In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, **v.** **MAGDALENO SALAZAR,** Defendant and Appellant.	**CAPITAL CASE** Case No. S077524

Los Angeles County Superior Court Case No. BA081564
The Honorable Robert J. Perry, Judge

RESPONDENT'S BRIEF

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STATEMENT OF THE CASE

In an amended information filed by the Los Angeles County District Attorney, appellant was charged with the murder of Enrique Guevara (Pen. Code,[1] § 187, subd. (a)), with the special-circumstance allegation that appellant was previously convicted of first degree murder (§ 190.2, subd. (a)(2)). It was further alleged that appellant personally used a firearm (§ 12022.5, subd. (a)), and that a principal was armed with a firearm (§ 12022, subd. (a)(1)). (1CT 171-172.) Appellant pled not guilty and denied the special-circumstance allegations. (1CT 173.)

Trial was by jury. (2CT 354-355.) Appellant's motion to dismiss pursuant to section 1118.1 was heard and denied. (2CT 361.) The jury found appellant guilty of first degree murder, and found the special-circumstance and special allegations to be true. (2CT 444.) At the conclusion of the penalty phase, the jury fixed the penalty at death. (3CT 482, 484.)

Appellant's motion for a new trial was denied. The court sentenced appellant to death, in accordance with the jury's verdict. In addition, the court stayed the sentences on the special allegations. (3CT 525-529, 534-542.)

This appeal is automatic following a judgment of death. (§ 1239, subd. (d).)

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

STATEMENT OF FACTS

A. Evidence Presented at the Guilt Phase

1. Prosecution

a. Eyewitnesses

On July 25, 1993, at approximately 2:30 a.m., Arnold Lemus, Juan Salazar, and Mario Ramirez were at the restaurant Yoshinoya Beef Bowl on the corner of Figueroa and 30th Streets in Los Angeles. (3RT 606-607, 617.) As the three men were eating, appellant and co-defendant Enrique Echeverria[2] approached them. Appellant, a Hispanic man in a white T-shirt, asked where Lemus and the others were from, meaning to which gang did they belong. Neither Lemus, Salazar, nor Ramirez were gang members, and stated as much. Lemus told the gang member that they belonged to a "party crew."[3] (3RT 609, 617, 620.)

Appellant then stated that he and Echeverria were "Harpys" gang members. Lemus responded that it "was cool, because [he] didn't have nothing against nobody like that." Lemus did not want any trouble. (3RT 608-609.) Appellant and Echeverria then walked outside the restaurant. Appellant stood next to a security guard outside the front door. A short time later, Lemus and the others heard gunshots. They sounded "real close." Everyone ducked under their seats. After the shooting stopped, Lemus went outside. He saw Enrique Guevara laying face down in a pool of blood. Guevara had a cast on one of his legs. (3RT 609-610, 622-623.)

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[2] Throughout the trial, Echeverria was referred to by his nickname, "Rascal."

[3] According to Lemus, a party crew is a "bunch of young adults, just hang together, call themselves a name and go[] out to parties." (3RT 608.)

Prior to July 25, 1993, Kathy Mendez had known appellant for about two years and had seen him around two or three times. In the late evening on July 24, 1993, Mendez and Cynthia Bonilla were at a Jack-in-the-Box restaurant where they saw appellant and Echeverria. Mendez and Bonilla left Jack-in-the-Box with appellant and Echeverria. Mendez, appellant, and Echeverria were all members of the Harpys gang.[4] Appellant was wearing a white T-shirt. Appellant drove the group to the Yoshinoya Beef Bowl on the corner of Figueroa and 30th Streets. (3RT 629-632, 635.)

After entering Yoshinoya, Mendez went to order food while appellant and Echeverria sat down. Mendez heard appellant and Echeverria talking. The two were talking about taking "care of the business," or taking "care of the neighborhood." Mendez heard appellant state that he did not "want to be caught slipping." Mendez believed this to mean that appellant and Echeverria had to protect their territory from other gangs. (3RT 635-637.) Mendez heard appellant tell Echeverria to get the "cuete."[5] Echeverria went outside to the car, leaned forward and grabbed something out of the car, and tucked what appeared to be a gun into the waist of his pants. (3RT 642-643, 654-655.)

Appellant and Echeverria then stood outside the front door of the Yoshinoya. Appellant had a gun. It looked like a 9-millimeter. (3RT 638-639, 647-648.) Mendez then saw a man with a cast on his leg limp by the Yoshinoya. He looked like another gang member. (3RT 646-648.) Appellant and Echeverria pushed the man. The man tried to run, but he could not because of his bad leg. Appellant and Echeverria began wrestling with the man. Mendez then saw appellant and Echeverria with guns.

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[4] Appellant's gang moniker was "Toy." Echeverria's gang moniker was "Rascal." (3RT 630, 713-714.)

[5] "Cuete" is slang for gun. (3RT 643.)

Mendez saw appellant pointing his gun and then heard several gun shots. Mendez dropped to the floor. (3RT 649-651, 655-656.) After the shooting stopped, Mendez went outside and saw appellant and Echeverria running through the parking lot to the car. (3RT 657-658.) Mendez then saw the man with a cast on his leg lying face down in a pool of blood. (3RT 659.) When Mendez saw that the dead person was not appellant or Echeverria, she told Bonilla that they needed to leave. (3RT 660-661.)

On July 25, 1993, at approximately 2:30 a.m., Emilio Antelo was working as the security officer at Yoshinoya. Antelo was in uniform and carrying a gun. (4RT 737-739.) Antelo saw a car drive up and park in the lot. The passenger, Giovanni Guevara, got out of the car and went into Yoshinoya. The driver, Enrique Guevara, then got out of the car and walked past Yoshinoya towards the café located next door. (4RT 741-742.) Antelo heard a "metallic sound" that sounded like the cocking of a gun. Antelo turned around and saw a young Hispanic man walking towards Guevara with a semi-automatic pistol. Antelo then heard another weapon being cocked. He turned and saw another young Hispanic man with a semi-automatic pistol moving towards Guevara. Antelo did not see Guevara with a weapon. (4RT 742-744, 746-748, 751.) Antelo knew there was going to be trouble, and proceeded to enter Yoshinoya. As soon as Antelo entered Yoshinoya, he heard the first gunshot. Antelo then heard several more gunshots. Antelo ordered the cook to call the police. After the shooting stopped, Antelo went back outside. Antelo saw Guevara lying on the ground. (4RT 745.)

