutual combat even without formally scheduled appointments for the time and place of each gun battle. The May 6, 1995 shooting of Cheap Boy Tuan Pham - like the July 21, 1994, shooting of Tony Nguyen, the February 5, 1995, shooting of Cheap Boy Sang Nguyen, the March 11, 1995, shooting of Cheap Boy Khoi Huynh, and the May 3, 1995, shooting of Duy Vu - illustrate ongoing mutual combat carried on by Asian criminal street gangs in general and the Nip Family gang members and the Cheap Boys in particular.

Appellant contends that true mutual combat - unlike the scenario resulting in the shooting of Tuan Pham, - gives each party the opportunity to withdraw in good faith from the struggle. (AOB 147-148.) Appellant asserts that there is no mutual combat absent a way to withdraw for a member of one gang who no longer wishes to participate in the war or who never sought to participate in the first place. (AOB 149.) Appellant asserts that a prohibition against self-defense during a gang war would lead to a legal absurdity by requiring rivals - but not requiring non-rivals - to submit to death at the hands of the gang. (AOB 149-150.)

But appellant's argument relies on a mistaken premise. Mutual combat does not require any opportunity to withdraw in good faith from the struggle. Whether or not such an opportunity exists is an independent factual issue for the jury. (CALJIC No. 5.56; 3 CT 1059; 27 RT 5286.) And jurors in the case at hand could reasonably decide from the substantial evidence summarized in respondent's argument VII(b), *ante*, that appellant had such an opportunity at some point prior to the fatal shooting of Tuan Pham.

Appellant contends there was no evidence he was the initial aggressor and therefore no legal ground to limit his right to defend himself by

requiring that (1) he first try in good faith to refuse to continue fighting; (2) clearly inform his opponent he wants to stop fighting; and (3) clearly inform his opponent he has stopped fighting. (CALCJIC 5.54; 3 CT 1057; 27 RT 5285; AOB 156.)

But jurors could reasonably find from the substantial evidence summarized in respondent's argument VII(A),(B), *ante*, that by the time of the May 6, 1995, shooting of Tuan Pham, appellant was a senior Nip Family warrior who knew his Cheap Boy rivals and was therefore either an initial aggressor or mutual combatant prior to the fatal shooting. Rather than seeking to withdraw from or call off the impending gun battle, appellant and his armed passenger "got the drop" on Tuan Pham and lay in wait for him after Pham failed in his efforts to move the Oldsmobile out of its spot in the left turn lane and thereafter exited the Oldsmobile in order to approach appellant's Honda on foot.

F. The Jury Verdicts In Counts Thirteen And Fourteen Were Not Based On An Unconstitutional Mutual Combat Theory of Gang War Espoused by the Prosecutor That Deprived Deserving Defendants of Their Right of Self-Defense

Based upon his previously discussed interpretation of cited testimony of Detective Nye regarding Asian gang warfare (16 RT 3181, 3188-3189, 3195, 3197-3199, 3211, 3212-32133; AOB 136) and his previous references to the prosecutor's closing argument relying on Nye's testimony (26 RT 4972, 4977, 4979, 5002; AOB 136), appellant contends that the prosecution relied on an unconstitutional mutual combat theory of gang war that deprives deserving defendants of their right of self-defense (AOB 150-154). Appellant asserts the alleged prosecution theory was unconstitutionally vague insofar as persons of common intelligence must necessarily guess at its meaning and differ as to its application (AOB 150-154); is constitutionally overbroad (AOB 153-154); violates due process as

unexpected and indefensible by reference to previously expressed law (AOB 154); and must be legislatively enacted before it is embraced by a court or asserted by a prosecutor. (AOB 154.)

But as respondent has previously explained, appellant has misinterpreted Nye's testimony by overstating Nye's assertions. Nye never claimed the sole activity of every gang member was killing a member of a rival gang or that no gang member left his home unless he did so for the purpose of killing another gang member. As noted in respondent's argument VII(A), *ante*, Nye instead described an ongoing and deadly gang war between the Nip Family and the Cheap Boys in which armed gang members from one gang would regularly hunt gang members from another gang. Gang members could therefore plan and premeditate murders and attempted murders within a very short time after spotting rival gang members.

Insofar appellant relies on the prosecutor's argument to support his contention that the prosecution presented an unconstitutional mutual combat theory of gang war, appellant has forfeited his contention. Appellant has forfeited his contention by failing to object in the trial court to the prosecutor's argument at any of the pages he references and by failing to request a curative admonition from the trial court for any of the prosecutor's referenced remarks. (*People v. Mills, supra,* 48 Cal.4th at p. 194; *People v. Huggins* (2006) 38 Cal.4th 175, 205; *People v. Harris, supra,* 37 Cal.4th at p. 345.) Had any of the prosecutor's referenced remarks misstated the law of self-defense as set forth in the trial court's instructions, a successful trial court objection and trial court admonition would have cured any prejudice created by the remark.

Furthermore, appellant errs insofar as he focuses on the alleged prosecution theory to support his argument that insufficient evidence supports the challenged verdicts, since the prosecutor's argument is not

evidence and the theories suggested by the prosecutor are not the exclusive theories that may be considered by the jury. (*People v. Perez* (1992) 2 Cal.4th 1117, 1125-1126; *People v. Raley* (1992) 2 Cal.4th 870, 902.)

Were this Court to nevertheless consider appellant's contention on its merits, it should in any event reject the contention as meritless. A review of the prosecutor's argument belies appellant's assertion of an unconstitutional prosecution theory depriving appellant of his right of self-defense. It shows instead that appellant has either overstated the meaning of the referenced remarks or taken them out of context. (26 RT 4972, 4977, 4979, 5002; AOB 136.)

At 26 RT 4972, the prosecutor stated,

> In the gang world you've heard from the expert they think about killing the rivals all the time. It's going to be a quicker decision for them than it would be for a decent person, deciding to kill somebody else. Because they have already weighed and considered the consequences.
>
> It's more like deer hunters. They go out, they know that they're going to look for the buck to shoot and kill. They think about what type of ammunition would be the best, what type of weapons would be the best for that. They're considering all of these things beforehand.
>
> When they go up to the mountains and a big, delicious looking duck flies by, it's not duck season. They don't pull the trigger. They consider the consequences. No, it's not duck season.
>
> But when they see the buck, it doesn't take but a few seconds that thing starts bounding, to know, to develop that intent to kill. That's considered, deliberate, premeditated. And they do it.

(26 RT 4972.)

In the foregoing passage, the prosecutor used the deer hunting analogy to illustrate how the trial evidence showed that gang members hunting for rival gang members can premeditate and deliberate very quickly once they spot the rival gang members, an argument well within the law since

premeditation and deliberation do not require an extended period of time, merely an opportunity for reflection. (CALJIC No. 8.20; 3 CT 1010; *People v. Cook* (2006) 39 Cal.4th 566, 603.)

At 26 RT 4977-4978, the prosecutor stated,

> Another important issue on self-defense in a gang case is, the right of self-defense is not available to a person who seeks a quarrel with the intent to create a real or apparent necessity of exercising self-defense. In other words, it's not available in the gang situation where both sides are actively at war, both sides are actively seeking out the other to fight, to go into battle. Neither side, for instance, the May 6th, 1995 incident at Brookhurst and Westminster, neither side can step back and say "self-defense." This is a bit out of order, but because of the instructions. As a Cheap Boy pulled up and saw the defendant in that car, right across from them, they can't say well, we had to use self-defense against the defendant, because he has been killing us and would shoot us. Because they're both actively engaged in that battle. In that war.
>
> And the same way the defendant can't claim self-defense when he has actually initiated the war. He has done the killings. Anybody in that gang world knows that there's going to be retaliations. He can't sit back and say self-defense, in that situation, either.

(26 RT 4797-4978.)

The prosecutor made the foregoing remarks in the context of her longer discussion about whether or not defendant acted in self-defense when committing the charged crimes. (26 RT 4973-4979; 27 RT 5170-5173, 5183-5184, 5207-5208, 5215.) That discussion included the prosecutor's explanation of why appellant's facial expression and his actions immediately prior to the May 6, 1995, shooting showed that appellant was not acting in self-defense but rather was actively engaged in the gang war. (26 RT 4978-4979.)

Viewed against the backdrop of the trial court's self-defense instructions, summarized in respondent's argument VII(C), *ante*, - and viewed in the context of the prosecutor's full discussion of whether or not appellant acted in self-defense when committing the charged crimes - the referenced remarks highlighted the prosecutor's view that rather than acting in self-defense at the time of the May 6, 1995, shooting, appellant actively engaged in the gang war at that time by killing Tuan Pham for the purpose of enhancing his own Lip Family status while enhancing the status of Nip Family itself.

At 26 RT 4979, the prosecutor stated,

> There's also no right to self-defense in a mutual combat situation. You'll get that instruction, as well.
>
> And in our situation they were all engaged in combat on May 6th, 1995. Both sides. Neither side again would be able to say self-defense, unless they said, okay, we're in mutual combat. But again, I want to stop and tell you I quit fighting, I'm done. I give up. No more fighting. Peace.
>
> And of course you heard from the expert they can't do that in Asian gangs, they'd lose face. And they didn't want to lose face. In fact, the primary motivation for the killings, was to gain face.

(26 RT 4979.)

When making the foregoing remarks about mutual combat, the prosecutor reminded jurors of the self-defense/mutual combat instruction they would receive, summarized in respondent's argument VII(C), *ante*. The prosecutor's remarks, viewed as a whole, reasonably suggested that the importance of face to Asian gang members, appellant's prior history as a gang assassin, and the evidence surrounding the May 6, 1995, shooting, show appellant had no intention of withdrawing from the impending gun battle. Instead, appellant seized the opportunity to kill Tuan Phan in order to further his own gang status and the status of Nip Family.

At 26 RT 5002, the prosecutor stated,

> And that [the Tuan Phan homicide] is one of the ones that you'll look at self-defense. If it's a mutual combat situation. They do not have a right to self-defense until they try to pull out of the mutual combat. These two gangs were mutually at war. And both sides could be and should be prosecuted for that particular homicide. Both sides. The survivors – obviously Tuan Pham is not around to be prosecuted. Both sides were engaged in mutual combat.
>
> The Cheap Boys pulled forward. If they had stayed where they were, probably would have been a gunfight straight across. But they did back up before Tuan Pham got out of the car and walked over.

(26 RT 5002.)

Once again, the prosecutor's remarks reasonably expressed her view that the evidence surrounding the shooting of Tuan Phan showed that when he killed Tuan Pham on May 6, 1995, appellant had no intention of withdrawing from the mutual combat between Nip Family and the Cheap Boys.

Appellant nevertheless lists the following perceived problems with the alleged prosecution theory of mutual combat based upon pre-existing and ongoing gang war, a theory that allegedly contradicted and nullified the self-defense instructions given by the trial court: (1) Detective Nye admitted gang members sometimes commit crimes for reasons unrelated to their gang membership (17 RT 3218; AOB 150); (2) when one gang member assaults a member of a rival gang for purely personal reasons, the person assaulted is therefore arbitrarily entitled to use self-defense under the theory (AOB 150); (3) the intended victim cannot know for certain whether his assailant is acting for personal or gang related reasons (AOB 150); (4) the theory does not say whether the assailant's actual motivation or the intended target's belief controls (AOB 150); (5) the theory does not say whether the intended target's belief must be reasonable or whether his

good faith belief suffices (AOB 150-151); (6) the intended target might lose his right of self-defense under the theory if he does not recognize his assailant, or his right of self-defense might arbitrarily depend on whether or not his assailant turns out to be a rival gangster (AOB 151); (7) the theory could make the intended target strictly liable for murder if his assailant is a rival gangster, whether or not the intended target recognizes him as such (AOB 151); (8) the intended target who believes the assailant is not a member of a rival gang could go free if he is correct or go to prison or death row if he is mistaken (AOB 151); (9) an intended target who thinks the assailant is a member of a rival gang could go free if he is mistaken (AOB 151); (10) an untrained intended target acting under the stress of impending death cannot be expected to accurately determine if his assailant is actually a rival gang member; (11) an intended target who does not know which gang his assailant is from might not be entitled to defend himself (AOB 152); (13) an intended target who does not believe or know the gangs are actually at war might not have the right to defend himself (AOB 152 fn. 103); and (14) whether an intended target can defend himself under the theory depends upon the definition of gang war used at trial and whether or not any reciprocal fighting between the gangs meets that definition under the circumstances of the case (AOB fn. 103).

But as respondent has explained in respondent's argument VII(F), *ante*, appellant has forfeited any complaint about an alleged special prosecution theory which contradicted and nullified the trial court's self-defense instructions by failing to object to the referenced portions of the prosecutor's argument in the trial court. (*People v. Mills*, *supra*, 48 Cal.4th at p. 194; *People v. Huggins*, *supra*, 38 Cal.4th at p. 205; *People v. Harris*, *supra*, 37 Cal.4th at p. 345.) And while there was substantial evidence of mutual combat based upon a pre-existing and ongoing gang war - substantial evidence summarized in respondent's argument VII(A), *ante*,

and referenced both in Detective Nye's gang testimony and the prosecutor's opening and closing arguments to the jury – there was no special prosecution theory other than appellant's guilt under the trial court's instructions.

None of the hypothetical problems perceived by appellant could exist at a trial like appellant's, in which the jury (1) determines the facts surrounding the charged crime; (2) determines how those facts would have appeared to the defendant from all the evidence of the defendant's background and experience, and from all the evidence surrounding the charged crime; and (3) reaches its verdict based on an objective determination of how a reasonable person with defendant's history and background would react when faced with those apparent facts.

G. The Jury's Verdicts In Counts Thirteen and Fourteen Were Not Based on an Erroneous Initial Aggressor Theory Espoused by the Prosecutor

Appellant contends there was no evidence to support the prosecutor's closing argument claim that appellant "actually initiated the war" between the Nip Family and Cheap Boys gangs (26 RT 4978; AOB 156-157) because that war began in April 1993 (13 RT 2516) with the shooting in front of the Can Restaurant (10 RT 1906; AOB 157), whereas appellant's first offence against a Cheap Boy gang member occurred nearly two years later, on February 5, 1995, with the killing of San Nguyen (AOB 157). Appellant further explains that (1) the attempted murders of Tony Nguyen on July 21, 1994, and Huy (PeeWee) Nguyen on November 24, 1994, did not involve Cheap Boys; (2) appellant was merely the back seat passenger in the car from which the shots that hit Tony Nguyen were fired; and (3) PeeWee Nguyen was himself the initial aggressor in the incident in which PeeWee was shot. (AOB 157 fn. 109.)

Appellant contends that the prosecutor distorted the initial aggressor doctrine insofar as she argued to the jury that the shootings of Cheap Boys Sang Nguyen on February 5, 1995, and Khoi Huynh on March 11, 1995, made appellant the initial aggressor two to three months later on May 6, 1995, when Tuan Pham was killed. (26 RT 4978; AOB 158.) He alleges these earlier shootings could not make him the initial aggressor in the Tuan Pham shooting for the following reasons: (1) they did not create an immediate danger to Tuan Pham and neither of the earlier victims were present or in danger when Tuan Pham was shot (AOB 158); (2) a pause in combat eliminates one's status as an initial aggressor (AOB 158-159); (3) an initial aggressor in one incident does not retain that status when retaliation is later sought for that incident (AOB 159); (4) the initial aggressor's retreat from the scene of his initial aggression extinguishes his status as initial aggressor (AOB 160-161); (5) the initial aggressor doctrine applies solely to the circumstances and situation of the deceased and defendant at the time the killing occurred, and under which defendant asserts he was justified in killing the deceased (AOB 161); and (6) the doctrine of lenity and the canon of constitutional avoidance preclude the expansion of the initial aggressor doctrine to the circumstances in the case at hand (AOB 161-162; AOB 162 fn. 110).

This Court should reject appellant's contention as forfeited because appellant failed to object in the trial court to the prosecutor's challenged argument and failed to ask the trial court for a curative admonition that would have cured the alleged prejudice. (26 RT 4978.) (See respondent's argument VII(F), *ante*; *People v. Mills*, *supra*, 48 Cal.4th at p. 194; *People v. Huggins*, *supra*, 38 Cal.4th at p. 205; *People v. Harris*, *supra*, 37 Cal.4th at p. 345.) Appellant in any even errs insofar as he focuses on an alleged prosecution theory in an argument challenging the sufficiency of the evidence because the theories suggested by the prosecutor are not the

exclusive theories that may be considered by the jury. (See respondent's argument VII(F), *ante*; *People v. Perez*, *supra*, 2 Cal.4th at pp. 1125-1126; *People v. Raley*, *supra*, 2 Cal.4th at p. 902.)

Were this Court to nevertheless consider appellant's contention on the merits, it should in any event reject the contention as meritless. Appellant has taken the prosecutor's remark that appellant "has actually initiated the war[]" out of its immediate context (26 RT 4797-4978) and out of the context of the prosecutor's longer discussion about self-defense. (Respondent's argument VII(F), *ante*; 26 RT 4973-4979; 27 RT 5170-5173, 5183-5184, 5207-5208, 5215.)

Sufficient substantial evidence supports the prosecutor's argument that appellant was an initial aggressor as well as a mutual combatant on May 6, 1995, not only because of the circumstances surrounding the shooting of Tuan Phan on that date (Respondent's argument VII(B), (F), *ante*), but also because of appellant's history as an initial aggressor in the previous Nip Family and Cheap Boy encounters of 1994 and 1995 (respondent's argument VII(A), *ante*). Notwithstanding appellant's assertions to the contrary, appellant participated as an initial aggressor in the Nip Family-Cheap Boy war on July 21, 1994, by helping to spot Cheap Boys and Cheap Boy associates in the car driven by Tony Nguyen and thereby triggering and aiding and abetting Nip Family gang member Nghia Phan when he fired his gunshots into Tony Nguyen's car. (Respondent's argument VII(A), *ante*.) Notwithstanding appellant's assertion to the contrary, Tiny Rascal gang associate Huy "Pee Wee" Nguyen was not the aggressor when appellant shot him on November 24, 1994. On the contrary, Pee Wee Nguyen testified that before he was shot, a man asked him if he was from T.R.G. and punched him in the face when he said he only associated with T.R.G. (Respondent's argument VII(A), *ante*.)

H. The Prosecutor Did Not Erroneously Rely on the Contrived Self-Defense Theory In Order to Convict Appellant Of Counts Thirteen And Fourteen

Appellant contends that the prosecutor's argument to the jury erroneously relied upon the contrived self-defense theory to defeat appellant's self-defense claim (26 RT 4977-4978; AOB 162 fn. 111) because that theory – that the right of self-defense is not available to a person who seeks a quarrel with intent to create a real or apparent necessity of exercising self-defense – did not apply to the facts of the case (AOB 162).

Appellant contends for the following reasons that there was no credible evidence he sought a quarrel with Tuan Pham in the manner contemplated by the contrived defense theory: (1) Detective Nye's testimony that all Nip Family and Cheap Boys gang members always went out for the purpose of hunting for rivals to shoot was inherently incredible (AOB 163); (2) the concept of hunting for rivals to shoot does not in any event equate with seeking a quarrel with the intent to create a real or apparent necessity of exercising self-defense, but on the contrary puts the intended victim on guard and gives him an increased chance of thwarting the planned killing (AOB 163); (3) the contrived defense theory applies only to the circumstances and situation of the deceased and defendant at the time the killing occurred and therefore necessarily excludes a surprise attack by a person defendant had never quarreled with or met (AOB 164); and (4) the doctrine of lenity and the canon of constitutional avoidance prohibit the expansion of the contrived defense theory to the scenario presented in the case at hand (AOB 164 fn. 112).

This Court should reject appellant's contention as forfeited because appellant failed to object in the trial court to the prosecutor's challenged argument and failed to ask the trial court for a curative admonition that

would have cured the alleged prejudice (26 RT 4978; *People v. Mills*, *supra*, 48 Cal.4th at p. 194; *People v. Huggins*, *supra*, 38 Cal.4th at p. 205; *People v. Harris*, *supra*, 37 Cal.4th at p. 345.) Appellant in any event errs insofar as he focuses on an alleged prosecution theory in an argument challenging the sufficiency of the evidence because the theories suggested by the prosecutor are not the exclusive theories that may be considered by the jury. (*People v. Perez*, *supra*, 2 Cal.4th at pp. 1125-1126; *People v. Raley*, *supra*, 2 Cal.4th at p. 902.)

Were this Court to nevertheless consider appellant's contention on the merits, it should in any event reject the contention as meritless. As previously explained in respondent's argument VIII(E), appellant overstates Nye's testimony when portraying it as inherently incredible. Nye never claimed the sole activity of every gang member was killing a member of a rival gang or that no gang member left his home unless he did so for the purpose of killing another gang member. As noted in respondent's summary of the factual history leading up to the shooting of Tuan Pham, Nye instead described an ongoing and deadly gang war between the Nip Family and the Cheap Boys in which armed gang members from one gang would regularly hunt gang members from another gang. Gang members could therefore plan and premeditate murders and attempted murders within a very short time after spotting rival gang members. (Respondent's argument VII(A), *ante*.)

Notwithstanding appellant's assertion to the contrary, the concept of hunting for rivals to shoot equates with seeking a quarrel with the intent to create a real or apparent necessity of exercising self-defense. A killer can hunt for a rival with the intent to create a real or apparent necessity of exercising self-defense when the killer and the rival are both armed and are both hunting for each other, as shown by the evidence surrounding the shooting of Tuan Pham (counts thirteen and fourteen). The killer can later

urge he killed in order to defend himself from his victim whether or not the facts bear out such a defense.

When the killer shot Phan, the killer was not the victim of a surprise attack precluding the theory of contrived self-defense theory. On the contrary, the facts surrounding the shooting show Phan's approach was anticipated by his killers. (Respondent's argument VII(B)-(F), *ante*.)

I. The Prosecutor Did Not Erroneously Exploit the "Reasonable Person" Language From the Trial Court's Instructions

Appellant contends that the prosecutor's argument to the jury erroneously exploited "reasonable person" language from the trial court's voluntary manslaughter instructions (CALJIC No. 8.42; 23 CT 1016, 1019; 27 RT 5265, 5267) and self-defense instructions (CALJIC Nos. 5.12, 5.30 and 5.51; 3 CT 1048, 1051, 1054; 27 RT 5281-5284) in order to concoct a baseless theory that self-defense is only available to an ordinary, decent, reasonable person rather than gang member who kills a member of a rival gang (26 RT 4961-4962, 4966, 4972, 4975; 27 RT 5169; AOB 165-169).

This Court should reject appellant's contention as forfeited because appellant failed to object in the trial court to the prosecutor's challenged argument and failed to ask the trial court for a curative admonition that would have cured the alleged prejudice. (*People v. Mills*, *supra*, 48 Cal.4th at p. 194; *People v. Huggins*, *supra*, 38 Cal.4th at p. 205; *People v. Harris*, *supra*, 37 Cal.4th at p. 345.) Appellant in any event errs insofar as he focuses on an alleged prosecution theory in an argument challenging the sufficiency of the evidence because the theories suggested by the prosecutor are not the exclusive theories that may be considered by the jury. (*People v. Perez*, *supra*, 2 Cal.4th at pp. 1125-1126; *People v. Raley*, *supra*, 2 Cal.4th at p. 902.)

Were this Court to consider appellant's contention on the merits, it should in any event reject the contention as meritless. In the referenced passages, the prosecutor only emphasized the objective reasonable person standard applicable in self-defense and heat of passion manslaughter when discussing self-defense and heat of passion manslaughter. The prosecutor could use emotional language so long as she based her argument on the evidence. (*People v. Franco* (1994) 24 Cal.App.4th 1528, 1536.) The prosecutor referenced "decent" persons when discussing the reasonable person standard in order to emphasize that appellant could not set up his own standard of conduct as a criminal street gang member in order to justify or mitigate the charged crimes.

As this Court has noted, the reasonable person standard does not mean the "reasonable gang member standard." (*People v. Humphrey* (1996) 13 Cal.4th 1073, 1087.) Appellant's status as a criminal street gang member engaged in a gang war did not give him any self-defense privileges not available to the ordinary reasonable person unaffiliated with a criminal street gang. Nor did it mitigate any of the charged crimes. Appellant could not justify arming himself or his companions for anticipated gang battles because of his status as a member of a criminal street gang. And appellant could not justify his crimes because he feared losing face for himself or his gang by avoiding a gang battle, fleeing the scene of a gang battle, or getting out of the criminal street gang.

J. The Prosecutor Did Not Erroneously Rely on a Theory That Self-Defense Required a Display of Emotion

Appellant contends the prosecutor erroneously suggested that self defense is only available if defendant expresses an emotional reaction. Appellant asserts the prosecutor did so when stating during her closing argument that the issue is whether a "reasonable person in this situation would react while so overcome with emotion, that they may kill." (26 RT

4875; AOB 169-174.) Appellant asserts that the prosecutor thereafter used this erroneous theory when discussing how the shooter's act of smiling at witness Robert Murray immediately before Pham arrived at his car showed the shooter (appellant) acted with self confidence rather than fear (26 RT 4978; AOB 170), and looked forward to killing Tuan Pham and other gang rivals with pleasure and joy (AOB 172 fn. 113). In this second closing argument passage referenced by appellant, the prosecutor stated,

> But further evidence of whether the defendant really thought he was acting in self-defense when he began to fire at that particular point was, that smile on his face, as he put his gun up readying it so he could fire, so he could kill another Cheap Boy. That's not a person acting in self-defense. That was a person saying another battle? Those fools, they're going to send a lone gunman up here and think they're going to win?
>
> Smile, self-confidence, and knowledge that once again, he was going to kill another rival gang member.

(27 RT 4978.)

Appellant asserts that the prosecutor erroneously relied on this "emotional reaction" theory because a person may defend himself calmly and without panic or a display of terror without losing his right of self-defense. (AOB 171.)

This Court should reject appellant's argument as forfeited because appellant failed to object in the trial court to the prosecutor's remarks and failed to ask the trial court for a curative admonition that would have cured the alleged prejudice. (*People v. Mills*, *supra*, 48 Cal.4th at p. 194; *People v. Huggins*, *supra*, 38 Cal.4th at p. 205; *People v. Harris*, *supra*, 37 Cal.4th at p. 345.) Appellant in any even errs insofar as he focuses on an alleged prosecution theory in an argument challenging the sufficiency of the evidence because the theories suggested by the prosecutor are not the exclusive theories that may be considered by the jury. (*People v. Perez*,

supra, 2 Cal.4th at pp. 1125-1126; *People v. Raley*, *supra*, 2 Cal.4th at p. 902.)

Were this Court to nevertheless consider appellant's contention on the merits, it should in any event reject the contention as meritless. The prosecutor did not misstate the law by using the word "emotion" since fear is an emotion. When the prosecutor discussed appellant's smile, she also discussed his accompanying actions of putting his gun up and readying himself to fire. The prosecutor could properly make the assertion now challenged by appellant because she reasonably infer appellant's self-confident, non-fearful mental state from appellant's smile and his actions that accompanied his smile. (*People v. Valencia, supra,* 43 Cal.4th at p. 284.) The trial evidence further supported the prosecutor's interpretation of appellant's smile insofar as it showed that immediately before Nip Family gang member Nghia Phan fired gunshots into Tony Nguyen's car and paralyzed Tony Nguyen on July 21, 1994, Phan, appellant, and the other Nip Family gang members in the car in which Phan was riding all smiled at Nguyen and the passengers in Nguyen's car. (Respondent's argument VIII(A), *ante*; 9 RT 1626, 1628, 1702.)

Appellant claims that Murray's testimony that the Honda's driver smiled in Murray's direction (14 RT 2715) was a culturally ignorant conclusion which could not be used to support the conclusion that appellant was acting in self-confidence rather than from fear. (AOB 171-172.) Relying on various internet sources cited at AOB 172-173 in footnotes 119-126, appellant makes the following assertions to support his contention: (1) smiling is a common facial expression among Vietnamese, and guessing the meaning of the smile is almost impossible even for Vietnamese people; (2) the smile is the regional mask worn to disguise the degree and nature of a problem, or even the fact that one exists; (3) in Vietnam the smile can mask embarrassment, anger, fear, anxiety or disagreement; (4) a

Vietnamese smile can be used as a polite screen to hide confusion, ignorance, fear, contrition, shyness, bitterness, disappointment or anger; (5) the Vietnamese smile can mean almost anything. (AOB 172-173.)

But insofar as appellant's argument challenges Murray's testimony describing appellant's smile, appellant has forfeited the argument by failing to object to Murray's testimony in the trial court. (*People v. Riggs* (2008) 44 Cal.4th 248, 299-300.) And appellant may not rely on the internet sources he now cites because they are not part of the trial record, were never offered into evidence at trial, and have not been embraced by both parties as accurate. (*People v. Jennings* (2010) 50 Cal.4th 616, 685 fn. 34.) No one has sought judicial notice for these internet sources. Even if judicial notice could be taken of their existence, content and authenticity, such judicial notice could not establish the truth of the factual matters asserted therein. (*Ibid*; *Mangini v. R.J. Reynolds Tobacco Co.* (1994) 7 Cal.4th 1057, 1063-1064.)

Appellant contends that the prosecutor erroneously offered a Western interpretation of a smile by a non-Westernized individual who had not acculturated to the United States. (AOB 173 citing 29 RT 5707-5709 [the penalty phase testimony of defense psychologist Francis Crinella]), foreshadowing the prosecutor's use of appellant's failure to acculturate as a factor against appellant at the penalty phase of the trial (AOB 173 citing 30 RT 5782-5784).

But the penalty phase opinion of defense psychologist Francis Crinella that appellant failed to acculturate in the United States (29 RT 5707-5709) - like the prosecutor's penalty phase argument that if appellant failed, he failed despite encouragement to do so (30 RT 5782-5784) - concerned such matters as emersion in the general culture, education and economic success, not the varied meanings of a smile.

Appellant asserts the prosecutor herself noted during jury voir dire that Vietnamese have interpersonal mannerisms culturally distinct in meaning from people born in this country or acculturated to this country. (AOB 174 fn. 127.) In the referenced passage, the prosecutor asked prospective jurors if they had heard that Asian witnesses might not necessarily look jurors in the eye. (4 RT 651-652.) The prosecutor asked the question in order to assure herself that they could fairly judge the credibility of witnesses from different cultures regardless of preconceived ideas about what made a person credible or not credible. The prosecutor did not thereby forfeit future closing argument inferences about appellant's state of mind reasonably drawn from the trial evidence.

K. The Jury's Verdicts in Counts Thirteen and Fourteen Did Not Rely on an Erroneous Belief That Self-Defense Is Negated by Additional Motives

Appellant contends that by rejecting self-defense in spite of the unequivocal evidence that appellant shot Tuan Pham in self-defense, jurors likely relied upon an erroneous theory that self-defense is unavailable to a defendant who entertains multiple motives when killing his assailant even when one of those motives is self-defense. (AOB 174-193.) Appellant contends it is reasonably likely they relied upon such a theory by relying on the following language in CALJIC No. 512:

> A bare fear of death or great bodily injury is not sufficient to justify a homicide. To justify taking the life of another in self-defense the circumstances must be such as would excite the fears of a reasonable person placed in a similar position, and the party killing must act under the influence of those fears alone. (3 CT 1047-1048; 27 RT 5281; emphasis added; AOB 174, 193.)

Appellant contends that likelihood was enhanced when the prosecutor argued to the jurors that appellant's smile showed he was looking forward to killing Tuan Pham (27 RT 5183, 5215) and that appellant's smile

showed the pleasure and joy he experienced while contemplating Pham's death (27 RT 5215). (AOB 193.)

While acknowledging that the pertinent language of CALJIC No. 5.12 is taken from Penal Code section 198 (AOB 174), appellant contends that past opinions have erroneously assumed that the pertinent statutory language set forth in section 198 means that self-defense is unavailable to an actor who entertains multiple motives when killing his assailant. (AOB 174, 176-193, 188 fn. 135.)

This Court should reject appellant's contention as forfeited. Insofar as appellant challenges an otherwise proper instruction as incomplete, appellant forfeited the contention by failing to request amplification or clarification of the instruction in the trial court. (*People v. Chatman* (2006) 38 Cal.4th 344; *People v. Jablonski* (2006) 37 Cal.4th 774, 809; *People v. Jurado* (2006) 38 Cal.4th 72, 124-125.) Insofar as appellant challenges the prosecutor's argument, appellant forfeited the challenge because appellant failed to object in the trial court to the prosecutor's remarks and failed to ask the trial court for a curative admonition that would have cured the alleged prejudice. (*People v. Mills*, *supra*, 48 Cal.4th at p. 194; *People v. Huggins*, *supra*, 38 Cal.4th at p. 205; *People v. Harris*, *supra*, 37 Cal.4th at p. 345.)

Were this Court to consider appellant's contention on its merits, it should in any event reject the contention as meritless. Notwithstanding appellant's contention to the contrary, the trial court's instruction does not bar self-defense to a defendant who entertains multiple motives when killing his assailant, nor has any opinion so interpreted the pertinent language of Penal Code section 198. Like Penal Code section 198, the instruction simply bars the defendant from acting upon any of his motives other than his reasonable fear of death or great bodily injury. (See: *People v. Trevino* (1988) 200 Cal.App.3d 874, 877-880.)

VIII. COUNTS THIRTEEN AND FOURTEEN WERE NOT BASED ON INVALID LEGAL THEORIES

Appellant argues that even if substantial evidence supports counts thirteen and fourteen, those counts must be reversed because they could have been based on the following invalid legal theories discussed by appellant in his previous argument: (1) A mutual combat theory of self-defense inapplicable to the surprise attack by Tuan Pham; (2) an initial aggressor theory of self-defense inapplicable to appellant; (3) a multiple motives theory improperly negating self-defense; (4) a decent person theory improperly negating self defense; (5) a theory imposing the following invalid requirement for self-defense, to wit: that defendant display an emotional reaction when killing his assailant. (AOB 194-197.) Appellant contends the theories were effectively ratified by the trial court's statements that both attorneys' discussion of the law amounted to "good efforts . . . to be accurate" and did not contain any "major difference" from the instructions. (27 RT 5231; AOB 194.)

This Court should reject appellant's argument as forfeited. Appellant forfeited the argument by failing request amplification or clarification of the trial court's otherwise lawful instructions (*People v. Chatman, supra,* 38 Cal.4th at p. 393; *People v. Jablonski*, *supra*, 37 Cal.4th at p. 809; *People v. Jurado*, *supra*, 38 Cal.4th at pp. 124-125) and by failing to object and request a trial court admonition when the prosecutor allegedly urged the invalid theories in her closing and rebuttal arguments to the jury. (*People v. Mills*, *supra*, 48 Cal.4th at p. 194; *People v. Huggins*, *supra*, 38 Cal.4th at p. 205; *People v. Harris*, *supra*, 37 Cal.4th at p. 345.)

Were this Court to consider the argument on its merits, it should in any event reject the argument as meritless because neither the trial court's instructions nor the prosecutor's argument presented the jury with any

invalid theories of self-defense. (See respondent's argument VII(C)-(K), *ante*.)

IX. THE VERDICTS UNDER COUNTS THIRTEEN AND FOURTEEN SHOULD NOT BE REDUCED TO VOLUNTARY MANSLAUGHTER

Appellant argues for reasons discussed below that even if this Court concludes the jury would have validly returned guilty verdicts under counts thirteen and fourteen under either mutual combat or multiple motivation theories, appellant was guilty of no more than manslaughter. (AOB 198-201.)

Appellant first contends that mutual combat reduces the offense from murder to manslaughter so long as the contest is waged upon equal terms, and no undue advantage is sought or taken by either side. (AOB 198-199.)

Appellant is mistaken. Homicide is excusable "[w]hen committed . . . upon a sudden combat, when no undue advantage is taken, nor any dangerous weapon used, and when the killing is not done in a cruel or unusual manner." (Pen. Code, § 195, subd. (2).) But when parties by mutual understanding engage in a conflict with deadly weapons and death ensues to either, the slayer is guilty of murder. (*People v. Bush* (1884) 65 Cal. 129, 132.)

In an earlier 1864 opinion, the California Supreme Court rejected a claim that a voluntary manslaughter instruction should have been given for an alleged sudden quarrel on the following two grounds: (1) To reduce the offence from murder to manslaughter, it must appear that the contest was waged on equal terms with no undue advantage sought or taken by either side; and (2) If sufficient time elapsed between the quarrel and the fight to enable the blood to cool and passion to subside, as it had in that case, the killing would be murder rather than manslaughter. (*People v. Sanchez* (1864) 24 Cal. 17, 27.)

Dicta in subsequent opinions relied upon by appellant - like appellant himself - errs insofar as it suggests that the *Sanchez* opinion announced that a victim's participation in mutual combat with a defendant mitigates the defendant's offense from murder to manslaughter. (See: *People v. Lee* (1999) 20 Cal.4th 47, 60 fn. 6; *People v. Ross* (2007) 155 Cal.App.4th 1033, 1043 fn. 11; *People v. Whitfield* (1968) 259 Cal.App.2d 605, 609; AOB 198-199, 199-200 fn. 138.)

Appellant contends that multiple motives reduce the offense from murder to manslaughter because if the degree of force used is influenced by any motivations aside from a belief in the necessity to act in self-defense, then manslaughter is an appropriate verdict on that ground alone. (AOB 200-201.)

Appellant is mistaken. Murder only becomes manslaughter if defendant commits the deadly act because of his actual but unreasonable belief that he faces death or great bodily injury if he fails to act, or if he kills in the heat of passion under provocation sufficient to cause an ordinary person of average circumspection to act rashly or without caution and circumspection. (*People v. Manriquez* (2005) 37 Cal.4th 547, 570-576.)

While acknowledging opinions precluding self-defense when defendant acts with multiple motives (*People v. Trevino*, *supra*, 200 Cal.App.3d at pp. 878-880; *People v. Shade* (1986) 185 Cal.App.3d 711; *People v. Vernon* (1925) 71 Cal.App. at p. 628; AOB 200), appellant asserts that none of those opinions considered the manslaughter claim he now raises and that all predated this Court's ruling that "a defendant's actual belief in the need for self-defense against imminent peril would negate a finding of implied as well as express malice." (*In re Christian S.* (1994) 7 Cal.4th 768, 781; AOB 200.)

But no legal authority, including *In re Christian S.*, *supra*, 7 Cal.4th at page 781, supports the manslaughter claim now raised by appellant, to wit:

murder becomes manslaughter when no undue advantage is taken sudden combat or when defendant kills for multiple motives, one of which is self-defense.

X. THE TRIAL COURT DID NOT ERR BY REFUSING TO GIVE APPELLANT'S REQUESTED INSTRUCTION THAT THE LAW OF SELF DEFENSE APPLIES EQUALLY TO ALL PERSONS

Appellant contends that counts thirteen and fourteen must be reversed because the trial court erroneously refused to give appellant's requested instruction that "[t]he law of self defense applies equally to all persons, regardless of whether he or she is a member of a criminal street gang." (3 CT 954; 25 RT 4872; AOB 202-206.)

Appellant contends that the instruction correctly stated the law because California maintains a single standard for all defendants who claim they acted in self-defense. (AOB 202-203.) Appellant contends that the subject covered by the proposed instruction was crucial to appellant's claim of self-defense and was not covered by any of the instructions given by the trial court. (AOB 203.)

This Court should reject appellant's argument as meritless. Defendants have no right to argumentative instructions inviting favorable inferences from specific evidence (*People v. Mincey* (1992) 2 Cal.4th 408, 407) or to special instructions duplicating instructions already given by the trial court (*People v. Manriquez*, *supra*, 37 Cal.4th at pp. 579-580; *People v. Bolden* (2002) 29 Cal.4th 515, 558-559; *People v. Catlin* (2001) 26 Cal.4th 81, 152).

In the case-at-hand, appellant's requested special instruction was argumentative insofar as it singled out a special class of persons, namely criminal street gang members, in order to invoke favorable inferences from the trial evidence. California courts have never adopted a "reasonable gang member" standard of self-defense. (*People v. Humphrey*, *supra*, 13 Cal.4th

at p. 1087; *People v. Romero* (1999) 69 Cal.App.4th 846, 854.) Similarly, expert testimony on street violence, the Hispanic culture, and whether a street fighter should or should not retreat from a street fight, has no bearing on whether that person may lawfully use deadly force. (*People v. Romero*, *supra*, 69 Cal.App. 4th at pp. 853-854.) Evidence regarding honor, like evidence of street fighter mentality, is irrelevant to the issue of whether or not deadly force is warranted under the circumstances. (*People v. Romero*, *supra*, 69 Cal.App.4th at p. 854.) So is expert testimony regarding honor, tradition, street mentality, culture, paternalism, poverty or sociology. (*People v. Romero*, *supra*, 69 Cal.App.4th at p. 855.)

Appellant's special instruction was duplicative because it added nothing relevant to the trial court's general self-defense instructions. The trial court's self-defense instructions properly informed jurors that to justify a homicide, the circumstances must be such as would excite the fears of a reasonable person placed in a similar position, and that the danger must be apparent, present, immediate, and instantly dealt with, or must so appear at the time to the slayer as a reasonable person. (Respondent's argument VIII(D), *ante*; CALJIC No. 5.12; 3 CT 1047-1048; 27 RT 5281.) The trial court's self-defense instructions further informed jurors that although the belief in the need to defend must be objectively reasonable, jurors must consider what would appear to be necessary to a reasonable person in a similar situation and with similar knowledge. (CALJIC No. 5.50; 3 CT 1053; 27 RT 5284.)

Appellant nevertheless contends that – after the prosecutor assured jurors she had studied the law from 40 to 60 hours a week for three years in law school and knew the law (AOB 203-204 citing 26 RT 4943-4944) - the prosecutor took advantage of the instructions given by the trial court and the absence of appellant's requested instruction by arguing that the reasonable person standards in the self-defense instructions was applicable

to decent, reasonable and basically good persons rather than gang members (AOB 203 citing 26 RT 4961-4962, 4966-4967, 4975).