At approximately 2:30 a.m., Patrick Turner was walking past Yoshinoya. Turner saw a car enter the parking lot. Turner saw Giovanni, a passenger in the car, get out and walk into Yoshinoya. The driver, Guevara, then got out of the car. (4RT 783-785.) Appellant and Echeverria approached Guevara and stated, "Don't I know you from somewhere?"

The men argued with Guevara and began pushing him. The men wrestled as they pushed Guevara into the café next to Yoshinoya. Appellant pulled out a gun. Echeverria, also with a gun, stepped into the café and the shooting started. Appellant and Echeverria ran out of the café, got into a car, and drove away. Guevara lay dead on the floor of the café. (4RT 786-789.) Turner did not see any other guns at the shooting. (4RT 791.)

At approximately 3:00 a.m., Sabino Nungaray, a Harpys gang member, was awakened by a knock at his door by appellant. Appellant told Nungaray that Echeverria had been shot. Nungaray went outside and saw Echeverria sitting in the front seat of passenger side of the car. Nungaray got inside the car with appellant and Echeverria. He could tell Echeverria had been shot because he could not talk or do anything. (3RT 711-718.) Appellant drove the car to the hospital. Upon arriving at the hospital, Nungaray got Echeverria out of the car and took him inside the hospital. Appellant drove away. (3RT 719-720.)

b. Investigation

Los Angeles Police Detective Michael McPherson was assigned to investigate the shooting. (4RT 807-808.) Upon arriving at the scene, Detective McPherson saw Guevara's car parked in front of the Au Rendez-Vous café. The doors between the café and Yoshinoya were approximately 20 feet apart. (4RT 809.)

At approximately 8:30 a.m., Detective McPherson interviewed Turner. Turner stated that after Guevara's car parked in the parking lot, Giovanni got out of the passenger side of the car and went into Yoshinoya. He then saw Guevara get out of the car. Two men, one in a white T-shirt and one in a black shirt, approached Guevara. One of the men asked Guevara, "Don't I know you from somewhere?" After that, the two men began to wrestle with Guevara. Turner stated that he saw the man in the

white T-shirt push Guevara into the café and then pull out a gun. As that was taking place, the man in the black shirt stood in the doorway and started shooting into the café. After the shooting, Turner stated that he saw the two men running from the café to a car in the parking lot. (4RT 810-811.)

Dr. Ogbonna Chinwah, Deputy Medical Examiner for the Los Angeles County Coroner, performed an autopsy on Guevara. Guevara died of multiple gunshot wounds. Overall, Guevara was shot nine times, which caused 22 holes in his body. He suffered one gunshot to his left chest, one to the top of his left shoulder, one to the back of the head, one to the right side of the back of the neck which hit the spinal cord, one to the back (in the right shoulder), one which grazed the back of his armpit, one to the left forearm, one to the left side of the back, and one to his left hand. (4RT 820-831, 838-840, 850.)

c. Expert Testimony

Los Angeles Police Officer Freddi Arroyo was a member of the Los Angeles Police Department gang unit. [6] Officer Arroyo had specific knowledge of the Harpys gang. Harpys was a Hispanic gang whose border ranged from Jefferson Boulevard to the south, Washington Boulevard to the north, Figueroa on the east, and Normandie on the west. (4RT 768-769.) In his position on the gang unit, Officer Arroyo had contact with appellant. Officer Arroyo knew appellant by the moniker "Toy." (4RT 770.) Appellant admitted that he was a member of the Harpys gang. Appellant had several tattoos identifying himself as a Harpys gang member. He had the word "Toy" on his right hand, "HPS" on his the elbow, and

[6] The parties stipulated that Officer Arroyo was a gang expert. (4RT 769.)

"Harpys" across his back. The tattoos indicated that appellant was heavily involved in the gang. (4RT 771-773.)

Echeverria was also a member of the Harpys gang. "Cuete" means gun in the gang culture. (4RT 774.) The area of Figueroa and 30th Streets is on the fringe of the Harpys's territory. The strip mall where Yoshinoya was located was frequented by other gangs who came there to eat. If a gang member states that he has to take care of the neighborhood, he means that he has to protect the territory at all cost. When a gang member asks another person where they are from, he is asking the person what gang are they affiliated with. (4RT 775-776.)

d. Stipulations

The parties stipulated to Giovanni Guevara's testimony.[7] Giovanni was unavailable to testify at trial. He passed away on September 7, 1994, from respiratory failure as a result of cancer. (3RT 731.) Giovanni was Guevara's cousin. In the early hours of July 25, 1993, Giovanni and Guevara went to the Yoshinoya on the corner of Figueroa and 30th Streets. Guevara parked their car in front of the Au Rendez-Vous Café located next door to Yoshinoya. As Giovanni went inside the Yoshinoya to order food, he saw two "gangster-looking guys" walk into the restaurant. A few moments later he heard gunshots. Giovanni did not see who was shooting. Shortly thereafter, he learned his cousin had been shot to death. (3RT 730-731.)

It was further stipulated that 15 bullet casings were recovered from the crime scene. Twelve of the casings belonged to a 9-millimeter and were all fired from the same gun. The remaining three casings belonged to

[7] Respondent refers to Giovanni Guevara as Giovanni because he and the victim share the same last name.

a .25 caliber handgun, and all were fired from the same gun. (4RT 846.) It was also stipulated that of the nine bullets recovered from Guevara's body, three were identified as belonging to the same 9-millimeter handgun to which the bullet casings recovered from the crime belonged. The remaining six bullets were fragments and the caliber of those bullets could not be determined. (4RT 851.)

2. Defense Evidence

On July 25, 1993, in the early morning hours, Echeverria was at the Yoshinoya restaurant in Los Angeles. Echeverria shot and killed Guevara. Echeverria went to trial and was convicted for killing Guevara. He was sent to prison for the killing. (5RT 860-861.)