But instead of assuring jurors she had studied law from 40 to 60 hours for three years in law school, the prosecutor prefaced her closing argument by stating that "we" (both she and defense counsel) studied 40 to 60 hours a week for three years in law school. (26 RT 4944.) She made this observation not to gain any advantage over defense counsel, but rather to excuse the both the trial court and the attorneys for the time needed to explain the law to the jury during their closing arguments and the reading of the trial court's instructions. (26 RT 4943-4945.)

And as respondent noted earlier (respondent's argument VII(I), *ante*), appellant forfeited any appellate challenge to the prosecutor's remarks about the reasonable person standard by failing to object to those remarks and request a curative admonition in the trial court. (*People v. Mills*, *supra*, 48 Cal.4th at p. 194; *People v. Huggins*, *supra*, 38 Cal.4th at p. 205; *People v. Harris*, *supra*, 37 Cal.4th at p. 345.) As respondent also explained (respondent's argument VII(I), *ante*), the prosecutor did not in any event misstate the law by referencing "decent" persons when discussing the reasonable person standard. Her remarks merely emphasized that appellant could not set up his own standard of conduct as a criminal street gang member in order to justify or mitigate the charged crimes.

Appellant contends that although his defense counsel argued that the law of self-defense was applicable to gang members, defense counsel's argument did not cure trial court's failure to give the requested for the following reasons: (1) defense counsel downplayed his own credibility on legal issues by telling jurors that he – unlike the prosecutor – had not studied much in law school and did not know a lot of law (26 RT 5047; AOB 204); (2) the prestige of the prosecutor's governmental position gave her more credibility than defense counsel (AOB 204); and (3) the

instructions given by the trial court appeared to support the prosecutor's arguments much more than defense counsel's (AOB 204).

But both of appellant's defense counsel made closing arguments to the jury. And defense counsel Harley did not harm appellant's chances by strategically seeking to win the jurors' favor in the following passage referenced by appellant:

> The prosecution spent about an hour and a half, two hours talking to you this morning about the law, and she spent three years studying in the morning, in the afternoon, and the evening learning about the law which she spent about an hour and a half explaining to you.
>
> I'm not going to talk very much about the law. And one of the reasons is I wasn't one of those students studying morning, afternoon, evening. I don't know an hour and a half worth of law to be telling you. So you're not going to hear too much of the law from me.
>
> What I'm going to be talking to you about is common sense. The human condition. What motivates people to come into the court and look you in the eye and lie. It's the human condition, and it's your common sense.
>
> And myself, the prosecutor, and the judge, if you add up our experience, it does not equal your common sense. There's twelve of you in the box, four alternates. So you have more common sense than myself, the prosecutor, and the judge put together. And that's what counts, your common sense.

(26 RT 5047-5048.)

The self-defense instructions given by the trial court properly recited the law of self-defense. If, as appellant contends, they appeared to favor the prosecutor's arguments more that defense counsels' arguments, they could have done so only because the law favored the prosecutor's arguments.

Appellant contends the trial court's erroneous refusal to give his requested instruction violated appellant's Sixth, Eighth and Fourteenth

Amendment rights to due process, to present a defense, to a fair trial, to a jury trial, and to a reliable determination of guilt and penalty in a capital case, and requires automatic reversal of counts thirteen and fourteen.

But the alleged instructional error did not implicate the federal constitution because it did not deprive appellant of his due process right to a fair trial. (*Henderson v. Kibbe* (1977) 431 U.S. 145, 154 [97 S.Ct. 1730, 52 L.Ed.2d 203].)

Appellant contends the alleged instructional error in any event warrants reversal of counts thirteen and fourteen because different verdicts would have been reasonably probable had the instruction been given. (*People v. Watson*, *supra*, 46 Cal.2d at p. 836; AOB 205.)

But even had the trial court erred under state law by refusing appellant's requested instruction, reversal is unwarranted because different verdicts would not have been reasonably probable had the instruction been given. Substantial evidence supported the jurors' verdicts and their finding, under the trial court's instructions, that appellant was not acting in self-defense when he killed Tuan Phan. The special instruction would not have affected that finding.

XI. THE TRIAL COURT DID NOT ERR BY REFUSING TO INSTRUCT THE JURY ON IMPERFECT SELF-DEFENSE

Appellant argues that the trial court committed an error warranting reversal of counts thirteen and fourteen by refusing appellant's request for an instruction on imperfect self-defense. (3 CT 1014; 25 RT 4861, 4863, 4903; 27 RT 5263-5264; AOB 206-207.) The trial court refused appellant's request by concluding "there's insufficient evidence to justify either a sua sponte instruction, or one at the request of counsel for defendant." (25 RT 4861.)

This Court should reject as meritless appellant's argument that the trial court erred by refusing to give the imperfect self-defense instruction.

Generally, trial courts need only give a lesser included offense instruction when faced with substantial evidence that the defendant committed the lesser, but not the greater offense. (*People v. Parson* (2008) 44 Cal.4th 332, 349-351; *People v. Huggins*, *supra*, 38 Cal.4th at p. 215.) In a murder case, the trial court need only give an imperfect self-defense voluntary manslaughter instruction when faced with substantial evidence that appellant killed the victim in the actual but unreasonable belief in the necessity to defend himself against imminent peril to life or great bodily injury. (*In re Christian S.*, *supra*, 7 Cal.4th at p. 783.)

There was no such evidence in the case-at-hand because there was no substantial evidence appellant killed Tuan Phan because he unreasonably believed he had to do so in order to defend himself against imminent peril to life or great bodily injury. The evidence showed instead that appellant and appellant's passenger shot Tuan Phan after Phan approached appellant's car with a gun and began lifting his gun toward appellant. (Respondent's argument VII(B), *ante*.) Jurors reasonably rejected the defense that appellant justifiably killed Tuan Phan in perfect self-defense – the claim triggered by this evidence - because appellant killed Phan for reasons unrelated to defending himself, e.g. to enhance his status as a Nip Family gang member and to enhance the status of Nip family in its gang war with the Cheap Boys. (Respondent's argument VII(C)-(K).)

Appellant nevertheless contends that the trial court erred for the following reasons: (1) an imperfect self-defense instruction is required in every case in which a court instructs on perfect self-defense since the substantial evidence of defendant's actual belief in the need for self-defense required for a perfect self-defense instruction necessarily suffices to support an imperfect self-defense instruction; and (2) even if the failure to instruct on imperfect self-defense is not error in every case in which perfect self-

defense instructions are given, it was error in this case because substantial evidence supported instructions on imperfect self-defense. (AOB 206-207.)

Appellant is mistaken. Whether or not the trial court instructs on perfect self-defense, the trial court need not instruct on imperfect self-defense absent substantial evidence supporting the imperfect self-defense instruction. (*In re Christian S.*, *supra*, 7 Cal.4th at p. 783; *People v. Oropeza* (2007) 151 Cal.App.4th 73, 82.)

Appellant cites dicta in several opinions stating that evidence sufficient to support an instruction on self-defense is also sufficient to support an instruction on imperfect self-defense. (*People v. Viramontes* (2001) 93 Cal.App.4th 1256, 1262; *People v. Ceja* (1994) 26 Cal.App.4th 78, 90 [conc. opn. of Johnson, J.], disapproved on another ground in *People v. Blakeley* (2000) 23 Cal.4th 82; *People v. De Leon* (1992) 10 Cal.App.4th 815, 825 [conc. opn. of Johnson, J.]; AOB 206.) But in *People v. Viramontes*, *supra*, 93 Cal.App.4th at page 1263, and in *People v. Ceja*, *supra*, 26 Cal.App. 4th at page 86, there was specific substantial evidence supporting an honest but factually unreasonable belief in the need to defend oneself, evidence absent in the case-at-hand. And in *People v. DeLeon*, *supra*, 10 Cal.App.4th at pages 824-825, there was no substantial evidence supporting either an imperfect self-defense instruction or a perfect self-defense instruction.

Appellant contends that: (1) the error violated appellant's federal constitutional rights to due process, to present a defense, to trial by jury, and to a reliable guilt and penalty decision in a capital case; and (2) regardless of what standard of reversible error is used, the error is reversible so long as there was any substantial evidence to support a finding that appellant's actual belief in imminent peril was unreasonable. (AOB 207.) But there was no substantial evidence supporting a finding that appellant entertained an actual belief in imminent peril that was unreasonable when

he shot Tuan Phan. For that reason, the trial court could not have committed reversible error by refusing to give the requested imperfect self-defense instruction.

XII. THE TRIAL COURT VIOLATED NO SUA SPONTE DUTY TO INSTRUCT JURORS ON THE MEANING OF "MUTUAL COMBAT"

Appellant argues that even if the verdicts in counts thirteen and fourteen could be upheld on a mutual combat theory negating appellant's self-defense claim, the trial court committed reversible error under those counts by violating a sua sponte duty to instruct jurors on the legal meaning of "mutual combat." (AOB 207-211.) Appellant contends that the trial court had a sua sponte duty to instruct jurors on the legal meaning of "mutual combat" because trial courts have a sua sponte duty to explain the meaning of statutory terms which do not have a plain, unambiguous meaning, which have a particular and restricted meaning, or which have a technical meaning peculiar to the law or an area of the law. (AOB 208.)

Appellant contends that the term "mutual combat" requires further definition by the trial court because it has a "dangerously vivid quality," with its danger lying "in the power of vivid language to mask ambiguity and even inaccuracy." (*People v. Ross*, *supra*, 155 Cal.App.4th at pp. 1043-144; AOB 208-209.) Appellant contends that "mutual combat" has a specific and limited legal meaning which covers not merely a reciprocal exchange of blows but one pursuant to mutual intention, consent, or agreement preceding the initiation of hostilities. (*People v. Ross*, *supra*, 155 Cal.App.4th at p. 1045.)

This Court should reject appellant's argument as meritless. When a word or phrase is commonly understood by those familiar with the English language and is not used in a technical sense peculiar to the law, the trial court need not give an additional instruction conveying its meaning absent a request to do so. (*People v. Estrada* (1995) 11 Cal.4th 568, 574; *People v.*

Palmer (2005) 133 Cal.App.4th 1141, 1156.) As currently described in CALCRIM No. 3471:

> A fight is mutual combat when it began or continued by mutual consent or agreement. That agreement may be expressly stated or implied and must occur before the claim to self-defense arose. (CALCRIM No. 3471. New January 2006; revised April 2008, Dec. 2008.)

Before the promulgation of CALCRIM No. 3471, those familiar with the English language understood that the words "mutual combat" meant more than a mere reciprocal exchange of blows because they understood the words included some sort of mutual intention, consent, or agreement, express or implied, preceding the initiation of hostilities.

The phrase "mutual combat" only had a "dangerously vivid quality[]" - with its danger lying "in the power of vivid language to mask ambiguity and even inaccuracy[]" (*People v. Ross*, *supra*, 155 Cal.App.4th at pp. 1043-144; AOB 209) - when used in a case which presented no facts supporting it. In one such case, the trial court erroneously gave a mutual combat instruction narrowing defendant's claim of self-defense because there was no evidence of mutual combat justifying the instruction. (*Id.* at pp. 1036, 1049-1054.) In that case Ross and his female victim engaged in a hostile verbal exchange which culminated when the victim slapped Ross and Ross immediately responded with a blow which fractured the victim's jaw. (*Id.* at pp. 1036, 1049-1054.) Unlike the facts in the case at hand - which involve a deadly ongoing gang war between Nip Family and Cheap boys in which each gang hunts members of the rival gang – the foregoing facts in *People v. Ross* did not suggest any express or implied mutual agreement to fight.

Appellant nevertheless contends that the alleged error violated appellant's federal constitutional rights to due process, to present a defense, to a jury trial on all elements of the charges against him, and to a reliable

determination of guilt and penalty in a capital case. (AOB 210.) But the allegedly erroneous failure to clarify the applicable law is generally state court error reversible only if different verdicts would have been reasonably probable had the law been adequately clarified. (See: *People v. Ross*, *supra*, 155 Cal.App.4th, at pp. 1054-1055, discussing the failure to clarify the applicable law upon inquiry by the jury.)

Appellant contends that the alleged error was reversible no matter which standard of reversal is used given the following circumstances presented by the trial evidence: (1) appellant engaged in no aggressive, threatening or provocative act toward Tuan Pham; (2) appellant engaged in no such act toward anyone else for the preceding two months according to the jury's verdicts; and (3) appellant refrained from using defensive force against Tuan Pham for as long as he possibly could, refraining from firing his weapon until Tuan actually started to raise his gun hand. (AOB 210-211.)

This Court should reject appellant's contention because the alleged error would not have warranted reversal under any standard. The issue of whether or not Tuan Phan was killed in mutual combat was not a complex one under the facts of the case and would not have been resolved differently had the trial court further clarified the words "mutual combat." Substantial evidence supported the prosecution's mutual combat scenario that Cheap Boy gang member Tuan Phan was killed by a Nip Family gang member in the middle of a deadly gang war between Nip Family and Cheap Boys as Tuan Phan approached the Nip Family gang member with a gun and as he was about to raise a gun in order to shoot the Nip Family gang member. Appellant testified he was never a Nip Family gang member (21 RT 4011-4012, 4071-4072, 4142, 4157-4158, 4194-4200) and had no idea who was involved in the May 6, 1996, shoot-out (21 RT 4046-4047). Jurors would have found there was no mutual combat under the trial court's instructions

had they believed appellant's testimony and rejected the substantial evidence which contradicted it.

XIII. THE TRIAL COURT VIOLATED NO SUA SPONTE DUTY TO INSTRUCT JURORS ON THE LEGAL CONCEPT OF IMPOSSIBILITY OF WITHDRAWAL

Appellant argues that if the jury verdicts in counts thirteen and fourteen can be upheld under either a "mutual combat" or an "initial aggressor" theory notwithstanding his previous arguments to the contrary, those verdicts must nevertheless be reversed because the trial court violated a sua sponte duty to instruct jurors on the legal concept of impossibility of withdrawal. (AOB 211-214.)

Appellant contends that such a sua sponte instruction was required for the following reasons: (1) an instigator of a fight who uses non-lethal force may kill his opponent in self-defense without withdrawing from the fight when his opponent's counter assault is a deadly assault and is so sudden and perilous that he initiator has no opportunity to expressly decline to continue the fight or to retreat (AOB 212); (2) normally, however, an initial aggressor using lethal force cannot resort to self-defense without withdrawing regardless of the suddenness and dangerousness of the opponent's response (AOB 212); (3) but no reported cases have dealt with the alleged long-term, multiple occasion varieties of mutual combat proposed by the prosecutor in the present case (AOB 212); (4) in the prosecutor's proposed long-term, multiple occasion mutual combat theory, the initial aggressor who uses lethal force should be given the same opportunity to withdraw as the initial aggressor who uses non-lethal force because if he were not, every attacked individual deemed to have been involved in mutual combat or initial aggression on the basis of distinct, past acts, i.e., every gang member, would have to submit to his death at the hands of street justice vigilantism (AOB 212-213); (5) the law will always

leave the original aggressor an opportunity to repent (AOB 213); and (6) without such an opportunity, the constitutional rights to self-defense would be violated.

This Court should reject appellant's argument as meritless. The argument is meritless because it relies on a faulty premise, to wit: that the prosecutor proposed a new legal theory of long-term, multiple occasion mutual combat. As respondent explained in respondent's argument VII(F),(G), appellant took referenced passages of the prosecutor's argument out of context when erroneously concluding that the prosecutor was proposing new, multiple-occasion, mutual combat and initial aggressor theories. Taken in their proper context, the referenced passages advanced the prosecutor's argument that under the trial court's self-defense instructions, when appellant shot Tuan Phan, on May 6, 1995, appellant was both the initial aggressor in the immediate conflict leading to the shooting and a mutual combatant in the immediate conflict resulting in the shooting.

The argument is in any event meritless because it erroneously shifts to the trial court appellant's own duty of objecting to the referenced passages and requesting a curative admonition if he believed the prosecutor was stating a new legal theory not encompassed in the instructions being given by the trial court. (*People v. Mills*, *supra*, 48 Cal.4th at p. 194; *People v. Huggins*, *supra*, 38 Cal.4th at p. 205; *People v. Harris*, *supra*, 37 Cal.4th at p. 345.)

Appellant alternatively argues that if the trial court had no sua sponte duty to instruct jurors on the legal concept of impossibility of withdrawal as it relates to the prosecutor's theories of mutual combat and initial aggressor, his trial counsel violated appellant's Sixth Amendment right to the effective assistance of counsel by failing to request such an instruction. (AOB 211.)

This Court should reject appellant's alternative argument as meritless because he cannot prove from the trial record both that his trial counsel acted in a professionally unreasonable manner and that different verdicts would have been reasonably probable but for his trial counsel's alleged failing. (*Strickland v. Washington, supra,* 466 U.S. at pp. 679-684 [104 S.Ct. 2052, 80 L.Ed.2d 674]; *People v. Jennings*, *supra*, 53 Cal.3d at p. 376.) As explained above, the prosecutor did not introduce new legal theories calling for an additional instruction. While both defense counsel focused the majority of their closing arguments on appellant's primary defense that he did not shoot any of the victims, including Tuan Phan (26 RT 5007-5125), defense counsel Harley in any event reminded jurors in the conclusion of his closing argument to review the trial court's self-defense instructions while at the same time challenging the legitimacy of the prosecutor's arguments that Tuan Phan's killer did not act in self-defense (26 RT 5091, 5095-5096).

Notwithstanding appellant's assertion to the contrary (AOB 214), the record does not in any event show there is a reasonable probability the verdicts in counts thirteen and fourteen would have been different absent trial counsels' alleged unprofessional failing.

Jurors necessarily rejected appellant's testimonial claims that he was not a Nip Family gang member (21 RT 4011-4012, 4071-4072, 4142, 4157-4158, 4194-4200) and did not know who was involved in the May 6, 1996, shoot-out (21 RT 4046-4047) by finding that he actively participated in the Nip Family criminal street gang by shooting Tuan (count fourteen) and by finding that he committed his crimes for the benefit of the Nip Family street gang (counts three, five, seven, ten). They would therefore have rejected any assertion that he was not at least mutual combatant when he killed Tuan Phan. The evidence surrounding Phan's shooting showed Phan's approach was anticipated rather than sudden. And even homicide triggered

by sudden combat is not excusable when a dangerous weapon is used. (Pen. Code, § 197, subd. (2); *People v. Bush*, *supra*, 65 Cal. at p. 132.)

XIV. THE TRIAL COURT DID NOT VIOLATE A SUA SPONTE DUTY TO INSTRUCT JURORS ON IGNORANCE OR MISTAKE OF FACT

Appellant argues that the verdicts in counts thirteen and fourteen must be reversed because the trial court did not on its own motion instruct jurors that an individual is not criminally liable for an act that he or she committed under an ignorance or mistake of fact which disproves any criminal intent. (Pen. Code, § 26; AOB 215-217.) Appellant argues the trial court had a sua sponte duty to give the instruction because appellant's own testimony constituted substantial evidence under an ignorance or mistake of fact instruction that appellant did not recognize his assailants on May 6, 1995, and did not know they were Cheap Boys gang members. (AOB 216.) Appellant contends that defendant's alleged ignorance or mistake of fact would have rendered inapplicable the prosecutor's mutual combat, initial aggressor and multiple motivation theories challenging appellant's self-defense claim. (AOB 215-216.)

This Court should reject appellant's argument as meritless. The trial court had no sua sponte duty to give the instruction. Defendant must request an instruction based on evidence proffered in order to raise a reasonable doubt about an element of the offense when such an instruction relates particular facts to a legal issue in the case or when it pinpoints the crux of defendant's case. (*People v. Jennings, supra,* at pp. 674-675.) A trial court's duty to instruct, sua sponte, on particular defenses only arises if defendant is relying on the defense, or if there is substantial evidence supportive of such a defense and the defense is not inconsistent with defendant's theory of the case. (*People v. Maury* (2003) 30 Cal.4th 342, 424.)

In the case at hand, appellant testified that he did not shoot Tuan Phan on May 6, 1995. Instead, as a passenger in a Camry driven by the brother of a friend, he crouched down into the back seat of the car when a man fired a shotgun at him from behind the car and lay down on the floorboard carpeting below the back seat during the ensuing gun battle. He did not see anyone involved in the ensuing gun battle. He only rose up from the floorboard below the back seat after his friend's brother drove away from the scene. (21 RT 4043-4047, 4049, 4228, 4231.)

A mistake of fact instruction would only have benefitted appellant if jurors could use it to draw the following conclusions from his testimony: (1) appellant shot Tuan Pham in self-defense (count thirteen); and (2) appellant did not shoot Tuan Phan in order to promote his status as a Nip Family gang member or in order to gain respect for the Nip Family (count fourteen). But in order to draw those inferences from appellant's testimony, jurors would have to reach all the following conclusions: (1) appellant lied about being a back seat passenger; (2) appellant lied about ducking down onto the back seat and lying down on the floorboard below the back seat; (3) appellant lied about not seeing anyone involved in the gun battle following the initial gunshot blast; (4) appellant lied when he testified that he did not have a gun and did not know anyone in his car had a gun; (5) appellant lied when he testified that he did not rise up from the floorboard below the back seat until the gun battle was over; (6) appellant lied insofar as he denied shooting Tuan Phan; and (7) appellant's testimony that he did not see anyone involved in the gun battle nevertheless established that he did not recognize that any of his assailants were Cheap Boys.

Appellant alternatively argues that if appellant's trial counsel had a duty to request such an instruction, this Court should find appellant's trial counsel deprived appellant of his Sixth Amendment right to counsel because there can be no reasonable explanation for the failure to request

such an instruction and because different verdicts under counts thirteen and fourteen would have been reasonable probable had the instruction been given. (AOB 216-217.)

This Court should reject appellant's alternative argument as meritless because appellant cannot show from the trial record both that his trial counsel acted in a professionally unreasonable manner and that different verdicts would have been reasonably probable but for his trial counsel's alleged failing. (*Strickland v. Washington*, *supra*, 466 U.S. at pp. 679-684; *People v. Jennings*, *supra*, 53 Cal.3d at p. 376.) The closing arguments of appellant's defense counsel show their plan to stress appellant's primary defense as proffered in appellant's own testimony, to wit: that he did not shoot any of the victims in the charged crimes. In order to draw any favorable inferences from a mistake of fact instruction, jurors would have to believe appellant lied. Appellant's defense attorneys did not need the mistake of fact instruction now suggested by appellant to argue the primary defense or to argue that the alternative defense that whoever shot Tuan Phan did so in self-defense.

XV. THE TRIAL COURT PROPERLY OVERRULED APPELLANT'S FOUNDATIONAL OBJECTION TO OFFICER VINCENT ON'S TESTIMONY THAT THE PASSENGER WHO FLED FROM A MAY 23, 1995, CAR STOP LOOKED LIKE A PHOTOGRAPH OF SOMEONE NAMED LAM THANH NGUYEN

Appellant argues that this Court must reverse counts thirteen and fourteen because the trial court erroneously overruled his foundational objection (15 RT 2849) to redirect-examination testimony by Officer Vincent On that the passenger who fled from the Ford Escort when it was stopped on May 23, 1995, resembled the photograph of someone with the name of Lam Thanh Nguyen that On had seen about 15 to 20 minutes before the Ford Escort was stopped. (15 RT 2849, 2851-2853; see also respondent's factual summary of the pertinent testimony in respondent's

argument VII(B), *ante*.) (AOB 218-223.) Officer On acknowledged on recross examination that in his written report of the incident, he stated that the person he saw running from the Ford Escort was possibly similar to the person whose picture he saw 15 minutes earlier. (15 RT 2850-2852.) On further explained on recross-examination that the picture depicted only the face of the person and that he had not seen the person running from the Ford Escort before he saw the photograph. (15 RT 2851.) While the picture only depicted the person's face, body descriptions accompanied the picture. (15 RT 2851.)

On redirect examination On acknowledged that he would not be able to recognize the person depicted in the photograph or the passenger he saw running from the Escort three years after the incident (15 RT 2851), and would therefore not be able to make an in-court identification of that person.

Appellant contends the trial court should have sustained his foundational objection for the following reasons: (1) as the proponent of the testimony, the prosecutor had the burden of producing evidence establishing the authenticity of the photograph (Evid. Code, § 403, subd. (a)); (2) authentication of a photograph is required before secondary evidence of its content may be received in evidence (Evid. Code, §§ 250, 1401, subd. (b)); (3) the foundational showing must be made by a competent witness who can testify to personal knowledge of the correctness of the representation (*People v. O'Brien* (1976) 61 Cal.App.3d 766, 781); and (4) the photograph is inadmissible unless the trial court finds there is evidence sufficient to sustain a finding of authenticity (Assem. Com. on Judiciary, com. to Evid. Code, § 403). (AOB 218-223.)

This Court should reject appellant's argument as meritless because the trial court did not abuse its discretion by overruling appellant's objection. The prosecutor did not seek to admit either the photograph or secondary evidence of the contents of the photograph. Officer Vincent On instead

testified that 15 or 20 minutes prior to the May 23, 1995, auto stop, he saw a photograph of someone named Lam Thanh Nguyen that resembled the face of the passenger that he observed running away from the Ford Escort. On made no representation that the photograph depicted appellant, that the photograph accurately portrayed the person named Lam Thanh Nguyen, or that it accurately portrayed the person he saw running. On merely testified that he believed at the time of the stop that the picture of a person named Lam Thanh Nguyen – a photograph he had seen 15 minutes earlier - resembled the person he saw running from the Ford Escort.

To the extent that On's testimony amounted to secondary evidence of the contents of the photograph, On was a competent witness who had personal knowledge of the correctness of the photographic representation he described. (*People v. O'Brien*, *supra*, 61 Cal.App.3d at p. 781, see also: *People v. Mayfield* (1997) 14 Cal.4th 668, 747.) He could testify from personal knowledge that the photograph depicted the face of a person named Lam Thanh Nguyen and that the face in the photograph resembled the person On saw running from the Ford Escort fifteen minutes after looking at the photograph.

On could give the foregoing testimony from his personal knowledge because of the limited nature of the testimony. On did not assert that the photograph accurately depicted the man named Lam Thanh Nguyen. On did not assert the photograph depicted appellant. And On did not assert he could identify appellant as the man he saw running from the Ford Escort. On testified only that the face in the photograph resembled the face of the man he saw running from the Ford Escort, while acknowledging on recross examination that in his written report of the incident, he stated that the man he saw running from the Ford Escort was possibly similar to the photograph.

Appellant contends that an inference of identity could not be drawn from the fact the name connected with the photograph matched appellant's

name. Appellant asserts that such a connection which was missing because (1) there was no evidence that the name connected with the photograph referred to appellant; (2) there was no evidence connecting appellant to the likeness in the photograph, and (3) the names "Nguyen" (belonging to multiple victims and witnesses in the case) and "Lam Thanh Nguyen" (with 2,400 Google search hits reported by appellant) are extremely common among the Vietnamese. (AOB 223-224 fn. 143.)

This Court should reject the foregoing contention as forfeited because a trial court evidentiary objection made on a stated ground forfeits appellate complaints urging new grounds not stated in the objection. (Evid. Code, § 353, subd. (a); *People v. Doolin* (2009) 45 Cal.4th 390, 434; *People v. Demetrulias* (2006) 39 Cal.4th 1, 19-31.) This Court should also disregard appellant's supporting claim that his name is extremely common among the Vietnamese because the internet resources upon which appellant bases his claim are not part of the trial record, were never offered into evidence at trial, and have not been embraced by both parties as accurate. (*People v. Jennings*, *supra*, 50 Cal.4th at p. 685 fn.34.) No one has sought judicial notice for these internet sources. Even if judicial notice could be taken of their existence, content and authenticity, such judicial notice could not establish the truth of the factual matters asserted therein. (*Ibid*; *Mangini v. R.J. Reynolds Tobacco Co.*, *supra*, 7 Cal.4th at pp. 1063-1064.)

Appellant contends the alleged error violated due process because it rendered the trial of counts 13 and 14 fundamentally unfair (AOB 228) and in any event amounted to an arbitrary refusal to adhere to statutory foundational requirements set forth in Evidence Code sections 1401, 1521 and 1523 (AOB 338). Appellant forfeited the contention by failing to make it in the trial court. (*People v. Tafoya*, *supra*, 42 Cal.4th at p. 166; *People v. Geier*, *supra*, 41 Cal.4th at p. 609; *People v. Halvorsen*, *supra*, 42 Cal.4th at pp. 413-414.) The contention is in any event meritless because the

routine application of a state's evidentiary rules did not implicate appellant's due process right to a fair trial given the modest scope of the challenged testimony and the independent evidence connecting appellant with the crime. (*People v. Lindberg*, *supra*, 45 Cal.4th at p. 26; *People v. Patida*, *supra*, 37 Cal.4th at p. 439; *People v. Harris*, *supra*, 37 Cal.4th at p. 336; *People v. Kraft*, *supra*, 23 Cal.4th at p. 1035.) And the state evidentiary rules applied by the trial court did not create a mandatory entitlement implicating appellant's due process rights. (*Chambers v. Mississippi, supra,* 494 U.S. at pp. 746-747.)

Appellant contends counts thirteen and fourteen must in any event be reversed because it is reasonably probable for the following reasons that more favorable verdicts would have been reached absent the alleged error: (1) appellant denied he was the driver of a white car when Tuan Pham was shot, claiming instead that he was an unarmed passenger in the back seat of a Toyota Camry who did not participate in the shooting (21 RT 4041-4049, 22 RT 4225-4232; AOB 218); (2) Robert Murray, the only eyewitness who saw the driver who shot Tuan Phan, could not make a positive identification of the driver, although he thought appellant's photograph in a photo lineup was not inconsistent with the driver (14 RT 2723-2724, 2737, 2744, 2748, 2750; AOB 218); (3) appellant's shotgun pellet injuries to the left side of his back (Exh. 140), the inside of his right forearm (Exh. 113), the inside of his left thumb and forefinger, and the top of his left index finger (Exhs. 114-115; 21 RT 4044; 22 RT 4228-4230; AOB 224-226) were consistent with appellant's defense testimony that he was hit in the back and hand while crouched down on the back seat of the Honda with his head facing the driver's side (16 RT 3148; Exh. 90; AOB 225 fn. 144); (4) appellant's shotgun pellet injuries to his back were inconsistent with the prosecutor's scenario that he was the driver hit by birdshot fired beyond the rear of the car (15 RT 2870, 2886-2887; Exh. 116; 25 RT 4819; AOB 225

fn. 144); (5) the evidence suggesting that appellant occupied the Amarillo Street residence from which the fleeing passenger had exited shortly before Officer On tried to detain him was weak insofar as no evidence suggested his two companions lived at the residence, and the evidence appellant had been living at the house consisted solely of the discovery of appellant's prescription medication bottle on top of the television set in the living room of the separate apartment (15 RT 2933 [Findley], 16 RT 3168-3169 [Nye]); and (6) the bedroom of that same apartment contained a prescription bottle belonging to someone other than appellant, who was therefore the more likely occupant of the apartment (AOB 226-227). But the foregoing assertions do not support appellant's claim of reversible error. As respondent explains below, the trial record instead shows appellant would have been convicted of counts thirteen and fourteen even had On's testimony about the photograph been excluded.

The jury's verdicts under counts two, three, four, five, six, seven, nine, ten, thirteen and fourteen, show that jurors disbelieved all the major points of appellant's testimony and therefore did not believe appellant's claim that he was an unarmed back seat passenger on May 6, 1996, who did not know anyone in the car was carrying guns and did not see anyone involved in a gun battle which followed rather than preceded the shotgun blast that injured him. Substantial evidence showed appellant was the driver who shot Tuan Pham before he was hit by birdshot from a shotgun blast which followed Pham's killing.

Monica Tran recalled that appellant drove a white Honda Accord. (16 RT 3117.) The closest eyewitness to the shooting (Robert Murray) described the car from which the driver shot Phan as a white Honda. (14 RT 2714-2715.) Shortly after the shooting, eyewitness Robert Murray selected appellant's photo from a photo lineup as the photo looking most like the shooter. (13 RT 2724-2725.)

The prosecutor reasonably pointed out in her rebuttal argument that the following trial evidence showed appellant was hit by birdshot and glass after he and his armed passenger fatally shot Tuan Phan. (27 RT 5183-5189.) Cheap Boy gang member Khai Vu got out of the Oldsmobile and fired a shotgun at the white Honda fifteen to twenty seconds after appellant and his passenger fatally shot Tuan Phan. (14 RT 2703-2704, 2707, 2723.) The glass shattered by the shotgun blasts landed to the driver's side of the white Honda near Tuan Phan's body. (13 RT 2681-2682, 2574, 2577-2578.) Shotgun wadding, which would have traveled with the birdshot, lay in the same area. (15 RT 2863.) None of the birdshot went through eyewitness Murray's car or the other cars on either side of the white Honda because those cars had already left the scene. None of the birdshot hit Tuan Pham because Tuan Pham was already down on the ground, fatally shot by appellant and his passenger. Appellant was about to drive away from the scene after shooting Tuan Pham when either the first shotgun blast or a passenger in his car alerted him to the second gunman now standing beside the Oldsmobile. Birdshot struck appellant on his hands, his forearms, and the left side of his back as appellant turned around to fire back at the gunman. Birdshot struck the left side of appellant's back, rather than striking him all the way across his back, because that was the side left unprotected by the driver's seat as appellant turned around to shoot back at the second gunman. The birdshot and glass which hit appellant caused the white Honda to swerve back and forth (16 RT 3148) as appellant attempted to drive away from the scene on Brookhurst.

Powerful independent evidence established that appellant fled from the Ford Escort on May 23, 1995, and thereafter ditched the gun which fired the bullet into Oldsmobile on May 6, 1995. Monica Tran told Detective Nye during her May 9, 1995, police interview that she believed appellant often met her at the Trask Market liquor store on the northeast

corner of Hoover and Trask because appellant lived nearby. The front yard of the 13401 Amarillo address from which the three men entered the Ford Escort on May 23, 1995, was a ¼ mile from the intersection of Hoover and Trask. (15 RT 2825-2827.)

Police executing a search warrant for the studio apartment attached to the rear of the residence at 13401 Amarillo, Westminster on May 23, 1995, found an ampicillin prescription bottle for Huy Pham in the bedroom closet of the studio apartment (15 RT 2933) and a cephalexin prescription bottle prescribed by Dr. Dinh Do for appellant, aka "John Nguyen" (16 RT 3169-3170, 21 RT 4153) on the television set of the living room area of the studio apartment (15 RT 2964). Two days later Huy Pham (16 RT 3205), who was appellant's friend (22 RT 4252) and a fellow Nip Family gang member (16 RT 3205), drove appellant to his May 25, 1995, appointment with Dr. Dinh Ho, at which time appellant was arrested (17 RT 3326-3327).

As discussed in greater detail in respondent's argument VII(A),(B), *ante*, police executing the search warrant for the studio apartment also found a brown jacket in the bedroom closet. Witnesses the shooter of Duy Vu on May 3, 1995, as wearing a brown jacket. As discussed previously in respondent's argument VII(A), *ante*, this Court can consider that evidence along with the rest of the evidence supporting counts thirteen and fourteen, even though jurors acquitted appellant of shooting Duy Vu (count ten).

Police executing the search warrant for the studio apartment also found in the bedroom closet an AK-47 (15 RT 2932-2933, 2963) and found on the bedroom bed two loaded .357 pistols (15 RT 2932, 2962-2963). When he was not using firearms to commit the charged crimes, appellant tended to show off firearms wherever he was staying. While at her sister's house, Monica Tran saw appellant show her sister three different handguns, a TEK 9, a .45, and a .380. (10 RT 2020.) Chamroeun (Shannon) Choeun and Channthae (Cindy) Pin saw appellant showing off two guns in a motel

room on November 22, 1994, two days before appellant shot Huy "Pee Wee" Nguyen. (7 RT 1364, 1374; 8 RT 1420-1421.) And when he was arrested two days after the execution of the search warrant, appellant assured the police that Huy Phan had done nothing and that appellant owned the loaded black .380 handgun in the glove box of Huy Phan's car. (17 RT 3328-3329, 21 RT 4407.)

On described the passenger who fled the Ford Escort as male Vietnamese, thinly built, five-two to five-four (15 RT 2842, 2849), a description which matched appellant. Cuong Le, one of the two men who remained in the Ford Escort when it was stopped, was a fellow Nip Family gang member (15 RT 2830, 16 RT 3206) and an acquaintance of appellant (21 RT 4065).

Because the trial court did not abuse its discretion by admitting On's narrow testimony about the photograph of Lam Phan Nguyen, and because the verdicts would have been the same even if the trial court had sustained appellant's objection to the testimony, this Court should reject appellant's argument that the trial court committed reversible error by overruling his foundational objection to that testimony.

XVI. SUBSTANTIAL EVIDENCE SUPPORTS APPELLANT'S CONVICTIONS OF ATTEMPTING TO MURDER TONY NGUYEN (COUNT TWO) AND ACTIVE STREET GANG PARTICIPATION BASED UPON THAT ATTEMPTED MURDER

Appellant argues insufficient evidence supports count two (the July 21, 1994, attempted murder of Tony Nguyen) and count three (active street gang participation based upon the attempted murder) because insufficient evidence shows appellant knowingly and intentionally aided and abetted the attempted murder. (AOB 230-237.) Appellant alleges there was no evidence that while acting with knowledge of the unlawful purpose of the perpetrator and the intent or purpose of committing, encouraging, or facilitating the attempted murder, he aided, promoted, encouraged or

instigated the attempted murder by his actions or advice, as required for a guilty verdict as an aider and abettor. (Pen. Code, § 31; *People v. Prettyman* (1996) 14 Cal.4th 248, 259; AOB 231.)

This Court should reject appellant's argument as meritless because viewing the record as a whole in the light most favorable to the verdicts, and drawing all inferences jurors could reasonably draw in favor of the verdicts (*People v. Farnam, supra*, 28 Cal.4th at p. 143; *People v. Kraft, supra*, 23 Cal.4th at p. 1053), substantial direct and circumstantial evidence shows appellant aided and abetted the attempted murder of Tony Nguyen.

Respondent has previously summarized the substantial evidence supporting counts two and three in respondent's argument VII(A), *ante*. That evidence shows that appellant was an active member (16 RT 3203-3203, 3205-3206) of the Nip Family criminal street gang on July 21, 1994 (16 RT 3178). Nip Family and the Cheap Boys were deadly gang rivals at that time. (16 RT 3197, 3208-3211.) Nip Family gang members made it their business to know Cheap Boys on sight. (9 RT 1632, 16 RT 3193-3194.) Rival gangs knew the cars their rivals drove. (10 RT 1890.) Nip Family gang members and Cheap Boys sought to kill each other on sight (16 RT 3181, 3195, 3197) in order to enhance the reputation of the individual gang members and the gang (16 RT 3183-3185). Nip Family gang members and Cheap Boys traveled in cars hunting for rival gang members. (16 RT 3185.) They carried one or two firearms in the car for ready access in the event they spotted rival gang members. (16 RT 3201.) Passengers aided and abetted shooters by spotting potential targets (16 RT 3198, 3210-3213), looking out for police (16 RT 3186), intimidating witnesses and victims by their numbers (16 RT 3185), and serving as backups for the shooter in the event the shooter got shot or otherwise disabled (16 RT 3185-3186; 27 RT 5194).

Cheap Boy Kevin Lac (9 RT 1638, 1660-1661) and appellant lived in the same apartment complex before the July 21, 1994, shooting of Tony Nguyen (9 RT 1629-1630). Lac bumped into appellant on several occasions before finding out about 1 1/2 months after Lac moved into the apartment that appellant associated with Nip Family. (9 RT 1630.)

As Lac walked upstairs on a Saturday, a group of appellant's friends were leaving the apartment building. (9 RT 1631.) One of appellant's friends called out Lac's name. (9 RT 1631.) Lac believed appellant's friends (and therefore appellant) found out Lac was a Cheap Boy because in the gang culture, when someone calls out your name, they know your gang. (9 RT 1631.) Lac's friend, Cheap Boy Tinh Dam, told Lac, sometime before the July 21, 1994, shooting of Tony Nguyen, that appellant was a Nip Family gang member. (9 RT 1633-1634.)

On July 21, 1994, Tony Nguyen - an Orange gang member nicknamed Chubby Cheeks (9 RT 1619-1620) - and Cheap Boy Viet Quoc Tran (17 RT 3311-3312) were driving Cheap Boy gang members and associates home in separate cars (9 RT 1667). Viet Quoc Tran drove an Oldsmobile, and Tony Nguyen followed Viet Quoc Tran in a car belonging to Cheap Boy Tinh Dam (9 RT 1620), aka Little Elvis (9 RT 1682). Viet Quoc Tran's girlfriend Linda Vu, a former Southside Scissors gang member who associated with Cheap Boys, rode in Viet Tran's Oldsmobile along with some other passengers. (9 RT 1667-1669.)

Tony Nguyen drove Tinh Dam's car. (9 RT 1620.) Lac rode as the right front seat passenger in the car driven by Tony Nguyen. (9 RT 1619-1620.) Tin Dam sat in the back seat of the car along with his girlfriend Chynna (Thoa) Vu and Truong Nguyen. (9 RT 1620.) Chynna Vu was Linda (Thoa) Vu's sister. (9 RT 1668.) Truong Nguyen, aka Trippy, 'kick[ed] back" with the Lonely Viets. (9 RT 1663.) "The V." was another rival of Nip Family at the time. (16 RT 3196-3197.)

Given the state of war existing between the Nip Family and Cheap Boys in 1994 and 1995, gang members traveling together could agree to shoot rival gang member within a very short period of time as soon as the rival gang members were spotted. (16 RT 3210-3212.) Both gangs sought rivals of the other gang. (16 RT 3212-3213.) Gang members commonly acted together to ensure success. (16 RT 3211.) Nip Family gang members spotting Cheap Boys would attempt to kill them and vice versa. (16 RT 3211.)

Shortly before 2:00 pm. a carload of people (three or more) passed Tinh Dam's car at the intersection of Trask and Harbor in Garden Grove as Tony Nguyen drove down Harbor. (9 RT 1619, 1621.) Lac recalled the car that passed them as a carload of Asians. (9 RT 1624.) Lac recalled the back seat passengers of that car looking back at them as the car passed them. (9 RT 1621-1622.) The car that passed them drove through the intersection while the light was still yellow. (9 RT 1621-1622.) Tony Nguyen stopped at the intersection for the red light. (9 RT 1621.)

After the light turned green, Tony Nguyen continued driving Tinh Dam's car down Harbor. (9 RT 1622.) Lac saw the car that had passed them inside the enter-exit area of a fast food restaurant parking lot as Tony Nguyen neared the corner of Harbor and Garden Grove Boulevard. (9 RT 1622-1623.) The car exited the fast food restaurant parking lot and followed Tony Nguyen's car as Nguyen turned right on Garden Grove Boulevard. (9 RT 1624-1625.) Tony Nguyen said he knew the girl driving the car because his friend used to date her. (9 RT 1625, 1674-1676.) When Tony Nguyen stopped at the stop light at the intersection of Garden Grove and Palm, the girl's car pulled next to them in the lane immediately to their left. (9 RT 1625-1626.) Tony Nguyen's car and the girl's car were second in line in their respective lanes. (9 RT 1672-1673.) Viet Quoc Tran's Oldsmobile was immediately ahead of the girl's car. (9 RT 1673.)

Tony Nguyen and the girl smiled at each other. (9 RT 1625.) A man wearing a hat and seated in the right front passenger's seat of the girl's car looked at Tony Nguyen's car and smiled. (9 RT 1626, 1702.) Other male passengers in the girl's car also smiled. (9 RT 1628.) The male passengers in the girl's car looked familiar to Lac. (9 RT 1677-1678.) Lac therefore asked Tinh if he knew any of the passengers in the girl's car. (9 RT 1678-1679.)

At that point, the light turned green and four or five gunshots immediately rang out. (9 RT 1626, 1679.) Lac closed his eyes and took cover. (9 RT 1627.) The car Tony Nguyen had been driving took off as if Nguyen had slammed on the gas pedal. (9 RT 1627.) The car repeatedly crashed into the curb. (9 RT 1627.) Tinh yelled that Tony had been shot. (9 RT 1627.) Tinh and Lac tried to steer the car. One of them succeeded in pulling the key from the ignition in order to stop the car. (9 RT 1627.) Tony Nguyen lay across the front seat; he had been shot in the neck and could not move. (9 RT 1627.)

Lac recalled that Viet Quoc Tran's Oldsmobile and the girl's (My Tran's) car both drove away eastbound on Garden Grove Boulevard when the light turned green, the girl's car following Viet Quoc Tran's car. (9 RT 1681-1682.) While Tinh Dam and Chynna (Thoa) Vu stayed with Tony Nguyen, Lac followed Thoa Vu and Truong Nguyen to a nearby pay phone, where Thoa phoned the police. (9 RT 1683.) As Thoa phoned the police, Lac left the scene on foot, walking eastbound on Garden Grove to Fairfield Avenue. (9 RT 1684.) Before he left, Lac told Thoa not to tell the police he had been at the scene. (9 RT 1694.)

A few days after the shooting, appellant came to the front door of Lac's residence and asked Lac, "What's up with the cops?" (9 RT 1634.) When someone comes up and asks, "What's up with the cop[s]," he generally means, "Have you talked to the police?" (9 RT 1635.) Lac said

he had not said anything to the cops. (9 RT 1635.) Appellant and others who accompanied appellant then left. (9 RT 1635.)

Lac recalled that at the time of the shooting, the back seat passenger immediately behind the shooter looked familiar. (9 RT 1634.) Lac now realized that appellant was the back seat passenger immediately behind the shooter. (9 RT 1629, 1634, 1641-1644, 1733-1738.) Lac told police he believed the males in the girl's car were Nip Family gang members. (9 RT 1628, 1700.) He identified Nghia Phan's photo as the photo of the shooter, but told police he did so only because he had heard from others that he was the shooter and because he had seen Nghia Phan a few times after the shooting. (9 RT 1729-1730, 1735-1736.)

Monica Tran told detectives that when she was at the house of appellant's "street sister" Chi Phuong, appellant, Nghia, Long, and Hiep Vinh were also there. (10 RT 2019.) She saw weapons when she was there. (10 RT 2019.) She told a detective or probation officer that she saw appellant show Phuong three different handguns. (10 RT 2020.) People who associated with the Cheap Boys and Nip Family knew how hot their war was in February, March, April and May of 1995. (10 RT 2023.)

The foregoing substantial evidence shows appellant knowingly aided and abetted the attempted murder of Tony Nguyen. As My Tran (8 RT 1516-1517, 1523) drove appellant and the other Nip Family gang members through the intersection of Trask and Harbor, appellant and the other back seat passengers spotted Cheap Boy Tinh Dam's car. Appellant helped spot as potential targets Cheap Boys Vinh Kevin Lac and Tinh Dam, and/or Cheap Boy associates Tony Nguyen, Chynna Vu and Truong Nguyen. Appellant and his Nip Family confederates then premeditated and planned the shooting by advising driver My Tran to follow Nguyen's car and pull up next to Nguyen's at the intersection of Garden Grove and Palm. There, front passenger Nghia Phan had a clear shot through the open driver's side

window of Tony Nguyen's car while the two cars were stopped at the intersection and about seven feet apart. (8 RT 1518.) Appellant remained in the back seat ready to assist the shooter should the shooter be disabled in a potential gun battle which never occurred. Appellant and the other Nip Family gang members turned to smile at Tony Nguyen and his passengers immediately before the light turned green. When the light turned green, Nghia Phan shot Tony Nguyen in the neck while firing four or five gunshots into Nguyen's car. The planning preceding the shooting allowed My Tran to immediately drive away from the scene before anyone in Nguyen's car could respond.

Appellant contends he could not have prevented the attempted murder, which happened suddenly and without warning. (AOB 232; 232 fn. 146 citing prosecutor's argument at 27 RT 5194.) But given the state of war existing between the Nip Family and Cheap Boys in 1994 and 1995, gang members traveling together could plan to shoot rivals within a very short period of time as soon as rivals were spotted. (16 RT 3210-3212.) And those who helped plan or prepare a surprise attack could still call it off if they chose to do so.

Appellant contends that neither his alleged presence at the scene of the crime nor his failure to prevent the crime established that he aided and abetted the attempted murder. (AOB 231.) But substantial evidence summarized above and in respondent's argument VII(A), *ante*, shows more than appellant's alleged presence at the scene.

Appellant contends that the prosecutor could not rely solely on Detective Nye's expert opinion testimony that a non-shooting gang member is expected to act as a backup to the shooter in the car. (16 RT 3185-3186; 27 RT 5194; AOB 232.) Since gang crimes can be unplanned and spontaneous, appellant asserts that gang members do not invariably act as backups merely by being present at the scene of a crime committed by

another gang member. Appellant also asserts that gang members do not subscribe invariably to all the principles of the gang and do not move in lock-step formation. But the prosecutor did not rely solely on Detective Nye's gang testimony, testimony which was fully corroborated by the evidence surrounding the shooting Tony Nguyen as well as the evidence surrounding the other charged crimes.

Appellant contends that the prosecutor could not prove appellant's guilt as a gang backup without any proof of actual knowledge, actual intent to facilitate, or action in support of the other member's crime. (AOB 234.) But the evidence summarized above circumstantially proved all the foregoing elements.

Appellant contends that culpability is not increased because, unwittingly, a person provides additional security or support to the perpetrator. (AOB 234-235.) But substantial evidence summarized above circumstantially establishes that when he provided additional security and support to the perpetrator, appellant did so intentionally.

Appellant contends the verdicts were nothing more than a finding of guilt by association and therefore inconsistent with the fundamental principles of law. (AOB 235.) The trial record belies the contention.

Appellant contends his flight following the shooting proved nothing because to show a consciousness of guilt, flight requires a purpose to avoid being observed or arrested. (AOB 236-237). Appellant alleges that neither his flight nor his alleged "[w]hat's up with the police" inquiry of Kevin Lac shows anything about what he knew, intended or did at the time of Tony Nguyen's shooting and therefore shows at the most that appellant was conscious of having been present at a seemingly compromising situation. (AOB 237 fn. 147.)

But jurors could draw a more incriminating inference from appellant's flight. And whether or not they did so, substantial evidence supported

appellant's convictions under two and three. This Court should therefore reject appellant's argument that insufficient evidence supports those counts.

XVII. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY LIMITING TESTIMONY THAT SOMEONE FROM CHEAP BOY TINH DAM'S CAR WAS SEEN WITH A GUN AFTER TONY NGUYEN WAS SHOT

Appellant argues that counts two and three should be reversed because the trial court erred by limiting testimony that someone from Cheap Boy Tinh Dam's car was seen carrying a gun at some point after driver Tony Nguyen was shot. (AOB 238-247.) As summarized below, the trial record belies appellant's argument.

At a conference outside the presence of the jury during the defense case, the prosecutor moved to exclude anticipated testimony from defense witnesses Alicia Trujillo, Carolyn Hunt and Laura Hughey on the following grounds: (1) there was no evidence anyone in the car driven by My Tran saw any guns in Cheap Boy Tinh Dam's car before Nghia Phan, the right front passenger in My Tran's car, shot Tony Nguyen, the driver of Tinh Dam's car; (2) there was no evidence anyone in Tinh Dam's car pulled out a gun or displayed a gun before Nghia Phan shot Tony Nguyen; (3) testimony that someone from Tinh Dam's car was seen carrying a gun after the shooting would not support a claim of self-defense; (4) testimony that someone from Tinh Dam's car was seen carrying a gun after the shooting would add nothing to what jurors already knew from the prosecutor's gang expert's testimony, to wit: that gang members traveling together in cars typically carry one or two guns in the car; and (5) testimony that someone from Tinh Dam's car was seen carrying a gun after the shooting was therefore improper character evidence whose probative value to any material issue in the case was substantially outweighed by the substantial danger that it would confuse and mislead the jury under Evidence Code section 352. (18 RT 3404-3405.)

Defense counsel Parkin responded by making the following assertions: (1) prospective defense witnesses included Miss Trujillo, Ms. Hunt and Miss Hughey from a urology center next to the spot where Tinh Dam's car crashed into the curb; (2) prosecution witness Kevin Lac had testified that he did not have a gun and did not see any guns; (3) the proffered defense testimony would impeach Kevin Lac's testimony insofar as another prospective defense witness, prospective defense witness Villanueva, saw two males get out of the car with guns drawn after the shooting; and (4) one of those two was almost certainly Kevin Lac because other prospective defense witnesses saw a female and a third male at a pay phone after the shooting. (18 RT 3405-3406.)

The prosecutor disagreed with defense counsel Parkin's description of what proffered and prospective defense witnesses had seen, disagreed with Parkin's assertion that testimony from the named witnesses would impeach Kevin Lac, and disagreed with Parkin's conclusion that Kevin Lac had a gun. (18 RT 3405-3407.) The prosecutor repeated her observations that jurors already knew gang members traveled together with guns and that the named witnesses could not support any claim of self-defense absent evidence that when he shot Tony Nguyen, Nghia Phan did so in self-defense. (18 RT 3405-3406.)

Defense counsel Harley gave his own summary of the proffered defense evidence while claiming it circumstantially showed there were guns in both Cheap Boy cars at the time of the shooting, to wit: Tinh Dam's car driven by Tony Nguyen and the Oldsmobile driven by Viet Quoc Tran. (18 RT 3407-3408.) Although the trial court observed that the relevance of the proffered defense evidence appeared marginal at best, it nevertheless ordered an Evidence Code section section 402, hearing after further discussions with defense counsel. It did so in order to determine what the proffered defense witnesses actually said. (18 RT 3408-3411.)

At the Evidence Code section 402, hearing, proffered defense witness Alicia Trujillo testified that when she heard a bang and a shot, she ran into the front office to see if urology center patients waiting for their appointments were alright. (18 RT 3411-3412.) She then noticed a car had hit the curb outside the urology center and a lady was hysterically crying at an outdoor pay phone next to the Taqueria taco stand. (18 RT 3412.) Trujillo then saw a young man run in front of the window with a weapon in his hand. (18 RT 3412.) She did not know whether or not he ran from the car that hit the curb. (18 RT 3412.) A man in the front seat of the car that hit the curb had apparently been wounded. (18 RT 3412.) The car that hit the curb was a small car. (18 RT 3412.) The man with the weapon came from the direction where the car had struck the curb, but Trujillo did not know if he had been in the car. (18 RT 3413.) The car that hit the curb was 50 to 52 feet from the man running with the gun. (18 RT 3414.) The man ran into a second car in front of the parking lot of the urology center. (18 RT 3413.) The second car was a larger model car and there were a few males in that car. (18 RT 3414.) After the running man got in the second car, it took off down Garden Grove Boulevard. (18 RT 3413.) Several people were in the second car. (18 RT 3413.) Urology center witnesses took down the license plate of the second car and gave the receptionist the information for her 911 phone call. (18 RT 3413.)

Proffered defense witness Carolyn Hunt testified that she saw a young man get into a car but saw nothing in his hand. (18 RT 3416-3417.)

Proffered defense witness Laura Hughey testified that she came into the reception area from the back of the urology center where the exam rooms were located. (18 RT 3418-3419.) She opened the door to bring a patient back to see the doctor in an exam room. (18 RT 3419.) A pregnant woman came running in the front door with her son, screaming that there were shots fired outside. (18 RT 3419.) Once the pregnant woman entered,

Hughey locked the front door. (18 RT 3419.) .After locking the door, Hughey yelled at the patients to get back from the big bay window in the front of the center. (18 RT 3419.) She then saw a man run in front of the bay window while putting a large pistol inside the front of his pants. (18 RT 3419.) The man ran around the front of the building. (18 RT 3419.) She could barely see him get into a second car which drove away. (18 RT 3419.) She believed she saw him jump into the back seat of the second car but could not say for sure. (18 RT 3419.) The car he entered was an older American car. (18 RT 3420.) She was not good with cars. (18 RT 3420.) She did not get a good look at the car in which the young man was shot because her view of that car was obstructed. (18 RT 3420.) The man who ran in front of the bay window was originally 10 to 15 feet from the car in which the young man had been shot. (18 RT 3421.) The parking lot next to the urology center was long and narrow. (18 RT 3421.) She first saw the man with the gun midway between Garden Grove Boulevard and the center. (18 RT 3421.) She did not see the car in which the man was shot when the shooting occurred and did not hear the shots. (18 RT 3422.)

After the three foregoing, proffered witnesses gave their Evidence Code section 402, testimony - and after hearing further arguments from counsel (18 RT 3423-3427) - the trial court sustained the prosecutor's objection to those three witnesses (18 RT 3427).

The next court day, defense witnesses Gene Melancon and Floriberto Villaneuva gave the following testimony in front of the jury. Defense witness Melancon recalled he was in a waiting area waiting to see a doctor in the urology center at about 2:00 p.m., July 21, 1994, when he heard four or five gunshots. (19 RT 3659-3660.) He got up and looked out the window. (19 RT 3661.) He saw a car pulling to a stop behind his parked car and a young Vietnamese male running from the car as soon as it pulled to a stop. (19 RT 3662-3663.) The car stopped two or three feet from

Melancon's car. (19 RT 3665.) The young Vietnamese male was about five-two or five-three. (19 RT 3663.) The car door was already open when Melancon saw the man run out of the car. (19 RT 3663.) The young Vietnamese male had what looked like a blue steel revolver in his left hand. (19 RT 3663-3664.) He was trying to tuck it into his trousers. (19 RT 3664.) He wore a white shirt. (19 RT 3664.) He stopped for a moment and looked around before continuing to run away. (19 RT 3665.) He was looking for a way out. (19 RT 3666.)

On cross-examination, Melancon testified that he also saw a female come out of the car but did not see any other males come out of the car. (19 RT 3667.) He did not see the gun until he saw the man trying to tuck the gun into his trousers. (19 RT 3667.) The car from which the young Vietnamese man ran may have stopped alongside – or in front of – Melancon's parked Suburban. (19 RT 3668.) Melancon saw someone injured lying across the front seat of the car from which the man ran. (19 RT 3668.) Melancon did not see anyone from the car remain at the scene to talk to police officers. (19 RT 3668.)

Defense witness Villanueva recalled that he was working at the Taqueria taco stand near Garden Grove Boulevard and Palm on the afternoon of July 21, 1994, when he heard some gunshots. (19 RT 3706-3707.) He ran outside and saw a car hit the curb and veer into the driveway of the taco stand. Another car followed slowly and hit the curb. (19 RT 3707.) A girl between the two seats of the second car shut the car off. (19 RT 3707.) The second car hit the curb a third time and stopped. (19 RT 3707.) No one was in the front seat with the driver. (19 RT 3708.) After the girl returned to the back seat of the car, a male who had been sitting in the back seat with the girl (19 RT 3708) pushed the front passenger's seat forward so he could open the passenger door (19 RT 3707). The male then got out of the car and began running toward the taco stand (19 RT 3710)

with a gun in his hand (19 RT 3707). Villanueva ran back into the taco stand, fearing he might be robbed or shot. (19 RT 3707.) The injured driver had been shot in the neck and was leaning over in the seated position in the driver's seat. (19 RT 3709-3710.)

On cross-examination, Villanueva testified did not see the police who arrived later search anyone. (19 RT 3711.) The male with the gun was no longer at the scene when the police arrived. (19 RT 2713.) The girl was no longer there either. (19 RT 3713.) Everyone in the car (except the injured person) took off before the police arrived. (19 RT 3713.)

Villanueva was in custody when he testified and was transported to court with other prisoners. (19 RT 3727.) Villanueva only testified because he knew he was testifying for the defense. (19 RT 3713-3714.) He refused to take an oath when he was in court the week before. (19 RT 3714.) Before one of the defense attorneys told him he would be testifying for the defendant, he refused to come into court and take an oath to tell the truth. (19 RT 3716-3718.) When the judge earlier told him he was going to be asked questions about a case in which someone was wounded, Villanueva explained that if he talked, they could kill him inside jail. (19 RT 3721.) His life could be in danger in jail if he testified against anyone. (19 RT 3727.)

During a later conference outside the presence of the jury, the trial court reaffirmed its ruling sustaining the prosecutor's objection to proffered testimony by Alicia Trujillo, Carolyn Hunt and Laura Hughey. It noted when reaffirming its prior ruling that the proffered testimony it had earlier excluded was additionally cumulative to the jury testimony of Melancon and Villanueva and that any inference which could be drawn to support a self-defense theory could be drawn from the testimony of Melancon and Villanueva. (19 RT 3736-3737.) It further explained that it would not permit further testimony in this area (passengers from Tinh Dam's car

being seen with guns after the shooting) unless further evidence in the defense case - particularly appellant's upcoming testimony - made such testimony relevant. (19 RT 3737-3738.)

When appellant later testified on his own behalf, appellant testified that he was out of the state when Tony Nguyen was shot on July 21, 1994. (21 RT 4017- 4023.) So did his older sisters Phuong Nguyen (23 RT 4413-4414) and Nen Nguyen (24 RT 4632-4633). No other defense witness suggested Nghia Phan shot Tony Nguyen in self-defense.

Following the conclusion of the defense case, the prosecutor announced she planned to call Chynna (Thoa) Vu as a rebuttal witness in order to rebut testimony from defense witness Villanueva that there were only three people in Tinh Dam's car immediately following the shooting. (25 RT 4667.) The prosecutor sought to rebut this testimony in order to dispel any defense inference that there were only three people in the car before the shooting and that Kevin Lac – the man who identified appellant - had therefore not been present at the time of the shooting. The prosecutor proposed that since she was limiting Chynna Vu's rebuttal testimony to the narrow issue of the identity of the passengers in Tinh Dam's car, the trial court should preclude the defense from cross-examining Chynna Vu about the issue of guns in the car. (25 RT 4667-4668.)

The prosecutor made the following additional points in support of her request: (1) since Kevin Lac never claimed in his prosecution testimony that there were no guns in the car, defense counsel Parkin had been mistaken when he earlier asserted that Lac's testimony would be impeached by testimony that someone in the car had a gun (25 RT 4668); (2) even had there been guns in the back seat, the defense could not in any event prove that Lac had seen them from his position as a front seat passenger (25 RT 4668); and (3) the gun issue was in any event irrelevant to a claim of self-

defense since neither the prosecution's case-in-chief nor the defense case suggested Nghia Phan shot Tony Nguyen in self-defense (25 RT 4668).

While declining to concede the absence of a viable self-defense claim, defense counsel Harley responded that credibility was still an issue given the defense testimony of Melancon and Villanueva. (25 RT 4668-4669.) After hearing Harley's response, the trial court granted the prosecutor's request to limit rebuttal witness Chynna Vu's cross-examination to the parameters of the proposed direct-examination of Chynna Vu by stating, "I'll sustain the objection by the district attorney as to that." (25 RT 4669.)

Chynna Vu testified on direct-examination that Kevin Lac ("Doughboy") sat in the front seat passenger in Tinh Dam's car, and that she, her boyfriend Tinh Tam and "Trippy" (Truong Nguyen) sat in the back seat of the car, when driver Tony Nguyen was shot on July 21, 1994. (25 RT 4710-4712.) Defense counsel Harley then cross-examined her at some length about how well she knew Lac, her prior meetings with Lac, how well she knew Trippy, and her failure to tell officers who arrived at the scene after the shooting that Lac and Trippy had been in the car at the time of the shooting. (25 RT 4712-4716.) Additional cross-examination questioning by Harley elicited Chynna Vu's testimony that: (1) Lac and Trippy fled the scene before the arrival of the police because they were both on probation and did not want probation violations (25 RT 4716); and (2) Tinh Dam was the one who told her not to tell the police they were present since they were both on probation (25 RT 4717).

In an ensuing conference outside the jury's presence, Harley asked the trial court if he could now ask Chynna Vu if Lac and Trippy were carrying anything in their hands when they fled the scene before the arrival of the police, given Chynna Vu's cross-examination testimony that they fled the scene before the arrival of the police. (25 RT 4719-4720.) After the prosecutor repeated her earlier successful objection to cross-examination

questioning going beyond the scope of Chynna Vu's direct-examination testimony, the trial court once again sustained the objection. (25 RT 4720.)

The foregoing trial court record shows that this Court should reject as meritless appellant's argument that the trial court erroneously limited testimony that someone from Cheap Boy Tinh Dam's car was seen with a gun after Tony Nguyen was shot. (AOB 238-247.) The trial court did not abuse its discretion when it excluded the proffered defense testimony from Alicia Trujillo and Laura Hughey because that testimony was nothing more than inadmissible and irrelevant character evidence, the probative value of which was substantially outweighed by its substantial danger of misleading and confusing the jurors by confusing the issues in the case. (Evid. Code, § 352; *People v. Farnam*, *supra*, 28 Cal.4th at p. 157.) The trial court did not abuse its discretion when limiting the scope of defense counsel Harleys' cross-examination of prosecution rebuttal witness Chynna Vu because the additional cross-examination questions proposed by defense counsel Harley exceeded the scope of Chynna Vu's direct-examination testimony.

Notwithstanding appellant's contention to the contrary, the proffered testimony of Alicia Trujillo, Carolyn Hunt and Laura Hughey would not have impeached prosecution witness Kevin Lac. It would not have impeached Lac because Lac never claimed in his prosecution testimony that there were no guns in Tinh Dam's car and never stated in his prosecution testimony that no one in Tinh Dam's car had a gun.

Lac's only testimony concerning the topic of Cheap Boys and guns on the day of the shooting came when he was cross-examined about his activities after the shooting during the prosecutor's case-in-chief. When cross-examined about his activities after the shooting, Lac testified that immediately after Tinh Dam's car came to a stop following the shooting, Lac, Chynna Vu and Trippy (Truong Nguyen) walked to a pay phone by a nearby Taco stand (9 RT 1682, 1684) while Tinh stayed in the car with

Tony (9 RT 1682). When Chynna Vu phoned the police, Lac walked away down Garden Grove heading toward Fairview. (9 RT 1683.) Other than telling Chynna Vu not to tell the police he was there, Lac had no other conversation with either Chynna Vu or Truong Nguyen before walking away from the scene eastbound on Garden Grove. (9 RT 1683-1695.) Lac last saw Truong Nguyen at the pay phone. (9 RT 1685, 1695.)

Lac did not know whether Truong Nguyen left the scene or where Truong Nguyen went if Truong Nguyen did leave the scene. (9 RT 1684.) Lac did not know if Truong Nguyen had a gun. (9 RT 1684.) Lac only knew that he himself did not have a gun. (9 RT 1684.)

Notwithstanding appellant's contention to the contrary, the proffered defense testimony of Alicia Trujillo, Carolyn Hunt and Laura Hughey would not have supported any self-defense claim. Neither the prosecution witnesses nor the defense witnesses saw or heard any other shots fired other than the shots fired by Nghia Phan. After turning to smile at Tony Nguyen and his passengers, Nghia Phan produced a gun and fired four to five shots into Tinh Dam's car as soon the intersection light turned green. (6 RT 1125; 9 RT 1626, 1679, 1702; 8 RT 1521-1522, 1523.) Lac only had time to ask Tinh Dam if he knew the passengers in Nghia's car before the shots were fired. (9 RT 1677-1678.) Nghia's car sped off immediately once the shots were fired. (6 RT 1129; 9 RT 1681-1682.)

Notwithstanding appellant's contention to the contrary, defense counsel Harley would have improperly exceeded the narrow scope of prosecution rebuttal witness Chynna Vu's testimony – testimony limited to describing the identity of the passengers in Tinh Dam's car when Tony Nguyen was shot - by asking her whether any of those passengers had anything in their hands when they fled the scene after the shooting. The trial court could properly sustain the prosecutor's objection to the proposed cross-examination question because (1) defense counsel had not called

Chynna Vu as a defense witness before resting the defense case; and (2) the proposed cross-examination question exceeded the scope of Chynna Vu's direct-examination. (Evid. Code, § 773, subd. (a).)

Appellant nevertheless contends that the trial court erroneously limited the testimony that someone from Tinh Dam's car had a gun because the prosecutor seriously contested the testimony that appellant was allowed to admit on the issue of whether Kevin Lac was armed by (1) cross-examining defense witness Melancon about whether or not he had an unobstructed view of Tony Nguyen's car; (2) eliciting testimony during her cross-examination of defense witness Villanueva that Villanueva did not remember a male and female from car (Chynna Vu and Tinh Dam) remaining at the scene (19 RT 3713); and (3) introducing evidence of defense witness Villanueva's status as a convicted felon, a jail inmate, and a criminal defendant (19 RT 3713-3728). Additionally, appellant asserts that the People's rebuttal witness Chynna Vu was the witness in the best position to know whether or not Kevin Lac was lying when Lac denied seeing a weapon in Tin Dam's car, yet the trial court refused to allow the defense to ask Chynna Vu about such matters. (25 RT 4716, 4719-4720.) (AOB 243-244.)

This court should reject the foregoing contention. Whether or not the prosecutor contested the testimony of Melancon and Villanueva, the testimony of Alicia Trujillo and Laura Hughey was irrelevant either to impeach the testimony of Kevin Lac or to support a claim of self-defense. Chynna Vu was not in a good position to know whether or not Kevin Lac lied when he denied seeing a weapon in Tin Dam's car because Kevin Lac never claimed in his prosecution testimony that there was no weapon in Tinh Dam's car.

If anyone carried a gun from the car, it would in any event have been Truong Nguyen rather than Lac since: (1) Defense witness Villanueva

testified that no one was in the front seat of the car with the injured driver when he saw a male (Truong Nguyen) who had been sitting with a girl (Chynna Vu) in the back seat push the front passenger's seat forward before getting out of the car and running off with a gun in his hand (19 RT 3707-3710); (2) Tinh Dam and Chynna Vu remained at the scene to talk to the police (6 RT 1100, 1109); (3) Defense witness Melancon described the man running with the gun as about five-two or five-three (19 RT 3663); and (4) Rebuttal witness Chynna Vu described "Trippy" (Truong Nguyen) as a small Asian male (25 RT 4715).

Appellant contends for the following reasons that the appellate record need not affirmatively demonstrate that Chynna Vu would have testified that she saw Kevin Lac and/or Truong Nguyen with a gun: (1) no offer of proof is required for cross-examination (Evid. Code, § 354, subd. (c); AOB 244 fn. 151); (2) the prosecutor opposed the admission of the evidence, did not deny defense counsel's claim about the content of the proposed cross-examination, and had no reason to object to the proposed cross-examination had the resulting testimony not supported defense counsel's claim (AOB 244 fn. 152); (3) the trial court also precluded Chynna's sister Linda Vu, a passenger in the car Kevin Lac and/or Truong Nguyen entered after the shooting (18 RT 3412-3414, 3419-3420), from testifying about whether or not Lac or Truong carried a gun (19 RT 3651; AOB 244-245); (3) for the reasons applicable to Chynna Vu, the appellate record need not affirmatively show that Linda Vu's testimony would have supported the assertion that either Kevin or Truong carried a gun (AOB 245 fn. 153); and (4) two of the proffered urology center witnesses, (Alisa Trujillo, and Laura Hughey) had an uncontested, unobstructed view of Tinh Dam's car, had no arguable defense bias, and confirmed that the man running from the car had a gun in his hand which he put into his waistband (AOB 245).

This Court should reject the contention for the following five reasons. First, the fact no offer of proof is required for cross-examination does not mean this Court must presume that cross-examination questions reasonably barred as beyond the scope of the direct-examination of the witness (Evid. Code, § 773, subd. (a)) would have yielded the desired answers.

Second, this Court need not presume that either Lac or Truong Nguyen carried a gun merely because the prosecutor in the case at hand reasonably opposed cross-examination of her rebuttal witness Chynna Nguyen which exceeded the scope of Chynna Nguyen's limited direct examination testimony. Contrast the sui generis scenario presented in *People v. Linder* (1971) 5 Cal.3d 342, 347 footnote 2, relied upon by appellant at AOB 244 footnote 152, and 245 footnote 153. The reviewing court in that case held only that the People could not complain that the appellate record did not affirmatively demonstrate that the defense witness corroborated her defendant/husband's alibi at a first trial - which ended in a mistrial - when the trial prosecutor successfully opposed admission of that same evidence at the second trial and when the prosecutor did not deny defendant's claim of corroboration when doing so. (*People v. Linder*, *supra*, 5 Cal.4th at p. 347 fn. 2.)

Third, notwithstanding appellant's assertion to the contrary, the trial court did not preclude defense witness Linda Vu from testifying about whether or not Lac or Truong Nguyen carried a gun after the shooting of Tony Nguyen. The trial record shows instead that when the prosecutor announced her objection to anticipated defense questions to Linda Vu "about a gun," defense counsel Harley volunteered that he was not going to be questioning Linda Vu about guns in light of unspecified earlier rulings by the trial court. (19 RT 3651.)

Fourth, Linda Vu would not in any event have testified that Kevin Lac or Truong Nguyen carried a gun. When called as a defense witness Linda

Vu testified that she was a passenger in the Oldsmobile driven by her boyfriend, Cheap Boy gang member Viet Quoc Tran, when she heard the gunshots at the intersection of Garden Grove and Palm on July 24, 1994. (21 RT 2956, 3959-3960.) She testified that after driving away when the light turned green, Viet Quoc Tran u-turned some time later. (21 RT 3961.) However, she could not remember where they went after Viet Quoc Tran u-turned (21 RT 2961) and could not remember if they picked anyone up who had been in the car driven by Tony Nguyen (21 RT 3963). And even had Linda Vu testified that Viet Quoc Tran picked up someone who carried a gun, that testimony would not have impeached Kevin Lac, who testified on cross-examination that he walked away from the scene without knowing whether or not Truong Nguyen had a gun.

Fifth, notwithstanding appellant's assertion that they saw a man with a gun running from the car with the injured driver, neither Alicia Trujillo nor Laura Hughey testified that they saw the man with the gun in the car with the injured man. They first saw the man with the gun when he ran in front of the bay window of the urology center. (18 RT 3412, 3419.) Notwithstanding appellant's assertion that both proffered witnesses had an unobstructed view of the car with the injured driver, Laura Hughey's view of the car was obstructed. (18 RT 3420.) And whether or not they were credible witnesses, the proffered testimony of Alicia Trujillo and Laura Hughey neither impeached the testimony of prosecution witness Kevin Lac nor supported a claim of self-defense.

Appellant contends that the trial court rulings violated defendant's federal constitutional rights to due process, to present a defense, to compel the testimony of witnesses, and to confront adverse witnesses. (AOB 242.) But appellant forfeited these constitutional claims by failing to make them in the trial court. (*People v. Tafoya*, *supra*, 42 Cal.4th at p. 166; *People v. Geier*, *supra*, 41 Cal.4th at p. 609; *People v. Halvorsen*, *supra*, 42 Cal.4th

at pp. 413-414.) The trial court did not implicate appellant's federal constitutional rights by reasonably exercising its discretion under state evidentiary rules when excluding proffered defense evidence under Evidence Code section 352, and when limiting the cross-examination of a prosecution rebuttal witness. (*People v. Brown* (2003) 31 Cal.4th 518, 545; *People v. Box*, *supra*, 23 Cal.4th at p. 545.)

Appellant contends for the following reasons that the alleged error requires reversal of counts two and three either because it was federal constitutional error not harmless beyond a reasonable doubt, or because it was state court error and it is reasonably probable that verdicts would have been different in its absence (AOB 249-250): (1) the case against appellant was extremely close since he was tied to the attempted murder only by the questionable identification testimony of Kevin Lac (AOB 249); and (2) while there were other reasons to doubt Lac's credibility, the excluded evidence showing he was untruthful about not having a gun and/or not seeing Truong Nguyen with a gun would have exposed him as a liar concerning the core events of his testimony in a direct way that no other evidence did (AOB 249-250).

This Court should reject the contention because the trial court's discretionary rulings under state evidentiary rules did not implicate the federal constitution by removing a viable defense or by rendering the trial fundamentally unfair. (*People v. Lindberg*, *supra* 45 Cal.4th at p. 26; *People v. Partida*, *supra*, 37 Cal.4th at p. 439; *People v. Kraft*, *supra*, 23 Cal.4th at p. 1035.) And any state court error committed by the trial court was harmless, non-reversible error because it is not reasonably probable different verdicts would have been reached under counts two and three absent the error. (*People v. Watson*, *supra*, 46 Cal.2d at p. 836.) As explained above, Lac never claimed there were no guns in Tinh Dam's car at the time of the shooting. The proffered and excluded defense evidence

would not have added little if any material impeachment to the impeachment of Lac's testimony already heard by the jury. Nor would it have supported a viable claim that Nghia Phan shot Tony Nguyen in self-defense.

XVIII. THE TRIAL COURT DID NOT ERRONEOUSLY LIMIT KEVIN LAC'S CROSS-EXAMINATION

Appellant argues that the trial court erroneously limited Kevin Lac's cross examination by forbidding appellant from cross-examining Lac about where in the transcript of Lac's May 25, 1995, police interview was there evidence favorable to the prosecution. (9 RT 1742-1746; AOB 247-249.) The trial record belies appellant's argument.

It shows that defense counsel Harley extensively cross-examined Kevin Lac (9 RT 1644-1712) and cross-examined him in detail regarding Lac's May 25, 1995, police interview and Lac's failure during that interview to identify appellant as a back seat passenger in the shooter's car on July 21, 1994, despite being shown a photo lineup (Defendant's Exh. C) during the May 25, 1995, police interview which included appellant's photograph (9 RT 1704-1705, 1713-1723, 1731). During his recross-examination of Lac (9 RT 1738-1742) defense counsel revisited Lac's May 25, 1995, police interview and Lac's failure to identify appellant as a back seat passenger in the shooter's car on July 21, 1994, despite being shown a photo lineup (Defendant's Exh. C) containing appellant's photo (9 RT 1739-1742).

The following colloquy between defense counsel Harley and Lac led to the trial court ruling challenged by appellant.

> Q. And isn't it also true, that after having reviewed what the paper [the May 25, 1995, reporter's transcript] says, you are convinced that you made a couple [of] comments about the guys looking like – two guys looking like old farts and two guys looking younger, you're sure about that now, right?

A. I'm sure about that.

Q. Positive about that?

A. Yeah.

Q. And it's not a matter of thinking about it, you know that that's a fact. You made those statements, right?

A. Show me the page again.

Yeah. The interview was like an hour and a half. I said a lot of stuff that I don't remember, you know. You're just hitting the ones that you want to try to get me on. There's a lot of stuff in there that would help out the guys. You just want to get no, yes, no, yes.

Q. You want to show me where you made any type of identification on May 25th?

THE COURT: May I see counsel.

(9 RT 1742.)

At an ensuing chambers conference out of the presence of the jury, the trial court correctly noted that a full record had been made of Lac's failure to identify appellant as a back seat passenger during the May 25, 1995, police interview despite being shown a photo lineup including defendant's photo. The trial court added the pertinent officers would later be called to testify about statements made during the May 25, 1995, interview, and that further questioning of Lac regarding the same point seemed fruitless. (9 RT 1743-1744.) Defense counsel Harley acknowledged the trial court's concern but requested he be allowed to ask his last question in light of Lac's suggestion that Harley was being selective when questioning Lac from the May 25, 1995, reporter's transcript. (9 RT 1744.) The trial court ruled Harley could not ask the question because he had clearly established that Lac failed to identify appellant during the May 25, 1995, interview, the question was argumentative, and further testimony on that particular subject would add nothing material to what had already been established. (9 RT 1745.)

Defense counsel Harley concluded his recross-examination by eliciting Lac's acknowledgment that he had spoken with police on numerous occasions. (9 RT 1746). The following additional colloquy ensued.

> Q. Okay. Are you still looking for something?
> A. Just reading this.
> A. Okay. Let me know if you've found anything interesting, okay?
> MS. PARK: Objection, argumentative.
> THE COURT: It is. My instincts were correct. So that's it. You're done.
> THE WITNESS: Thank you.
> THE COURT: Okay. Now you are subject to being recalled as a witness, I have to tell you that.
> THE WITNESS: I have to come back?
> THE COURT: You might have to, okay? We'll let you know if you do.
> THE WITNESS: Okay.

(9 RT 1746.)

Neither the defense nor the prosecution recalled Lac as a witness.

The foregoing record shows that this Court should reject as meritless appellant's argument that the trial court erroneously limited the cross-examination of prosecution witness Kevin Lac. The trial court ruling was well within its power of exercising reasonable control over the mode of interrogation of a witness so as to make the interrogation as rapid, as distinct, and as effective for the ascertainment of truth as possible. (Evid. Code, § 765, subd. (a).)

Appellant nevertheless contends the trial court erred for the following reasons: (1) while Lac admitted he made no identification on May 25, he nevertheless asserted that defense counsel was selectively reviewing the interview transcript and there was a lot in there favorable to the prosecution (9 RT 1742; AOB 248-249); (2) there was nothing argumentative about

asking Lac to point out where in the transcript there was anything that supported his accusations against defense counsel (AOB 249) and (3) appellant had a constitutional right to cross-examine a witness's assertion made made under the protection of the trial court by pursuing a relevant line of inquiry (AOB 242, 249).

But Lac's gratuitous remark did not suggest how he in any way incriminated appellant during the May 25, 1995, police interview. The cross-examination question prohibited by the trial court was argumentative insofar as it sought to involve the witness in an argument without appreciably furthering the resolution of any material issue in the case (*In re Loucks' Estate* (1911) 160 Cal. 551, 558; *People v. Harlan* (1901) 133 Cal. 16, 21; *People v. Alexander* (1926) 77 Cal.App. 231, 236), including the credibility of Lac's identification of appellant as a rear seat passenger in the shooter's car on July 21, 1994. And appellant forfeited his consitutional claim by failing to make it in the trial court. (*People v. Tafoya*, *supra*, 42 Cal.4th at p. 166; *People v. Geier*, *supra*, 41 Cal.4th at p. 609; *People v. Halvorsen*, *supra*, 42 Cal.4th at pp. 413-414.) The federal constitution does not in any event prevent state trial courts from reasonably limiting cross-examination under state evidentiary rules which guard against harassment, confusion, or irrelevant evidence. (*People v. Brown*, *supra*, 31 Cal.4th at p. 545; *People v. Box*, *supra*, 23 Cal.4th at p. 1203.)

Appellant contends that the alleged error requires reversal of counts two and three because absent the error, he could have further discredited Kevin Lac's testimony connecting him with the attempted murder. (AOB 250.) This Court should reject the contention because the trial record does not support it. Moreover, it is not reasonably probable that appellant would have enjoyed a more favorable outcome if permitted to inquire further.

XIX. THE OTHER EVIDENTIARY RULINGS PREVIOUSLY CHALLENGED BY APPELLANT DO NOT WARRANT REVERSAL OF COUNTS TWO AND THREE

Appellant argues that trial court rulings he has previously challenged at AOB 96-111 and AOB 115-118 require reversal of counts two and three because his convictions under counts two and three depended entirely upon the eyewitness testimony of Cheap Boy Kevin Lac (AOB-252).

But for reasons previously set fourth in respondent's argument III and respondent's argument V, *ante,* those rulings were not erroneous and did not in any event affect the verdicts, including the verdicts under counts two and three.

XX. THE TRIAL COURT PROPERLY ALLOWED PROBATION OFFICER STEVEN SENTMAN TO TESTIFY AS A REBUTTAL WITNESS

Appellant argues that this Court must reverse counts two and three because the trial court abused its discretion by denying appellant's motion to exclude Probation Officer Steven Sentman as a rebuttal witness on the ground that Sentman violated the trial court's witness exclusion order by remaining in the courtroom during appellant's defense testimony. (24 RT 4656-4657, 4663-4664; AOB 253, 257, 261-262.) Appellant contends that the trial court erred for the following reasons: (1) the prosecutor had a duty to advise her witnesses of the trial court's witness-exclusion order; (2) neither the prosecutor nor Sentman offered any justification for Sentman's violation of the order; (3) the court need only limit the sanction to contempt of court when the violation of the order is not chargeable to the party or counsel calling the witness; and (4) the trial court violated due process by allowing Sentman to testify notwithstanding the violation of the order. (AOB 261-262.) This Court should reject appellant's argument as meritless. Appellant has not shown there was a trial court order excluded witnesses.