According to Echeverria, earlier that evening, he and appellant were at a Jack-in-the-Box restaurant on 24th and Vermont Avenue, where they met Mendez and Bonilla. It appeared that Mendez and Bonilla were under the influence of P.C.P. (5RT 861, 863-864.) Echeverria drove appellant and the two girls to Yoshinoya. Once inside, Echeverria and appellant sat down while the girls went to order food. (5RT 865.)

A short time later, Echeverria and appellant went outside. Echeverria and appellant stood out front of Yoshinoya. There was a security guard on duty. Echeverria saw a car driving by with two people inside, and the occupants just stared at him. The people in the car looked like "gang bangers." (5RT 866-869.) Echeverria went to his car to get a gun for protection. It was a 9-millimeter. He placed the gun in his waistband. (5RT 871, 872, 877.) After the car parked, the passenger got out and went inside Yoshinoya. The driver, Guevara, then got out of the car. He appeared under the influence of drugs. (5RT 869.)

After getting out of the car, Guevara sat down a few feet away from Echeverria. Guevara said something about "Trece" to Echeverria and then

started shooting at him. Echeverria believed Guevara was referring to a gang. Echeverria was shot three times. When Echeverria went for his gun, he was shot three more times. (5RT 870-872.) Echeverria was shot in the stomach area and his arms. (5RT 873.) Echeverria shot Guevara with the entire clip, 14 bullets. As the two were shooting each other, they began wrestling for the guns. They ended up inside the café next door to Yoshinoya. Echeverria fell on top of Guevara. Appellant picked Echeverria up and took him to the car. Echeverria shot Guevara because he was scared for his life. (5RT 874-876.)

Richard Lonsford, a private investigator, was assigned by the court to assist the defense. Lonsford spoke with Mendez. Mendez stated that she never saw anyone firing a gun. Mendez also stated that she saw appellant helping Echeverria to the car. (5RT 940-941.)

The parties stipulated that Guevara had some gunshot particles on his hand and therefore discharged a firearm or had his hand in the vicinity of gunshot residue. (5RT 943.)

B. Evidence Presented at Penalty Phase

1. Prosecution's Case in Aggravation

a. Appellant's Prior Murder Conviction

Deputy District Attorney Keri Modder prosecuted a felony murder case, case number BA125255, involving three defendants, one of whom was appellant. Appellant was charged with murder with the special-circumstance that the murder was committed during the commission of a robbery. There were also special allegations of personal use of a handgun and that a principal was armed with a handgun. Appellant was convicted of first degree murder with a true finding as to the special-circumstance and to the armed principal allegation. (6RT 1074-1075.)

Appellant and two of his Harpys gang members went to an apartment to visit two girls they knew. While visiting the sisters, a neighbor left his apartment to go to the market. Appellant saw the man leave. Appellant believed the man had money and jewelry, and also thought he was a drug dealer. Appellant and the others planned to rob the man when he returned from the store. (6RT 1075-1076.)

Appellant and his two Harpys friends watched out the window for the man to return home. In the meantime, they loaded a gun that one of appellant's friends had brought along. In addition, appellant and another of the gang members cut holes out of beanies to hide their faces. After the man returned home, two of the Harpys gang members pulled the beanies over their heads like ski masks and went next door. As appellant and the others attempted to rob the neighbor, shots were fired. The neighbor was killed in the hallway. (6RT 1076-1078.)[8]

b. Victim Impact Evidence

Rosa Guevara was Guevara's mother. Rosa had three children, with Guevara being the oldest. Rosa has not been feeling well since Guevara died. Guevara was a "good boy." He was caring and affectionate. Guevara was twenty years old when he died. He used to help Rosa at work. Rosa misses Guevara very much. (6RT 1091-1093.)

Ana Guevara was Guevara's sister. She and Guevara had a wonderful, close relationship. He would give Ana advice. Also, Guevara would share his earnings from work with Ana and Rosa. Guevara assumed the role of "man of the house" because their father was not around. Since

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[8] The prosecution also introduced a packet containing a record of the conviction, a photograph of appellant, and the charges alleged against appellant. (6RT 1083-1085.)

Guevara's death, life has been difficult. Ana hears her mother crying at night. Ana also has developed epilepsy since Guevara's death. (6RT 1093-1095.)

2. Appellant's Case in Mitigation

Maria Elena Salazar was appellant's mother. Salazar had four children, three girls and appellant. Growing up, appellant went to Vermont Elementary School and Martin Luther King Elementary School. When appellant was approximately 11 years old, he was hit by a car. Appellant suffered from fractured legs and a head injury. (6RT 1097-1098.) He missed about four or five months of school. (6RT 1100.)

Both Salazar and her husband worked full time while appellant was growing up. She and her husband were only around on weekends and when they returned from work. The last school appellant attended was middle school. (1099-1100.) Appellant got along well with others. He was wonderful with his family. He was "very sweet." (6RT 1101.) When appellant was around 17 years old, Salazar found out appellant was a Harpys gang member. Salazar was upset because appellant had "markings" on his body. He had tattoos on his hand, arm, and back. She told him not to hang around "bad people." (6RT 1101-1102.) Salazar was saddened by what occurred. She still loved appellant. She asked for compassion for appellant. Salazar asked that appellant not be given the death penalty. (6RT 1103-1104.)

Guillermina Juarez was appellant's sister. She was about seven years older than appellant. Juarez grew up with appellant until she was 17 years old, when she got married and moved away. Juarez was close with appellant. She used to take care of him when he was recovering from the car accident. When Juarez had her children, appellant would come over and play with the kids. (6RT 1109-1110.)

At some point, appellant changed the way he dressed. Juarez thought appellant might have joined a gang. Juarez has spoken with appellant almost every day since his arrest. Appellant stated that he was sorry for what had happened in this case and in the past case. Juarez did not want appellant to receive the death penalty. (6RT 1111-1112.)

Loretta Corral had known appellant since he was about nine years old. Corral lived in the same apartment house as appellant. She knew him very well. Corral wanted to join the Harpys gang, but appellant would always tell Corral to go home, that the gang was not for her. Appellant would give Corral advice on everything, including boyfriends. He would tell Corral if she was heading in the wrong direction. Appellant looked out for Corral and lectured her if she was doing something that she should not be doing. Corral felt that if it was not for appellant, she would be dead or pregnant. Appellant helped Corral a lot. He was a "very lovable person." Appellant told Corral that he was sorry that someone died. (6RT 1115-1118.)