Assuming arguendo that there was such an order, appellant has not shown that the trial prosecutor violated it.

The pertinent trial record shows that the defense rested its case subject to the presentation of the identity of the males who comprised the live pretrial lineup held at the County Jail on May 31, 1995. (24 RT 4653.) In the ensuing conference outside the presence of the jury, the prosecutor announced a stipulation would be prepared once those identities were obtained. (24 RT 4655.)

Responding to the trial court's question, the prosecutor announced she would be presenting a rebuttal case. (24 RT 4654.) The prosecutor then announced the rebuttal witnesses she planned to present, one of which was Probation Officer Steve Sentman, and stated she had so advised defense counsel. (24 RT 4654-4655.) After a brief discussion about exhibits, defense counsel Parkin informed the trial court that appellant had advised him that Sentman was in the courtroom while appellant was testifying. (24 RT 4654.) Parkin therefore objected to Sentman testifying as a rebuttal witness because witnesses were supposed to be excluded during trial testimony by other witnesses. (24 RT 4656.)

Sentman was not among the prosecutor's anticipated witnesses in her case in chief. (3 CT 827-829.) Defense counsel Harley explained that the defense had not previously been informed that Sentman would be called. He first learned Sentman would testify in rebuttal five minutes after the defense rested and the jury left the courtroom, when the prosecutor gave him a note stating that Sentman and perhaps Officer Bruce Davis would be among the rebuttal witnesses. (24 RT 4656.)

Following further discussions about exhibits, instructions and argument, defense counsel Parkin asked if the trial court had denied the defense motion to exclude Sentman as a rebuttal witness. (24 RT 4663.)

The trial court stated it was denying the motion. (24 RT 4663.) It explained that

> I wasn't advised that he [Sentman] was in the court room [] in a timely fashion. And I'm not faulting counsel. Apparently you didn't know that they were thinking of calling him as a witness.

(24 RT 4663.)

The trial court further explained,

> the area that he plans to testify doesn't appear to be impacted or prejudiced by the fact that he was here while the defendant was testifying

(24 RT 4663-4664.)

The foregoing record fails to show that either the prosecutor or Sentman knew Sentman would be a rebuttal witness before the prosecutor so advised counsel and announced her rebuttal witnesses immediately after the defense rested. The record does not in any event show the prosecutor knew Sentman was in the courtroom when appellant testified.

Assuming arguendo that the prosecutor and/or Sentman violated a witness exclusion order because the prosecutor decided to call Sentman as a rebuttal witness after Sentman had been present in the courtroom during appellant's testimony, appellant has not shown that the trial court abused its discretion by denying the motion to exclude Sentman as a rebuttal witness. The violation of a witness exclusion order (Evid. Code, § 779) does not constitute grounds for excluding the witness's testimony, at least when the party seeking to offer the testimony is not at fault in causing the witness's violation of the exclusion order. (*People v. Redondo* (1988) 203 Cal.App.3d 647, 654.)

One reviewing court upheld the exclusion of a defense expert based on defense counsel's earlier express agreement to forego the defense

expert's testimony so the defense expert could remain at his side in order to assist his cross-examination of the prosecution expert. (*People v. Valdez* (1986) 177 Cal.App.3d 680, 686-695, cited at AOB 261-262.) But as that opinion explained, no one contended that a trial court must exclude a witness for disobedience of a court order excluding witnesses. (*People v. Valdez*, *supra*, 177 Cal.App.3d at p. 694.)

Even had appellant been able to show the prosecutor was at fault in the case at hand, the trial court did not abuse its discretion by declining to exclude Sentman as a rebuttal witness. As noted earlier, the record does not show that the prosecutor knew Sentman was present in the courtroom when appellant was testifying and does not show that she knew at that time that she would call him as a rebuttal witness. The trial court further noted that the anticipated testimony by Sentman did not appear to be prejudicially impacted by his presence in the courtroom during appellant's testimony. (24 RT 4663-4664.)

Appellant argues that the alleged error warrants reversal of counts two and three because its erroneous admission of Sentman's testimony was not harmless beyond a reasonable doubt. (*Chapman v. California*, *supra*, 386 U.S. at p. 24; AOB 268.) But notwithstanding appellant's contention to the contrary, a state trial court's discretionary decision under state evidentiary rules does not implicate the Federal Constitution when it does not remove a viable defense or render the trial fundamentally unfair. (*People v. Lindberg*, *supra*, 45 Cal.4th at p. 26; *People v. Partida*, *supra*, 37 Cal.4th at p. 439; *People v. Kraft*, *supra*, 23 Cal.4th at p. 1035.)

And the alleged error was in any event harmless under any standard because the prosecutor could have conveyed to Sentman the points in appellant's testimony that she wished rebutted even had Sentman been absent from the courtroom during appellant's testimony.

XXI. APPELLANT FORFEITED HIS ARGUMENT THAT THE TRIAL COURT ERRONEOUSLY ALLOWED SENTMAN TO TESTIFY FROM HIS FIELD NOTES BY FAILING TO OBJECT TO SENTMAN'S TESTIMONY FROM HIS FIELD NOTES

Appellant argues that this Court must reverse counts two and three because the trial court erroneously allowed Sentman to testify from his field notes despite repeated defense complaints about the belated discovery of the field notes (AOB 257-259.) This Court should reject appellant's argument as forfeited. If defendant does not object in the trial court to the admission of evidence challenged on appeal, defendant forfeits an appellate complaint about the admission of that evidence. (Evid. Code, § 353; *People v. Chain* (1971) 22 Cal.App.3d 493, 497.)

Appellant forfeited his argument because he never objected to Sentman's use of the field notes when he testified as a rebuttal witness and never moved to exclude any reference to the field notes in Sentman's rebuttal testimony. Moreover, appellant himself used the field notes in his cross-examination of Sentman. (Respondent's argument XXI(C), *post.*)

The trial court had no sua sponte duty to impose the ultimate discovery sanction of excluding evidence because appellant had not: (1) informally requested that the prosecutor provide the field notes; (2) made a motion for a court order for the field notes; (3) moved for sanctions and supported the motion by showing that the prosecutor had violated Penal Code section 1054.1, and failed to comply with an informal request for the field notes; and (4) shown all other sanctions had been exhausted or were insufficient. (Pen. Code, § 1054.7, subds. (b), (c).)

Assuming arguendo that this Court considers appellant's argument on its merits, it should in any event reject appellant's argument as meritless. Appellant contends that due process demanded the ultimate sanction, to wit: preclusion of Sentman's testimony from the field notes, because the late

disclosure of the notes would otherwise render the trial fundamentally unfair.

On April 22, 1996, more than two years before trial, the defense served a subpoena duces tecum on the Orange County Probation Department seeking "any and all probation records, reports, notes, memos, reports [sic], handwritten notes, and activity logs pertaining to the probation of and supervision of Lam Thanh Nguyen." (3 CT 937.) The Probation Department responded by delivering four pages of single-page probation department forms or "chronos" to the superior court (25 RT 4765; AOB 255), which, on May 10, 1996, provided copies to the parties. (1 RT 53, 55, 100-101; AOB 254.) When it produced the chronos in response to the subpoena duces tecum, the Probation Department stated the chronos were copies of "all records described in the Subpoena Duces Tecum" that the Department had. (3 CT 937; Defense Exh. WW, p. 3.) The Probation Department provided none of the field notes when it responded to the April 22, 1996 defense subpoena duces tecum, although it kept the field notes in the same probation file as the chronos. (25 RT 4791; AOB 262.)

When later considering the defense request for an instruction permitting adverse inferences from the alleged failure to comply with the subpoena duces tecum discussed in respondent's argument twenty-two, *post*), the trial court observed that the defense properly subpoenaed the field notes as well as the chronos when the defense served the subpoena duces tecum on the Probation Department more than two years earlier. (25 RT 4873; AOB 262.) Appellant complains that neither Sentman nor the prosecutor explained why the notes were not disclosed two years earlier in response to the defense's April 22, 1996 subpoena duces tecum. (AOB 262.)

Penal Code section 1054.1, subdivision (f), required that the prosecutor turn over relevant written statements of witnesses or the reports

of the statements of witnesses whom the prosecutor intended to call at trial. Appellant contends the prosecutor's request that rebuttal witness Sentman bring the field notes to trial (24 RT 4659) showed she knew the notes existed. He also asserts the fact Sentman and Detective Nye were partners in the Target Gang Unit made them members of the investigating agency subject to the prosecution's discovery obligations.

Appellant contends the withheld field notes contradicted - in a manner helpful to the prosecution and prejudicial to the defense - Sentman's earlier testimony at the May 10, 1996 hearing on appellant's motion to suppress evidence. (AOB 263.) Sentman testified at the May 10, 1996, suppression hearing that "[p]hone contact was made monthly with the defendant until approximately December of '94" (25 RT 4766; Supp CT 51; AOB 263 fn. 158) and that "'minimally I talked to him at least once a month, if not more" between August and November 1994 (1 RT 65-66; AOB 263 fn. 159). But using the field notes at trial, Sentman testified as a rebuttal witness that he had no personal contact with appellant after appellant phoned him in August 1994. (25 RT 4803; AOB 263.)

In order to properly discuss the merits of appellant's argument, respondent must first summarize: Sentman's testimony at the May 6, 1996, pretrial suppression hearing; the alibi defense rebutted by Sentman when called as a rebuttal witness at trial; the proceedings leading to Sentman's use of the field notes as a rebuttal witness; and Sentman's testimony as a rebuttal witness.

A. Sentman's Testimony at the May 6, 1996, Pretrial Suppression Hearing

Appellant's defense counsel called Sentman as a defense witness at the May 6, 1996, pretrial suppression hearing in order to prove that appellant's probation had been effectively terminated by the time of his May 25, 1995, arrest, when an officer found the gun appellant had

described in the glove compartment of Huy Phan's car. (See respondent's argument VII(B), *ante*.) The defense thereby sought to show that appellant was no longer subject to his probation condition waiving his right to be free from warrantless search and seizure. As a consequence, appellant had the necessary standing to challenge the warrantless seizure of the gun. (1 RT 52-59.) When called as supplemental defense witness in support of appellant's motion to suppress the gun, Sentman testified as follows.

Sentman estimated that appellant first approached him asking to leave the state within a few weeks of July 4, 1994. (1 RT 62-63.) Sentman recalled giving appellant permission to leave the state in July of 1994. (1 RT 61.) Sentman opined appellant left California in August of 1994 based upon a phone call he received from appellant in which appellant told Sentman he was in Louisiana. (1 RT 60-62.) Sentman did not believe the telephone call was reported in appellant's adult probation file. (1 RT 62.) Sentman opined appellant moved from California on or about August 19, 1994. (1 RT 60.)

Sentman had no way of knowing whether or not appellant was really out of state when appellant phoned him. (1 RT 66.) Appellant did not come into the probation office, and Sentman did not see appellant after the phone call. (1 RT 66.) Sentman told appellant to notify him immediately when he returned to California. (1 RT 64.)

Sentman recalled last hearing from appellant in out of state phone call he received from appellant approximately November of 1994. (1 RT 63.) In his previous phone calls to Sentman, appellant was unclear about what he was doing and whether he was going to stay in Louisiana. (1 RT 65.) Sentman estimated he talked to appellant at least once a month, if not more, between the months of August and November 1994. (1 RT 65-66.)

Sentman made several unsuccessful attempts through December 1994 to contact appellant. (1 RT 64.) Sentman prepared a warrant package for

appellant's arrest before appellant was ultimately arrested on May 25, 1995. (1 RT 64.) Sentman did so because he could no longer contact appellant and because appellant's family did not know his whereabouts. (1 RT 67.)

When cross-examined, Sentman confirmed appellant had a warrantless search condition as a condition of his probation. (1 RT 69-70.) Appellant had been placed on three years adult probation for his Penal Code section 245, subdivision (a)(2), conviction on September 3, 1992. (1 RT 71.)

B. Appellant's Alibi Defense

Appellant gave the following testimony supporting the claim that he was not in California when Tony Nguyen was shot on July 21, 1994, and when Huy Nguyen was shot on November 24, 1994. (21 RT 4027.)

In May or June of 1994, appellant told Probation Officer Sentman that he was going to go to live with another sister in Alabama. (21 RT 4015.) Appellant explained to Sentman that because the sister he was currently living with in California was going to move, he planned to make the trip in July. (21 RT 4016.) Appellant left for Bayou La Batre, Alabama, flying from Los Angeles International Airport to New Orleans Airport, about July 4, 1995, in order to live with the sister who lived in Alabama. (21 RT 4017-4018.) Appellant's brother-in-law picked appellant up at the New Orleans Airport and drove him to his sister's house in Alabama in about two hours. (21 RT 4018.) Appellant stayed with his sister in Bayou La Batre almost two months. (21 RT 4018-4019.) Appellant worked at a part time job at T & W Seafood in Bayou La Batre. (21 RT 4019-4021.) Appellant then moved to a trailer park in Marrero, Louisiana, where he stayed and worked with Khai Tran on Tran's shrimp boat. (21 RT 4021-4022.)

Appellant tried to keep in touch with his probation officer by phone when he was in Alabama. (21 RT 4022.) But when appellant phoned, his

probation officer was not in the office. (21 RT 4022.) Although appellant left messages, he could not reach his probation officer. (21 RT 4022.) Appellant stopped phoning because he thought he was doing well. (21 RT 4022-4023.)

Appellant returned to California when the shrimp season ended near the end of November or early December of 1994. (21 RT 4023.) Khai Tran agreed to drive appellant back to California because Khai was going to visit somebody in California. (21 RT 4023.) Appellant stayed with a different sister in Westminster when he returned to California. (21 RT 4023.) After Christmas, appellant moved to Garden Grove, where he rented a room in a pool hall near Dale Street and Garden Grove Boulevard. (21 RT 4024.) He lived there with a man named Quc for four or five months until his arrest. (21 RT 4024-4025.)

When cross-examined, appellant admitted that he did not know whether he worked at T & W Seafood in Bayou La Batre, Alabama, in July and August of 1994 or at some other time. (22 RT 4164-4170.) Appellant acknowledged he had previously gone to Alabama for a six-month period in 1993. (22 RT 4172-4173.)

Appellant's older sister Phuong Nguyen testified that she had six brothers and sisters in the United States, including appellant, and three more siblings in Vietnam. (23 RT 4405-4406.) Phuong moved with her husband and children to Bayou La Batre, in Alabama in September of 1991. (23 RT 4408.) Appellant stayed in Bayou La Batre from April until the end of August of 1993, when he went back to California. (23 RT 4409.) Appellant worked in the seafood industry and visited them occasionally during that period. (23 RT 4409-4410.) Appellant showed up a second time in Bayou La Batre in February of 1994, and stayed there about one week (23 RT 4411) before returning to California (23 RT 4412). Appellant came to Bayou La Batre a third time in the end of June or beginning of July

1994. (23 RT 4413.) Phuong recalled that appellant was with them on July 4, when they went to an island to see the fireworks. (23 RT 4413.) Appellant left Bayou La Batre near the end of August or early part of September, telling her he was going to New Orleans. (23 RT 4413-4414.)

When cross-examined, Phuong stated the nearest airport to Bayou La Batre was in Mobile, Alabama, some 40 to 50 minutes away. (23 RT 4415.) Phuong never bought an airlines ticket for appellant when he came to see her in Alabama. (23 RT 4424.) Phuong had no relatives in New Orleans or Louisiana. (23 RT 4427.) Phuong flew out of the Mobile Airport when she flew to California to testify. (23 RT 4427.) She planned to fly back to the Mobile Airport when she returned from California. (23 RT 4427.)

During appellant's stay in Bayou La Batre from April to September 1993, appellant stayed at Phuong's house for about one month before staying at his friends' apartment in Bayou La Batre. (23 RT 4431-4432.) Appellant would phone her once or twice a month. (23 RT 4431.) His friend drove him to the New Orleans Airport when he left to return to California. (23 RT 4433.) Even though appellant had to drive three hours to get to the New Orleans Airport, he flew out of the New Orleans Airport because it was cheaper. (23 RT 4433-4434.) Phuong did not discuss airlines tickets with appellant. (23 RT 4434.)

When appellant arrived in Bayou la Batre in February 1994, he showed up knocking on Phuong's front door. (23 RT 4427-4428.) Phuong did not recall who else was home at the time and did not remember whether she saw a car or a taxi out in front of the house. (23 RT 4428.) Appellant went to a friend's place to stay for several days before telling her he was going back to California. (23 RT 4429-4430.) Appellant spent no time with her husband on that occasion. (23 RT 4430.)

Appellant phoned from California a day before his third visit in late June or early July 1994. (23 RT 4420.) Neither Phuong nor her husband

paid for the airlines ticket. (23 RT 4438.) Appellant arrived at the New Orleans Airport before staying at his friends' Bayou La Batre apartment. (23 RT 4438-4439.) Phuong did not know the name of any seafood business in which her husband and appellant worked, never drove them to the seafood businesses or picked them up, never visited either of them at work, and never saw them working. (23 RT 4422-4423, 4440-4442.) Phuong did not know whether her husband was working in June, July, or August of 1994. (23 RT 4441.) But when her husband did work, he reported his income and paid his taxes. (23 RT 4441-4442.)

Phuong first found out appellant had been charged with crimes a two or three months before she testified. (23 RT 4423, 4444.) Several men who came to Bayou La Batre told her he had been charged and asked her when appellant had visited her. (23 RT 4425.) Phuong talked to her older sister Nen about the case two to six times per month after finding out that appellant was in jail. (23 RT 4444.)

Appellant's older sister Nen Nguyen testified that she lived with her husband and children at 7301 Wyoming Street, Westminster. (24 RT 4626.) Appellant lived with Nen's younger sister Le on 21st Street, Westminster, in 1991 and 1992. (24 RT 4627.) In April of 1993 appellant went to Bayou LaBatre in Alabama, where Nen's younger sister Phuong lived. (24 RT 4627-4628.) Nen spoke with appellant and Phuong by telephone between the months of April and September 1993. (24 RT 4629.) Nen dialed Phuong's phone number in Bayou LaBatre in order to talk with them. (24 RT 4629.) Nen saw appellant again when he was back in California in September of 1993. (24 RT 4629-4630.)

Appellant went to Bayou LaBatre a second time in March 1994, for about a week. (24 RT 4631.) After he returned, Nen saw appellant every few days to every few weeks from the middle of March to the end of June 1994. (24 RT 4632.) Toward the end of June 1994, appellant told her he

was going back to Bayou LaBatre (24 RT 4632) because fishing season just started (24 RT 4633). Nen stopped seeing appellant towards the end of June. (24 RT 4632.)

During the months of July and August 1994, Nen talked with Phuong every few days or every few weeks over the phone. (24 RT 4633.) Nen remembered Phuong's phone number in Bayou LaBatre (24 RT 4633) and remembered speaking to appellant when she talked to Phuong over the phone (24 RT 4634). She spoke to appellant ten times or more during this period. (24 RT 4634.) When she talked to Truong over the phone during the months of September, October and November 1994, Nen no longer spoke with appellant because he was no longer there. (24 RT 4634-4635.)

Nen next saw appellant two weeks before Christmas at her Wyoming Street house in Westminster. (24 RT 4635.) Appellant stayed with her three weeks and left the week after Christmas. (24 RT 4635-4636.) Appellant came to Nen's house three or four times a month between January and May of 1995. (24 RT 4636-4637.) He would usually play with the children during these visits. (24 RT 4637.)

When cross-examined, Nin recalled talking to appellant by phone one or two days after July 4, 1994. (16 RT 4642.) She might have heard her brother was charged with a crime in July. (16 RT 4644.) She did not have phone records corroborating her phone calls to Alabama. (16 RT 4645.) She refused to talk to district attorney's investigators that came to her house to talk with her a week or so before her testimony. (16 RT 4643.)

C. The Proceedings Leading to Sentman's Use of the Field Notes as a Rebuttal Witness

After the defense rested and after the prosecutor's announcement that Sentman would be one of her rebuttal witnesses, the prosecutor explained the she would be calling Sentman as a rebuttal witness in order to give the following testimony: appellant discussed with Sentman in July of 1994 the

possibility of leaving the state. Sentman last saw appellant on July 19, 1994, at Sentman's office, at which time appellant told Sentman he would not be leaving the state as planned; Sentman gave permission to appellant to leave California in August of 1994. (24 RT 4658-4659.)

The prosecutor stated that Sentman would be bringing in his field notes when he testified as a rebuttal witness. (24 RT 4659.) Defense counsel Harley said the defense needed the field notes before Sentman testified. (24 RT 4659.) The prosecutor noted that she asked Sentman to bring the field notes with him the next day before he took the witness stand. (24 RT 4659.)

The next morning, the prosecutor explained that the Probation Department had a policy of not releasing any original probation records without a court order. (25 RT 4667.) The prosecution had therefore procured copies of the field notes which Sentman had brought to court. (25 RT 4667.) The trial court granted the prosecutor's request for a court order allowing her to give a copy of the field notes to defense counsel. (25 RT 4667.) Following the presentation of the prosecutor's other rebuttal witnesses, including a portion of the rebuttal testimony of Thoa (Chynna) Vu (25 RT 4674-4718; respondent's argument XVII, *ante*), the parties conducted more chambers conferences which included among other topics, the upcoming testimony of rebuttal witness Sentman (25 RT 4721-4735).

The discussion regarding that topic began with defense counsel Harley's discussion of the permissible scope of his cross-examination of Sentman. (25 RT 4721-4725.) That discussion included Harley's expressed desire to explore the differences between Sentman's May 6, 1996, pretrial suppression hearing testimony and the proposed rebuttal testimony, differences based on Sentman's recently-discovered field notes. (25 RT 4723, 4725.)

Defense counsel Parkin then observed that the defense saw Sentman's field notes for the first time that same morning even though the defense previously subpoenaed all the probation notes and records concerning appellant. (25 RT 4725.) Parkin concluded the discrepancy raised a question about when the field notes were prepared. (25 RT 4725.) Defense counsel Harley complained generally about the late disclosure of appellant's contacts with law enforcement that could potentially scuttle appellant's alibi defense. (25 RT 4726.)

The prosecutor responded that the pertinent contact dates had all been noted in the subpoena duces tecum documents in the court's file. Further, Sentman's proposed rebuttal testimony regarding the date he permitted appellant to leave the state was set forth in the probation report Sentman prepared for his petition to revoke appellant's probation, a report included in the documents originally discovered to the defense before the trial. (25 RT 4726.)

The trial court reassured defense counsel that it would allow defense counsel Harley to explore in his cross-examination of Sentman all the inconsistencies between Sentman's pretrial suppression testimony, Sentman's rebuttal testimony and Sentman's probation reports. (25 RT 4727.)

D. Probation Officer Sentman's Testimony as a Rebuttal Witness at Appellant's Trial

When called as a rebuttal witness at appellant's trial, Sentman confirmed he was an Orange County Deputy Probation Officer who supervised appellant in July of 1994. (25 RT 4738-4739.) Reviewing his field notes – a running tally of a probationer's supervision used by probation officers to prepare their chronological history sheets for the probationer (25 RT 4739-4740) – Sentman recalled seeing appellant twice in July 1994 (25 RT 4740). Sentman first saw appellant July 13, 1994, in

the Westminster Police Department, where Sentman had one of his three offices. (25 RT 4740.) On that date appellant mentioned the possibility of moving to Minnesota to stay with one of his sisters. (25 RT 4740.) Sentman next saw appellant July 19, 1994. (25 RT 4740.) On that date Sentman saw appellant at his second West County Probation office. (25 RT 4741.) Appellant told Sentman he would not be moving when appellant came in to see him on July 19, 1994. (25 RT 4741.)

Sentman then gave appellant an August 2, 1994, date at which time appellant was to report back to Sentman in person. (25 RT 4741.) Appellant did not come in to talk to Sentman on that date. (25 RT 4742.) Sentman instead received a phone call from appellant in which appellant told Sentman he had moved to Louisiana. (25 RT 4742.) Appellant said he would provide him with a phone number in the future. (25 RT 4742.)

When cross-examined by defense counsel Harley, Sentman acknowledged that he recognized appellant's voice when appellant phoned him. (25 RT 4742.) Sentman acknowledged that on August 9, 1994, appellant phoned Sentman back and told him he was living with his brother-in-law, Mo Truong, whose phone number was 205-824-7515. (25 RT 4742.)

Sentman acknowledged preparing one probation report on May 30, 1995, and another in November of 1995. (25 RT 4743.) Sentman acknowledged preparing the chronological reports in appellant's adult probation file from his rough notes. (25 RT 4746.) Sentman acknowledged appearing at an earlier May 10, 1996, proceeding (the pretrial suppression hearing) and testifying that he gave appellant permission to leave the state in July 1994. (25 RT 4743-4744.) Sentman acknowledged making no mention of appellant's July 19, 1994, visit with Sentman during his May 10, 1996, testimony. (25 RT 4746.)

Defense counsel Harley then marked as Defense Exhibit WW a chrono (25 RT 4746-4747) which Sentman acknowledged he had prepared and signed (25 RT 4747). Sentman prepared the chrono September 12, 1995, even though it covered the period from June 22, 1995, to September 18, 1995. (25 RT 4748, 4751.) Reviewing the chrono, Sentman distinguished contacts at the probationer's home and at the probation office from "other" contacts at the police department or elsewhere. (25 RT 4748.) July 13 was listed as "other" and represented a Westminster Police Department contact. (25 RT 4749-4750.) June 21, June 28, July 19, and August 2, notations represented probation office contacts. (25 RT 4749-4751.)

When defense counsel Harley began to question Sentman about a phone contact with appellant in August (25 RT 4752), the prosecutor asked to approach the bench (25 RT 4752). When they approached the bench, the prosecutor observed that the trial court had previously barred defense counsel from questioning Sentman further about the content of the telephone contacts between appellant and Sentman without a prior Evidence Code section 402, hearing regarding, among other things, who had initiated the phone call. (25 RT 4734, 4752-4753.)

A recess was called, and during an ensuing discussion outside the presence of the jury defense counsel Harley expressed the defense team's new theory that – based upon their review of the previously subpoenaed chronos and their comparison of the chronos with the recently-reviewed field notes –Sentman had used his field notes to backdate his contacts with appellant to 1994 in an attempt to defeat appellant's alibi. (25 RT 4756-4758.) The prosecutor responded that the 1995 date entered at the top of the chrono which referenced Sentman's contacts with appellant appeared to have been entered in error. (25 RT 4758.) The prosecutor therefore requested that the trial court order Sentman to bring the original probation

file to court, explaining that the original file could assist the parties in determining whether or not Sentman mistakenly wrote in the year 1995, when he should have entered the year as 1994. (25 RT 4758.)

When Sentman thereafter reentered the courtroom, the trial court ordered Sentman to get the original probation file and bring it with him before he resumed the witness stand in the afternoon. (25 RT 4758-4759.) Responding to additional questions by the trial court regarding who initiated the noted telephone contacts with appellant in the fall of 1994, Sentman explained that according to his notes, appellant left one phone message for Sentman in October and Sentman phoned September 13, October 25, and November 8, without being able to reach appellant. (25 RT 4759-4760.) Sentman explained that he talked to appellant's brother-in-law on those occasions. (25 RT 4760.)

The trial court later made a record outside the presence of the jury that with the exception of Sentman's field notes from appellant's adult probation file, field notes recently copied for all parties and which all parties now had available for their examination of Sentman, all parties had the following documents pertinent to the examination of Sentman from the beginning of the trial (25 RT 4779-4780): Sentman's subpoenaed chronological reports (chronos) in appellant's adult probation file (25 RT 4770-4771); Sentman's May 30, 1995, probation report attached to the May 31, 1995, petition to revoke appellant's probation (25 RT 4770-4771, 4774); and Sentman's November 17, 1995, presentence probation report (25 RT 4770-4771). The parties had also been given the opportunity to go through appellant's entire adult probation file when Sentman brought it to court, and defense counsel had done so without Sentman's assistance because they knew what they were looking for. (25 RT 4777-4778.)

When Sentman's cross-examination continued, Sentman acknowledged he prepared the chronos for appellant's adult probation file

for the period running from December 31, 1993, to June 21, 1994 (25 RT 4782-4783), as well as for the period running from June 22, 1994, to September 18, 1995 (25 RT 4783). Sentman also acknowledged that the latter report covered the contacts he had previously described. (25 RT 4783.)

Sentman then explained that the contacts described in that chrono took place in 1994 rather than 1995 (25 RT 4783-4784) and that he had mistakenly entered in that chrono the pertinent year as 1995 rather than 1994 (25 RT 4784-4787). Sentman also acknowledged the listed preparation date for the last chrono, to wit: September 12, 1995, fell six days short of the date the report period was scheduled to end. (25 RT 4789.)

On redirect-examination, Sentman acknowledged that he had expected no other office contacts, house contacts, or phone contacts with appellant between the chrono preparation date of September 12, 1995, and the September 18, 1995, date terminating the chrono reporting period. (25 RT 4792-4793.) Evidence previously summarized by respondent (respondent's argument VII(B)) shows the reason, to wit: appellant's arrest for the charged crimes on May 25, 1995. Given the fact that appellant was arrested for the charged crimes on May 25, 1995, there was no possibility that the contacts with appellant that Sentman mistakenly listed as occurring in 1995 rather than 1994 - contacts on June 21, June 28, July 13, and July 19 - could have occurred in 1995 rather than 1994. (25 RT 4797.)

Sentman noted in a separate November 1995 (presentence) probation report that appellant was given permission to move to Louisiana on or about August 19, 1994. (25 RT 4797-4798.) Sentman did not have his field notes with him at the May 6, 1996, (suppression) hearing, the pretrial hearing at which Sentman testified that he did not know the specific date appellant left the state or when appellant talked about leaving the state. (25 RT 4798.)

Sentman never spoke to appellant after the phone call from appellant in August 1994 referenced in Sentman's cross-examination testimony, although Sentman tried to reach appellant by phone without success. (25 RT 4799.) The Garden Grove Police Department's gang unit and the Westminster gang unit notified Sentman in February of 1995 that appellant may have returned to Orange County and that they were looking for appellant. (25 RT 4795.) Sentman assisted the Westminster Police Department's search for appellant because Sentman was assigned to the Westminster Police Department. (25 RT 4795.) Sentman knew warrants for appellant's arrest were outstanding. (25 RT 4796.) Sentman was unable to re-contact appellant until May 25, 1995, the date of appellant's arrest. (25 RT 4795-4796.)

On recross-examination, Sentman acknowledged that nothing in his field notes reflected the August 19, 1994, date on which appellant was given permission to move to Louisiana to live with relatives. (25 RT 4799.) Sentman was unaware of any 1996 subpoena for his field notes. (25 RT 4800.)

On redirect-examination, Sentman testified that the terms and conditions of appellant's probation would have required that appellant notify Sentman before he moved (25 RT 4801), whether or not appellant had permission to move (25 RT 4801-4802). When Sentman saw appellant in July of 1994, Sentman had not in any event given appellant permission to move because appellant had not told Sentman he was going to move. (25 RT 4802.)

Sentman tried to contact appellant by phone with the phone number appellant had given him in the August 9, 1994, phone call, but family members said appellant was not there. (25 RT 4804.) Sentman usually spoke by phone with appellant's brother-in-law, but was never able to speak with appellant when he tried to contact appellant by phone after

appellant's August 9, 1994, phone call. (25 RT 4802-4803.) Sentman last attempted to contact appellant on November 8, 1994, again using the phone number appellant had given him on August 9, 1994. (25 RT 4804.) Appellant's brother-in-law answered the phone and told Sentman appellant was on a fishing boat. (25 RT 4804.) Sentman had no personal contact with appellant between the August 9, 1994, phone call from appellant and appellant's May 25, 1995, arrest for the charged crimes. (25 RT 4803.)

E. The Trial Record Summarized Above Belies Appellant's Argument That the Trial Court Violated Appellant's Right to a Fair Trial by Erroneously Allowing Sentman to Testify From His Field Notes When Sentman Testified as a Rebuttal Witness

The trial record shows that trial court did not err because appellant never moved to exclude the field notes and never moved for an order precluding Sentman's use of his field notes while testifying. On the contrary, defense counsel Harley affirmatively used the field notes in his own cross-examination of Sentman in an attempt to show that Sentman backdated the contact dates set forth in the probation file chronos in an effort to defeat appellant's alibi.

Notwithstanding appellant's contention to the contrary, the prosecutor complied with Penal Code section 1054.1, subdivision (f), by procuring copies of the field notes and providing them to defense counsel before Sentman's rebuttal testimony and by providing to defense counsel prior to trial all the other pertinent reports Sentman prepared regarding his probationary supervision of appellant. (Respondent's argument XXI(C)(D), *ante*.)

Appellant nevertheless contends for the following reasons that the trial court's double standard regarding discovery violations by the defense and the prosecution violated appellant's rights to due process and equal protection under the Fifth and Fourteenth Amendments (AOB 264): (1)

when the trial court mistakenly concluded the defense violated discovery by attempting to elicit previously undisclosed statements of Tin Duc Phan, it excluded any evidence of the statements on its own initiative. (AOB 103-105, 264); but (2) when the government violated discovery with its untimely disclosure of the field notes, the trial court not only refused to preclude Sentman's rebuttal testimony from the field notes (AOB 261-264), but also refused to impose any discovery sanction while additionally barring the defense from calling a proffered witness to impeach the belated discovery (AOB 259-261, 264-266). This latter ruling is discussed *post* in respondent's argument XXIII.

But there was no double standard. The trial court did not exclude evidence of Tin Duc Phan's undisclosed statements on its own initiative. It instead sustained the prosecutor's objection to defense counsel Harley's elicitation of the alleged statements based on Harley's prior agreement to restrict himself to a previously-referenced discovery paragraph when questioning Phan. (Respondent's argument II, *ante*; 20 RT 3834.) The trial court later reaffirmed its ruling sustaining the prosecutor's objection on the ground that the defense had adequate time before trial to explore all the parameters of what it could achieve through defense witness Phan. (Respondent's argument II, *ante*; 20 RT 3842-3843.) The additional inquiry of Phan unsuccessfully proposed by defense counsel Harley was in any event only marginally relevant and highly speculative. (Respondent's argument II, *ante*.)

XXII. THE TRIAL COURT PROPERLY DECLINED TO GIVE AN INSTRUCTION ALLOWING JURORS TO DRAW ADVERSE INFERENCES REGARDING THE ACCURACY OF THE FIELD NOTES AND THE CREDIBILITY OF SENTMAN AS A WITNESS

Appellant argues that this Court must reverse counts two and three because the trial court erroneously refused to give the following instruction requested by appellant:

> The probation officer[']s field notes which he used to prepare his 6 month chronological report of contacts with the defendant were not disclosed to the defense until 24 JUNE 1998. [¶] The failure to disclose the notes before that date may be considered in ... determining the accuracy of his notes and the credibility of the witness.

(3 CT 951; AOB 260, 264-265.)

Appellant contends the instruction should have been given because "[t]he fact that [a party] failed to comply with his obligations under the discovery statutes" is "relevant evidence the jury could consider in assessing the credibility of [the witness's] testimony." (*People v. Riggs, supra,* 44 Cal.4th at p. 310; AOB 265.)

Appellant contends that the only reason given by the trial court for refusing the instruction - "I did not find that the testimony should be stricken or precluded, nor do I think I should give this special instruction[]" (25 RT 4873; AOB 260-261) - fails to justify its refusal to give the instruction (AOB 265).

This Court should reject appellant's argument as meritless. The trial court did not abuse its discretion under Penal Code section 1054.7, subdivision (b), by declining to give the requested instruction. The trial court could reasonably decline to give the instruction absent evidence that appellant's ability to challenge Sentman's rebuttal testimony was adversely effected by the late disclosure of the field notes and absent evidence supporting an inference that the late disclosure of the field notes was triggered by an attempt by the prosecutor to gain a tactical advantage over the defense. (See: *People v. Bell* (2004) 118 Cal.App.4th 249, 354.) Even assuming error, appellant was not prejudiced. Appellant's trial counsel had ateh benefit of the notes when questining appellant, and appellant cannot show a reasonable probability of a different outcome if the instruction had been given as requested. (*People v. Watson, supra*, 46 Cal.2d at p. 836.)

XXIII. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY REJECTING PROFFERED SURREBUTTAL TESTIMONY BY APPELLANT'S SISTER LE NGUYEN

Appellant argues that this Court must reverse counts two and three because the trial court erred by rejecting as irrelevant proffered surrebuttal testimony by appellant's sister Le Nguyen. (25 RT 4853-4856; AOB 259-260, 265-267.)

In an offer of proof, defense counsel Harley represented that Le was the sister in Westminster with who appellant had been living from March until June 1994, when appellant told her he was leaving to work in the seafood industry in Alabama. Accordingly to Le appellant made a couple of unsuccessful attempts to contact Probation Officer Sentman before leaving around July 4, and then, between July 10 and 20, Le herself drove to Sentman's office to tell him that appellant had left and could be reached in Alabama. Le would further testify that Sentman said he had no problem with this. (3 CT 942; 25 RT 4854.) Defense counsel Harley also represented that while Le did not actually take appellant to the airport, she did speak with appellant by phone after phoning her sister Phuong Nguyen in Bayou La Batre, Alabama. (25 RT 4814-4815, 4856.)

Appellant contends the trial court erred by excluding the proffered surrebuttal testimony for the following reasons: (1) Le's proffered testimony was circumstantial evidence that appellant left the state (AOB 266); (2) Le's proffered testimony that appellant told her he was leaving to work in the seafood industry in Alabama was relevant testimony of an out-of-court statement of intent or plan offered to prove acts or conduct of the declarant (Evid. Code, § 1250, subd. (a)(2); AOB 266); (3) Le's proffered testimony that appellant engaged in behavior consistent with his statements - leaving her home and not coming back - had a tendency in reason to corroborate the out-of-court statement (AOB 266-267); (4) Le's proffered

testimony that she contacted appellant by phone in July (25 RT 4856) by dialing a phone number in Alabama (25 RT 4815) additionally corroborated the out-of-court statement; (5) Le's proffered testimony impeached Sentman's testimony that he saw appellant in person on July 13 and July 19, since Le would have testified that "between July 10th and July 20th," she herself "drove down to Sentman's office" and told him "that Lam had left town and how Lam could be reached in Alabama[]" (3 CT 842); and (6) Le's proffered testimony also provided the following defense-favorable explanations as to why Sentman made the July 13th and July 19th entries in the chronos: (a) any in-person contact Sentman had on those dates was with Le rather than appellant; and (b) Sentman recorded those entries either inaccurately or in such a cursory way that at trial, he merely assumed that appellant rather than Le had contacted him. (AOB 267).

This Court should reject appellant's argument as meritless because he cannot show that the trial court abused its discretion (*People v. Farnam*, *supra*, 28 Cal.4th at p. 157) by excluding the proffered surrebuttal testimony as irrelevant to rebut Sentman's rebuttal testimony. As the prosecutor pointed out and defense counsel Harley conceded, Le would not testify that she took appellant to the airport, that she saw him leave for Alabama, or that she saw him out-of-state. (25 RT 4814, 4855.) As the trial court noted, Le could not testify appellant left the state or even left the area after leaving her apartment. (25 RT 4854-4855.)

Notwithstanding appellant's contention to the contrary, the proffered surrebuttal testimony did not rebut Sentman's testimony that his field notes and chrono file showed personal contacts with appellant on July 13 and July 19, since the field notes and chrono file referenced in Sentman's testimony also reported that appellant mentioned the possibility of moving to Minnesota when he came in to see Sentman on July 13 (25 RT 4740) and told Sentman he would not be moving on July 19 (25 RT 4741).

(Respondent's argument XXI(D), *ante*.) Sentman could not have confused those reported contacts with contacts with Le in which Le told Sentman that appellant moved to Alabama and told Sentman how appellant could be reached in Alabama.

Le's proffered surrebuttal testimony that she told Sentman how appellant could be reached in Alabama additionally contradicted appellant's own defense testimony describing his attempts to keep in touch with his probation officer by phone while in Alabama (21 RT 4022), efforts which would have been unnecessary had Le told Sentman how to reach appellant.

Le's proffered surrebuttal testimony that appellant left her after telling her he was going to Alabama for the fishing season was hearsay insofar as appellant's out-of-court statement was offered for the truth of the matter asserted. (Evid. Code, § 1200, subd. (a).) Insofar as the out-of-court statement was offered to prove or explain acts or conduct of the declarant (Evid. Code, § 1250, subd. (a)(2)), it was inadmissible under that hearsay exception if made under circumstances indicating its lack of trustworthiness. (Evid. Code, §§ 1250, subd. (a), 1252.) Circumstances suggesting the lack of trustworthiness of the out-of-court statement included the self-serving nature of the statement and appellant's desire to shield Le from any knowledge of his impending criminal activities.

In any event Le's proffered surrebuttal testimony that appellant left her after telling her he was going to Alabama for the fishing season cumulated earlier testimony in the defense case by Nen (24 RT 4632-4633), as did Le's proffered surrebuttal testimony that she spoke with appellant after phoning Phuong in Alabama (24 RT 4623). (Respondent's argument XXI(B), *ante*.) The proffered testimony of Le was not relevant as surrebuttal testimony because it did not independently contradict the testimony of rebuttal witness Sentman.

Appellant argues that the trial court that by excluding Le's proffered surrebuttal testimony, the trial court violated his federal constitutional rights to present a defense, to compel the testimony of witnesses, and to confront adverse witnesses. (AOB 267-268.) Appellant forfeited this constitutional claim by failing to make it in the trial court. (*People v. Tafoya*, *supra*, 42 Cal.4th at p. 166; *People v. Geier*, *supra*, 41 Cal.4th at p. 609; *People v. Halvorsen*, *supra*, 42 Cal.4th at pp. 413-414) Nor can he show that the trial court's exercise of its discretion under state evidentiary rules implicated his federal constitutional rights. (*People v. Farnam*, *supra*, 28 Cal.4th at p. 157; *People v. Brown*, *supra*, 31 Cal.4th at p. 545; *People v. Box* ( ) Cal.4th at p. 545.)