ARGUMENT

I. SUBSTANTIAL EVIDENCE SUPPORTS APPELLANT'S CONVICTION FOR FIRST DEGREE MURDER

Appellant contends that there was insufficient evidence to support his conviction for first degree murder. (AOB 32-69.) Appellant's contention must be rejected because substantial evidence supports the conviction.

A. Applicable Law

In determining sufficiency of the evidence, an appellate court reviews the entire record in the light most favorable to the prosecution to determine whether it contains evidence that is reasonable, credible, and of solid value, from which a rational trier of fact could find the defendant guilty beyond a reasonable doubt. (*People v. Kipp* (2001) 26 Cal.4th 1100, 1128; *People v.*

Marshall (1997) 15 Cal.4th 1, 34.) An appellate court must presume in support of the judgment the existence of every fact the trier of fact could reasonably have deduced from the evidence. (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206; *People v. Barnes* (1986) 42 Cal.3d 284, 303; *People v. Johnson* (1980) 26 Cal.3d 557, 576-577.)

The oft-repeated rule is that, when a verdict is attacked on the ground that there is no substantial evidence to sustain it, the power of an appellate court begins and ends with the determination as to whether, on the entire record, there is any substantial evidence, contradicted or uncontradicted, which will support it; when two or more inferences can reasonably be deduced from the facts, a reviewing court is without power to substitute its deductions for those of the trier of fact. It is of no consequence that the trier of fact, believing other evidence, or drawing different inferences, might have reached a contrary conclusion. (*People v. Ceja* (1993) 4 Cal.4th 1134, 1138-1139; *People v. Johnson*, *supra*, 26 Cal.3d at pp. 576-577.) The appellate court does not reweigh evidence or redetermine issues of credibility. (*People v. Ochoa*, *supra*, 6 Cal.4th at p. 1206.)

When the evidence is circumstantial, the standard of review is the same. (*People v. Stanley* (1995) 10 Cal.4th 764, 793; *People v. Ceja*, *supra*, 4 Cal.4th at p. 1138.) If the circumstances reasonably justify the conviction, the possibility of a reasonable contrary finding does not warrant a reversal. (*People v. Kraft* (2000) 23 Cal.4th 978, 1053-1054; *People v. Ceja*, at p. 1139, fn. 1.)

First degree murder is found when the defendant killed with malice aforethought, intent to kill, premeditation, and deliberation. (§§ 187, 189.) This Court has defined "deliberate" as "formed or arrived at or determined upon as a result of careful thought and weighing of considerations for and against the proposed course of action." (*People v. Memro* (1995) 11 Cal.4th 786, 862-863; *People v. Perez* (1992) 2 Cal.4th 1117, 1123.)

"Premeditated" has been defined as "considered beforehand." (*People v. Perez*, at p. 1123.) Premeditation and deliberation can occur in a brief interval, and the test is not time, but reflection, as "'[t]houghts may follow each other with great rapidity and cold, calculated judgment may be arrived at quickly.'" (*People v. Osband* (1996) 13 Cal.4th 622, 697, quoting *People v. Memro*, *supra*, 11 Cal.4th at pp. 862-863; see also *People v. Bloyd* (1987) 43 Cal.3d 333, 348.)

Where, as here, an appellate court reviews the sufficiency of the evidence to support a jury's finding of first degree murder, the reviewing court need not be convinced beyond a reasonable doubt that the defendant premeditated the murder; the relevant inquiry on appeal is whether *any* rational trier of fact could have been so persuaded. (*People v. Lucero* (1988) 44 Cal.3d 1006, 1020; see also *People v. Wharton* (1991) 53 Cal.3d 522, 546.) In addition, the length of time which must pass before a killing can be described as deliberate and premeditated is a question of fact for the jury. (*People v. Wells* (1988) 199 Cal.App.3d 535, 540; see also *People v. Bender* (1945) 27 Cal.2d 164, 184.)

In *People v. Anderson* (1968) 70 Cal.2d 15, 26-27, this Court first set forth a tripartite test for analyzing the type of evidence sufficient to sustain a finding of premeditation and deliberation. There, the Court said that such evidence falls into three basic categories: (1) defendant's planning activity prior to the homicide; (2) his motive to kill; and (3) the manner of killing, from which it may be inferred that the defendant had a preconceived design to kill. This Court, however, has held that "[u]nreflective reliance on *Anderson* for a definition of premeditation is inappropriate." (*People v. Thomas* (1992) 2 Cal.4th 489, 517; see also *People v. Pride* (1992) 3 Cal.4th 195, 247; *People v. Perez*, *supra*, 2 Cal.4th at p. 1125.) Rather, the *Anderson* analysis was intended as a "framework" to assist reviewing courts in assessing whether the evidence supports an inference that a

homicide resulted from preexisting reflection and weighing of considerations; it did not refashion the elements of first degree murder or alter the substantive law of murder in any way. (*People v. Sanchez* (1995) 12 Cal.4th 1, 32; *People v. Thomas,* at p. 517; see also *People v. Daniels* (1991) 52 Cal.3d 815, 869-870.)

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

B. Substantial Evidence Supports Appellant's Conviction

Here, substantial evidence supports appellant conviction for first degree murder. Appellant and co-defendant Echeverria entered the

restaurant Yoshinoya Beef Bowl, on the corner of Figueroa and 30th Streets in Los Angeles, looking for trouble. Upon entering the restaurant, they immediately began approaching customers, asking about gang affiliations. (3RT 606-607, 617.) Appellant approached Lemus, Salazar, and Ramirez, who were sitting down and eating a meal, and asked where Lemus and the others were from, meaning to which gang did they belong. Neither Lemus, Salazar, nor Ramirez were gang members, and stated as much. (3RT 609, 617, 620.) Appellant then stated that he and Echeverria were "Harpys" gang members. Lemus responded that it "was cool, because [he] didn't have nothing against nobody like that." Lemus did not want any trouble. (3RT 608-609.) Appellant and Echeverria were then overheard talking about taking "care of the business," or taking "care of the neighborhood." Appellant state that he did not "want to be caught slipping." Mendez testified that this to meant that appellant and Echeverria had to protect their territory from other gangs. (3RT 635-637.) Mendez heard appellant tell Echeverria to get the "cuete." Echeverria then grabbed something out of the car, and tucked what appeared to be a gun into the waist of his pants. (3RT 642-643, 654-655.) Appellant was already armed with a 9-millimeter handgun. (3RT 649-651, 655-656; 4RT 742-744, 746-748, 751, 786-789.)

Multiple witnesses then testified that appellant and Echeverria were standing outside the Yoshinoya when a car drove-up and parked in the lot. The passenger, Giovanni Guevara, got out of the car and went into Yoshinoya. The driver, Enrique Guevara, who had a cast on his leg, then got out of the car and walked past Yoshinoya towards the café located next door. (4RT 741-742.) Mendez, Turner, and Antelo all saw appellant and Echeverria with guns. Appellant and Echeverria, with guns drawn, walked towards Guevara and asked, "Don't I know you from somewhere?" After that, appellant and Echeverria argued with Guevara and began pushing him. The men wrestled as they pushed Guevara into the café next to Yoshinoya.

Echeverria, also with a gun, stepped into the café and the shooting started. Appellant and Echeverria ran out of the café, got into a car, and drove away. Guevara lay dead on the floor of the café. (4RT 786-789.)

Guevara was shot nine times and died of multiple gunshot wounds. (4RT 820-831, 838-840, 850.) Fifteen bullet casings were recovered from the crime scene. Twelve of the casings belonged to a 9-millimeter and were all fired from the same gun. The remaining three casings belonged to a .25 caliber handgun, and all were fired from the same gun. (4RT 846.) No one saw Guevara with a weapon. (4RT 742-744, 746-748, 751, 791.)

Appellant contends that the lack of any planning activity and the manner of the killing does not support a finding of premeditation and deliberation. Specifically, appellant contends that he was only there to eat dinner at Yoshinoya, and he merely responded to Guevara's deadly attack. (AOB 65-69.) On the contrary, both appellant and Echeverria brought loaded guns to Yoshinoya. Bringing a loaded gun to the scene of the crime may be circumstantial evidence of planning activity. (*People v. Lee* (2011) 51 Cal.4th 620, 636 [bringing a loaded gun indicated defendant "had considered the possibility of a violent encounter"].) Moreover, before the shootings, appellant and Echeverria were targeting unsuspecting victims, obviously looking for trouble. They approached patrons of Yoshinoya and confronted them about their gang affiliation. (*People v. Francisco* (1994) 22 Cal.App.4th 1180, 1192 [defendant obtained a gun to shoot someone and drove around looking for someone to shoot].) Furthermore, motive is reasonably inferred from the hatred of rival gang members. (*People v. Rand* (1995) 37 Cal.App.4th 999, 1001–1002.)

In addition, the manner of killing Guevara also supports the jury's finding of premeditation and deliberation. Appellant and Echeverria approached Guevara with guns drawn and confronted him about his gang status. Appellant and Echeverria then wrestled with Guevara, pushing him

into the café before shooting him nine times. The number of shots fired at Guevara was indicative of premeditation and deliberation — that is, "the manner of killing was so particular and exacting that the defendant must have intentionally killed according to a 'preconceived design' to take his victim's life." (*People v. Anderson*, supra, 70 Cal.2d at p. 27, italics omitted; *People v. Thomas* (1992) 2 Cal.4th 489, 518 [manner of killing indicating that the defendant acted according to a preconceived design can be inferred from evidence that multiple shots were fired at close range]; *People v. Francisco*, *supra*, 22 Cal.App.4th at p. 1192 [five or six shots fired at close range indicative of premeditation and deliberation.) Guevara tried to defend himself, but ultimately, appellant's and Echeverria's attack left Guevara dead. These acts could reasonably be interpreted as appellant and Echeverria planning to confront a potential enemy and to take action against him, especially since they had talked about "taking care of business," and appellant said he did not want to be caught "slipping," immediately prior to the confrontation and shooting. Thus, substantial evidence supports appellant's conviction.

Next, appellant next argues that the evidence in this case was insufficient because Mendez's and Turner's testimony was inherently impossible to believe. (AOB 38-51). He contends that neither Mendez nor Turner actually saw the incident, and both gave inconsistent statements. An appellate court can only reject evidence accepted by the trier of fact when the evidence is inherently improbable and impossible to believe. (*People v. Sanchez* (1995) 12 Cal.4th 1, 31.) "To warrant the rejection of the statements given by a witness who has been believed by a trial court, there must exist either a physical impossibility that they are true or their falsity must be apparent without resorting to inferences or deductions." (*People v. Mayberry* (1975) 15 Cal.3d 143, 150)

Here, appellant argues what amount to inconsistencies and inferences, not inherently improbable or unbelievable testimony. Mendez's testimony supports a finding of premeditation and deliberation, and the fact that appellant had a gun and was involved in the shooting. Mendez testified that after entering Yoshinoya, she went to order food while appellant and Echeverria sat down. Mendez overheard appellant and Echeverria talking. The two were talking about taking "care of the business," or taking "care of the neighborhood." Mendez heard appellant state that he did not "want to be caught slipping." Mendez believed this to mean that appellant and Rascal had to protect their territory from other gangs. (3RT 635-637.) Mendez heard appellant tell Echeverria to get a gun. Echeverria went outside to the car, leaned forward and grabbed something out of the car, and tucked what appeared to be a gun into the waist of his pants. (3RT 642-643, 654-655.)

Appellant and Echeverria then stood outside the front door of the Yoshinoya. Appellant had a gun. It looked like a 9-millimeter. (3RT 638-639, 647-648.) Mendez then saw a man with a cast on his leg limp by the Yoshinoya. He looked like another gang member. (3RT 646-648.) Appellant and Echeverria pushed the man. He tried to run, but he could not because of his bad leg. Appellant and Echeverria began wrestling with the man. Mendez saw appellant and Echeverria with guns drawn. Mendez saw appellant pointing the gun and then heard several gun shots. Mendez dropped to the floor. (3RT 649-651, 655-656.) After the shooting stopped, Mendez went outside and saw appellant and Echeverria running through the parking lot to the car. (3RT 657-658.) Mendez's testimony was highly credible and established the requisite premeditation and deliberation to support appellant's conviction.