XXIV. REVERSAL OF COUNTS TWO AND THREE IS NOT MANDATED BY CUMULATIVE ERROR

Appellant contends that even if no single error mandates the reversal of counts two and three, cumulative error mandates the reversal of counts two and three. But there is no error to cumulate. And even if there were one or more errors, the trial court's exercise of its discretion under state evidentiary rules did not implicate appellant's federal constitutional rights by rendering his trial fundamentally unfair. (*People v. Watson*, *supra*, 43 Cal.4th at p. 693; *People v. Smithey*, *supra*, 20 Cal.4th at p. 995.) Singly or cumulatively, the alleged errors do not warrant reversal of counts two and three because appellant cannot show different verdicts reasonably probable in their absence. (*People v. Watson*, *supra*, 46 Cal.2d at p. 832.)

XXV. APPELLANT WAS NOT DEPRIVED OF HIS SIXTH AMENDMENT RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL UNDER COUNTS TWO AND THREE

Appellant contends that if any of his foregoing appellate complaints regarding counts two and three were not adequately preserved for appeal, the reversal of counts two and three is in that event mandated by the

constitutionally ineffective assistance of his trial counsel in failing to preserve those complaints. (AOB 270-271.)

This Court should reject the contention because appellant cannot prove from the state record that his trial counsel acted in a professionally unreasonable manner and that different verdicts would have been reasonably probable but for his trial counsel's alleged failings. (*Strickland v. Washington*, *supra*, 466 U.S. at pp. 679-684; *People v. Jennings*, *supra*, 53 Cal.3d at p. 376.)

Appellant alternatively alleges that to the extent he raises constitutional issues when challenging his convictions under counts two and three, they are not waived by inadequate trial court objections. (*People v. Yeoman*, *supra*, 31 Cal.4th at pp. 117-118; *People v. Coddington*, *supra*, 23 Cal.4th at p. 632; AOB 271.) Appellant has raised new constitutional claims pertinent to his challenge to his convictions under counts two and three. (See the constitutional claims discussed in respondent's arguments II, III, V, XVII, and XV111, *ante*.) Notwithstanding appellant's allegation, this Court has found constitutional claims forfeited when not raised in the trial court. (*People v. Tafoya*, *supra*, 42 Cal.4th at p. 166; *People v. Geier*, *supra*, 41 Cal.4th at p. 609; *People v. Halvorsen*, *supra*, 42 Cal.4th at pp. 413-414.) It should find the pertinent constitutional claims forfeited here.

XXVI. THE TRIAL COURT PROPERLY REFUSED TO GIVE AN IMPERFECT SELF-DEFENSE INSTRUCTION FOR COUNTS FOUR AND FIVE

Appellant argues that the trial court erred by refusing appellant's request for an imperfect self-defense voluntary manslaughter instruction in addition to the perfect self-defense instructions given by the trial court for count four, the November 24, 2004, attempted murder of Huy "PeeWee" Nguyen, and count five, the street terrorism count based upon that

attempted murder. (25 RT 4860-4861, 4863, 4903; 27 RT 5263-5264; AOB 272-275.)

This Court should reject the argument as meritless. The trial court properly refused the requested imperfect self-defense voluntary manslaughter instruction because there was no substantial evidence that appellant shot Pee Wee in the actual but unreasonable belief that he had to do so in order to avoid the imminent danger of death or great bodily injury. (*In re Christian S.*, *supra*, 7 Cal.4th at p. 783; *People v. Oropeza*, *supra*, 151 Cal.App.4th at p. 82.) The evidence instead shows that after shooting Pee Wee several times outside the Mission Control video arcade, appellant followed Pee Wee with the gun still in his right hand as Pee Wee stumbled into the Mission Control video arcade. Appellant stood over Pee Wee after Pee Wee collapsed to the floor inside the arcade, pointed his gun down at Pee Wee, took aim, and shot Pee Wee two to four more times before exiting the arcade. (7 RT 1391-1393; 8 RT 1435-1436, 1438-1440, 1484-1485, 1559-1556, 1585; 14 RT 2767-2770; 18 RT 3474-3474.) Upon exiting the arcade, appellant said in Vietnamese, "If anyone is against me, I'll shoot them too." (8 RT 1585.) Appellant then ran to a car parked in the Mission Control parking lot (6 RT 1154-1156) and got into the back seat of the car before it drove off. (8 RT 1580-1581.)

Appellant nevertheless contends the instruction was warranted because of the unprovoked, escalating, and unremitting assault on appellant, an assault which justified the initial shots he fired outside the arcade. Appellant references the following evidence. PeeWee began the fight with appellant and was joined by seven accomplices in the fight. Appellant's head was smashed into a pillar. Appellant was kicked, pushed, and held down by his hair. The assault continued even after appellant managed to draw a weapon in an effort to scare off his assailants. (AOB 273 and 273 fn. 161.)

But the testimony describing a fight which preceded the shooting did not warrant an imperfect self-defense instruction when considered together with the evidence describing the gunshots fired. As summarized in respondent's argument VII(A), *ante*, Huy "Pee Wee" Nguyen testified that after he finished smoking a cigarette outside the Mission Control video arcade, a man approached him and asked, "Are you in a gang? Do you belong to T.R.?" (7 RT 1302-1303.) Although Pee Wee told the man he only had friends in the gang (7 RT 1303), the man hit him in the face (7 RT 1305). Pee Wee ran back inside Mission Control after hearing gunshots. (7 RT 1303-1307.) He saw blood on his body after falling to the floor inside Mission Control. (7 RT 1306.) Blood came from his nose, ear, and "everywhere." (7 RT 1306.) Pee Wee felt no pain and could not move his body. (7 RT 1306-1307.) He asked a Mission Control employee to call the ambulance before losing consciousness. (7 RT 1307.) Pee Wee was approximately five feet tall. (25 RT 4596.)

Channthae (Cindy) Pin saw Pee Wee yell something in Vietnamese (8 RT 1409-1411) to appellant (8 RT 1413, 1415-1417). Appellant turned around to look at Pee Wee after Pee Wee yelled at him. (8 RT 1413, 1492.) Pee Wee approached appellant and punched him. (8 RT 1422-1423.) When appellant punched back (8 RT 1424), several men joined Pee Wee in his fight with appellant. (8 RT 1425.) Pee Wee pushed appellant against a pillar. (8 RT 1430.) Appellant fell to the ground. (8 RT 1430.) Appellant and the others who joined Pee Wee punched and kicked appellant when he fell. (8 RT 1431.) One of them pulled appellant's hair in an effort to keep him on the ground. (8 RT 1433.) Pee Wee grabbed appellant by the neck. (8 RT 1433.) Appellant got to his feet and punched back. (8 RT 1434.) Appellant knocked Pee Wee and a second assailant to the ground. (8 RT 1434.) Seconds later, appellant drew a gun for his waistband with his right hand and shot Pee Wee in the stomach. (8 RT 1435-1436.) Pin heard three

or more gunshots as Pee Wee got to his feet and stumbled into Mission Control. (8 RT 1438-1440.) Appellant followed Pee Wee into Mission Control, still holding the gun in his right hand. (8 RT 1439-1440, 1484.) Pin heard two or three more gunshots inside Mission Control. (8 RT 1440, 1484-1485.) In her preliminary hearing testimony and her redirect examination trial testimony, Pin testified that several men also backed up appellant in his fight with Pee Wee and Pee Wee's friends (8 RT 1484-1487), although there were more men on Pee Wee's side than on appellant's side (8 RT 1500-1501). One or more men also entered the fight in an attempt to break up the fight before the gunshots were fired. (8 RT 1487, 1501.)

Chamroeun (Shannon) Cheon testified that she saw Pee Wee arguing with appellant (7 RT 1361-1362, 1364) outside Mission Control in Vietnamese (7 RT 1355-1356), a language she did not speak (7 RT 1355). A fight broke out which others attempted to stop. (7 RT 1357.) Appellant then pulled a gun, aimed and fired it twice as everyone began running. (7 RT 1358-1359.) Pee Wee fell to the ground outside Mission Control when he was shot. (7 RT 1391-1392.) Pee Wee then got to his feet and walked back into Mission Control. (7 RT 1392-1392.) Cheon heard at least two more gunshots after Pee Wee fled back into Mission Control. (7 RT 1393.)

Anh Truong told police at the scene that she heard gunshots and saw the shooting victim turn and run towards Mission Control. (8 RT 1584.) She saw the shooting victim fall down by a coke machine just outside the Mission Control door. (8 RT 1584.) The gunman then approached the shooting victim and fired four or five more gunshots, all apparently missing the victim. (8 RT 1585.) The shooting victim then got up and ran inside Mission Control. (8 RT 1585.) Anh Truong then heard two more gunshots before seeing the gunman run out of Mission Control. (8 RT 1585.)

Although they denied participating in the fight (18 RT 3503-3504), Me Kim told a Garden Grove police detective that Andy Ja, Andy May, and Jimmy, who had been at the motel with the shooter the night before the shooting, assisted the shooter during the fight by pulling the shooting victim away from the shooter before the shooter shot the shooting victim (18 RT 3466). Kim told the detective that the two Andys and Jimmy later said they were supposed to help the shooter during the fight. (18 RT 3467.) Andy May, aka Mexican Andy, had a duty as a Natoma Boy in 1994 to "jump in" and help a "homeboy" involved in a fight. (18 RT 3502-3503.) Khanh Truong Nguyen, nicknamed Andy Ja (19 RT 3551) knew appellant from Westminster High School and Westminster Church (19 RT 3550-3551), had known appellant for quite awhile (19 RT 3567), acknowledged he was also a Natoma Boy in 1994 (19 RT 3552), and acknowledged he had been charged with possessing two guns to assist the gang in felony conduct (19 RT 3564-3566, 3569). Senior Natoma Boys had been older brothers and relatives of Nip Family gang members. (Respondent's argument I, *ante*; 7 RT 1217, 16 RT 3150-3151.)

Joseph-Vu Song Tran testified that he and his friend Adrian Hyunh were playing video games inside Mission Control when the gunshots were fired outside Mission Control. (8 RT 1554-1555.) People began running and screaming when the shots were fired outside. (8 RT 1555.) Joseph got under a pinball machine and pulled Adrian down with him. (8 RT 1557-1559.)

Joseph then saw a man limp into Mission Control before collapsing onto the floor (8 RT 1559-1561) and lying on his back or his side on the floor (8 RT 1563). Seconds to minutes later, the gunman ran into Mission Control, stood over man lying on the floor, and shot him two or three times. (8 RT 1561-1566.)

Hoan Ngoc Bui testified that he was playing a video game inside Mission Control when he heard two or three gunshots outside Mission Control. (14 RT 2765-2766.) He turned to see a man lying on the floor inside Mission Control next to the front desk. (14 RT 2765-2766.) He then saw a gunman stand over the man lying on the floor and point his gun down at the man. (14 RT 2767-2768.) The gunman then shot the man three to four times (14 RT 2769-2770), holding the gun in his right hand when he did so (14 RT 2768).

Viewed in the light most favorable to appellant, the foregoing evidence shows there was no real or apparent danger to appellant - nor could he believe there was any real or apparent danger - once he produced his gun and fired his first two shots at Pee Wee. Everyone started running at that point. There was no evidence whatsoever that anyone else had a gun or that anyone else continued fighting with or without a gun. The only combatants left were appellant and Pee Wee. After shooting at Pee Wee several more times and hitting him with at least one shot, appellant followed Pee Wee as Pee Wee attempted to flee inside Mission Control. After Pee Wee collapsed to the floor inside Mission Control, appellant stood over him and pointed his gun down at him. Appellant then shot Pee Wee two to four more times as Pee Wee lay helpless on the floor.

Appellant nevertheless points out that even the perfect self-defense instruction states that a person believing in the need to defend himself "... may pursue his assailant until he has secured himself from danger if that course likewise appears reasonably necessary. This law applies even though the assailed person might more easily have gained safety by flight or by withdrawing from the scene." (CALJIC No. 5.50; 27 RT 5283-5284; 3 CT 1053; accord CALCRIM No. 3470; AOB 273-274.) But there was no substantial evidence supporting this instructional scenario.

Appellant contends that it is reasonably likely that a jury would have found that appellant was still acting under the influence of the unrelenting attack when he pursued PeeWee into Mission Control and therefore believed it was still necessary to secure himself from imminent lethal danger by preventing PeeWee from obtaining a firearm or summoning one or more comrades who had a firearm before appellant could get away. (AOB 274.) But the trial record belies the contention.

Appellant contends that the trial court's error violated his federal constitutional rights to due process, to a jury trial, and to present a defense and therefore requires reversal per se of counts four and five. (AOB 275 citing *United States v. Miguel* (9th Cir. 2003) 338 F.3d 995, 1003, 1008.) Appellant alternatively alleges that reversal of counts nine and ten is warranted because it cannot be concluded beyond a reasonable doubt that the error did not contribute to the verdicts. (AOB 275 citing *Chapman v. California*, *supra*, 386 U.S. at p. 24.)

Appellant is mistaken. The alleged error did not implicate appellant's federal constitutional right to present a defense. (Contrast *United States v. Miguel*, *supra*, 338 F.3d at pp. 1003, 1008.) And did not implicate any other federal constitutional right belonging to appellant because there is no federal constitutional right to lesser included instructions under state law unless the failure to give a requested lesser included offense in a capital case gives the jury an all or nothing choice when deciding whether or not the defendant committed a charged capital crime. (*Beardslee v. Woodford* (9th Cir. 2003) 327 F.3d 799, 814; *Murtishaw v. Woodford* (9th Cir. 2001) 255 F.3d 926, 955.) That scenario was absent here since the crimes charged under counts four and five were not capital crimes. The trial court in any event gave jurors the alternatives of finding appellant not guilty under counts four and five or finding appellant guilty under count four of the lesser offenses of attempted second degree (unpremeditated) murder,

heat of passion voluntary manslaughter, or assault with a deadly weapon. (3 CT 1026-1030, 1041-1042; 27 RT 5269-5275, 5278, 5309-5310.)

Appellant cannot show the alleged error warrants reversal of counts four and five because given the evidence summarized above and in respondent's argument VII(A), *ante*, appellant cannot show it is reasonably probable that jurors would have found he committed imperfect defense voluntary manslaughter had the trial court given an imperfect self-defense instruction. (*People v. Ledesma* (2006) 39 Cal.4th 641, 716; *People v. Watson*, *supra*, 46 Cal.2d at p. 836.)

XXVII. SUBSTANTIAL EVIDENCE SUPPORTS THE GANG ENHANCEMENT FOR COUNT FOUR AND THE STREET TERRORISM CONVICTION UNDER COUNT FIVE

Appellant argues insufficient evidence supports his gang enhancement for count four (Pen. Code, § 186.22, subd. (b)(1)) and his street terrorism conviction under count five (Pen. Code, § 186.22, subd. (a).) (AOB 276-278.) This Court should reject his argument as meritless.

Viewing the record as a whole in the light most favorable to the challenged verdicts, and drawing all inferences jurors could reasonably draw in favor of the verdicts (*People v. Farnam*, *supra*, 28 Cal.4th at p. 143; *People v. Kraft*, *supra*, 23 Cal.4th at p. 1053), the following substantial evidence, summarized previously in respondent's argument VII(A), *ante*, and respondent's argument XXVI, *ante*, shows that when he shot Huy "Pee Wee" Nguyen at the Mission Control video arcade in Garden Grove appellant (1) knowingly and actively participated in the Nip Family criminal street gang by promoting, furthering, or assisting felonious criminal conduct by Nip Family gang members (Pen. Code, § 186.22 (a); count five); and (2) shot Pee Wee at the direction of, or in association with a criminal street gang with the specific intent to promote, further, or assist

in criminal conduct by gang members (Pen. Code, § 186.22, subd. (b)(1); count four).

Appellant was an active member of Nip Family (16 RT 3203, 3205-3206), a criminal street gang whose primary activities in 1994 and 1995 included homicide, attempted homicide, assault (16 RT 3178) and assault with a deadly weapon (16 RT 3178-3179). Asian criminal street gangs like Nip Family did not consider turf important. (16 RT 3180-3181.) Instead, they involved themselves in street warfare wherever they happened to be at the time. (16 RT 3181.) If they encountered rivals they would shoot it out at the site of the encounter. (16 RT 3181.) Asian gangs sought to be number one. (16 RT 3183.) Shooting rivals enhanced the status of the gang and the gang member within the gang by creating fear of the gang. (16 RT 3183-3185.)

Asian gang members rarely spent time in the street by themselves. (16 RT 3198.) They usually took close associates or other gang members in order to look for rival gang members and so increase their status in the gang community. (16 RT 3198.) Hunting rivals was a major gang activity. (16 RT 3199.)

In order to find out about rivals, gang members had cell phones and pager networks, and wrote letters to each other while in custody. (16 RT 3193.) They talked in the streets. (16 RT 3193.) Females sometimes supplied information about rival gangs and associates. (16 RT 3193.) Gang members had to know their rivals at any given moment in order to protect themselves and ready themselves for retaliation. (16 RT 3194.) Nip Family and the Tiny Rascal Gang were deadly rivals in 1994 and 1995. (16 RT 3197, 3208-3211.) Each side would try to kill the other on sight. (16 RT 3214.)

Cindy Pin knew Pee Wee associated with T.R.G. (8 RT 1412.) Pee Wee had introduced himself as a T.R.G. gang member when Pin and/or her

friends had seen him in the past. (8 RT 1445.) Cindy Pin and her friends had been in a motel room on November 22 or November 23, 1994, when appellant displayed a black handgun and a grey handgun. (8 RT 1420.) A man known as Jimmy, along with Andy May, aka Mexican Andy, and Khanh Truong Nguyen, aka Andy Ja, had also been in the motel room, although Mexican Andy and Andy Ja denied seeing appellant there. Mexican Andy belonged to the Natoma Boys gang in 1994 (18 RT 3498), as did Andy Ja (19 RT 3552.) Senior Natoma Boys had been older brothers and relatives of Nip Family. (16 RT 3150-3151.) Natoma Boys had a duty to jump in and help a homeboy involved in a fight (18 RT 3502, 3503), although Mexican Andy claimed he owed no such duty to allies or Nip Family (18 RT 3503). Andy Ja knew appellant from Westminster High School and Westminster Church (18 RT 3550-3551). He had known appellant quite awhile in 1994. (19 RT 3567.) At the time of appellant's trial, Andy Ja faced charges that he possessed two guns to assist a criminal street gang in felony conduct (19 RT 3564-3566) and assisted the Natoma Boys in 1994 (19 RT 3569).

The Mission Control video arcade in Garden Grove was a known Cheap Boys hangout. Police had contacted Cheap Boy shot caller Khoi Huynh there along with eight other Cheap Boys on May 14, 1992. (10 RT 1943-1944; 17 RT 3316.) The Cheap Boys were also deadly enemies of Nip Family in 1994 and 1995. (16 RT 3196-3197.)

After Pee Wee finished smoking a cigarette outside the Mission Control video arcade on the evening of November 24, 1994, appellant or an associate approached him and asked, "Are you in a gang? Do you belong to T.R.?" (7 RT 1302-1303.) Although Pee Wee told the man he only had friends in the gang (7 RT 1303), the man hit him in the face (7 RT 1305). A fight ensued in which Pee Wee was assisted by his friends (8 RT 1425) and appellant was assisted by his friends (8 RT 1484-1487). Although they

denied participating in the fight (18 RT 3503-3504), appellant's most likely allies in the fight were Jimmy, Mexican Andy and Andy Ja (18 RT 3467, 3502-3503). Appellant drew a revolver and fired two shots at Pee Wee. (8 RT 1435-1446.) Although everyone else ran (7 RT 1358-1359; 8 RT 1555), appellant fired several more shots at Pee Wee as Pee Wee attempted to flee into Mission Control (8 RT 1438-1440, 1585). After Pee Wee collapsed onto the floor inside Mission Control, appellant attempted to finish him off by aiming his gun down at Pee Wee's body and firing two to four more shots into the body. (7 RT 1393; 8 RT 1439-1440, 1484-1485, 1561-1562, 14 RT 2768).

The foregoing substantial evidence supported the reasonable inference that on November 24, 1994, appellant was hunting for rival gang members at Mission Control, a known Cheap Boy hang out, spotted Pee Wee, who he believed belonged to another deadly rival gang, T.R.G., and tried to kill Pee Wee following a fight in order to promote his own reputation as a Nip Family gang member and in order to enhance the reputation of Nip Family.

Appellant contends that appellant's criminal history and gang affiliations do not establish by themselves that a crime is gang-related. (AOB 276.) But they do when combined with the evidence summarized above.

Appellant contends the evidence shows only a personal dispute between Pee Wee and appellant, a dispute was initiated by Pee Wee. (AOB 277.) The trial record belies his contention by showing a gang confrontation rather than a personal dispute. Although the evidence does not prove the presence of other Nip Family gang members, it suggests the participation of associates of each combatant.

Appellant contends had the right to repeatedly shoot Pee Wee in order to defend himself from Pee Wee's assault, especially when Pee Wee's

friends joined in and escalated the violence. The trial record belies his contention. (See respondent's argument XXVI, *ante*.)

Appellant contends that even if he had no right to pursue Pee Wee into the Mission Control arcade, there is no evidence the pursuit was gang related, especially in light of appellant's ensuing statement that, "If anyone is against me, I'll shoot them, too." (8 RT 1585; AOB 277.) The substantial evidence summarized above belies the contention.

Appellant contends that Detective Nye gave no opinion testimony that the shooting was gang related despite such an opinion for every other incident for which appellant was charged. (AOB 277 and 277 fn. 163 citing 16 RT 3207, 3209-3210, 3212, 3214-3215.) But the gang testimony given by Nye and summarized above established Nip Family gang members benefit both themselves and the Nip Family when they enhance their reputation by assassinating suspected members of enemy gangs.

Appellant contends that in order to convict appellant of street terrorism under count five, jurors had to ignore the trial court's terrorism instruction. (CALJIC No. 6.50; 3 CT 1061-1064; 27 RT 5286-5289.) Appellant references the instruction's last paragraph (3 CT 1064), which told jurors they had to find the person aided and abetted a member or members of the gang in committing the crimes of murder, attempted murder, voluntary manslaugher, attempted voluntary manslauger, and/or assault with a deadly weapon or with force likely to produce great bodily injury (27 RT 5289; AOB 278 fn. 165), the listed crimes which comprised the gang's pattern of criminal activity (3 CT 1061-1063).

This Court should reject the contention as meritless. The instruction as a whole made it clear that the person aids or abets the gang's criminal activity by committing the substantive charged crime, whether he perpetrates or aids and abets that crime, if he otherwise falls within the provisions of Penal Code section 186.22, subdivision (a). After listing the

counts in which appellant was charged with street terrorism (counts three, five, seven, ten, twelve and fourteen), the instruction appropriately quoted the following language of Penal Code section 186.22, subdivision (a), language which incorporated all the substantive crimes charged against appellant whether appellant was guilty of the substantive crimes as a perpetrator or aider and abettor:

> Any person who actively participates in any criminal street gang with knowledge that its members engage in . . . criminal activity, and who willfully promotes, furthers or assists in any felonious criminal conduct by members of that gang . . . .

(3 CT 1061; 27 RT 5287).

There is no reasonable likelihood the instruction confused jurors. And appellant in any event forfeited any appellate complaint about that language by failing to request its amplification or clarification of the language in the trial court. (*People v. Chatman*, *supra*, 38 Cal.4th at p. 393; *People v. Jablonski*, *supra*, 37 Cal.4th at p. 809; *People v. Jurado*, *supra*, 38 Cal.4th at pp. 124-125.)

XXVIII. THE ABSENCE OF A LIMITING INSTRUCTION FOR THE HEARSAY TESTIMONY OF TRIEU BINH NGUYEN DOES NOT WARRANT REVERSAL OF COUNTS FOUR AND FIVE

Appellant argues that this Court must reverse counts four and five because the trial court refused to give a limiting instruction when Trieu Binh Nguyen testified that a single person was shooting his friends. (AOB 115-117, 121-122, 279.) This Court should reject appellant's argument because the trial court neither erred nor rendered different verdicts reasonable probable by refusing the requested limiting instruction. (*People v. Watson*, *supra*, 46 Cal.2d at p. 836; respondent's argument V, *ante*.)

XXIX. THE REBUTTAL TESTIMONY OF PROBATION OFFICER STEVEN SENTMAN DOES NOT REQUIRE REVERSAL OF COUNTS FOUR AND FIVE

Appellant argues that this Court must reverse counts four and five because the trial court: (1) erroneously allowed Probation Officer Steven Sentman to testify as a rebuttal witness even though he remained in the courtroom during appellant's defense testimony; (2) erroneously allowed him to testify from his field notes despite the late disclosure of the field notes; (3) erroneously refused to give a requested jury instruction telling jurors they could draw adverse inferences about his credibility and the accuracy of his field notes because of the delayed disclosure of the field notes; and (4) erroneously excluded the proffered surrebuttal testimony of appellant's sister Le Nguyen. (AOB 122, 253-268, 280.)

This Court should reject appellant's argument. Appellant never objected to Sentman's use of his field notes when testifying. None of the trial court's challenged rulings abused its discretion or implicated appellant's federal constitutional rights by depriving appellant of a fair trial. Appellant cannot show that it is reasonably probable different verdicts would have been reached absent the alleged errors. (*People v. Watson*, *supra*, 46 Cal.2d at p. 836; respondent's arguments XX, XXI, XXII,XXIII, *ante*.)

XXX. CUMULATIVE ERRORS DO NOT WARRANT THE REVERSAL OF COUNTS FOUR AND FIVE

Appellant argues that even if no single error warranted the reversal of counts four and five, the cumulative errors did. (AOB 281.)

But for reasons set forth in respondent's arguments V, XX, XXI, XXII, XXIII, XXVI, XXVII, XXVIII, and XXX, *ante*, there were no errors to cumulate, no violation of appellant's federal constitutional rights, and no reasonable probability that different verdicts would have been reached with

or without the alleged errors. (*People v. Watson*, *supra*, 46 Cal.2d at p. 836.)

XXXI. APPELLANT WAS NOT DEPRIVED OF HIS SIXTH AMENDMENT RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL UNDER COUNTS FOUR AND FIVE

Appellant argues that if his trial counsel failed to preserve any of his appellate complaints regarding counts four and five, this Court must reverse counts four and five because his trial counsel thereby deprived him of his Sixth Amendment right to the effective assistance of counsel. (AOB 282.)

This Court should reject the contention because appellant cannot prove from the state record that his trial counsel acted in a professionally unreasonable manner and that difference verdicts would have been reasonably probable for his trial counsel's alleged failings. (*Strickland v. Washington*, *supra*, 466 U.S. at p. 679; *People v. Jennings, supra,* 53 Cal.3d at p.376.)

Appellant alternatively alleges that to the extent he raises constitutional issues, they are not waived by inadequate trial court objections. (*People v. Yeoman*, *supra*, 31 Cal.4th at pp. 117-118; *People v. Coddington*, *supra*, 23 Cal.4th at p. 632; AOB 282.) The pertinent constitutional claims pertinent to counts four and five, discussed in respondent's arguments II, III, V, and XXIII, *ante*, have been raised by appellant for the first time in this Court. This Court hs found that appellants forfeit constitutional claims by failing to preserve them with adequate objections in the trial courts (*People v. Tafoya*, *supra*, 42 Cal.4th at p. 166; *People v. Geier*, *supra*, 41 Cal.4th at p. 609; *People v. Halvorsen*, *supra*, 42 Cal.4th at pp. 413-414) and should make that same finding in this case.

XXXII. THE ALLEGEDLY ERRONEOUS EXCLUSION OF A JANUARY 29, 1995, POLICE RAID ON A CHEAP BOY CRASH PAD DOES NOT WARRANT REVERSAL OF COUNT NINE, THE MARCH 11, 1995, ATTEMPTED MURDER OF KHOI HUYHN, OR COUNT TEN, THE STREET TERRORISM COUNT BASED ON THE ATTEMPTED MURDER OF KHOI HUYNH

Appellant argues that the allegedly erroneous exclusion of a January 29, 1995, police raid on a Cheap Boy crash pad warrants reversal of counts nine and ten. (AOB 96-111, 285-286.) Appellant contends the alleged error requires reversal of counts nine and ten either because it is not harmless beyond a reasonable doubt or because there is a reasonable probability of more favorable verdicts absent the errors.

This Court should reject appellant's argument as meritless. The trial court did not abuse its discretion under Evidence Code section 352, by rejecting the proffered evidence, nor did its ruling implicate any of appellant's federal constitutional rights. (Respondent's argument III, *ante*.) The excluded evidence added little if anything to appellant's defense theory that he was framed in a Cheap Boy retaliation plot initiated by Cheap Boy Khoi Huynh. (Respondent's argument III, *ante*.) Appellant cannot prove the alleged error warrants reversal of counts nine and ten because he cannot show it is reasonably probable the jury would have reached different verdicts had the trial court admitted the proffered evidence, proffered evidence which was speculative, cumulative and of little or no probative value. (Respondent's argument III, *ante*; *People v. Watson*, *supra*, 46 Cal.2d at p. 836.) Even had the trial court admitted the proffered evidence, jurors would have convicted appellant of attempting to murder Khoi Huynh on March 11, 1995 (count nine) for the benefit of the Nip Family criminal street gang (count ten) based upon the substantial evidence previously summarized in respondent's argument VII(A), *ante*.

Appellant nevertheless contends for the following reasons that trial court's alleged error warrants reversal of those verdicts (AOB 283): (1) no physical evidence connected appellant to the March 11, 1995, shooting of Khoi Huynh; (2) all the non-gang eyewitnesses viewed a photo lineup which included appellant's photo (photo number six), and all selected the photo of Anh Truong Phung (photo number four) as the shooter; (3) while two of those eyewitnesses thereafter selected appellant at a live lineup and a third was not sure, the live lineup did not include Anh Truong Phung or anyone else from the photographic display; and (4) only one of the non-gang witnesses (Jeremy Lenart) identified appellant in court.

But the clerk's transcript reproduction of the photo lineup depicted in Defense Exh. C. shows why the non-gang eyewitnesses picked photo number four. First, the photographs in the number four and number six positions in that photo lineup - identified as photo lineup 94-13916#3 (2 CT 639) - look remarkably the same, particularly around the eyes, and are both distinct from the remainder of the photographs in the lineup. (2 CT 641.) Additionally, photo number six is an extreme and distorted close-up of appellant's face which cuts off a portion of appellant's ears. (2 CT 641.)

The non-gang eyewitnesses who selected photo number four from Defense Exhibit C included Jeremy Lenart, Ignacio Raygoza and Stacy Murray (Raygoza). When cross-examined by defense counsel Parkin, eyewitness Jeremy Lenart acknowledged picking out photo number four from Defense Exhibit C (9 RT 1781-1784) and also acknowledged that photo number six was an "amazing likeness" of appellant (9 RT 1784). Lenard acknowledged that all but the tips of the ears were visible in photo number six, which depicted the subject's full face. (9 RT 1791.) Lenart acknowledged that Investigator Janet Strong's report of his photo identification quoted Lenart's statements, "He had big ears, that's how I recognized him[,]" and, "That's definitely him." (9 RT 1792.)

But when asked on redirect-examination whether anything about photograph number six in Defense Exhibit C made identification difficult, Lenart replied, "The only thing I could say is how close he is. If you look at all the other pictures, you can see their full -- a full picture of them. Neck and all. Except for number five and number six." (9 RT 1789.) When the prosecutor asked, "So he's right against the camera[,]" Lenart answered, "Exactly." (9 RT 1789.) Lenart further acknowledged that a three-dimensional view of the person might make identification easier. (9 RT 1789.) Lenart later identified appellant as the shooter at the May 31, 1995, live lineup conducted at the County Jail. (13 RT 2500.) And because appellant stood right underneath the outdoor light when he shot Huynh, Lenart had no doubt that appellant was the man who shot and chased Huynh notwithstanding his photo identification of photo number four. (9 RT 1791.)

When cross-examined by defense counsel Parkin, eyewitness Ignacio Raygoza acknowledged picking photo number four from Defendant's Exhibit C when the six-pack was shown to him by Investigator Strong and acknowledged that photo number six in the same six-pack was an "excellent" or "very good" likeness of appellant. (10 RT 1817.) During his redirect examination, however, Raygoza acknowledged he could not pick out the photo of the shooter from Defense Exhibit C at trial, three years after the shooting. (10 RT 1821.) Raygoza also acknowledged that when he picked out suspect number five (appellant) from the subsequent live lineup, he wrote, "I recognized him when he made his third quarter turn to the left." (10 RT 1821.) Raygoza acknowledged that he used the opportunity to look at appellant completely, in a three dimensional matter, before he selected appellant in the May 31, 1995, live lineup at the County Jail. (10 RT 1821; 13 RT 2499.)

During her direct-examination, eyewitness Staci Murray (Raygoza) testified she picked photo number four from People's Exhibit 19, the same six pack photo lineup depicted in Defendant's Exhibit C, but stated that while the person depicted in the photo looked similar to the man who shot the shooting victim, she told Investigator Strong she was not completely sure of her photo identification. (10 RT 1875.) At the subsequent May 31, 1995, live lineup at the County Jail , when she tentatively selected appellant as the shooter, she also stated that "Number five [appellant] looked familiar, but I'm not sure if it was from this case." (10 RT 1875.) Number five nevertheless was the person who looked most familiar to her when she attended the live lineup. (10 RT 1875.)

During her rebuttal argument, the prosecutor reasonably pointed out that the photograph of Anh Truong Phung (photo number four in Defendant's Exh. C) must look a lot like appellant's photo (photo number six in Defense Exh. C) because eyewitnesses at separate crime scenes all selected photo number four from the six pack: (1) the foregoing non-gang eyewitnesses at the March 11, 1995, Khoi Huynh crime scene and; (2) Scott Dalton, an eyewitness witness at the May 3, 1995, Duy Vu crime scene (12 RT 2420; respondent's argument VII(A), *ante*; 27 RT 5204.) The prosecutor further explained that while photo number six might be an excellent likeness of appellant - as proposed in defense counsel Parkin's questions put to the eyewitnesses who picked photo number four from the photo lineup - photo number six was a distorted close-up of appellant's face which offered no dimensional perspective of the face and only depicted a portion of appellant's ears. (27 RT 5204-5205.) The clerk's transcript reproduction of the photo lineup depicted in Defense Exhibit C (2 CT 641) confirms the points made by the prosecutor in her rebuttal argument.

Appellant nevertheless contends that Jeremy Lenart was in any event a problematic witness for the following reasons: (1) he was an ex-felon on

probation; (2) he admitted being under the influence of methamphetamine at the time of the shooting; (3) he gave police a description of the shooter that did not match appellant and told police he would not be able to recognize the shooter if he saw him again; and (4) he gave police a version of the shooting which contradicted his description of the shooting at trial. (AOB 283-284.)

But Lenart was not as problematic as appellant contends. Lenart became an ex-felon by pleading guilty to felony drug possession on July 27, 1997, more than two years after witnessing the shooting. (20 RT 3790.) While Lenart nevertheless acknowledged he was most likely under the influence of methamphetamine when he witnessed the shooting – given his habitual use of that drug (20 RT 3792) – he explained that unlike alcohol, methamphetamine did not affect his perceptions (20 RT 3792, 3797). He was not taking any other drugs that evening and had not been drinking. (20 RT 3792.) His probationary status had nothing to do with his identification of appellant. (20 RT 3792-3793.) The apparent contradictions between Lenart's description of the shooting incident to the police and his description of the shooting incident to the jury is explained by Investigator Janet Strong mixing up portions of her interview of Khoi Huynh with her interview of Jeremy Lenart. (See the prosecutor's unsuccessful foundational objection to the pertinent cross-examination inquiry of Jeremy Lenart at 9 RT 1776-1775.) Also, a second apparent shooting victim who fell back into the pool hall during an ensuing gun battle with the gunmen outside the pool hall (respondent's argument VII(A), *ante*; 9 RT 1759-1760) looked like he had been shot in the chest because he wore a red medallion on his chest which mimicked the appearance of blood (9 RT 1799).

Appellant contends that shooting victim Khoi Huyhn was a problematic identification witness for the following reasons (AOB 284): (1) in his first and second pretrial interviews with Investigator Janet Strong,

Huynh expressed his doubt that he could identify anyone; (2) although he said he suspected the Nip Family, he failed to select the shooter from photographs of Nip Family members; (3) Khoi nevertheless told Investigator Strong that his former friend "Lam" was one of the shooters, and he selected appellant's photograph from a photo lineup shown him the following day; (4) but about five weeks thereafter, Khoi told police, "I don't even know the guy who shot me[]" (13 RT 2496; 23 RT 4469-4470); (5) three days after that, however, Khoi told a different officer that appellant shot him.

But like witness Lenart, Khoi Huynh was not as problematic a witness as appellant contends. Investigator Janet Strong interviewed Khoi on March 14, 1995, at the U.C. Irvine Medical Center, and on March 21 and 22, 1995, at Khoi's house, where Khoi continued to recuperate from the gunshot injuries he received on March 11, 1995. (13 RT 2469-2470, 2477, 2482, 2495-2496.) Before the commencement of the March 21, 1995, interview at Khoi's house, Khoi asked Investigator Strong if they had the shooter in custody. She told him they did not and that they did not yet know the shooter's identity. (13 RT 49.) When Khoi Huynh made no identification from photographs of Nip Family gang members or associates shown him by Strong (13 RT 2496-2497), Strong asked Khoi if he knew who it was who shot him. (13 RT 2484.) It was at that point that Khoi told Strong he did know the man who shot him and that the shooter's name was Lam. (13 RT 2484, 2494-2495.) Khoi explained that he began to run as soon as he saw Lam outside the Rack & Cue on March 11, 1995, because he had once been friends with Lam, knew Lam became a Nip Family gang member, and knew Lam carried a gun. (13 RT 2486-2487.)

When Strong returned to Khoi's house the next day for their third interview and showed Khoi the six pack photo lineup that included appellant's photograph, Khoi identified appellant's photo (photo number

six) as the shooter. (13 RT 2498.) Their ensuing conversation explained both Khoi's memory loss as a trial witness regarding any of the details of the shooting and the identities of the shooter, and his earlier reluctance to identify the shooter when he was interviewed by Strong.

When Strong asked Khoi during that conversation if he would testify in court regarding the shooting, Khoi said he could not do so because of his association with a gang and because of the stigma attached to gang members who testified. (13 RT 2495, 2508-2509.) When Westminster Police Detective Michael Proctor interviewed Khoi in a tape-recorded interview at the Westminster Police Department on the evening of May 3, 1995, following Khoi Vu's appearance at the Duy Vu homicide scene (23 RT 4467-4468), Proctor asked Khoi if Khoi had problems with any specific individuals in the Nip Family (23 RT 4468-4469). Khoi's response – "-not that I know of[;] I don't even know the guy that shot me[]" – reflected Khoi's continuing reluctance as a gang member to risk the stigma of cooperating with the police in a recorded police interview in which he was being asked to finger an individual involved in a gang war.

Khoi had an understandable change of heart, however, after his friend Tuan Pham (10 RT 1885) was shot on May 6, 1995, when Khoi later showed up at the scene of that homicide with Tuan Pham's brother. (15 RT 2895.) It was at that time that Khoi once again identified appellant as the man who shot him by telling Garden Grove Homicide Detective Robert Donahue that he had been shot several times at a billiard parlor in Stanton by a man named Lam Nguyen. (15 RT 2895.)

XXXIII. THE ABSENCE OF A LIMITING INSTRUCTION FOR THE HEARSAY TESTIMONY OF TRIEU BINH NGUYEN DOES NOT WARRANT REVERSAL OF COUNTS NINE AND TEN

Appellant argues that this Court must reverse counts nine and ten because the trial court's failed to give a limiting instruction when Trieu

Binh Nguyen testified that a single person was shooting his friends. (AOB 115-117, 122, 287.) But as respondent has explained in respondent's argument V, ante, the limiting instruction was unnecessary. Even had the trial court erred by declining to give it, the context of Trieu's testimony made its limited purpose (Trieu's state of mind) obvious, even without the limiting instruction.

XXXIV. CUMULATIVE ERRORS DO NOT WARRANT THE REVERSAL OF COUNTS NINE AND TEN

Appellant argues that even if no single error warranted the reversal of counts four and five, the cumulative errors did. (AOB 288.) But for reasons previously stated by respondent, there were no errors to cumulate, no violation of appellant's federal constitutional rights, and no reasonable probability that different verdicts would have been reached absent the alleged errors. (*People v. Watson*, *supra*, 46 Cal.2d at p. 836.)

XXXV. APPELLANT WAS NOT DEPRIVED OF HIS SIXTH AMENDMENT RIGHT TO THE EFFECTIVE ASSISTANCE OF TRIAL COUNSEL UNDER COUNTS NINE AND TEN

Appellant argues that if his trial counsel failed to preserve any of his appellate complaints regarding counts nine and ten, this Court must reverse counts nine and ten because his trial counsel thereby deprived him of his Sixth Amendment right to the effective assistance of counsel. (AOB 288.)

This Court should reject the contention because appellant cannot prove from the state record that his trial counsel acted in a professionally unreasonable manner and that different verdicts would have been reasonably probable but for his trial counsel's alleged failings. (*Strickland v. Washington*, *supra*, 466 U.S. at p. 679; *People v. Jennings*, *supra*, 53 Cal.3d at p. 376.)

XXXVI. SUBSTANTIAL EVIDENCE SUPPORTS THE REQUIRED "PRIMARY ACTIVITIES" ELEMENT OF APPELLANT'S STREET TERRORISM CONVICTIONS AND GANG ENHANCEMENTS

Appellant argues insufficient evidence supports his street terrorism convictions (Pen. Code, § 186.22, subd. (a), counts three, five, seven, ten, and fourteen) and gang enhancements (Pen. Code, § 186.22, subd. (b)(1), counts two, four, six, nine, thirteen) because insufficient evidence shows the commission of crimes enumerated in Penal Code section 186.22, subdivision (e), was one of the primary activities of the Nip Family gang, a required element for a criminal street gang under Penal Code section 186.22, subdivision (f). (AOB 289-293.) Appellant contends that the following colloquy between the prosecutor and her gang expert Detective Nye failed to adequately establish the required "primary activities" element of the charged street terrorism counts and the gang enhancements.

> Q. Until 1994 and 1995, could you tell us some of the primary activities of the Nip Family Gang?
>
> A. Homicides, attempted homicides, assaults, assault with deadly weapons, home invasion robberies, burglaries, auto theft, and narcotics sales.

(16 RT 3178-3179.)

Appellant contends that the colloquy failed to establish the primary activities element for the following reasons: (1) it did not elicit the circumstances of the crimes, or where, when, or how Nye obtained his information, and therefore provided an inadequate foundation for Nye's conclusory testimony (AOB 289-290); (2) it did show that the crimes alleged were the primary activity of the gang in the context of all its other activities (AOB 290-292).

This Court should reject appellant's argument as meritless. Courts reviewing a street terrorism conviction or gang enhancement challenged for

insufficiency of the evidence examine the whole record in the light most favorable to the judgment and presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence. (*People v. Martinez* (2008) 158 Cal.App.4th 1324, 1329; *People v. Duran* (2002) 97 Cal.App.4th 1448, 1456-1457.) When based on his investigations of crimes committed by gang members, conversations with gang members, and/or information from colleagues in his own police department and other law enforcement agencies, opinion testimony by a gang expert that the primary activities of a criminal street gang include enumerated crimes listed in Penal Code section 186.22, subdivision (e), sufficiently proves the primary activities element in both a street terrorism charge (Pen. Code, § 186.22, subd. (a)) and an enhancement for committing a charged crime for the benefit of, or in association with, a criminal street gang (Pen. Code, § 186.22, subd. (b)(1)). (*People v. Sengpadychith* (2001) 26 Cal.4th 316, 324; *People v. Gardeley* (1966) 14 Cal.4th 605, 620; *People v. Margarejo* (2008) 162 Cal.App.4th 102, 106-108; *People v. Martinez*, *supra*, 158 Cal.App.4th at pp. 1329-1330; *People v. Ramirez* (2007) 153 Cal.App.4th 1422, 1426-1427.)

In the case at hand, gang expert Nye provided an adequate foundation for his opinion testimony specifying the listed crimes which constituted the primary activities of the Nip Family criminal street gang. He did so by describing the expertise he developed throughout the decade preceding his testimony by personally investigating Asian gang crimes in Orange County, talking to several thousand Asian gang members, and talking to witnesses as well as gang members involved in the Asian gang crimes he investigated in Orange County. (Respondent's arguments I, VII(A), *ante*; 16 RT 3151-3157.) (See: *People v. Margarejo*, *supra*, 162 Cal.App.4th at pp. 107-108, and *People v. Martinez*, *supra*, 158 Cal.App.4th at p. 1330, distinguishing *In re Alexander L.* (2007) 149 Cal.Ap.4th 605, 611-612, relied upon by

appellant at AOB 289-290. See also: *People v. Vy* (2004) 122 Cal.App.4th 1209, 1225-1226 and 1226 fn. 12, distinguishing *People v. Perez, supra,* 118 Cal.App.4th at pp. 159-160, another opinion relied upon by appellant at AOB 292 which, unlike the case-at-hand, did not involve gang expert opinion testimony describing the specified crimes as primary activities of the gang.)

XXXVII. THE GANG ENHANCEMENTS WERE PROPERLY APPLIED TO THE STREET TERRORISM CONVICTIONS

Appellant argues that the gang enhancements (Pen. Code, § 186.22, subd. (b)(1)) were improperly applied to the street terrorism convictions (Pen. Code, § 186.22, subd. (a)) in counts three, five, seven, ten and fourteen since both the enhancement and substantive crime describe the same gang-related conduct. (AOB 294-296.)

Appellant's argument should be rejected as meritless because street terrorism (Pen. Code, § 186.22, subd. (a)), and the gang enhancement (Pen. Code, § 186.22, subd. (b)(1)) do not describe the same conduct. Street terrorism requires both that defendant willfully promote, further, or assist in any felonious criminal conduct of the criminal street gang and that defendant actively participate in the criminal street gang. (Pen. Code, § 1866.22, subd. (a).) On the other hand, the gang enhancement (Pen. Code, § 186.22, subd. (b)(1)) does not require that the person actively participate in the criminal street gang. But it does require that the person specifically intend to promote, further, or assist in any criminal conduct by gang members. Specific intent requires the intent to do some further act or achieve some additional consequence. (*People v. Mendoza* (1998) 18 Cal.4th 1114, 1127.) On the other hand, the term "willfully" simply implies a purpose or willingness to commit the act, or make the omission referred to in the statute. (Pen. Code, § 22.1.)

XXXVIII. THE TRIAL COURT PROPERLY REJECTED APPELLANT'S NEW TRIAL ARGUMENT THAT CRIMES CHARGED AGAINST DEFENSE INVESTIGATOR DANIEL WATKINS DEPRIVED APPELLANT OF HIS SIXTH AMENDMENT RIGHT TO THE EFFECTIVE ASSISTANCE OF TRIAL COUNSEL

Appellant argues that crimes charged against defense investigator Daniel Watkins deprived appellant of his Sixth Amendment right to the effective assistance of trial counsel. (AOB 297-316.) Appellant made the same argument in support of his written motion for a new trial based upon ineffective assistance of defense investigator (5 CT 1680-1686), an argument opposed by the prosecutor in a written response to the motion (6 RT 1771-1773). The trial court rejected the argument (31 RT 6072-6079) following its consideration of documents submitted in support of the argument (5 RT 1681, 1688-1739), testimony taken by the trial court in order to help it render a decision on the argument (30 RT 5920-5921, 5930-5932, 31 RT 6059-6064), and the oral arguments of counsel (31 RT 6006-6016, 6025-6036, 6054-6055, 6076-6078).

A. Documentary Evidence Considered by the Trial Court Before Rejecting Appellant's Argument

The trial court considered the following documents before rejecting the argument: an October 5, 1998 Orange County felony complaint charging Watkins with conspiracy to commit an act injurious to the public on or about May 13, 1998 (5 CT 1692-1694); a federal indictment charging Watkins with conspiracy to use an interstate commerce facility in the commission of murder for hire (5 CT 1696-1702); a federal affidavit prepared by FBI Special Agent Michael Dunbar in support of arrest and search warrants pertinent to the federal case (5 CT 1703-1732); a state affidavit in support of a search warrant prepared by Orange County District Attorney's Investigator Joseph R. Huerth pertinent to the Orange County

Superior Court case against Watkins (30 RT 1734-1738); a March 24, 1998, domestic violence complaint filed against Watkins charging him with misdemeanor child abuse or endangerment (5 CT 1690); an April 21, 1998, domestic violence complaint charging Watkins with battery of a spouse/cohabitant or former spouse/cohabitant (5 CT 1688); a reported September 30, 1998 interview of Robison Harley (2 [9/29/06] Supp.CT 590-592; 31 RT 6051-6055); and an October 2, 1998 declaration of Robison Harley based upon that interview (2 [9/29/06] Supp. CT 593-595; 31 RT 6051-6055).

B. Circumstances Relied Upon by Appellant to Support His Argument

The trial court appointed Daniel Watkins as the sole investigator for appellant's defense team on March 11, 1996. (30 RT 5944-5946; AOB 298.) The trial court appointed Watkins as a defense investigator for Hung Mai on July 11, 1997. (30 RT 5945-5946.) Watkins was arrested on the federal conspiracy charge on July 27, 1998, less than two weeks after the jury returned its July 14, 1998, penalty phase verdict in appellant's case. (4 CT 1308-1309, 5 CT 1696-1702; 30 RT 5900-5901; AOB 297.)

The federal affidavit prepared for arrest and search warrants - and the state affidavit for a search warrant which incorporated the federal affidavit as an exhibit - alleged that the conspiracy commenced on October 1997 or shortly thereafter. (5 CT 1711¶¶ 20-21, 1734-1735; AOB 297, 297 fn. 168.) The ensuing federal indictment named three-co-conspirators: Hung "Henry" Mai (a county jail inmate facing murder charges in a case unrelated to appellant's case); Victoria Pham (Mai's girlfriend); and Huy Ha (a trusted associate of Mai). (5 CT 1696; AOB 297-298.)

The federal indictment filed against Watkins alleged acts occurring from December 24, 1997, through May 29, 1998. (5 CT 1698-1700; AOB

298.) The indictment and affidavits included the following summary of what had allegedly occurred.

While Mai was in jail on his capital murder charges, an undercover agent contacted Mai in October of 1997, purporting to want to work with him. (5 CT 1711 ¶20, 1724-1725 ¶¶6a-67; AOB 299.) During their first meetings Mai said he wanted to kill Alex Nguyen, a witness in Mai's pending capital murder charge. (5 CT 1711 ¶ 21, 1714 ¶ 30; AOB 299.) The undercover agent agreed to handle the murder for Mai. (5 CT 1711 ¶30; AOB 299.) Alex's brother may also have been targeted for killing. (5 CT 1715-1716 ¶¶37-38; AOB 299.)

Alex Nguyen was living in Texas, and the undercover agent needed information about Alex's appearance, family, and work and residences addresses in order to "kill" him. (5 CT 1711 ¶21, 1714 ¶30; AOB 299.) Mai, Mai's girlfriend Victoria Pham, and/or Mai's cohort Huy Ha passed along the required information to the undercover agent after Watkins discovered the information during one of his investigative trips to Texas. (5 CT 1714¶ 32, 1717-1720; AOB 299.) Watkins provided "information about the whereabouts of Alex Nguyen, which included the name, address and phone number of the gas station owned by Nguyen's family." (5 CT 1719, ¶50; AOB 299-300.) Watkins may also have provided a photograph of Alex that had been included in the discovery materials provided to the defense in Mai's case. (5 CT 1720-1721; AOB 300.)

In April 1998, the FBI faked Alex's murder and provided the undercover agent with two staged photographs of the "execution." (5 CT 1721 ¶54.) On April 14, the undercover agent gave the photographs to Huy Ha, who in turn told Mai about the supposed murder. (5 CT 1721¶ 55; AOB 300.) The next day, Mai left a telephone message with investigator Watkins, saying "I have something to tell you." (55 CT 1722 ¶56; AOB 300.) On April 17, Watkins told Mai in a recorded telephone call that he

was going to Dallas in a few weeks for appellant's case, and he asked Mai if he should also go to Houston (where Alex and his family lived). (5 CT 1722 ¶57; AOB 300.)

At the end of May, Mai phoned the undercover agent wondering why he had not been contacted by police about Alex's disappearance. The undercover agent responded that perhaps the police did not yet know Alex was missing and suggested that Mai check for a missing persons report. (5 CT 1723 ¶64; AOB 300.) Mai thereupon telephoned Watkins, who was about to leave for Texas to do some investigation for appellant's case, and asked Watkins to obtain a missing persons report for Alex. (5 CT 1723-1724 ¶65.) Watkins responded, "I don't think I can do ... you know what I mean? That would be showing your hand. And what I'm thinking about doing is just calling from a pay phone and seeing what I can find out." Mai agreed with this approach. (5 CT 1724 ¶65; AOB 300.)

On Wednesday, May 13, 1998 – after the faked murder of Alex Nguyen but before the exchange between Mai and Watkins about the missing persons report – Mai had another telephone conversation with Watkins. (5 CT 1726 ¶67c; AOB 301.) By this date, a jury had been selected for appellant's trial, and the prosecution's case-in-chief was set to begin the following Monday. In the May 13th phone call Watkins told Mai that the prosecution was about to call witnesses in appellant's case, and the following colloquy ensued:

> Hung Mai: You want me to put a shut on Khoi [Huynh] what I really need is that portion you asked me to read, but without the name of whoever it is that wrote it. I just need that portion because I talked to Khai [Vo] and he said he, you know, believes what I'm saying and all the other stuff, but he needs that portion if something needs to be done. You know what I mean?
>
> Watkins: Okay.
>
> Hung Mai: Because that's the paper that will keep that guy shut, you know.

Watkins: Yeah, well, I don't want to know anything more about that.

Hung Mai: But if you want ... I need that soon if you want that taken ... you know?

Watkins: Okay, I'll stop by the jail today. What you want me to do is take that page and to white out...

Hung Mai: The name of ... whoever it is that wrote it, or just cut it out. I just need the portion part of what I read.

Watkins: Okay, and I'll just make it look like it's all blacked out. I'll drop that by.

(5 CT 1726 ¶ 67c; AOB 301-302.)

The trial record shows the prosecutor in appellant's case called Khoi Huynh as a prosecution witness two weeks later, on Wednesday, May 27, 1998. (3 CT 820; 10 RT 1882-1994; AOB 302.) Khoi claimed lack of recall, and both the prosecutor and defense counsel later challenged Khoi's alleged memory lapses. (26 RT 4995-4998 [prosecutor's closing argument]; 30 RT 5898-5899 [defense counsel Harley's remarks pertinent to the new trial motion]; AOB 302.)

The federal affidavit in support of the arrest and search warrants alleged that Khoi telephoned the district attorney's office after he testified and stated that he did not identify appellant as his assailant because he had received information that his life was in danger. (5 CT 1727 ¶67d; AOB 302.) On June 1, 1998, jail personnel searched the cell of Khai Vo, the inmate referenced by Mai in his "put a shut on Khoi" phone call with Watkins on May 13. (5 CT 1727 ¶67e; AOB 302.) In Vo's cell, jailers found a report by an investigator for Vo's attorney, memorializing the investigator's November 1995 interview of Khoi Huyhn in which Khoi purported to identify appellant as the person who shot Khoi on March 11, 1995. (5 CT 1727 ¶67e; AOB 302.) Consistent with what Watkins had promised Mai in the May 13th phone call, the letterhead of the report was whited out.

After the discovery of the report, a jail inmate housed with Mai called Watkins, telling him "that something had happened and that it could come back to him (Watkins), so he should visit Mai soon." (5 CT 1728 ¶67f; AOB 302.)

On September 30 1998 (two months after Watkins' arrest), FBI Special Agent Michael Dunbar, who prepared the federal search warrant affidavit for the arrest and search warrants, together with an investigator from the Orange County District Attorney's Office, interviewed appellant's lead trial counsel Robison Harley about Watkins' work for Harley. Harley had a copy of the same report as had been found in Khai Vo's cell, except that Harley's copy had no white-outs. Harley had obtained the report from Ernie Eaddy, Vo's attorney. Harley explained that Watkins had told him he wanted to give a copy of the report to Mai, although Watkins said nothing about whiting out any portion of the documents. Harley approved Watkins' request. (9/29/06 Supp.CT vol. 2 at pp. 591, 594; AOB 303; 31 RT 6053; Motion for New Trial Exh. 1, 2nd page; AOB 308.)

The Orange County Superior Court felony complaint filed on October 5, 1998, charged Watkins with conspiracy to commit an act injurious to the public based upon his May 13 "put a shut on Khoi Huynh" conversation with Mai. (5/4/06 CT 460-461; AOB 305.)

C. Testimony Considered by the Trial Court Before Rejecting Appellant's Argument

The testimony considered by the trial court before rejecting appellant's argument included the testimony of Khoi Nguyen (30 RT 5920-5921), Orange County District Attorney's Investigator Lyle Wilson (30 RT 5930-5932), and Orange County District Attorney's Investigator Joseph Huerth (31 RT 6059-6064), all the foregoing witnesses except Huerth questioned by the trial court.

When questioned by the trial court, Khoi Huynh testified that when asked to talk to appellant's counsel and defense investigator Watkins in the courtroom hallway, he decided not to make any statements to them before he testified. (30 RT 5920-5921.) He made no statements to Watkins at any other time before he testified. (30 RT 5921.) Watkins never asked him not to testify. (30 RT 5921.)

When questioned by the court, Orange County District Attorney's Investigator Lyle Wilson recalled asking Khoi Nguyen in June of 1998 whether anyone had contacted him attempting to get him not to testify, either by asking him or by threatening him or a family member, or by offering any compensation for not testifying, or by attempting to get him to say anything other than the truth. (30 RT 5931-5932.) Khoi answered that no one had done any of these things. (30 RT 5932.) Investigator Baden Gardener was also present at the interview. (30 RT 5932.)

Called as a witness by James Mulgrew, the Orange County Deputy District Attorney opposing appellant's new trial motion, Orange County District Attorney's Investigator Joseph Ronal Huerth confirmed he prepared and signed the state search warrant affidavit signed by a judge on July 27, 1994. (31 RT 6059.) Huerth confirmed that Watkins was a court-appointed investigator for Mai as well as appellant. (31 RT 6060.) Huerth was not privy to any information regarding Watkins' communication with appellant's attorneys, although his affidavit discussed the telephone surveillance of Watkins' conversation with Mai. (31 RT 6060-6061.) Concurrent federal warrants were being sought when Huerth prepared his affidavit, and Huerth used the affidavit for the federal warrants as an exhibit to his own affidavit. (31 RT 6061.) Huerth had no information regarding Watkins activities in appellant's case beyond what was reported in the affidavit for the federal warrants. (31 RT 6061-6062.) He was not present when the FBI and a special master conducted the search of Watson's office.

(31 RT 6062.) He never discussed his investigation or affidavit with appellant's trial prosecutor Robin Park. (31 RT 6063.) Nor did he discuss any of these matters with anyone in the gang unit or District Attorney's office who might then have talked to trial prosecutor Park. (31 RT 6064.)

D. The Contentions Made by Appellant in Support of His Argument

Appellant argues that the crimes charged against Watkins deprived him of his Sixth Amendment right to the effective assistance of counsel in the following ways: (1) Watkins' alleged involvement in the "put a shut" on prosecution witness Khoi Huynh thwarted appellant's defense by triggering Khoi's feigned memory loss when he testified at trial (21 RT 3982) because the defense could not directly impeach Khoi's identification of appellant in court, jurors could not assess the demeanor and tone of Khoi's voice when identifying appellant as his assailant, and the prosecutor could instead present Khoi's prior inconsistent statements identifying appellant through the testimony of polished police officers (AOB 314); (2) Khoi Huynh's feigned memory loss undermined the defense claim that Khoi was a major participant in a Cheap Boys scheme to frame appellant in retaliation for Nip Family members testifying against Cheap Boys (AOB 314-315); and (3) Watkins' alleged efforts to "put a shut" on Khoi crippled the effectiveness of Watkins as a key witness in establishing the frame-up defense. Appellant notes the defense called Watkins as a defense witness in order to impeach testimony by Tin Duc Phan that Phan could not recall describing the frame-up scheme to Watkins. (Respondent's argument II, *ante.*) Appellant then contends that when the prosecutor cross-examined Watkins by repeatedly asking Watkins whether he talked to "anyone outside of this case," it was with the aim of preventing Khoi Huynh from testifying and Watkins could only state that he could not recollect doing so (21 RT 3983-3984). Watkins had to respond in this manner in order to avoid the

alternatives of committing perjury or incriminating himself in the scheme to silence Khoi Huynh. (AOB 315.) Appellant asserts that such a response from a trained investigator like Watkins was an obvious lie, leading jurors to the inevitable conclusion that Watkins tried to silence Khoi Huynh and therefore casting a pall of incredibility and deception over the entire defense team and the entire defense. (AOB 316.)

E. The Trial Court Did Not Abuse Its Discretion By Rejecting Appellant's Argument

This Court should reject as meritless appellant's argument that crimes charged against defense investigator Daniel Watkins deprived appellant of his Sixth Amendment right to the effective assistance of trial counsel. Since the trial court has broad discretion in ruling on a new trial motion (*People v. Verdugo* (2010) 50 Cal.4th 263, 308), it has broad discretion in ruling on arguments made in support of a new trial motion. Its ruling will be disturbed only for clear abuse of that discretion. (*People v. Verdugo, supra,* 50 Cal.4th at p. 308; *People v. Ault* (2004) 33 Cal.4th 1250, 1260.) The reviewing court accepts the trial court's credibility determinations and historical fact findings if supported by substantial evidence. (*People v. Verdugo, supra,* 50 Cal.4th at p. 308; *People v. Nesler* (1997) 16 Cal.4th 561, 582.)

The trial court in the case at hand did not abuse its discretion by denying appellant's motion for a new trial based on the crimes alleged against Watkins. (31 RT 6072-6079.) Its ruling reflected its conclusion that appellant failed to meet his dual burdens of proving both that Watkins' charged criminal activities caused his trial counsel to act in a professionally unreasonable manner and that there was a reasonable probability that the verdicts would have been different but for Watkins' charged criminal activities. (*Strickland v. Washington, supra,* 466 U.S. at pp. 679-684.)

Before its ruling denying the new trial motion based on the crimes charged against defense investigator Watkins, the trial court observed that it had to proceed on the new trial motion with all the information currently available rather than wait for the conclusion of the proceedings against alleged conspirators Hung Mai, Victoria Pham, Huy Ha, and Daniel Watkins at some point in the distant future. (31 RT 6067-6068.)

The trial court concluded that there was insufficient evidence at this point to conclude that Watkins told Khoi Huynh not to make any statements during appellant's trial. (31 RT 6066, 6074-6075.) It seemed equally plausible from the federal and state arrest and search warrant affidavits that in an effort to reach out to appellant, Mai Huyhn initiated and orchestrated any attempt made to silence Khoi Huynh. (31 RT 6074-6075.) Gang witnesses including Khoi Huynh were in any event adequately examined by both sides during appellant's trial. (31 RT 6066.) Jurors in appellant's trial knew the witnesses who were alleged members or associates with a rival gang and who might therefore have a motive to assist law enforcement in its attempt to convict appellant. (31 RT 6066.) Witnesses' failure to recollect and witnesses' prior inconsistent statements were not unusual in a gang case. (31 RT 6071-6072.) Whether or not Watkins was guilty of the charged crimes, there was no prejudice to appellant (31 RT 6066, 6068), no showing that the outcome of the trial court have been changed absent the crimes charged against Watkins (31 RT 6066), and no showing appellant was denied a fair trial by Watkins' involvement in the case (31 RT 6068, 6078).

The following paragraphs in the federal affidavit support the trial court's observation that Hung Mai rather than Watkins likely initiated the alleged effort to silence Khoi Huynh. They suggest that Hung Mai sought to silence Khoi Huynh at appellant's trial in an effort to ingratiate himself with appellant. Hung Mai was attempting with the help of his girlfriend,

alleged coconspirator Victoria Pham, to join the several Asian gangs into a single Asian Mafia in the California prison system. (5 CT 1710-1711¶19, 1713¶28, 1713-1714¶29.) The identified members of the Asian Mafia were Hung Mai, Lam Nguyen, Khai Vo, Paul Saole, aka Duke, and Phat Phoung Doan, all of who were inmates at the Orange County Jail. (5 CT 1710-1711¶ 19.) Mai told coconspirator Huy Ha that Ha was working on behalf of the Asian Mafia and needed to work harder. (5 CT 1723¶62) Mai told Ha that the Asian Mafia included one of the "big Homies" from the Samoans, Duke (aka Paul Saole), Lam from the Nip Family (identified as Lam Nguyen), and Phat (identified as Phat Phoung Doan), all of who were currently housed at the Orange County Jail. (5 CT 1723¶62.)

The September 30, 1998, interview of defense counsel Robison Harley by Orange County District Attorney's Investigator Lyle Wilson and FBI Special Agent Michael Dunbar - along with Robison Harley's October 2, 1998, declaration based upon that interview - also suggest that Mai rather than Watkins most likely initiated the alleged attempt to silence Khoi Huynh at appellant's trial. Although Harley and Watkins were friends, their relationship was primarily professional. (2 (9/29/06 Supp. CT 590, 595 [hereafter referenced as 2 Supp. CT ...].) Harley had worked with Watkins for an approximate ten year period which covered fifty to one hundred or more criminal cases, including appellant's case. (2 Supp. CT 590, 593.) Harley knew Watkins was on the certified court list of conflict private investigators and would frequently ask the court to appoint Watkins to his cases. (2 Supp. CT. 590.) Harley and Watkins rarely talked about the Mai case, in which Watkins was also the court-appointed investigator. (2 Supp. CT 591.)

Harley said he experienced problems getting discovery material from the prosecution in appellant's case during 1998. (2 Supp. CT. 591.) In early 1998, possibly March, Harley therefore contacted attorney Ernie Eddy

- Khai Vo's defense attorney in the pending prosecution against Khai Vo - asking if there were any reports in Eddy's file that related to appellant's case. (2 Supp. CT. 591.) When Eddy told Harley he could come over and check the Vo file for any reports, Harley sent Watkins to Eddy's office in order to go through the Khai Vo file and make copies of any reports pertinent to appellant's case. (2 Supp. CT 591, 594.)

When Watkins completed his assignment, he returned with copies of several reports pertinent to appellant's case, one of which was a reported November 14 and 15, 1995, interview of Khoi Huynh which included statements by Huynh implicating both Khai Vo and appellant in the commission of crimes. That same report included Khoi's home and business phone numbers and addresses. (2 CT Supp. CT 591.) As alleged in the federal affidavit in support of the arrest and search warrants, another copy of that same report was later seized in Khoi Vo's jail cell, a copy in which the letter head and author's name were whited out. (2 Supp. CT 591, 594.) The report was written by Roger Scharf, of the firm of Don Carroll and Associates, and would not have been included in the discovery materials in appellant's case. (2 Supp.at 591.) Harley had never before seen the white-out copy of the report and had never instructed Watkins to white out the report. (2 Supp. CT 591, 594.) Watkins never told Harley of Mai's desire to kill or silence witnesses. (2 Supp. CT 593.)

Since the federal affidavit shows that Mai had been reaching out to Khoi Vo as well as appellant, Mai likely learned from one or both of those County Jail inmates that Khoi Huynh had informed on appellant before Watkins carried out Harley's request to copy the documents in Khai Vo's file pertinent to appellant's case.

Harley also stated in his interview that when Harley experienced difficulties interviewing potential witnesses in appellant's case, Watkins told Harley that Mai could be used to set up interviews with witnesses who

were difficult to reach for an interview. (2 Supp. Ct 591-592.) Watkins suggested Mai could be helpful setting up interviews in appellant's case because of Mai's friendship with Khai Vo. (2 Supp. CT 593-594.) Mai could help arrange interviews of Khai Vo, Khoi Huynh and Kevin Lac. (2 Supp. CT 594.)

Such advice from Watkins would not have been surprising to Harley since Watkins was also the court-appointed investigator for Mai at this time. Harley approved Watkins' use of Mai to set up interviews because gang members rarely come forward with truthful information when more conventional methods are used. (2 Supp CT 592, 595.) Harley used ex gang members in the past to locate witnesses and set up interviews, while explaining to them that these interviews were beneficial because he represented the defense rather than the prosecution. (2 Supp CT 592.)

Harley's interview and declaration, taken together with the allegations made in the federal affidavit for the arrest and search warrants, support the reasonable inference that appellant's defense team used Watkins to assist them in getting interviews with gang-member witnesses rather than engaging in any effort to silence witnesses.

Regardless of Watkins' guilt or innocence of the federal and state charges, the trial record in any event supports the trial court's conclusion that appellant could not meet his burden of showing that the crimes charged against Watkins rendered his trial counsel constitutionally ineffective. Appellant could not meet his dual burdens by proving both that Watkins' alleged criminal activities rendered his trial counsels' performance professionally unreasonable and that different verdicts would have been reasonably probable absent Watkins' alleged criminal activities. (*Strickland v. Washington, supra,* 466 U.S. at pp. 379-384.)

Notwithstanding appellant's first contention in support of his argument, Khoi's feigned memory loss on the witness stand did not cripple

appellant's trial counsels' opportunity to impeach Khoi identification of appellant. On the contrary, appellant's trial counsel could impeach Khoi's out-of-court statements identifying appellant as his assailant with: (1) Khoi's failure to remember any of the details of the shooting on the witness stand; (2) Khoi's failure to identify his assailant during his first interview with Investigator Janet Strong on March 14, 1995; (3) Khoi's failure to identify appellant from Nip Family photographs shown him by Strong during their second March 21, 1995, interview (13 RT 2496-2497); and (4) Khoi's statement to Detective Michael Proctor during their tape-recorded May 3, 1995, interview that "I don't' even know the guy who shot me[]" (23 RT 4468-4469). (Respondent's arguments VII(A) and XXXII, *ante.*)

Notwithstanding appellant's second contention in support of his argument, Khoi's feigned memory loss did not undermine the defense claim that Khoi was a major participant in a Cheap Boys scheme to frame appellant in retaliation for Nip Family members testifying against Cheap Boys. After telling Investigator Strong that appellant shot him, Khoi explained how he could willingly identify appellant without testifying against him in court by telling Strong that he could not testify in court regarding the shooting because of his association with a gang and the stigma attached to gang members who testified. (Argument XXXII, *ante;* 13 RT 2495, 2508-2509.)

As respondent as previously explained (respondent's arguments II and III, ante), the defense claim was in any event preposterous because it required jurors to believe that in order to retaliate against the Nip Family for "ratting" on Cheap Boys, Khoi protected the person who really shot him by falsely accusing appellant of the crime.

Notwithstanding appellant's third contention in support of his argument, Watkins' alleged effort to "put a shut" on Khoi did not cripple his effectiveness as a defense witness called to impeach testimony by Tinh

Duc Phan that Phan did not recall describing the frame-up scheme to Watkins. Nor did it cripple the integrity of the defense team in the eyes of the jury. Watkins directly impeached Phan's testimony by testifying that when he interviewed Phan, Phan told him: (1) Cheap Boys would "rat" on the Nip Family to retaliate for Nip Family ratting on Cheap Boys (21 RT 3976); and (2) the Cheap Boy motive for getting appellant was to teach Nip Family that Cheap Boys will "rat off" any Nip Family gang members in retaliation for Nip Family "ratting" on Cheap Boys. (21 RT 3976; respondent's argument II, *ante.*) Watkins' cross-examination testimony that he could not recall talking with anyone outside the case in order to prevent Khoi Huynh from testifying (21 RT 3983-3984) neither undermined Watkins' impeachment testimony nor suggested that Watkins tried to silence Khoi Huynh on the defense team's behalf.

Because the trial court did not abuse its discretion by rejecting the argument, this Court should reject appellant's argument that Watkins' alleged criminal activities deprived appellant of his Sixth Amendment right to the effective assistance of trial counsel.

XXXIX. THIS COURT SHOULD NOT REMAND THE CASE TO THE TRIAL COURT FOR A RENEWED MOTION FOR A NEW TRIAL WITH NEW COUNSEL APPOINTED FOR APPELLANT

Appellant argues that if this Court does not reverse his convictions and death penalty for the crimes alleged against defense investigator Watkins, it should alternatively remand the case for a renewed motion for a new trial on this issue with new counsel appointed to represent appellant. (AOB 317-320.) Appellant contends that the trial court violated a sua sponte duty to inquire into a potential conflict between appellant's trial counsel - who continued to represent appellant when making the new trial motion - because it either knew or should reasonably have known that appellant's trial counsel were operating under a conflict of interest with

appellant when representing him on the new trial motion. (AOB 317.) Appellant contends that the trial court was put on notice when James Mulgrew - the deputy district attorney who opposed the new trial motion - expressed concerns about " ... whether this defense team is capable of bringing this type of motion as opposed to some independent counsel taking a look at it and presenting it." (31 RT 6049-6050; AOB 320.)

Appellant contends the following factors reveal the conflict: (1) appellant's trial counsel based their new trial motion on the alleged derelictions of their own investigator; (2) appellant's trial counsel could not be expected to urge their own ineffectiveness based on their investigator's ineffectiveness and their own ineffective supervision of their investigator (AOB 318 and 318 fn. 178 citing 31 RT 6020, 6034-6035); and (3) appellant's trial counsel demonstrated a close personal and professional relationship with Watkins.

Appellant relies on the following circumstances to show a close personal and professional relationship between Harley and Watkins. Watkins had worked for lead counsel Harley for 10 to 15 years. (31 RT 6037; AOB 318.) Harley told the FBI he "frequently ... would ask the court to appoint Watkins to a case he was working on." (2 Supp. CT 590.) Harley would sometimes socialize with Watkins and considered Watkins a friend to whom he felt a certain amount of loyalty. (2 Supp. CT 590; AOB 318). After Watkins' arrest on the conspiracy charges, Harley acted as surety, posted his own partial interest in his office building to obtain Watkins' release on bail, and was prepared to vouch for Watkins' character. (3 Supp. CT 747.) When trial counsel discussed Watkins' pre-arrest legal problems with the trial court, they characterized them as merely involving family court and a divorce situation, omitting to state that Watkins was the subject of domestic violence prosecutions charging him with two misdemeanors. (5 CT 1688, 1690; 31 RT 6013-6015; AOB 318 fn. 179.)

Appellant additionally contends that the following inferences reasonably drawn from the record tied lead counsel Harley to both of the illegal conspiracies in which Watkins was allegedly involved: (1) although Harley denied any knowledge of the conspiracy to kill Alex Nguyen (2 Supp. CT 592-593), Watkins' attorney James Waltz claimed that Watkins reported Mai's plan to kill Alex Nguyen to some of the attorneys for whom Watkins was working, including Harley, that Watkins took their directions, and that all Watkins' activities were blessed by attorneys Peters, Harley and O'Connel. (3 CT 748; AOB 319); and (2) while Harley denied that he knew about the plot to "put a shut" on Khoi Huynh, he admitted authorizing Watkins to give to Hung Mai the report later found (with white-out added) in Khai Vo's cell. (2 Supp. CT vol. 2 591, 594; AOB 319-320.)

Appellant contends that the trial court's failure to inquire deprived appellant of his constitutional rights to due process, the effective assistance of counsel, and a reliable determination of guilty and penalty. (AOB 320.)

This Court should reject appellant's argument as meritless. Defendants showing a theoretical division of trial counsel's loyalties must prove both (1) trial counsel's deficient performance and (2) a reasonable probability that the result of the proceeding would have been different absent counsel's deficiencies. (*Mickens v. Taylor* (2002) 535 U.S. 162, 171, 172 fn. 5 [122 S.Ct. 1237, 152 L.Ed.2d 291]; *People v. Doolin, supra,* 45 Cal.4th at pp. 417-421.) Defendant has no right to a remand for a further hearing whenever a trial court has not inquired sufficiently into a potential conflict of interest. (*People v. Cornwell* (2005) 37 Cal.4th 50, 77.) When a defendant claims that a trial court's inquiry into a potential conflict was inadequate, defendant must demonstrate the impact of the conflict on counsel's performance. (*Mickens v. Taylor, supra,* 535 U.S. at pp. 173-174; *People v. Cornwell, supra,* 37 Cal.4th at p. 77.)

In the case at hand, neither appellant nor appellant's trial counsel suggested a conflict of interest requiring substitution of counsel for the new trial motion. Defense counsel Harley stated he had no problem urging ineffective assistance of counsel based upon his inadequate supervision of Watkins. When deputy district attorney Mulgrew expressed his own concern, the trial court noted with the following remarks that it had been reviewing all the evidence pertinent to the new trial motion, would continue to monitor any new developments in the hearing on the motion, and would consider the option of substituting counsel if the need arose:

> THE COURT: That [appointment of substitute counsel] is an option that is available to the court as a result of conduct[ing] these proceedings. I am not prepared to cross that bridge at this juncture. I would take another look at that situation as things develop here [in] this hearing.
>
> And I have some other comments because I've -- in view of the discussion yesterday, I've gone back and looked at the exhibits in greater detail than previously. And so I need to discuss some other aspects that fall within this area.
>
> Now, it's understood that in cases of this nature one of the prime areas of appellate review is the competency of the trial attorneys. So I'm obviously aware of that component and am concerned about it. But whether I need to appoint a third attorney to review this matter and then present whatever motions may be deemed necessary is something I'm not prepared to do at this stage. However, that could change real quickly depending on what else comes to the court's attention this afternoon. (31 RT 6050-6051.)

The trial record shows that appellant's trial counsel thoroughly prepared and argued appellant's motion for a new trial based upon ineffective assistance of defense investigator. (5 CT 1680-1686, 31 RT 6006-6016, 6025-6036, 6054-6055, 6076-6078.) The trial court already knew all the parameters of any potential conflict from its review of the

evidence and reasonably observed that the appointment of a new attorney was unnecessary. Appellant cannot point to any new developments in the hearing warranting further consideration of the option of appointing a new attorney for the pertinent new trial motion. Appellant cannot meet his dual burdens of proving the alleged conflict triggered professionally unreasonable performance by his trial counsel in preparing and presenting the pertinent new trial motion and that a different ruling by the trial court would have been reasonably probable but for trial counsels' professionally unreasonable performance in preparing and presenting the pertinent new trial motion. This Court should therefore reject appellant's request for a remanded hearing on the motion with the appointment of new counsel for the motion.

XL. THE TRIAL COURT PROPERLY OVERRULED APPELLANT'S OBJECTIONS TO EVIDENCE OF THE DISCOVERY OF GUNS WHEN APPELLANT WAS ARRESTED

Appellant argues that the trial court erroneously overruled his repeated objections (2 RT 336, 373-373, 15 RT 2821-2822, 2833; 1 CT 46-47, 2 CT 446-448) to evidence that the following guns were found when appellant was arrested on May 25, 1995: (1) a .38 caliber handgun removed from the glove box of Huy Pham's car, in which appellant had been riding just prior to his arrest; and (2) two loaded .357 pistols and an unloaded AK-47-type weapon, found in a bedroom and closet in studio apartment in the back of the house on Amarillo Street from which three Vietnamese males had exited shortly before police stopped their car. (15 RT 2932-2933, 2963, 21 RT 4007; AOB 321.)

Appellant contends that the trial court erred because the prosecutor (15 RT 2822) sought to introduce the guns as inadmissible propensity evidence showing appellant's general predisposition to engage in gun battles (2 CT 656-657; AOB 322, 324), while at the same time conceding

that none of the four weapons were used in any of the six charged shootings. (AOB 321, 324.) Appellant contends that even had the unused, unconnected weapons had some minimal probative value, it was substantial outweighed by the substantial danger of undue prejudice, to wit: its portrayal of appellant as the kind of person who surrounds himself with deadly weapons, including an assault weapon. (AOB 324 and AOB 324 fn. 182 citing *People v. Henderson* (1976) 58 Cal.App.3d 349, 360.)

This Court should reject appellant's contention as meritless. Unlike the prosecutor in *People v. Barnwell* (2007) 41 Cal.4th 1038, 1056, relied upon by appellant at AOB 324, this was not a case in which the prosecutor erroneously sought to show defendant possession of a specific weapon used in the charged crime with evidence that he possessed other weapons.

Even though the guns found when appellant was arrested did not fire any of the shots that hit the victims of the alleged crimes, the trial court did not abuse its discretion admitting evidence of appellant's access to the guns because that evidence was relevant to such other material disputed issues as motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident. (Evid. Code, § 1101, subd. (b); *People v. Cox* (2003) 30 Cal.4th 916, 956; *People v. Carpenter* (1999) 21 Cal.4th 1016, 1052; *People v. Neely* (1993) 6 Cal.4th 877, 896; *People v. Edwards* (1991) 54 Cal.3d 787, 817-181; *People v. Lane* (1961) 56 Cal.2d 773, 774.) More specifically, appellant's and Nip Family gang member Huy Phan's joint access to the guns in the glove compartment of a car and in the studio apartment they shared in the back of the Amarillo Street residence was relevant to the disputed material issues of whether or not appellant was himself an active member of the Nip Family engaged in a deadly war with the Cheap Boys and the Tiny Rascals Gang in 1994 and 1995, a war which triggered the charged crimes. The high probative value of the evidence to this disputed material issue was not substantially outweighed by any

substantial danger of undue prejudice (Evid. Code, § 352) because it did not uniquely tend to evoke an emotional bias against appellant as an individual while bearing little or no relevance to the material issues in the case. (*People v. Felix, supra,* 23 Cal.App.4th at pp. 285-286.)

Appellant nevertheless contends that the trial court's decision to admit the foregoing gun evidence against appellant contradicts its reluctance to admit gun evidence to impeach Kevin Lack. (AOB 238-247) and thereby constitutes uneven treatment of the prosecution and appellant violating due process. (AOB 325.) But there is no contradiction. The trial court admitted the gun evidence proffered by the prosecutor because it was probative to a material disputed issue in the case, to wit: whether appellant was an active Nip Family gang member during 1994 and 1995 with ready access to guns maintained for the ongoing deadly gang war between the Nip Family and rival gangs such as the Cheap Boys and the Tiny Rascals Gang.

The trial court also allowed appellant to present testimony that shortly after Tony Nguyen was shot while driving Cheap Boy Tinh Dam's car on July 21, 1994, someone was seen running from Tinh Dam's car with a gun. (19 RT 3659-3666, 3706-3710; Respondent's argument XVII, *ante.*) However, the trial court properly excluded the additional proffered defense evidence on that issue under Evidence Code section 352, because the excluded defense evidence did not impeach Kevin Lac's testimony, would not have supported a self-defense claim, cumulated evidence gang members typically travel with guns, and was therefore nothing more than inadmissible and irrelevant character evidence, the probative value of which was substantially outweighed by its substantial danger of misleading and confusing the jurors by confusing the issues in the case. (Respondent's argument XVII, *ante.*) The trial court's discretionary rulings under state evidentiary rules did not implicate the federal constitution because they did

not remove a viable defense or render the trial fundamentally unfair. (*People v. Lindberg, supra,* 45 Cal.4th at p. 26; *People v. Partida, supra,* 37 Cal.4th at p. 439; *People v. Kraft, supra,* 23 Cal.4th p. at 1035.)