Moreover, Turner's testimony provided additional evidence that helped corroborate Mendez's testimony. At approximately 2:30 a.m.,

Turner was walking past Yoshinoya. Turner saw a car enter the parking lot. Turner saw Giovanni, a passenger in the car get out and walk into Yoshinoya. The driver, Guevara, then got out of the car. (4RT 783-785.) Appellant and Echeverria approached Guevara and stated, "Don't I know you from somewhere?" The men argued with Guevara and began pushing him. The men wrestled as they pushed Guevara into the café next to Yoshinoya. Appellant pulled out a gun. Echeverria, also with a gun, stepped into the café and the shooting started. Appellant and Echeverria ran out of the café, got into a car, and drove away. Guevara was lying dead on the floor of the café. (4RT 786-789.) Turner did not see any other guns at the shooting. (4RT 791.) Thus, even though Mendez and Turner made inconsistent statements regarding what they actually saw, their testimony was believable.

Therefore, appellant's claim that the evidence presented at trial was legally insufficient to support his convictions is nothing more than an attempt to reargue the case, and to urge various inferences he deems appropriate or inappropriate from the evidence. (See *People v. Thornton* (1974) 11 Cal.3d 738, 754 ["Although an appellate court will not uphold a judgment or verdict based upon evidence inherently improbable, testimony which merely discloses unusual circumstances does not come within that category . . . . Conflicts and even testimony which is subject to justifiable suspicion do not justify the reversal of a judgment, for it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the fact upon which a determination depends," internal quotation marks and citations omitted, disapproved on another point in *People v. Flannel* (1979) 25 Cal.3d 668, 684, fn. 12].) As appellant does nothing more than attempt to reargue his case, his present argument fails. (See, e.g., *People v. Cortes* (1999) 71 Cal.App.4th 62, 81 ["Defendant merely reargues the evidence in a way more appropriate for

trial than for appeal . . . . Under the circumstances, we are bound by the trial court's determination," citation omitted]; *In re Stephen W.* (1990) 221 Cal.App.3d 629, 642 ["Mother's attempt to reargue the evidence founders on the substantial evidence standard by which this court is bound"].)

Next, appellant contends that because the evidence is "undisputed" and unrefuted" that Guevara fired one of the weapons at Echeverria "first" in a "sudden, unprovoked attack," that there was insufficient evidence that appellant acted with malice. (AOB 56-57.) The record belies appellant's version of the facts. The testimony presented at trial showed not only that Guevara did not even possess a gun, but that it was appellant and Echeverria who attacked Guevara suddenly and unprovoked. The record reflects that appellant and Echeverria were standing outside the Yoshinoya when a car drove-up and parked in the lot. The passenger, Giovanni Guevara, got out of the car and went into Yoshinoya. The driver, Enrique Guevara, who had a cast on his leg, then got out of the car and walked past Yoshinoya towards the café located next door. (4RT 741-742.) Mendez, Turner, and Antelo all saw appellant and Echeverria with guns. Appellant and Echeverria, with guns drawn, walked towards Guevara and asked, "Don't I know you from somewhere?" After that, the men argued with Guevara and began pushing him. The men wrestled as they pushed Guevara into the café next to Yoshinoya. Both appellant and Echeverria started shooting. Appellant and Echeverria ran out of the café, got into a car, and drove away. Guevara lay dead on the floor of the café. (4RT 786-789.) There was no evidence that Guevara somehow provoked or instigated the incident, that he even possessed a gun, or that he shot first.

Furthermore, it was stipulated that 15 bullet casings were recovered from the crime scene. Twelve of the casings belonged to a 9-millimeter and were all fired from the same gun. The remaining three casings belonged to a .25 caliber handgun, and all were fired from the same gun.

(4RT 846.) Thus, the bullet casings recovered from the crime scene belonged to *only* two guns. If Guevara had a gun, and fired at appellant and Echeverria first as appellant contends, there would have to be casings or bullets from a third gun at the scene, or a third gun would have been recovered at the scene. There was none. Clearly, the proper inference deduced from these facts was that Echeverria was somehow shot with his own gun after he and appellant confronted and attacked Guevara with their guns drawn. Therefore, contrary to appellant's assertion otherwise, there was no way that appellant could reasonably have believed that it was necessary to shoot Guevara to protect Echeverria, since there was no evidence, apart from Echeverria's self serving testimony, that Guevara was armed with his own gun and shot first. Accordingly, there was sufficient evidence appellant had the requisite malice required for first degree murder. (*In re Christian S.* (1994) 7 Cal.4th 768, 778-780 [intent to unlawfully kill constitutes malice].) This claim also must be rejected.

II. CALJIC NOS. 8.71 AND 8.72 DID NOT COERCE JURORS TO RELINQUISH THEIR VIEW AS TO THE DEFENDANT'S LEVEL OF CULPABILITY

Appellant next complains that CALJIC Nos. 8.71 and 8.72 were prejudicially erroneous because they coerced jurors to relinquish their opinions regarding a defendant's level of culpability. (AOB 70-90.) Appellant's contention must be rejected, however, because the instructions were properly given under the circumstances.

A. The Instructions

At trial, the jury was instructed with the 1996 version of CALJIC No. 8.71. As given, the instruction provided:

> If you are convinced beyond a reasonable doubt and unanimously agree that the crime of murder has been committed

by a defendant, but you unanimously agree that you have a reasonable doubt whether the murder was of the first or of the second degree, you must give the defendant the benefit of the doubt and return a verdict fixing the murder as of the second degree.

(2CT 426.)

The trial court also gave the 1996 version of CALJIC No. 8.72 which stated:

> If you are convinced beyond a reasonable doubt and unanimously agree that the killing was unlawful, but you unanimously agree that you have a reasonable doubt whether the crime is murder or manslaughter, you must give the defendant the benefit of such doubt and find it to be manslaughter rather than murder.

(2CT 427.)