Appellant nevertheless argues that the alleged error requires reversal under any standard by portraying appellant as the type of person who would use guns and an assault rifle, bolstering one or more of the prosecutor's improper theories undermining appellant's self-defense claim in the Tuan Pham shooting, and making it appear more likely that appellant was the person responsible for all the charged shootings. (AOB 325.)

Notwithstanding appellant's contention, the alleged error does not warrant reversal given the independent evidence which established his guilt and undermined his defense. Appellant cannot show the alleged error is reversible error because he cannot show that different verdicts would have been reasonably probable had the challenged gun evidence been excluded. (*People v. Watson, supra,* 46 Cal.2d at p. 818.)

XLI. THE TRIAL COURT PROPERLY ADMITTED STATEMENTS MADE BY APPELLANT AFTER INVOKING HIS *MIRANDA* RIGHTS FOR THE PURPOSE OF IMPEACHING APPELLANT'S TRIAL TESTIMONY DENYING NIP FAMILY MEMBERSHIP

Appellant argues that the trial court erroneously admitted - for the purpose of impeaching appellant's trial testimony denying he had ever been a Nip Family gang member (21 RT 4011, 4066-4067) - statements made by appellant after invoking his *Miranda* rights (*Miranda v. Arizona* (1966) 384 U.S. 436 [86 S.Ct. 1602, 16 L.Ed.2d 694]) during a videotaped pretrial May 25, 1995, interview by Detectives Proctor and Nye (9/29/06 Supp. CT 1250-1251; Court Exh. 1; 21 RT 4128-4130; AOB 326-339). Appellant's trial counsel moved to suppress these statements as impeachment evidence because police deliberately violated in *Miranda* rights in order to use the statements for impeachment (2 CT 588-589; 2 RT 339-341, 9 RT 1846, 22 RT 4097-4098.) The prosecutor conceded appellant's statements were

taken in violation of *Miranda* and that she would not be using them in her case in chief. (1 RT 81.) The trial court deferred ruling on the admissibility of the statements as impeachment until the defense presented its case (2 RT 379-380) and appellant testified (12 RT 2293). During the defense case, appellant testified that he knew or was friends with many Nip Family gang members but did not consider himself a gang member, and had never joined the gang or been "jumped into" it. (21 RT 4011, 4066-4067.) The prosecutor thereafter sought to admit the pertinent May 25th, 1995 statements made by appellant in order to rebut this testimony. (21 RT 4095-4096.)

After the trial court granted appellant's request for a hearing on his previous objection – an objection made on the ground that the police deliberately violated appellant's *Miranda* rights so they could use his statements in order to impeach appellant's trial testimony (21 RT 4097-4098) – appellant called Detective Nye as a witness regarding the videotaped interview in which the statements were taken. (22 RT 4106-4125.) The trial court the watched a portion of the videotaped interview played for the trial court by appellant's trial counsel (Court Exh. 1; 22 RT 4125-4128).

At the conclusion of the hearing, after summarizing the portion of the videotaped interview that appellant's trial counsel had asked it to watch (22 RT 4126-4129), the trial court ruled the statements were admissible to impeach appellant's testimony. The trial court explained its ruling with the following comments:

> From the demeanor of the defendant and the demeanor of the two officers from the videotape that I have seen, I didn't see anything that was overbearing in terms of their conduct, or the way that they handled or processed the accused, which I think is an important factor in making an assessment whether the court should or should not permit any prior statements made by the

> defendant that may be inconsistent with his in-court testimony.
>
> One of the underlying factors of the cases addressed at the appellate level in making an assessment is[:] [S]hould the defendant have the right to take the stand and testify without having his prior statements brought to the attention of the trier of fact[?] And in this case I'm going to permit the District Attorney to introduce his prior statements to Westminster Police Department. (22 RT 4129-4130.)

This Court should reject as meritless appellant's argument that the trial court erroneously overruled his objection to the statements' admission as impeachment evidence. Even though the protections of *Miranda v. Arizona, supra,* 384 U.S. 436 are constitutionally required (*Dickerson v. U.S.* (2000) 530 U.S. 428, 438-441 [120 S.Ct. 2325, 147 L.Ed.2d 405]), statements voluntarily made by defendant after an interrogating officer's deliberate *Miranda* violations are nevertheless admissible to impeach defendant's trial testimony. (*People v. Demetrulias, supra,* 39 Cal.4th at pp. 29-30.)

Appellant nevertheless contends that the trial court should have suppressed the statements because they were a product of widespread police department policy and police department training to ignore suspects' invocation of the right to counsel in order to obtain statements for impeachment purposes. (AOB 331-335.) Appellant asserts such deliberate tactics undermine the constitutional protections provided by the *Miranda* warning because they undermine the following assumption made by the United States Supreme Court in *Harris v. New York* (1971) 401 U.S. 222, 226 [91 S.Ct. 643, 28 L.Ed.2d 1]), and *Oregon v. Hass* (1975) 420 U.S. 714, 721-722 [95 S.Ct. 1215, 43 L.Ed.2d 570]), to wit: The limited exclusion of illegally obtained statements from the prosecution's case-in-in chief sufficiently deters police conduct violating *Miranda.* (AOB 332-334.)

Appellant misconstrues the foregoing United States opinions. The United States Supreme Court did not create the impeachment exception in the Harris opinion because it was satisfied it had sufficiently deterred police misconduct by limiting the exclusion of evidence to the prosecutor's case-in-chief. Instead, it created the impeachment exception because the goal of police deterrence is outweighed by the specter of uncontested perjury that would result from the exclusion of voluntary prior inconsistent statements offered for the purpose of impeachment. In the Harris opinion, the United States Supreme Court explained that:

> Every criminal defendant is privileged to testify in his own defense, or to refuse to do so. But that privilege cannot be construed to include the right to commit perjury. [Citations.] Having voluntarily taken the stand, petitioner was under an obligation to speak truthfully and accurately, and the prosecution here did not more than utilize the traditional truth-testing devices of the adversary process. Had inconsistent statements been made by the accused to some third person, it could hardly be contended that the conflict could not be laid before the jury by way of cross-examination and impeachment. [¶] The shield provided by Miranda cannot be perverted into a license to use perjury by way of a defense, free from the risk of confrontation with prior inconsistent utterances. *Harris v. New York, supra,* 401 U.S. at pp. 225-226, quoted in *People v. Williams* (2000) 79 Cal.App.4th 1157, 1165-1166.)

In support of its analysis, the *Harris* opinion cited *Walder v. United States* (1954) 347 U.S. 62 [74 S.Ct. 354, 98 L.Ed.2d 503], a Fourth Amendment case in which the court permitted physical evidence inadmissible in the case-in-chief to be used for impeachment purposes. In Walder, the court stated,

> It is one thing to say that the Government cannot make an affirmative use of evidence unlawfully obtained. It is quite another to say that the defendant can turn the illegal method by which evidence in the Government's possession was obtained to his own advantage, and provide

> himself with a shield against conviction of his untruths ... [¶] ... [T]here is hardly any justification for letting the defendant affirmatively resort to perjurious testimony in reliance on the Government's disability to challenge his credibility. (*Walder v. United States, supra,* 347 U.S. at p. 65, quoted in *People v. Williams, supra,* 79 Cal.App.4th at p. 1166.)

Only after noting that there was no difference in principle between the circumstances presented in the Walder opinion and the circumstances presented in the Harris opinion, did the United States Supreme Court then state:

> Assuming that the exclusionary rule has a deterrent effect on proscribed police conduct, sufficient deterrence flows when the evidence in question is made unavailable to the prosecution in its case in chief. (*United States v. Harris, supra,* 401 U.S. at p. 225, quoted in *People v. Williams, supra,* 79 Cal.App.4th at p. 1166.)

The Supreme Court eliminated the exclusionary rule for voluntary statements taken in deliberate violation of *Miranda* rights when those statements are admitted for the purpose of impeaching a defendant's trial testimony which contradicts those voluntary statements. This Court should therefore reject as meritless appellant's argument that the trial court erroneously overruled his trial court objection to those statements.

Appellant alternatively contends that the statements were inadmissible for all purposes because they were involuntary. (AOB 335-337.) This Court should reject appellant's contention as forfeited because he never contended in the trial court that his statements were involuntary. (Evid. Code, § 353, subd. (a); *People v. Marks* (2003) 31 Cal.4th 197, 228-229.)

Should this Court choose to consider the contention even though appellant makes it for the first time in this Court, it should reject the contention as meritless. Whether police who repeatedly refuse to honor defendant's invocation of his *Miranda* rights render defendant's statements

involuntary by overbearing defendant's will depends on all the circumstances surrounding the interrogation, with no one circumstance necessarily dispositive. (*People v. Jablonski, supra,* 37 Cal.4th at pp. 813-817.) The following substantial evidence considered by the trial court supported its ruling admitting the pertinent *Miranda*-violative statements to impeach appellant's testimony.

After looking at the portion of the videotaped interview played for it by appellant's trial counsel, the trial court observed nothing in appellant's demeanor, Detective Nye's demeanor or Detective Proctor's demeanor that suggested the detectives in any way overbore appellant's will. (22 RT 4129.) The transcript of the interview shows the detectives got appellant a Vietnamese interpreter (Vol. 5 of 9/29/06 clerk's supplemental transcript [hereafter 5 SCT] 1246) and shows the interpreter translated the *Miranda* warning for appellant (5 SCT 1249). It shows the detectives ended the interview after appellant stated, "Think I got to talk to my attorney." (5 SCT 1249.) When the videotape was turned on again four minutes later (5 SCT 1249-1250), the transcript shows the following colloquy took place between Detective Proctor and appellant:

> DETECTIVE: Yeah. Okay. Now we're back on. We're back on talking to you and stuff. I know you[] asked for an attorney and stuff like that. We just have to get some other things clear. Okay. Uh, number one, you got some injuries and stuff here? You got some injuries?
>
> NGUYEN: Little cuts.
>
> DETECTIVE: Well, you got some little cuts, but I mean as, what I understand that maybe you got shot or something?
>
> NGUYEN: No, just a little cut. It's okay.
>
> DETECTIVE: Okay, but I mean did –
>
> DETECTIVE #2 [Nye]: Well, -
>
> DETECTIVE: Go ahead, Mark.
>
> DETECTIVE #2: We have some medical record that indicate that you have buck shot in your hands, from a shotgun. Can you tell us about that?

NGUYEN: No, I can't tell you. Talk to my attorney because, 'cause** (5 SCT 1250.)

As the transcript continues, it shows the detectives questioning appellant about a different topic, to wit: appellant's membership in the Nip Family. That questioning elicited the statements by appellant (5 SCT 1250-1251) admitted to impeach appellant's trial testimony that he never was a Nip Family gang member (21 RT 4011, 4066-4067).

When appellant's trial counsel called Detective Nye to testify about the interview, Nye testified that after appellant was arrested at about 3:30 p.m. at Dr. Dinh's office, he took appellant down to the Westminster Police Department and brought him to the interview room. (22 RT 4106-4107.) After the video camera was turned on for the interview, Detective Proctor began asking appellant about his education and ability to read and understand English. (22 RT 4107.) Appellant said he had some problems with some English words but understood Vietnamese when it was spoken. (22 RT 4107-4108.) Proctor then requested the assistance of Vietnamese interpreter-jailer Chris Duong. (22 RT 4108.) Before Duong entered the room, Nye asked appellant if he had been arrested before, and appellant said he had been arrested for attempted murder. (22 RT 4108.) Nye asked appellant if he was on probation or parole, and appellant replied that he was supposed to be on adult probation. (22 RT 4109.)

Duong then entered the interview room with Detective Proctor and read appellant his *Miranda* rights from the Westminster Police Department Vietnamese *Miranda* advisement form. After appellant said he understood his rights (22 RT 4109), Proctor asked appellant if appellant would speak to him about the Westminster incidents. (22 RT 4110.) At that point, appellant said he wanted to talk to an attorney. (22 RT 4110.) The interview was then terminated. (22 RT 4110.)

Nye acknowledged that he had the impression that appellant did not want to talk about the crimes, although he did not know what was in appellant's mind. (22 RT 4111.) Nye knew that statements obtained after a suspect invoked his right to an attorney could be used for impeachment purposes even though they could not be used in the prosecutor's case in chief. (22 RT 4112.) Nye learned the foregoing information from Department training presented by DeVallis Rutledge from the District Attorney's office. (22 RT 4112-4113.) Nye attended one of Rutledge's live training presentations at the District Attorney's office and viewed some two dozen videotaped presentations to the Police Department by Rutledge. (22 RT 4113-4114.) Rutlege explained during these presentations that statements can be obtained for impeachment purposes after the suspect has invoked his right to an attorney. (22 RT 4114-4115.) Nye therefore understood that such statements could be used to impeach a statement who had testified in a manner inconsistent with the statements. (22 RT 4116.)

Nye agreed that after he brought appellant back into the interview room four minutes after the termination of the first interview, Proctor started asking appellant about the injuries to his hands. (22 RT 4117.) Nye denied that he and Proctor talked about getting statements for impeachment purposes during the four minute period which followed the initial termination of the interview. (22 RT 4120.) Proctor decided to bring appellant back to the interview room –most likely from the booking area – because he wanted to talk to appellant about something else. (22 RT 4120-4121.) Nye acknowledged that the detectives questioned appellant about his gang affiliation after appellant invoked his right to an attorney in response to questions about his injuries. (22 RT 4117, 4121-4122.) Nye acknowledged that one of the reasons he questioned appellant was to obtain statements admissible for impeachment should appellant testify, but added that the detectives also asked the questions as a part of the booking process.

(22 RT 4118, 4120, 4122.) At the same time, Nye acknowledged that he was convinced in his own mind that appellant was a Nip Family gang member and that a denial by appellant would neither have changed his opinion nor altered any decision to place him in a different cell from rival gang members. (22 RT 4122-4124.)

Because the foregoing substantial evidence shows appellant voluntarily made the statements regarding his Nip Family gang membership (5 SCT 1250-1251) notwithstanding his earlier *Miranda* invocations, appellant's alternative contention that his statements were involuntary is meritless even if this Court chooses to consider it.

Appellant nevertheless asserts the following factors show appellant's statements were involuntary: (1) the detectives repeatedly refused to honor appellant's invocations of his right to counsel; and (2) Detective Nye misled appellant by additionally stating that although the detectives "know you[] asked for an attorney," nevertheless "[w]e just have to get some other things clear." (5CT 1250; AOB 334, 336-337.)

This Court should reject the assertion. The detectives terminated the interview when appellant initially invoked his *Miranda* rights, and questioned appellant on a different subject (his gang affiliation) when appellant told them he could not answer their questions about his injuries without an attorney. And the detectives did not affirmatively mislead appellant by making him any false promises or by telling appellant his statements could not be used in court. (Contrast: *People v. Bey* (1993) 21 Cal.App.4th 1623, 1627, relied upon by appellant at AOB 334, 336-337.)

Appellant nevertheless asserts that although reviewing courts normally uphold the trial court's ruling admitting such statements when its factual determinations are supported by substantial evidence (AOB 331 fn. 331), no deference should be given the trial court's ruling in this case since the trial court misconstrued key facts (AOB 331 fn. 190). Appellant alleges

no deference should be given to the trial court's ruling because the trial court misspoke when it stated that appellant invoked his right to an attorney in response to Detective Proctor's question about appellant's association with the Nip Family (22 RT 4129) and when it stated the detectives terminated the interview after appellant's third invocation of that right (AOB 330-331). Appellant alleges that contrary to the foregoing statements by the trial court. (1) appellant invoked his right to counsel three times before Proctor asked about appellant's association with the Nip family (AOB 330-331 fn. 188); and (2) the interview was terminated after appellant's sixth invocation of his right to an attorney (5 SCT 1252 [4th invocation], 1254 [5th invocation], 1255 [6th invocation]) and after appellant had invoked his right to remain silent five times (5 SCT 1253-1255; AOB 331 n. 189.) Appellant also observes that the trial court said nothing about the detectives' Police Department training via the District Attorney's Office. (AOB 331.)

But because the trial court's determination did not rely on the alleged misstatements and omission, the trial court's determination is entitled to deference regardless of the cited misstatements and omission so long as substantial evidence supports the determination. (See: *People v. Carmony* (2004) 33 Cal.4th 367, 379, distinguishing on this ground *People v. Cluff* (2001) 87 Cal.App.4th 991, 998, relied upon by appellant at AOB 333 fn. 190.) Respondent additionally asserts that appellant has himself misconstrued the transcript of the videotaped interview played to the trial court. That transcript shows appellant only invoked his right to counsel twice before the detectives asked appellant about his gang affiliation, the first invocation terminating the initial portion of the interview (5 SCT 1249), and the second suggesting appellant could not talk about his injuries without at attorney. (5 SCT 1250.) Appellant's remaining invocations (appellant's third, fourth, fifth and sixth at 5 SCT 1252-1255) all followed

the conclusion of the questioning regarding appellant's gang affiliation and are irrelevant to the question of whether the statements admitted for impeachment (5 SCT 1250-1251) were voluntary or involuntary.

Appellant alternatively argues that even if the statements were properly admitted for the limited purpose of impeaching his testimony, the trial court erroneously instructed jurors that a witness's inconsistent statements could be use also "as evidence of the truth of the facts as stated by the witness on that former occasion[]" (27 RT 5246-5248) without specially instructing jurors they could only consider appellant's *Miranda*-violative statements to police for the limited purpose of impeaching his credibility as a witness. (AOB 337-339.)

But appellant forfeited this argument by failing to request modification of the trial court's prior inconsistent statement instruction and by failing to request a special limiting instruction that *Miranda*-violative statements were only admitted for the purpose of impeaching defendant's testimony and not for the truth of the matter asserted in the prior inconsistent statement. (*People v. Williams* (2000) 79 Cal.App.4th 1157, 1170.) Notwithstanding appellant's contention to the contrary (AOB 338 fn. 193), trial courts have no sua sponte duty to modify the general instruction that prior inconsistent statements can be used as truth of the facts as stated by the witness on the former occasion when *Miranda*-violative statements are admitted to impeach a defendant's testimony. Nor do they have a sua sponte duty to specially instruct the jury on the limited use of a *Miranda*-violative statements admitted to impeach defendant's testimony. (Evid. Code, § 355; *People v. Coffman* (2004) 34 Cal.4th 1, 63; *People v. Gutierrez* (2002) 28 Cal.4th 1083, 1134; *People v. Williams* (2000) 79 Cal.App.4th 1157, 1170; *People v. Torrez* (1995) 31 Cal.App.4th 1084, 1090-1091.)

Appellant contends the alleged erroneous admission of the statements requires reversal of all the verdicts because the evidence on the issue of his guilt of the charges was so close, the erroneously admitted statements undermined appellant's credibility as a witness, and it cannot be said beyond a reasonable doubt that the erroneous admission of the statements did not contribute to the verdicts. (*Chapman v. California, supra,* 386 U.S. at p. 24; AOB 339.) Appellant contends the erroneous admission of the statements in any event requires reversal of the street terrorism counts and gang enhancements because they were the only evidence appellant had claimed membership after 1993. (AOB 339.)

This Court should reject the contentions. Even had the trial court erroneously admitted the statements rebutting appellant's testimony that he had never been an active member of the Nip Family gang, the error would have been harmless beyond a reasonable doubt because none of the verdicts would have changed. Even had the statements been excluded, the following independent evidence thoroughly impeached appellant's testimony that he had never been an active member of Nip Family gang. (21 RT 4011.)

Detective Nye met appellant in 1990 in the company of other active members of the Nip Family. (16 RT 3203.) In 1992, when appellant pled guilty to aiding and abetting an assault with a deadly weapon while riding in a car with four other Nip Family gang members, appellant also admitted committing the crime for the benefit of, and in association with, the Nip Family criminal street gang. (21 RT 4012-4013, 4073-4074.) When Nye later visited appellant at his house, appellant claimed gang membership by admitting he was part of the gang. (16 RT 3203.) Other Nip Family gang members, rival gang members, confidential informants, and investigators informed Nye that appellant was a Nip Family gang member. (16 RT 3205.) Appellant self-admitted his gang membership to Nye on a few occasions.

(16 RT 3205-3206.) Witnesses like Monica Tran (16 RT 3160) and Khoi Huynh (13 RT 2485) identified appellant as an active Nip Family gang member when questioned by the police.

Nip Family gang member Huy Pham drove appellant to a scheduled office visit with Dr. Dinh Dam on May 25, 1995, where appellant was arrested for the charged crimes. (16 RT 3205.) When he was arrested, appellant claimed he owned the KBI .380 semiautomatic handgun recovered from the glove compartment of Huy Phan's car. (17 RT 3328-3329, 21 RT 4007.) A prescription bottle for appellant and a prescription bottle for Huy Pham were found in the same studio apartment in the back of the residence at 13401 Amarillo, Westminster (15 RT 293, 2964), along with two loaded .357 caliber pistols (15 RT 2932, 2963) and an AK-47 type weapon. (15 RT 2932-2933, 2963.)

Two days before appellant's arrest, a Vietnamese male matching appellant's description (15 RT 2849) was seen running from a car containing three Vietnamese males. One of the three males who stayed behind in the car (15 RT 2841) was active Nip Family gang member Cuong Le (15 RT 2830). Minutes earlier, police spotted the Vietnamese males getting into the car from the front yard of the 13401 Amarillo residence. (15 RT 2828.) Police had just pulled the car over when the Vietnamese male matching appellant's description fled the car. (15 RT 2840-2841.) When he fled, the Vietnamese male who matched appellant's description ditched the handgun which fired the bullet into the engine of Cheap Boy gang member Huu Thien Tran's 1983 Buick Regal after Cheap gang member Boy Tuan Pham was fatally shot on May 6, 1995. (13 RT 2581-2582, 16 RT 3103-3105, 3131, 3135, 3138.)

While appellant acknowledged knowing ten to fifteen gang members on cross-examination (21 RT 4060) and named ten at the request of the prosecutor (21 RT 4056-4066), he thereafter identified the photographs of

many more (21 RT 4135-4139, 4142-4156). Appellant knew the nine original Nip Family gang members each had nine cigarette burns. (21 RT 4160.) Appellant claimed that one of the Nip Family gang members he hung out with was Toan Tran, aka Tiny, the man he claimed gave him a ride after the May 6, 1995, shooting of Cheap Boy gang member Tuan Phan. (21 RT 4056.) While appellant admitted carrying a gun on May 25, 1995, the date of his arrest, he claimed Tiny had given him the gun on May 10, 1995, after appellant phoned Tiny to report that someone shot him on May 6, 1995. (22 RT 4208-4209.)

Appellant's claim that he had never been a Nip Family gang member was unbelievable. The challenged statements impeaching that claim cumulated appellant's previous admissions that he was a Nip Family gang member, admissions which independently impeached appellant's testimony. Any error in admitting the challenged statements impeaching appellant's testimony that he was not a Nip Family gang member was therefore harmless beyond a reasonable doubt.

XLII. THE CASE NEED NOT BE REMANDED FOR A NEW HEARING ON APPELLANT'S OBJECTIONS TO THE ADMISSION OF THE STATEMENTS HE MADE AFTER INVOKING HIS *MIRANDA* RIGHTS

Appellant alternatively argues that if the record does not support his previous argument, this Court should remand the case for a new hearing on his objections because the trial court unconstitutionally precluded him from developing a full record on the issue. (AOB 240.) Appellant contends that the trial court did so by precluding defense counsel from finding out the extent of Detective Nye's training regarding the interrogation of suspects who have invoked their *Miranda* rights. Appellant references fourteen objections made by the prosecutor to this line of questioning (22 RT 1411-4116) which triggered the trial court to bar defense counsel from finding out what Nye had "been trained ... to do when [suspects] say they want to

talk to an attorney" and why the District Attorney's Office said it was important to talk to a suspect after he invoked that right. (22 RT 4111-4112; AOB 340.)

This Court should reject appellant's argument as meritless. The trial court did not abuse its discretion (Evid. Code, § 765, subd. (a)) by sustaining the prosecutor's objections to cross-examination questions that were vague (5 RT 4111-4113), assumed facts not in evidence (5 RT 4111-4113), and/or compound (5 RT 4112-4113). The trial record in any event belies appellant's contention that the trial court rulings prevented defense counsel from finding out the extent of Detective Nye's training regarding the interrogation of suspects who have invoked the *Miranda* rights because defense counsel did find out. (5 RT 4111-4116; respondent's argument XLI, *ante.*)

Nye's training was in any event irrelevant to the admissibility of appellant's statements as impeachment evidence because whether or not the police deliberately attempt to elicit them for impeachment, voluntary statements made after defendant invokes his *Miranda* rights are admissible to impeach his trial testimony. (*People v. Demetrulias, supra,* 39 Cal.4th at pp. 29-30; respondent's argument XLI, *ante.*)

XLIII. THE CLAIMED ERRORS REGARDING THE REBUTTAL TESTIMONY OF PROBATION OFFICER STEVEN SENTMAN DO NOT WARRANT REVERSAL OF ANY OF THE VERDICTS

Appellant argues that the claimed errors regarding the rebuttal testimony of Probation Officer Steven Sentman (AOB 253 et seq.) require reversal of all the verdicts because they adversely affected the jury's assessment of his credibility as a witness (AOB 341).

This Court should reject appellant's argument as meritless. For reasons set forth in respondent's arguments XX-XXIII, *ante,* the trial court committed none of the alleged errors, its discretionary application of state

evidentiary rules did not remove any defenses or implicate appellant's federal constitutional right to a fair trial, and there is no reasonable probability any of the verdicts would have been different absent the alleged errors.

XLIV. THE CLAIMED ERRORS REGARDING TRIEU BINH NGUYEN'S HEARSAY TESTIMONY DO NOT WARRANT REVERSAL OF ANY OF THE VERDICTS

Appellant argues that the claimed errors regarding Trieu Binh Nguyen's hearsay testimony (AOB 115 et seq.) require reversal of all the verdicts because appellant's identity was in question in all the charged incidents. (AOB 342.)

This Court should reject appellant's argument as meritless. For reasons set forth in respondent's argument V, *ante,* no errors were committed regarding Trieu Binh's hearsay testimony, the error alleged did not implicate the Federal Constitution by depriving appellant of his due process right to a fair trial, and appellant cannot show a reasonable probability that any of the verdicts would have been different but for the alleged errors.

XLV. APPELLANT WAS NOT DEPRIVED OF HIS SIXTH AMENDMENT RIGHT TO TRIAL COUNSEL

Appellant argues that if this Court concludes any of his previous appellate complaints were not adequately preserved, the failure to preserve those claims deprived him of his Sixth Amendment right to the effective assistance of trial counsel. (AOB 343.)

This Court should reject the argument because appellant cannot prove from the appellate record that his trial counsel acted in a professionally unreasonable manner and that different verdicts would have been probable but for his trial counsel's alleged failings. (*Strickland v. Washington, supra,* 466 U.S. at pp. 679-684; *People v. Jennings, supra,* 53 Cal.3d at p. 376.)

Appellate alternatively argues that any constitutional issues raised in this appeal are not forfeited by inadequate objections in the trial court. (AOB 343.) But reviewing courts have ruled that appellants forfeited constitutional claims by failing to preserve them with adequate objections in the trial courts. (*People v. Tafoya, supra,* 42 Cal.4th at p. 166; *People v. Geier, supra,* 41 Cal.4th at p. 609; *People v. Halvorsen, supra,* 42 Cal.4th at pp. 413-414.)

XLVI. NO CUMULATIVE ERROR WARRANTS REVERSAL OF APPELLANT'S CONVICTIONS AND THE JURY'S TRUE FINDINGS

Appellant argues that given the serious nature of the previously-described errors permeating the guilt phase and the closeness of the evidence as to his guilt underlying each of the five separately charged incidents, the cumulative guilt phase errors previously discussed by appellant requires reversal of his convictions and the jury's true findings, even if any those errors, when separately considered, do not. (AOB 344-349.)

This Court should reject appellant's argument as meritless. For reasons set forth in respondent's previous arguments, there were no errors to cumulate. Assuming argument there was more than one error to cumulate, those errors were harmless whether considered separately or together (*People v. Hinton* (2006) 37 Cal.4th 839, 397) because different verdicts would not have been reasonably probable in their absence (*People v. Watson, supra,* 46 Cal.2d at p. 836) and because if the violated any of appellant's federal constitutional rights, they were harmless beyond a reasonable doubt. (*Chapman v. California, supra,* 386 U.S. at p. 24.)

XLVII. THE TRIAL COURT DID NOT VIOLATE APPELLANT'S RIGHT TO A FAIR AND IMPARTIAL PENALTY PHASE JURY BY EXCLUDING VOIR DIRE QUESTIONS ASKING PROSPECTIVE JURORS ABOUT THE EFFECT OF THE MULTIPLE MURDER SPECIAL CIRCUMSTANCE UPON THEIR PENALTY PHASE DELIBERATIONS

Appellant argues that the trial court violated his right to a fair and impartial penalty phase jury by excluding voir dire questions asking prospective jurors about the effect of the multiple murder special circumstance on their penalty phase deliberations. (AOB 354-372.) This Court should reject the argument as forfeited because appellant neither exhausted his peremptory challenges nor expressed any dissatisfaction with the jury which was selected, rendering any error nonprejudicial. (5 RT 934, 977; *People v. Coffman, supra,* 34 Cal.4th at p. 47; *People v. Burgener* (2003) 29 Cal.4th 833, 866.)

This Court should in any event reject appellant's argument as meritless. A trial court has considerable discretion when conducting death-qualification voir dire. (*People v. Solomon* (2010) 49 Cal.4th 792, 838; *People v. Tate* (2010) 49 Cal.4th 634, 657; *People v. Rogers* (2009) 46 Cal.4th 1136, 1152; *People v. Butler* (2009) 46 Cal.4th 847, 859; *People v. Carasi* (2008) 44 Cal.4th 1263, 1286; *People v. Zambrano, supra,* 41 Cal.4th at p. 1130.) Death-qualifying voir dire seeks to determine prospective jurors' attitudes about capital punishment only in the abstract, and whether without knowing the specifics of the case, they have an open mind on penalty. (*People v. Butler*, *supra*, 46 Cal.4th at p. 859; *People v. Carasi*, *supra*, 44 Cal.4th at p. 1286; *People v. Zambrano*, *supra*, 41 Cal.4th at p. 1120; *People v. Clark* (1990) 50 Cal.4th 583, 597.) Defendant has no right to ask specific questions that invite prospective jurors to prejudge the penalty issue based on a summary of the aggravating and mitigating evidence. (*People v. Butler*, *supra*, 46 Cal.4th at p. 859; *People*

v. Tate, *supra*, 49 Cal.4th at p. 657; *People v. Zambrano*, *supra*, 41 Cal.4th at p. 1120; *People v. Cash* (2002) 28 Cal.4th 703, 720-721.)

While death-qualification voir dire must not be so abstract that it fails to identify jurors whose death penalty views would prevent or substantially impair the performance of their duties as jurors in the case being tried, it must not be so specific that it requires the prospective jurors to prejudge the penalty issue based on a summary of the mitigating and aggravating evidence likely to be presented. (*People v. Solomon*, *supra*, 49 Cal.4th at p. 839; *People v. Butler*, *supra*, 46 Cal.App.4th at p. 860; *People v. Coffman*, *supra*, 34 Cal.4th at p. 47; *People v. Cash*, *supra*, 28 Cal.4th at pp. 721-722.) Trial courts have considerable discretion when deciding where to strike the balance between these two extremes. (*People v. Butler*, *supra*, 46 Cal.4th at p. 860; *People v. Carasi*, *supra*, 44 Cal.4th at pp. 1263, 1285-1287; *People v. Zambrano*, *supra*, 41 Cal.4th at pp. 1120-1121; *People v. Coffman*, *supra*, 34 Cal.4th at p. 47; *People v. Cash*, *supra*, 28 Cal.4th at pp. 721-722.)

The trial record belies appellant's argument that the trial court abused its discretion over death-qualification voir dire. It shows instead that the trial court only limited death-qualification voir dire that sought penalty phase prejudgment by prospective jurors. After reviewing the proposed jury voir dire questionnaires prepared by the prosecutor (2 CT 659-675) and by defense counsel (2 CT 504-528), the trial court modified the proposed questionnaire proposed by defense counsel (2 RT 360-364; 2 CT 676-702) and ordered defense counsel and the prosecutor to confer and jointly rewrite a proposed final jury questionnaire (2 RT 364; 5 RT 703). After complying with the trial court's order, the parties presented a retyped questionnaire (2 CT 676-702) which the trial court thereafter modified into a final jury questionnaire. (2 RT 367; 2 CT 705-734.) During a conversation with counsel outside the presence of the prospective jurors, a

conversation which occurred during counsel's voir dire of the prospective jurors, the trial court explained:

> As you know we've set up the questionnaire to try to get to whatever key areas you felt were significant. And obviously, no questionnaire can cover all possibilities. But the questionnaire, as I understood the reason why you folks wanted to do it, was to minimize the time that would be required at this juncture. (4 RT 724.)

During its own preliminary voir dire - which included the initial hardship voir dire but preceded the substantive voir dire of prospective jurors regarding their ability to serve as impartial jurors - the trial court advised prospective jurors as follows: (1) the charges against appellant included three counts of murder (3 RT 411, 437, 527, 4 RT 563); (2) a penalty phase proceeding would be required if jurors found appellant guilty of multiple counts of murder and found that one or more of those counts amounted to first degree murder (3 RT 411-412, 437, 527, 4 RT 588-589); and (3) the penalty phase would involve a jury determination of which of the following penalties was the appropriate punishment, life without parole or death. (3 RT 412, 435, 527, 4 RT 589).

When it voir dired prospective jurors regarding their ability to serve as impartial jurors, the trial court repeated its explanation that a penalty phase would be triggered by a guilt phase jury verdict finding true the special circumstance that appellant was guilty of more than one first degree murder. (Juror 214; 4 RT 680.) It emphasized that not all first-degree murders with special circumstances warrant the death penalty. (Juror 214; 4 RT 681).

During his voir dire of individual prospective jurors regarding their ability to serve as jurors, defense counsel Harley asked the following questions pertinent to the issue now raised by appellant. Harley asked Juror 305 if Juror 305 understood that in order to get to the penalty phase, jurors had to find appellant guilty of at least two of the charged murders. (4 RT

727.) Juror 305 answered, "I understand sir." (4 RT 727.) Harley asked Juror 97 if Juror 97 understood that jurors would have to convict appellant of at least two murders to trigger a penalty phase, Juror 97 answered, "Yes, I understand that. (4 RT 729-730.) The following colloquy between Harley and Juror 97 led to the trial court rulings now challenged by appellant:

> Q. BY MR. HARLEY: But my concern is and what I would like you to do is put yourself in the starting point of the second phase of this process. And, hopefully, -- I mean, obviously, we don't know whether we are going to get there.
>
> But recognizing your present state of mind, do you feel that you would be leaning towards the imposition of death by the time you found beyond a reasonable doubt that a person has been convicted of two separate first-degree murders?
>
> THE COURT: Let me interrupt, because I'm concerned about this. And if I'm misunderstanding your question help me.
>
> MR. HARLEY: Okay.
>
> THE COURT: Factor A [Pen. Code, § 190.3, subd. (a)] is a – the circumstances of the crimes dealing with a determination that they are first-degree murders. That can be deemed aggravating or mitigating. So I'm concerned that the question contains a prejudging of that factor by this juror. So that – I have to be honest. I don't like the question.
>
> MR. HARLEY: I can hear that, Your Honor.
>
> THE COURT: So –
>
> MR. HARLEY: I can understand.
>
> THE COURT: But I have to tell you why I'm concerned about it. So I would like to get into a different area, if you don't mind.
>
> (4 RT 731-732.)

The trial court again limited voir dire in the area referenced by appellant's current argument during the following colloquy between Harley and Juror 214:

Q. But in the abstract I obviously can't tell you what the evidence is going to be, but I'm talking about in the abstract. You've heard the charges, that there are three separate murder counts and [...] three attempt murder counts with premeditation and deliberation.

And knowing what little you know about right now and thinking about your present thoughts, your feelings and your state of mind, do you find yourself leaning one way or another right now?

THE COURT: I have to ask the juror not [t]o answer that question. You ask another one. (4 RT 733.)

Defense counsel Harley's voir dire of Juror 275 included the following colloquy – also pertinent to appellant's argument:

Q. Okay. But my main concern is right now is talking about the death penalty. Again, because somebody's up here and ta[l]king about it doesn't mean I expect to get there. But we have to know your opinions right now, because by the time – if we get there it is going to be too late. We don't get a chance to talk to you.

A. Well, if I were to vote for death or life in prison without parole that means I found the guy guilty of at least two first-degree murders.

Q. That's correct?

A. And then I would probably favor the death penalty in the case.

Q. And when you say "probably," how strong would you be in favor of death penalty?

A. I guess moderate. I'm kind of a skeptic about life without parole. (4 RT 741.)

The multiple murder issue resurfaced during the prosecutor's voir dire of the prospective jurors. When questioning Juror 305, the following colloquy took place:

Q. BY MS. PARK: (Juror 305), I'm going to talk to you briefly because of the questions the defense attorney asked. You said that you feel like it would affect your feelings about the case.

> The Court is going to tell you that there are certain factors – aggravating factors and mitigating factors that you have to consider before your reach a decision.
>
> MR. HARLEY: Your Honor, I would object. They have to – there is not mandatory requirement like that, Your Honor.
>
> THE COURT: I'll let the question go to the juror.
>
> MS. PARK. Thank you.
>
> PROSPECTIVE JUROR 305: If we go through – if the jury goes through the first phase of the trial and they find without any reasonable doubt that the defendant is guilty of at least two of the crimes he is accused of and we had a choice of life imprisonment or death penalty, yes, I would lean toward the death penalty. (4 RT 747-748.)

In a chambers conference discussion held the next morning, the trial court fully explained its previous rulings. It further explained what it would allow in the future when counsel voir dired prospective jurors regarding their attitudes toward the death penalty in the event of a penalty phase. (5 RT 776-784.) The trial court explained that it did not want counsel to put jurors in the position in which they had to prejudge the penalty phase or some aspect of the case. (5 RT 776.) It observed that some jurors appeared to construe defense counsel Harley's questions in a manner that forced them to prejudge penalty phase factor (a). (5 RT 776-778.) It noted that prospective jurors should not be asked to prejudge penalty phase factor (a) at this stage of the proceeding. (5 RT 778.)

The trial court nevertheless concluded that it would allow counsel to ask prospective jurors if they could keep an open mind under all of the applicable factors before making a final decision. (5 RT 778.) In other words the trial court would allow counsel to ask prospective jurors if after finding appellant guilty of first degree murder and after finding true the additional special circumstance triggering the penalty phase, they could nevertheless keep an open mind at the penalty phase under all the

applicable factors outlined in the penalty phase instructions to be given by the trial court. (5 RT 778-783.)

After the trial court and counsel recommenced their respective voir dire of prospective jurors regarding their ability to serve as impartial jurors, the following colloquy between the trial court and Juror 242 reflected the trial court's approach towards the issue discussed earlier in chambers:

> Q. Now , one of the things I was talking to the attorneys about, and it started to develop late yesterday afternoon is I think counsel is entitled to ask you – or any prospective juror do you have the ability to look at all the evidence that might come under the different factors should we get to the penalty phase, okay.
>
> On the other hand, one of the factors that you'll be asked to look at is what's called Factor (A), or the circumstances of the homicides and the special circumstances and you decide how much weight to attach to that.
>
> And I don't want to put a juror in a position of prejudging that aspect of the proceeding.
>
> So all I want to know from you is can you promise the parties that if we get to that stage that you get to hear evidence concerning the defendant's background, his history, his record, and any other factors that – any other evidence dealing with other factors that come with the penalty phase, and I take it you're saying you can do that?
>
> A. Yes.
>
> Q. Is there anything else that we should know about you as a possible juror on this case?
>
> A. No, nothing personal.
>
> Q. Okay. Anything else at all?
>
> A. No.
>
> Q. You're ready to go in case they pick you?
>
> A. Right now.
>
> COURT: Okay. All right. (5 RT 803.)

The trial court repeated this approach with pertinent voir dire questions put to Jurors 62 (5 RT 810-812), who the trial court excused because Juror 62 would automatically vote for the death penalty if intent to

kill was established (5 RT 811-812), Juror 207 (5 RT 819-821, 828-829), Juror 165 (5 RT 836), who the trial court excused because Juror 165 would never vote for the death penalty (5 RT 836-837), and Juror 107 (5 RT 842-843).

When he continued his voir dire, defense counsel Harley got an affirmative response when he asked Juror 322 if Juror 322 understood a penalty phase could only be triggered by jury verdicts finding true the multiple murder special circumstance. (5 RT 893.) Juror 322 assured Harley there was no factor among the penalty phase factors listed in questionnaire question 75 that Juror 322 considered inappropriate to the penalty phase (5 RT 894) and that Juror 322 would be asked to follow those factors in the penalty phase weighing and balancing process (5 RT 894). Harley got affirmative responses to follow-up questions pertinent to the death penalty issue put to Jurors 84 (5 RT 895) and 311 (5 RT 895-896).

The trial court questioned the following prospective jurors more briefly because they heard counsels' and the trial court's previous questioning on the subject : Juror 311(5 RT 852-853); Juror 58 (5 RT 855); Juror 394 (5 RT 861-862); Juror 32 (5 RT 869); Juror 177, excused by the trial court because Juror 177 would never vote for the death penalty (5 RT 872); Juror 297 (5 RT 874-875); Juror 72 (5 RT 906-910); Juror 30 (5 RT 912); Juror 344 (5 RT 914); Juror 364 (5 RT 917); Juror 55 (5 RT 919-920); Juror 261, excused by the trial court because Juror 261 would automatically vote for the death penalty (5 RT 928-929); Juror 325 (5 RT 930-931); Juror 197 (5 RT 933-934); Juror 290 (5 RT 939); Juror 61, a prospective alternate juror excused by the trial court over appellant's objection on the ground that Juror 61 could not impose the death penalty (5 RT 940-943); Juror 317 (5 RT 946); Juror 186 (5 RT 947); Juror 38 (5 RT 949); Juror 420 (5 RT 952-953); Juror 205 (5 RT 956); Juror 374 (5 RT 957-958); Juror 188, excused by the trial court because Juror 188 was against the death penalty

under all circumstances (5 RT 963); Juror 220 (5 RT 964); Juror 452, excused by the trial court because Juror 452 would always vote for the death penalty (5 RT 966-967); Juror 150 (5 RT 967); Juror 359 (5 RT 977).

The trial record summarized above shows that shows that defense counsel Harley triggered the trial court's challenged rulings and the concerns it subsequently expressed in the chambers conference by seeking penalty phase prejudgments with the following voir dire questions:

> (1.) But recognizing your present state of mind, do you feel that you would be leaning towards the imposition of death by the time you found beyond a reasonable doubt that a person had been convicted of two separate first-degree murders? (4 RT 731.)
>
> (2.) And knowing what little you know about right now [there are three separate murder counts and three attempted murder counts with premeditation and deliberation] and thinking about your present thoughts, you feelings and your state of mind, do you find yourself leaning one way or another right now? (4 RT 733.)
>
> (3.) And when you say [...I would probably favor the death penalty if I found defendant guilty of at least two first-degree murders], how strong would you be in favor of the death penalty? (4 RT 733.)

The trial record shows that the trial court merely sought to prevent voir questioning which would force prospective jurors to prejudge the penalty phase in general and Penal Code section 190.3, subd. (a), in particular, to wit: the penalty phase factor comprising "[t]he circumstances of the crime of which defendant was convicted in the present proceeding and the existence of any special circumstances found true pursuant to [Pen. Code] section 190.1" (Pen. Code, § 190.3, subd. (a).)

The trial record therefore shows that the trial court acted within its discretion by limiting questions that would invite prospective jurors to prejudge the penalty issue based on a summary of the aggravating and

mitigating evidence. (*People v. Butler*, *supra*, 46 Cal.4th at p. 859; *People v. Tate, supra,* 49 Cal.4th at p. 657; *People v. Zambrano*, *supra*, 41 Cal.4th at p. 1120; *People v. Cash*, *supra*, 28 Cal.4th at pp. 720-721.)

Appellant nevertheless complains that the final written voir dire questionnaire (2 CT 733) shows the trial court deleted the following contextual information set forth in the written voir dire questionnaire proposed by defense counsel: If a penalty phase is required in this case it will be because the defendant has been found guilty beyond a reasonable doubt of more than one offense of murder in the first or second degree. (2 CT 525; AOB 358-360.)

But the failure to object or suggest pertinent modifications to the trial court's juror questionnaire generally forfeits appellate challenges to its contents. (*People v. Foster* (2010) 50 Cal.4th 1301, 1324; *People v. Robinson* (2005) 37 Cal.4th 592, 617.) While appellant complains about a voir dire questionnaire modified rather than proposed by the trial court, he nevertheless forfeited his specific complaint about the final questionnaire in this case by failing to suggest to the trial court that the referenced contextual information be included in the final voir dire questionnaire, particularly since the pertinent information was apparently excluded from the final questionnaire solely because it was contained in "duplicate questions." (2 CT 732.) More specifically the handwritten list of additional voir dire questions for the trial court proposed by the defense (2 Supplemental Clerk's Transcript dated May 4, 2006, 413-415) included no suggestion that the trial court ask jurors if multiple convictions of first degree murder would prevent or substantially impair their ability to return a verdict of life without the possiblity of parole.

In any event, and notwithstanding appellant's contentions to the contrary, the voir dire record summarized above shows jurors knew that a penalty phase would only be triggered by appellant's conviction of more

than one first degree murder. (3 RT 411-412, 435, 527-528, 563, 581-582, 588-589, 680-681.) And the trial court did not preclude defense counsel during his initial voir dire of prospective jurors from simply informing those jurors that a penalty phase would only be triggered by appellant's conviction of at least two first degree murders. (4 RT 727, 729-730, 741.)

Appellant complains that the trial court never asked prospective jurors if a multiple murder finding would prevent or substantially impair any prospective juror's ability to return a verdict of life without the possibility of parole. (AOB 361, 363-367, 369-371.) Appellant forfeited the claim by not seeking an opportunity to ask that question during oral voir dire and by not suggesting the trial court ask that question during oral voir dire. (*People v. Vieira* (2005) 35 Cal.4th 264, 286.)

Instead, defense counsel Harley triggered the trial court rulings by asking a different question, to wit: whether a prospective juror would lean towards the death penalty given the fact that any penalty phase would be triggered by at least two first degree murder convictions. (4 RT 731-732.) As noted above, the trial court did not abuse its discretion by barring such a question on the ground that it would force prospective jurors to prejudge the circumstances of "[t]he circumstances of the crime of which defendant was convicted in the present proceeding and the existence of any special circumstances found true pursuant to [Pen. Code] section 190.1." (Pen. Code, § 190.3, subd. (a).)

Prospective jurors in any event knew from the trial court's remarks before the substantive voir dire and from Harley's initial voir dire that a penalty phase would only be triggered by appellant's convictions of two or more counts of first degree murder. (5 RT 411-412, 437, 527, 4 RT 588-589, 680, 727, 729-730, 741, 747-748, 893.) The death-qualifying voir dire in the case at hand adequately ascertained whether or not prospective jurors would automatically vote for the death penalty if faced with multiple first

degree murder convictions at the penalty phase because their assurances that they could perform their duties as penalty phase jurors necessarily encompassed the fact that the penalty phase could only be triggered by appellant's conviction of at least two first degree murders. (See: *People v. Carasi*, *supra*, 44 Cal.4th at pp. 1287-1288.)

Even had the trial court erred, reversal is unwarranted because the voir dire conducted by the trial court and counsel was not so inadequate that the resulting trial was fundamentally unfair. (*People v. Bolden, supra,* 29 Cal.4th at p. 538.)

XLVIII. THE TRIAL COURT PROPERLY BARRED VOIR DIRE QUESTIONING ABOUT THE MEANING OF LIFE WITHOUT THE POSSIBILITY OF PAROLE AND PROSPECTIVE JURORS' IMPRESSIONS OF LIFE WITHOUT THE POSSIBILITY OF PAROLE

Appellant argues that the penalty-phase verdict must be reversed because the trial court erroneously barred voir dire questions asking prospective jurors about the meaning of life without the possibility of parole and their impressions of life without the possibility of parole. (AOB 373-382.) About one month before trial, the defense proposed the following questions in a motion to have the prospective jurors fill out a written questionnaire. (2 CT 504-528):

> 77. What are you general feelings regarding life imprisonment without the possibility of parole? Please explain.
>
> 78. Do you believe that [l]ife without the possibility of parole actually means a life sentence without the possibility of parole? Please explain. (2 CT 521-522; AOB 374.)

The prosecutor proposed her own questions, one of which (No. 26) tracked defense No. 77. (2 CT 665-666.) At the hearing concerning the questionnaire, the trial court announced it had deleted the foregoing questions. (2 CT 689, 696; 2 RT 360, 363; AOB 374.)

During counsels' substantive voir dire of prospective jurors, the trial court sustained the prosecutor's objection to the following voir dire question by defense counsel Gregory Parkin: "Do you think that if someone is sentenced to life without possibility of parole, that at some time they're going to get paroled?" (4 RT 625.) Defense counsel Parkin then asked the following voir dire questions: "What is your feeling about someone who is sentenced to life without possibility of parole? What is your view about that? Is that a harsh penalty in your view?" (4 RT 625.) These oral voir dire questions covered supplemental handwritten questions proposed by defense counsel (Nos. 3 and 4 at 2 May 4, 2006 Supp. CT 413), which in turn tracked the previously- rejected jury questionnaire questions No. 77 and 78. (2 CT 665-666.)

When Parkin asked the follow up questions, the trial court called for a hearing outside the presence of the jury (4 RT 625-628), a hearing at which the trial court explained the questions were inappropriate for the following reasons: (1) the questions went beyond the death-qualification topics set forth in the final written jury questionnaire and the accompanying rulings made by the trial court regarding the topics that could be covered in death-qualification voir dire (4 RT 625-628); (2) the first question violated the spirit of California Supreme Court rulings barring trial judges from telling jurors that life without the possiblity of parole really means life without the possiblity of parole (4 RT 625-626); and (3) the questions involved a very sensitive (and therefore problematic) area (4 RT 627).

This Court should reject as meritless appellant's argument that the trial court erroneously prohibited the foregoing voir dire questions. The trial court's rulings did not abuse its considerable discretion over death-qualification voir dire. (*People v. Solomon*, *supra*, 49 Cal.4th at p. 838; *People v. Tate*, *supra*, 49 Cal.4th at p. 657; *People v. Rogers*, *supra*, 46 Cal.4th at p. 1152; *People v. Butler*, *supra*, 46 Cal.4th at p. 859; *People v.*

Carasi, *supra*, 44 Cal.4th at p. 1286; *People v. Zambrano*, *supra*, 41 Cal.4th at p. 1130.)

On the contrary, the trial court reasonably prohibited the voir dire questions because they encouraged the type of penalty phase speculation prohibited by this Court. As the trial court noted, this Court prohibits trial courts from telling the jury that the penalty of life without the possibility of parole will inexorably be carried out. (*People v. Musselwhite* (1998); *People v. Arias* (1996) 13 Cal.4th 92, 172; *People v. Gordon* (1990) 50 Cal.3d 1223, 1227; *People v. Thompson* (1988) 45 Cal.3d 86, 130.) This Court prohibits such a statement by the trial courts for two reasons: (1) the statement ignores the power of the Superior Court to reduce a sentence of death under review under Penal Code section 190.4, subdivision (e) and the governor's power of commutation; and (2) the statement invites speculation whether unidentified officials will in the future perform their job in a specified way and whether defendant will be unsuitable for any modification of his sentence. (*People v. Thompson*, *supra*, 45 Cal.4th at pp. 130-131.) At the same time, this Court approves trial court admonitions telling penalty phase jurors not to speculate on the possibility that future actions by others - including the Courts and Legislature - might someday result in the parole of a defendant sentenced to life without the possiblity of parole. (*People v. Bramit* (2009) 46 Cal.4th 1221, 1247-1248; *People v. Perry* (2006) 38 Cal.4th 302, 321-322; *People v. Kipp* (1998) 18 Cal.4th 349, 378-379.)

Appellant nevertheless contends that: (1) the trial court must grant a challenge for cause for a pro-death juror who cannot follow an instruction to assume that a sentence of life without the possiblity of parole means the prisoner will never be released (AOB 379-380 citing *People v. Boyette* (2002) 29 Cal.4th 381, 418); and (2) the trial court must therefore allow voir dire questions asking prospective jurors if they harbor such a

disqualifying bias. (AOB 378-380.) But appellant never proposed a voir dire question asking jurors if they could follow such an instruction. He instead proposed asking jurors to speculate about whether someone sentenced to life without the possiblity of parole would ever be paroled.

The prospective juror challengeable for cause in the *Boyette* case was challengeable for cause because he also stated he was strongly in favor of the death penalty, would apply a higher standard to an LWOP sentence than a death sentence, and believed that a defendant who killed more than one victim (such as Boyette) should automatically receive the death penalty. (*People v. Boyette*, *supra*, 29 Cal.4th at pp. 417-418.) An adequate voir dire – like the one in the case at hand - would have ferreted out such a juror without asking him to speculate whether someone sentenced to life without the possiblity of parole would ever be paroled.

XLIX. APPELLANT FORFEITED HIS ARGUMENT THAT THE TRIAL COURT ERRONEOUSLY LIMITED APPELLANT FROM QUESTIONING PROSPECTIVE JURORS WHO GAVE AMBIGUOUS QUESTIONNAIRE RESPONSES ABOUT WHETHER OR NOT ANYTHING PREVENTED OR SUBSTANTIALLY IMPAIRED THEIR ABILITY TO RETURN A VERDICT OF LIFE WITHOUT THE POSSIBILITY OF PAROLE

Appellant argues that the penalty phase verdict must be reversed because the trial court erroneously prevented him from questioning prospective jurors who gave ambiguous questionnaire responses about whether or not anything prevented or substantially impaired their ability to return a verdict of life without the possibility of parole. (AOB 383-388.) This Court should reject the argument as forfeited because appellant never raised this objection below. (*People v. Foster*, *supra*, 50 Cal.4th at p. 1324; *People v. Ferrel* (1972) 25 Cal.App.3d 970, 976.)

A request by the defense and seconded by the prosecution triggered the use of the written jury questionnaire. (2 RT 339.) The trial court granted counsels' request to orally voir dire the prospective jurors

following the trial court's oral voir dire. (2 RT 377-378.) Defense counsel made no objection during the following colloquy when the trial court explained the procedure now challenged by appellant:

> THE COURT: Okay. [¶] So everybody – one side and another gets half an hour. And you get another half an hour in the afternoon. Submit to me the topics that you want to cover with the jury in writing sometime next week. Because you won't get to that until Monday, the 4th of May, okay?
>
> So plan on half an hour on the morning of the 4th of May and another half an hour I would say probably Tuesday, the 5th of May, would be the second go around.
>
> Other than that, if a prospective juror gets up in the box and has answered the questions in the questionnaire and they seem like they are – they have been listening to the questions that have been asked by the Court and by counsel and they indicate that to you, I'm simply going to the challenges.
>
> MR. HARLEY: So half an hour for each side?
>
> THE COURT: Right. Will that work for you?
>
> MR. PARKIN: Guess it will have to.
>
> THE COURT: Well, you know, the questionnaire covers a lot of this stuff so – I mean what I've observed in other cases is the questionnaire starts to give you an indication of which jurors are acceptable or not. So – I mean that's why we're going to have them fill it out.
>
> MR. HARLEY: I presume you engage in some type of comprehensive voir dire in addition to –
>
> THE COURT: Yes, that's correct.
>
> MR. HARLEY: -- This juror questionnaire that they'll fill out. (2 RT 378-379.)

Appellant nevertheless contends that the trial court repeated the alleged error during substantive voir dire when it barred voir dire questining about the meaning of life without the possibility of parole and prospective jurors' impressions of that sentence. (Respondent's argument XLVIII, *ante.*) Appellant contends the trial court repeated the error by ruling that "these kinds of questions" were "inappropriate in view of the

fact that we used the questionnaire[]" (4 RT 625; AOB 385), and by thereafter announcing that counsel would have to rely on the questionnaires in order to make their determination of whether or not they should challenge jurors for cause or peremptorily challenge jurors. (4 RT 625-628; AOB 385).

But as noted in respondent's argument XLVIII, *ante,* the trial court reasonably ruled the questions inappropriate for several reasons: (1) they exceeded the topics suggested in the final written questionnaire and accompanying trial court rulings (4 RT 625-628); (2) they violated the spirit of California Supreme Court opinions prohibiting trial judges from telling jurors that the penalty of life without the possibility of parole will inexorably be carried out (4 RT 625-626); and (3) they involved a very sensitive (and therefore problematic) area (4 RT 627).

And appellant suggests no other specific areas in which the challenged trial court procedure rendered the voir dire inadequate to identify jurors whose death penalty views would prevent or substantially impair the performance of their duties as jurors in the case being tried. (*People v. Solomon*, *supra*, 49 Cal.4th at p. 839; *People v. Butler*, *supra*, 46 Cal.4th at p. 860; *People v. Coffman*, *supra*, 34 Cal.4th at p. 47; *People v. Cash*, *supra*, 28 Cal.4th at pp. 721-722.)

L. THE TRIAL COURT PROPERLY EXCLUDED PROPOSED PENALTY PHASE TESTIMONY BY A SENTENCING CONSULTANT REGARDING THE REALITIES OF LIFE WITHOUT POSSIBILITY OF PAROLE

Appellant argues that the penalty phase verdict must be reversed because the trial court erroneously excluded proffered penalty phase testimony by Norman M. Morein - a sentencing consultant who had worked for the Department of Corrections for more than a quarter century (Court Exh. 8, §§ 2 & 3; AOB 389) - regarding the realities of life without the possibility of parole. (AOB 389-404.) The defense submitted two written

offers of proof (Court Exh. 8 [dated 7/1/98]; 4 CT 1232-1233 [dated 7/6/98, filed 7/7/98]), and Morein testified at an Evidence Code section 402, hearing (28 RT 5535-5549; AOB 389) before the trial court ruled that the proposed testimony was inadmissible. (28 RT 5427-5431, 5537, 5589-5590, 5613; AOB 390).

Morein's proffered testimony concerned three topics: (1) The prison conditions faced by LWOP inmates, including they types of institutions where they are confined, their housing, security used at these institutions, the dangerousness of these institutions, and the curtailment of LWOP inmate activities (Court Exh. 1, p. 1, items 6-9; 4 CT 1233; 28 RT 5538-5541, 5545-5547; AOB 389); (2) statistics regarding the unlikelihood that LWOP prisoners would ever be presented to the governor for parole consideration via commutation (Court Exh. 8, p. 1, items 4 and 5; 28 RT 5427-5428; AOB 390); and (3) the socially useful work appellant could do while an LWOP inmate (Court Exh. 8, p. 1, items 10; 4 CT 1233; 28 RT 5541-5542; AOB 390).

This Court should reject as meritless appellant's argument that the trial court erred by excluding the proffered testimony. Evidence conerning conditions of confinement for a person serving as sentence of life without possibility of parole is not relevant to the penalty determination because it has no bearing on defendant's character, culpability, or the circumstances of the offense under either the Federal Constitution or Penal Code section 190.3, subdivision. (k). (*People v. Martinez* (2010) 47 Cal.4th 911, 963; *People v. Jones* (2003) 29 Cal.4th 1229, 1261; *People v. Quartermain* (1997) 16 Cal.4th 600, 632; *People v. Fudge* (1994) 7 Cal.4th 1075, 1117; *People v. Daniels* (1991) 52 Cal.3d 815, 876-878; *People v. Thompson*, *supra*, 45 Cal.3d at pp. 138-139.)

More importantly, describing future conditions of confinement for a person serving life without possibility of parole involves speculation as to

what future officials in another branch of government will or will not do. (*People v. Martinez*, *supra*, 47 Cal.4th at p. 963; *People v. Thompson*, *supra*, 45 Cal.3d at p. 139.) One cannot reasonably assume that the precise conditions described will remain static throughout a life sentence. (*People v. Martinez*, *supra*, 47 Cal.4th at p. 963.) Even at the penalty phase of a capital trial, the trial court determines relevancy in the first instance and retains discretion to exclude evidence whos probative value is substantially outweighed by the probability that its admission will create substantial danger of confusing the issues or misleading the jury. (*People v. Martinez*, *supra*, 47 Cal.4th at p. 963, citing *Lockett v. Ohio* (1978) 438 U.S. 586, 604 fn. 12 [98 S.Ct. 2954] and *People v. Fauber* (1992) 2 Cal.4th 792, 856.)

LI. THE TRIAL COURT PROPERLY RESTRICTED DEFENSE COUNSEL FROM DESCRIBING THE CONFINEMENT CONDITIONS OF A SENTENCE OF LIFE WITHOUT THE POSSIBILITY OF PAROLE AND FROM COMMENTING ON OTHER WELL-KNOWN CASES WHERE LIFE WITHOUT THE POSSIBILITY OF PAROLE WAS IMPOSED

Appellant argues that the trial court unconstitutionally restricted defense counsel's penalty phase argument by (1) sustaining the prosecutor's objection when defense counsel started to discuss how an LWOP sentence would confine appellant for the rest of his life to a small cell with a metal door (28 RT 5613, 30 RT 5831); (2) precluding defense counsel from discussing "any of the future possible impact prison may have on a person"; and (3) commenting on other well-known cases in which life without the possibility of parole was imposed (28 RT 5613, 30 RT 5770-5771). (AOB 405-407.)

The cited trial record references show the following pertinent events: (1) the trial court announced during a pre-penalty phase in limine conference that case law appeared to render inadmissible proffered penalty phase testimony regarding the conditions of confinement and the life one would lead during a life sentence without the possibility of parole (28 RT

5613); (2) when defense counsel Harley then asked "... can we make reference to that in final closing argument[,]" the trial court replied, "No." (28 RT 5613); (3) when defense counsel Harley argued in his penalty phase argument that an LWOP sentence would confine appellant "...to live in a six by eight cell surrounded by brick and a metal door for the rest of his life[] [a]nd basically given the life –", the trial court sustained the prosecutor's objection that the argument in question "assumes facts not in evidence, argument outside the evidence[]" (30 RT 5831); and (4) when defense counsel Harley asked during an in limine conference preceding closing penalty phase arguments if it would allow defense counsel to comment on other reasonably well-known cases in which LWOP was imposed, the trial court confirmed that it would not allow such a comment if made to support a claim that appellant therefore deserved a similar sentence (30 RT 5770-5771).

This Court should reject as meritless appellant's argument that the trial court unconstitutionally restricted his penalty phase argument. The trial court properly ruled inadmissible proffered penalty phase testimony regarding the conditions of confinement and the life one would lead during a life sentence without the possibility of parole because it had no bearing on appellant's character, culpability, or the circumstances of the offense under either the Federal constitution or Penal Code section 190.3, subdivision (k). (Respondent's argument L, *ante; People v. Martinez*, *supra*, 47 Cal.4th at p. 963; *People v. Jones*, *supra*, 29 Cal.4th at p. 1261; *People v. Quartermain*, *supra*, 16 Cal.4th at p. 632; *People v. Fudge*, *supra*, 7 Cal.4th at p. 1117; *People v. Daniels*, *supra*, 52 Cal.3d at pp. 876-878; *People v. Thomson*, *supra*, 45 Cal.3d at pp. 138-139.)

The trial court properly sustained the prosecutor's objection that defense counsel Harley's argument describing the cell appellant would

occupy was based upon facts not in evidence. (*People v. Valencia, supra,* 43 Cal.4th at p. 264.)

The trial court properly precluded defense counsel Harley from comparing his case to other cases resulting in LWOP verdicts because such a comparison could not be made without a time-consuming inclusion of all the facts in mitigation and aggravation in those cases, cases in any event tried before different juries. (*People v. Benavides* (2005) 25 Cal.4th 69, 110-111.)

Appellant contends defense counsel should have been allowed to discuss the nature of an LWOP sentence in penalty phase argument even if evidence of the conditions of confinement were properly excluded. (AOB 406-407.) But the opinions relied upon by appellant do not undermine any of the trial court's rulings. These opinions merely hold that defense counsel may argue the severity of a sentence of life without the possibility of parole when contrasting it to the death penalty alternative in order to stress to jurors the gravity of their task. (*People v. Gutierrez, supra,* 28 Cal.4th at pp. 1159-1160; *People v. Daniels*, *supra*, 52 Cal.3d at pp. 877-878; *People v. Thompson*, *supra*, 45 Cal.3d at p. 131 n. 129.) During his closing argument, defense counsel Harley did just that (30 RT 5810, 5831, 5836.)

Appellant finds it difficult to reconcile this Court's opinion restricting capital case defense counsel from comparing their cases to cases in which LWOP was imposed (*People v. Farley* (2009) 46 Cal.4th 1053, 1130-1131; *People v. Benavides*, *supra*, 25 Cal.4th, at pp. 110-111; *People v. Hughes* (2002) 27 Cal.4th 287, 400; *People v. Roybal* (1998) 19 Cal.4th 481, 528-529) with opinions by this Court permitting prosecutors to allude to well-known cases in their arguments (*People v. Jablonski, supra,* 37 Cal.4th at pp. 836-837; *People v. Jones*, *supra*, 15 Cal.4th at p. 180; *People v. Bloom* (1989) 48 Cal.3d 1194, 1213). (AOB 406 and 406 fn. 222.) But there is no

difficulty. This Court has always concluded that prosecutors should refrain from comparing defendants to historic or fictional villains when the comparisons are wholly inappropriate or unlinked to the evidence. (*People v. Jablonski*, *supra*, 37 Cal.4th at p. 837; *People v. Jones*, *supra*, 15 Cal.4th at p. 180; *People v. Bloom*, *supra*, 48 Cal.3d at p. 1213.) It has found either permissible or nonprejudicial brief prosecution references to notorious villains made not for the purpose of comparison, but solely to illustrate a larger point. (*People v. Jablonski*, *supra,* 37 Cal.4th at p. 837, references to Elena Bobbitt and the Menendez brothers in order to illustrate the larger point about defenses based on shifting moral culpability away from defendant; *People v. Jones*, *supra*, 15 Cal.4th at pp. 179-180, references to Adolph Hitler and Charles Manson in a sanity phase argument in order to illustrate the larger point about irrational murders committed by sane people; *People v. Bloom*, *supra*, 48 Cal.3d at p. 1213, reference to Fu Manchu as evil incarnate when describing the aggravated nature of defendant's multiple killings.)

Appellant argues that the trial court's error requires reversal of the penalty phase verdict for the following reasons: (1) the error violated appellant's Sixth, Eighth and Fourteenth Amendment rights to the effective assistance of counsel, to due process, to present a defense, to freedom from cruel and unusual punishment, and to a reliable penalty determination; (2) it violated appellant's constitutional right to have counsel present closing argument (*Herring v. New York* (1975) 422 U.S. 853, 856-862 [95 S.Ct. 2550, 45 L.Ed.2d 592]); and (3) it was not harmless beyond a reasonable doubt (*Chapman v. California*, *supra*, 386 U.S. at p. 24) given the mitigating evidence presented to the jury. (AOB 407.)

But the trial court's discretionary application of state evidentiary rules did not implicate the Federal Constitution by rendering appellant's trial fundamentally unfair. (*People v. Lindberg*, *supra*, 45 Cal.4th at p. 26;

People v. Patida, *supra*, 37 Cal.4th at p. 439; *People v. Harris*, *supra*, 37 Cal.4th at p. 336; *People v. Kraft*, *supra*, 23 Cal.4th at p. 1035.) And the trial court's exercise of discretion over the scope of closing argument and the propriety of statements made during closing argument did not implicate appellant's constitutional right to have counsel present closing argument. (*Herring v. New York*, *supra*, 422 U.S. at p. 862; *People v. Benavides*, *supra*, 25 Cal.4th at p. 1110.) Even had the trial court erred, reversal of the penalty phase verdict is unwarranted because there is no reasonable possibility the verdict would have been different absent the error. (*People v. Jones, supra,* 29 Cal.4th at pp. 1264 fn. 11.)

LII. THE TRIAL COURT'S INSTRUCTIONS DID NOT INCLUDE CONFLICTING INSTRUCTIONS REGARDING ALTERNATE JURORS' ABILITY TO CONSIDER LINGERING DOUBT

Appellant contends the penalty phase verdict must be reversed because the trial court's final penalty phase instructions included conflicting instructions regarding the ability of two alternate jurors – who were substituted into the jury at the beginning of appellant's penalty phase trial (28 RT 5587; AOB 408) – to consider lingering doubt. (AOB 408-411.) Respondent quotes the following portion of the trial court's final penalty phase instructions which contains the alleged conflicting instructions, with the alleged conflicting instructions highlighted:

> The defendant in this case has been found guilty of two counts of murder of the first degree. The allegation that the murder was committed under a special circumstance has been specially found to be true.
>
> Though there have been convictions for two counts of first degree murder, the special circumstance of multiple murder constitutes a single special circumstance.
>
> The fact that a special circumstance has been specially found to be true may be considered by you only under factor (a).
>
> You may consider victim impact evidence only under Factor (a).

> *Alternate jurors who have not been placed as jurors during this phase of the trial must accept the guilty phase verdicts and findings during deliberations of the appropriate penalty.*
>
> The jury should not consider or discuss either the deterrent effects of capital punishment or the cost of either penalty.
>
> If evidence of any mitigating circumstance or evidence of any aspect of the defendant's background or his character arouses sympathy, empathy or compassion, you may consider that in determining the appropriate penalty.
>
> *If you have any lingering doubt after full consideration of the evidence presented during the guilt phase as to the guilt of the defendant or as to the culpability on the part of the defendant you may consider that lingering doubt in making your determination as to which penalty is appropriate.* (30 RT 5845-5845; emphasis added.)

Appellant contends for the following reasons that there is a reasonable likelihood the two alternate jurors would have found the two instructions inconsistent: (1) the distinction between a reasonable doubt and a lingering doubt is subtle, sophisticated, and unfamiliar and unintuitive to lay persons. (AOB 408); (2) the instruction focused on the alternate jurors singled them out from the other jurors; and (3) the trial court's penalty phase instructions instructions (a) did not state that the alternate jurors were to participate fully in the deliberations, including such review as may be necessary of the evidence presented in the guilt phase of the trial, and (b) did not direct the original jurors to set aside and disregard any earlier deliberations and begin deliberations anew with the substituted jurors with respect to the evidence presented in the guilt phase of the trial (AOB 409-410).

This Court should reject appellant's argument as forfeited because appellant did not request amplification or clarification of these instructions in the matter now suggested in the trial court. (*People v. Chatman*, *supra*,

38 Cal.4th at p. 393; *People v. Jablonski, supra*, 37 Cal.4th at p. 809; *People v. Jurado, supra,* 38 Cal.4th at p.. 124-125.)

If this Court considers the argument, it should in any event reject the argument as meritless. The instruction that alternate jurors should accept the guilt phase verdicts during penalty phase deliberations did not purport to limit the guilty phase evidence they could consider, whether in assessing the circumstances of the crime Penal Code section 190.3, subdivision (a), or in considering the existence of lingering doubt. (*People v. Cain* (1995) 10 Cal.4th 1, 66.) Notwithstanding appellant contention to the contrary, there was no reasonable likelihood that the two alternate jurors would have found the highlighted instructions inconsistent. During her penalty phase argument, the prosecutor discussed the concept of lingering doubt without excepting the two alternate jurors from her discussion. (30 RT 5791-5794.) Defense counsel Harley urged lingering doubt in his penalty phase argument without excepting the alternate jurors from that portion of his argument. (30 RT 5820-5822.)

The distinction between reasonable doubt and lingering doubt was not subtle, sophisticated, or unintuitive. Reasonable doubt prevents a guilty verdict. Lingering doubt can be considered as a mitigating factor at the penalty phase notwithstanding a guilty verdict.

The alternate jurors would have to abandon logic to infer from the trial court's instructions that they should step out of the jury room or stop their ears when the other ten jurors discussed lingering doubt during penalty phase jury deliberations.

Whether or not the penalty phase defense relied on lingering doubt and whether or not alternate jurors were substituted into the penalty phase, the trial court had no sua sponte duty to instruct penalty phase jurors at all on the mitigating factor of lingering doubt. (*People v. Gray* (2005) 37 Cal.4th 168, 232.) Instructions on Penal Code section 193, subdivision (a),

the circumstances of the crimes of which defendant was convicted, and the expanded Penal Code section 190.3, subdivision (k), factor would have sufficed to inform penalty phase jurors of their ability to consider lingering doubt. (*People v. Gray*, *supra*, 37 Cal.4th at p. 232; *People v. Johnson* (1992) 3 Cal.4th 1183, 1252.) The trial court in the case at hand gave both those instructions (30 RT 5840, 5842), as well as the lingering doubt instruction (30 RT 5846), to penalty phase jurors in the case at hand.

This Court should therefore reject appellant's claim of error even if it chooses to consider it on its merits.

Appellant contends the alleged error requires reversal of the penalty phase verdict for the following reasons: (1) although the United States Constitution does not directly require penalty phase juries to consider lingering doubt (*Franklin v, Lynaugh* (198) 487 U.S. 164, 173-174 [108 S.Ct. 2320, 101 L.Ed.2d 155]; *People v. Gray*, *supra*, 37 Cal.4th at p. 232) California has a constitutional duty of insuring that the relevance its own lingering doubt penalty phase defense is conveyed to the sentencing jury (AOB 410); (2) the error is not harmless beyond a reasonable doubt. (*Chapman v. California*, *supra*, 386 U.S. at p. 24; AOB 410); (3) given the importance of lingering doubt to the penalty determination, there is at least a reasonable possibility that a different penalty phase outcome would have occurred absent the error. (AOB 410-411). But reversal is unwarranted even if the trial court erred. For reasons set forth above, there is no reasonable likelihood that jurors believed the two alternates were excluded from penalty phase deliberation discussions of lingering doubt. There is therefore no reasonable possibility the verd ict would have been different absent the error. (*People v. Jones, supra*, 29 Cal.4th at p. 1264 fn. 11.)

LIII. JUDICIAL ELECTIONS DO NOT RENDER APPELLANT'S DEATH PENALTY UNCONSTITUTIONAL

Appellant argues that the election of California trial judges and the retention election of California justices render his death penalty unconstitutional because the pro-death penalty fervor of the electorate has made it impossible for the California judiciary to fairly adjudicate and review capital cases in California. (AOB 414-422.) This Court should reject appellant's argument as meritless. Appellant must show probability of actual judicial bias too high to be constitutionally tolerable in order to support his argument. (*Caperton v. A.T. Massey Coal Co.* (2009) 556 U.S. ___, ___ [129 S.Ct. 2252- 2259]; *People v. Cowan* (2010) 50 Cal.4th 401, 455-458.) Judicial rulings alone almost never constitute a valid basis for a claim of judicial bias. (*Liteky v. United States* (1993) 510 U.S. 540, 555 [114 S.Ct. 1147, 127 L.Ed.2d 474].) Appellant cannot therefore support his argument with commentaries about the fervor of the electorate, the political nature of the judicial elections or the high percentage of capital cases affirmed by this Court.

LIV. CALIFORNIA'S DEATH PENALTY STATUTES ARE CONSTITUTIONAL

Appellant contends that California's death penalty statutes – as interpreted by this Court and applied at appellant's trial – are unconstitutional. (AOB 423-430.) Pursuant to the procedure set forth in *People v. Schmeck* (2005) 37 Cal.4th 240, 303 fn. 22 and 303-304) appellant supports his argument by asking this Court to reconsider the following previously-rejected claims in order to preserve them for review.

(1). The circumstances of the crime penalty phase factor (Pen. Code, § 190.3, subd. (a); 30 RT 580) violates appellant's constitutional rights as unconstitutionally vague, a claim previously rejected in *People v. Mills, supra,* 48 Cal.4th 158, and earlier listed cases. (AOB 424.)

(2). The trial court's failure to require a unanimous finding that appellant committed criminal acts involving the express or implied use of criminal violence (Pen. Code, § 190.3, subd. (b); 30 RT 5841) violated appellant's federal constitutional rights, a claim previously rejected in *People v. D'Arcy* (2010) 48 Cal.4th 257, 408, and earlier listed cases; AOB 424-425) as did jury consideration of this factor when appellant when it had already convicted appellant of first degree murder, a claim previously rejected in *People v. Hawthorne* (1992) 4 Cal.4th 43, 77 (AOB 425).

(3). The trial court violated appellant's right to a unanimous jury verdict by failing to instruct jurors at the penalty phase that they had to unanimously agree that appellant had a prior felony conviction in order to consider penalty phase factor Penal Code section 190.3, subd. (c), a claim previously rejected by this Court in *People v. Martinez*, *supra*, 47 Cal.4th at p. 967, and other listed cases. (AOB 425-426.)

(4). The penalty phase consideration of appellant's 1992 assault conviction (29 RT 5651-5652, 30 RT 5841) under Penal Code section 190.3, subds. (b)(c), put appellant twice in jeopardy since guilt phase testimony had also been elicited on the underlying facts of the assault, a claim previously rejected by this Court in *People v. Bacigalupo* (1991) 1 Cal.4th 103, 134-135, vacated on other grounds in *Bacigalupo v. California* (1992) 506 U.S. 802 [113 S.Ct. 32, 121 L.Ed.2d 5].) (AOB 426.)

(5). The defendant's age (Pen. Code, § 190.3, subd. (i); 30 RT 5842) is an unconstitutionally vague penalty phase factor, a claim previously rejected by this Court in *People v. Mills*, *supra*, 48 Cal.4th at p. 213, and other listed cases. (AOB 426.)

(6). CALJIC No. 8.85 (30 RT 5840-5842) is unconstitutional because (a) it failed to delete inapplicable sentencing factors; (b) contained vague and ill-defined factors, particularly factors (a) and (k); (c) limited factors (d) and (g) by adjectives such as "extreme" or "substantial"; and (d) failed to

specify a burden of proof as to either mitigation or aggravation, claims previously rejected by this Court in *People v. D'Arcey*, *supra*, 48 Cal.4th at p. 308, and other listed cases. (AOB 426-427.)

(7). California's capital punishment scheme violates the Eighth Amendment by failing to provide a meaningful and principled way to distinguish the few defendants who are sentenced to death from the vast majority who are not, a claim previously rejected by this Court in *People v. D'Arcy*, *supra*, 48 Cal.4th at p. 308, and other listed cases. (AOB 427.)

(8). The trial court violated the Federal Constitution by failing to instruct jurors that they must find beyond a reasonable doubt that (a) aggravating circumstances exist, (b) aggravating circumstances outweigh mitigating circumstances, and (c) death is the appropriate punishment, a claim previously rejected by this Court in *People v. D'Arcy*, *supra*, 48 Cal.4th at p. 308, and other listed cases. (AOB 427-428.)

(9). The California death penalty scheme fails to require written findings by the jury regarding the aggravating and mitigating factors found and relied on and the fact aggravation outweighed mitigation, a claim rejected by this Court in *People v. D'Arcy*, *supra*, 48 Cal.4th at p. 308, and other listed cases. (AOB 428.)

(10). The trial court failed to inform the penalty phase jury that it must return a verdict of life without the possibility of parole if it finds mitigation outweighs aggravation, a claim previously rejected by this Court in *People v. McWhorter* (2009) 47 Cal.4th 318, 379 and other listed cases. (AOB 428.)

(11). The following instruction is unconstitutionally vague: Jurors may only impose a death sentence if the aggravating circumstances are "so substantial" in comparison to mitigation circumstances that death is warranted. (30 RT 5853.) This claim has been previously rejected by this

Court in *People v. Carrington* (2009) 47 Cal.4th 145, 199, and other listed cases. (AOB 428-429.)

(12). The California death penalty scheme unconstitutionally fails to require intercase proportionality review, a claim previously rejected by this Court in *People v. D'Arcy*, *supra*, 48 Cal.4th at 308; and other listed cases. (AOB 429.)

(13). The California death penalty scheme unconstitutionally fails to afford capital defendants the same kind of disparate sentence review afforded felons under the determinate sentence law, a claim previously rejected by this Court in *People v. D'Arcy*, *supra*, 48 Cal.4th at p. 308; and other listed cases. (AOB 429.)

(14). The California death penalty scheme violates international law, a claim previously rejected by this Court in *People v. D'Arcy*, *supra*, p. 48 Cal.4th at p. 308; and other listed cases. (AOB 429-430.)

(15). The death penalty violates the Eighth Amendment, a claim previously rejected by this Court in *People v. McWhorter*, *supra*, 47 Cal.4th at p. 379 and other listed cases. (AOB 430.)

(16). The foregoing deficiencies cumulatively render California's death penalty scheme unconstitutional. (AOB 430.)

This Court should reject appellant's argument as meritless. Appellant provides no reason for this Court to revisit its previous decisions rejecting the contentions he raises challenging California's death penalty scheme. Viewed singly or cumulatively, appellant's claims are meritless because California's challenged statutory death penalty scheme is constitutional. (*See: People v. Foster*, *supra*, 50 Cal.4th at pp. 1363-1368.)

LV. APPELLANT WAS NOT DEPRIVED OF HIS SIXTH AMENDMENT RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL AT THE PENALTY PHASE

Should this Court determine that any of appellant's claims are forfeited, appellant argues that his trial attorney deprived him of his Sixth Amendment right to the effective assistance of counsel by failing to preserve those claims. (AOB 431.) This Court should reject the contention because appellant cannot prove from the state record that his trial counsel acted in professionally unreasonable manner and that different verdicts would have been reasonably probable but for his trial counsel's alleged failings. (*Strickland v. Washington*, *supra*, 466 U.S. at 679-684; *People v. Jennings*, *supra*, 53 Cal.3d at p. 376.)

Appellant alternatively contends that the constitutional issues he raises are not waived by inadequate trial court objection. (*People v. Yeoman*, *supra*, 31 Cal.4th at pp. 117-118, 132; *People v. Coddington*, *supra*, 23 Cal.4th at p. 632; AOB 431.) But reviewing courts have ruled that appellants forfeited constitutional claims by failing to preserve them with adequate objections in the trial courts. (*People v. Tafoya*, *supra*, 42 Cal.4th at p. 166; *People v. Geier*, *supra*, 41 Cal.4th at p. 609; *People v. Halvorsen*, *supra*, 42 Cal.4th at pp. 413-414.)

LVI. THERE IS NO REVERSIBLE CUMULATIVE ERROR REQUIRING REVERSAL OF THE DEATH PENALTY VERDICT

Appellant argues that the seriousness and number of errors in the trial court require reversal of the death penalty verdict even if they would not have required reversal if viewed in isolation. (AOB 432.)

This Court should reject appellant's argument because: (1) there were no errors to cumulate; and (2) assuming arguendo that there were, reversal is nevertheless unwarranted because a different penalty phase verdict would

not have been reasonably possible in their absence. (*People v. Jones*, *supra*, 29 Cal.4th at p. 1264 fn. 11.)

CONCLUSION

Accordingly, respondent respectfully requests that the judgment be affirmed.

Dated: January 24, 2011

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached Respondent's Brief uses a 13 point Times New Roman font and contains 102,677 words.

Dated: January 24, 2011

KAMELA D. HARRIS.
Attorney General of California

GARRETT BEAUMONT
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DECLARATION OF SERVICE BY U.S. MAIL

Case Name: ***PEOPLE V. LAM THANH NGUYEN***
No.: **S076340**

I declare:

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

On January 25, 2011, I served the attached ***RESPONDENT'S BRIEF*** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system at the Office of the Attorney General at 110 West A Street, Suite 1100, P.O. Box 85266, San Diego, CA 92186-5266, addressed as follows:

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I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on January 25, 2011, at San Diego, California.

Terri Garza
Declarant

Terri Garza
Signature

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