In addition, the trial court instructed the jury that the "People and the defendant are entitled to the individual opinion of each juror," that each juror "must decide the case" for himself, and that each juror should "not hesitate to change an opinion" if "convinced it is wrong." (3CT 435; CALJIC No. 17.40.) Finally, the jury was instructed with CALJIC No. 8.50 as follows:

> The distinction between murder and manslaughter is that murder requires malice while manslaughter does not.
>
> When the act causing the death, though lawful, is done [in the heat of passion or is excited by a sudden quarrel that amounts to adequate provocation,] [or] [in the actual but unreasonable belief in the necessity to defend against imminent peril to life or great bodily injury,] the offense is manslaughter. In that case, even if intent to kill exists, the law is that malice, which is an essential element of murder, is absent.
>
> To establish that a killing is murder and not manslaughter, the burden is on the People to prove beyond a reasonable doubt each of the elements of murder and that the act which caused the

death was not done [in the heat of passion or upon a sudden quarrel] [or] [in the actual, even though unreasonable, belief in the necessity to defend against imminent peril to life or great bodily injury].

(2CT 424.)

B. Appellant Forfeited His Right to Raise This Issue

Appellant's failure to object to the instructions at trial forfeits his claim on appeal. This Court has held, "'A party may not complain on appeal that an instruction correct in law and responsive to the evidence was too general or incomplete unless the party has requested appropriate clarifying or amplifying language.'" (*People v. Hart* (1999) 20 Cal.4th 546, 622, quoting *People v. Andrews* (1989) 49 Cal.3d 200, 218; see also *People v. Toro* (1989) 47 Cal.3d 966, 977-978, [defendant's failure to object to proposed instructions constituted an implied consent to the instruction and a waiver of any objection based on lack of notice]; *People v. Gonzalez* (2002) 99 Cal.App.4th 475, 483.) Here, appellant did not object to the trial court instructing the jury with CALJIC Nos. 8.71 and 8.72. Accordingly, appellant has forfeited this issue.

C. Standard of Review

In reviewing a claim of instructional error, the court must consider whether there is a reasonable likelihood that the trial court's instructions caused the jury to misapply the law in violation of the Constitution. (*Estelle v. McGuire* (1991) 502 U.S. 62, 72 & fn. 4 [112 S.Ct. 475, 116 L.Ed.2d 385]; *People v. Cain* (1995) 10 Cal.4th 1, 36.) "[T]he correctness of jury instructions is to be determined from the entire charge of the court, not from a consideration of parts of an instruction or from a particular instruction." (*People v. Burgener* (1986) 41 Cal.3d 505, 538; *Estelle v. McGuire, supra*, 502 U.S. at p. 72.) "'The absence of an essential element

in one instruction may be supplied by another or cured in light of the instructions as a whole.'" (*People v. Burgener*, *supra*, 41 Cal.3d at p. 539.) The court should assume that jurors are intelligent persons and capable of understanding and correlating all jury instructions which are given. (*People v. Bradford* (1997) 15 Cal.4th 1229, 1337.)

D. Viewed in Their Entirety, the Jury Instructions Were Proper

In *People v. Moore* (2011) 51 Cal.4th 386, the defendant argued that the 1996 versions of CALJIC Nos. 8.71 and 8.72 given at his trial violated his constitutional due process and jury trial rights by suggesting to jurors that they must return a verdict on the greater offense unless they unanimously doubted whether it had been proven. (*People v. Moore*, *supra*, 51 Cal.4th at p. 410.) While this Court did say "the better practice is not to use the 1996 revised versions of CALJIC Nos. 8.71 and 8.72," the Court failed to reach the merits of the issue. (*Id.* at 411.) Instead, the Court found that any alleged error was harmless beyond a reasonable doubt. (*Ibid.*)

Recognizing the Court's view that "the better practice is not to use the 1996 revised versions of CALJIC Nos. 8.71 and 8.72," respondent contends, however, that the other jury instructions dispelled any alleged confusion the jury may have had. The intended purpose of CALJIC Nos. 8.71 and 8.72 is to provide a defendant with the benefit of doubt as to the degree of guilt. By the time a jury considers these instructions, it has unanimously determined the defendant's guilt. Contrary to appellant's assertion otherwise (AOB 73), CALJIC Nos. 8.71 and 8.72 do not require the jury to unanimously agree as to the "nature of the crime or the degree of murder" before giving a defendant the benefit of doubt. Instead, the instructions only call for the jury to unanimously agree that there is a *doubt* as to the nature of the crime or degree of the murder. In other words, the

jurors only have to unanimously agree that at least one juror has doubt as to the nature of the crime or the degree of murder to give a defendant the benefit of the doubt and convict him of the lesser charge. Once the jury unanimously agrees that at least one juror, *not the entire jury*, has a doubt as to the degree of guilt, the defendant, or appellant in this case, would receive the benefit of the doubt, and be convicted of the lesser charge. Viewing the proper purpose of CALJIC Nos. 8.71 and 8.72, and the other instructions in their entirety, it was not a reasonable likelihood that the trial court's instructions confused the jury as to their duties regarding the prosecution's burden of proof in violation of the Constitution.

In fact, a review of applicable case law shows the instructions were not erroneous. In *People v. Pescador* (2004) 119 Cal.App.4th 252, the defendant argued that the 1996 versions of CALJIC Nos. 8.71 and 8.72 – the instructions given in this case – "force[d] individual jurors who had a reasonable doubt as to the degree of murder" to conclude that they could not individually give the defendant the benefit of that doubt, unless "the jury collectively and unanimously agree[d] upon the existence of reasonable doubt." (*Id.* at p. 256.) The court of appeal rejected that assertion. In so holding, the court first observed that, when assessing the correctness of jury instructions, the court reviews all of the instructions given, rather than considering only "parts of an instruction or . . . a particular instruction." (*Id.* at p. 257.)

The court then noted that the defendant's proposed interpretation of the challenged instructions flew "in the face of CALJIC Nos. 17.11 and 17.40." (*People v. Pescador*, *supra*, 119 Cal.App.4th at p. 257.) CALJIC No. 17.11 specifically informed the jurors that if they had "a reasonable doubt" regarding the degree of murder, the jurors must give the defendant the benefit of that doubt and "find him guilty of that crime in the second degree." (*Ibid.*) CALJIC No. 17.40 further instructed the jurors that the

prosecution and defense were "entitled to the individual opinion of each juror," and that each juror must "decide the case" for himself, and that a juror should "not decide any question in a particular way because a majority of the jurors, or any of them, favor that decision." (*Ibid.*) Finally, the jurors were further directed to "'[c]onsider the instructions as a whole and each in light of all the others.'" (*Ibid.*)

The *Pescador* court concluded that, in "light of the instructions as a whole," it was not reasonably likely that the jury interpreted CALJIC No. 8.71 "as requiring them to make a unanimous finding that they had reasonable doubt as to whether the murder was first or second degree." (*People v. Pescador, supra*, 119 Cal.App.4th at p. 257.) For the same reasons, *Pescador* also found that "CALJIC No. 8.72, when considered in context with CALJIC No. 8.50 [explaining difference between murder and manslaughter], 17.11, and 17.40, did not instruct the jury that it had to make a unanimous finding that they had a reasonable doubt as to whether the crime was murder or manslaughter in order for defendant to receive the benefit of the doubt." (*Ibid.*)

Following *Pescador*, the validity of CALJIC No. 8.71 was again considered in *People v. Gunder* (2007) 151 Cal.App.4th 412. There, as in *Pescador*, the defendant argued that the instruction violated his due process rights because it purportedly "condition[ed] any juror's decision in favor of second degree murder on the unanimous agreement of the jurors that a doubt exists as to degree." (*Id.* at pp. 424-425.) The *Gunder* defendant also asserted that *Pescador* was inapposite, because the *Pescador* jury, unlike his jury, was given CALJIC No. 17.11, the instruction stating that if there was a reasonable doubt as to the degree of murder, the defendant was to be given the benefit of that doubt. (*Id.* at p. 425.) The *Gunder* court concluded that the foregoing distinction was immaterial, stating:

> We disagree that this is a crucial distinction. If indeed it were reasonably likely that CALJIC No. 8.71 communicated the need for the procedural prerequisite of a unanimous finding of doubt as to degree, the parallel pattern instruction [CALJIC No. 17.11] does not refute this any more directly than the instruction on the duty to deliberate individually. It is mere icing on the cake. What is crucial in determining the reasonable likelihood of defendant's posited interpretation is the express reminder that each juror is not bound to follow the remainder in decision making. Once this principle is articulated in the instructions, a reasonable juror will view the statement about unanimity in its proper context of the procedure for returning verdicts, as indeed elsewhere the jurors are told they cannot return any verdict absent unanimity and cannot return the lesser verdict of second degree murder until the jury unanimously agrees that the defendant is not guilty of first degree murder. Thus, nothing in the instruction is likely to prevent a minority of jurors from voting against first degree murder and in favor of second degree murder.

(*Id.* at pp. 827-828.)

In *People v. Frye* (1998) 18 Cal.4th 894, the defendant asserted that the 1979 versions of CALJIC Nos. 8.71 and 8.72 violated his due process rights, "by suggesting to members of the jury that they should compromise their firmly held beliefs in order to arrive at a verdict." (*Id.* at p. 963.) Although the version of the CALJIC instructions used in *Frye* did not contain the exact language in question here, the instructions were similar, and this Court's reasoning for approving their use was sound and applies to the instant case. In *Frye*, this Court rejected the defendant's contention, stating:

> Defendant's argument relies on a strained reading of the challenged instructions. The thrust of these instructions was to inform jurors they must give defendant the benefit of any reasonable doubts by returning a second degree murder verdict in the one circumstance, and a manslaughter verdict in the other. Nothing in this language can reasonably be understood as encouraging jurors to forego their personally held views so that a verdict could be rendered. Moreover, the jury was specifically

> instructed otherwise. The trial court explained, "Both the People and the defendant are entitled to the individual opinion of each juror. [¶] It is the duty of each of you to consider the evidence for the purpose of arriving at a verdict if you can do so. Each of you must decide the case for yourself, but should do so only after a discussion of the evidence and instructions with the other jurors. [¶] You should not hesitate to change an opinion if you are convinced it is erroneous. However, you should not be influenced to decide any question in a particular way because a majority of the jurors, or any of them, favor such a decision." In light of this instruction, jurors were adequately informed not to abandon their views for the sake of a verdict. The instructions compelling verdicts of second degree murder and manslaughter if jurors had reasonable doubts when deciding between first and second degree murder, and murder and manslaughter, respectively, did not undermine this command.

(*Id.* at pp. 963-964.)

Here, as in *Frye*, *Pescador*, and *Gunder*, the totality of the instructions clearly informed the jurors not to forsake their individual opinions when considering appellant's guilt or innocence. Like the juries in *Pescador* and *Frye*, the jury in this case was instructed that both the People and the defendant were "entitled to the individual opinion of each juror," and that each juror must "decide the case" for himself, and that a juror should "not decide any question in a particular way because a majority of the jurors, or any of them, favor that decision." (2CT 435; CALJIC No. 17.40.) In addition, the court correctly instructed the jury regarding the State's burden of proving that the killing was murder and not manslaughter. (2CT 424; CALJIC No. 8.50.) Likewise, the jurors here were further directed to "'[c]onsider the instructions as a whole and each in light of all the others.'" (2CT 372; CALJIC No. 1.01.)

Moreover, the court further instructed the jury with the crucial instructions regarding the prosecution's burden of proof. The trial court instructed the jury that any fact or circumstance relied upon to prove

appellant's guilt must be proven beyond a reasonable doubt (CALJIC No. 2.01; 2CT 377), that the People must prove beyond a reasonable doubt every element or charge against appellant (CALJIC No. 2.61; 2CT 388), and that appellant was innocent until proven guilty beyond a reasonable doubt (CALJIC No. 2.90; 2CT 390).

Furthermore, as discussed above, the jury would not have assumed, based on CALJIC No. 8.71, that its ability to find appellant guilty of second degree murder first hinged on the entire jury concluding that he was not guilty of first degree murder. Certainly, nothing in the language of the challenged instructions superseded the clear mandate of CALJIC No. 17.40 or forced individual jurors in the instant case to surrender their own opinion as to the degree of appellant's guilt. As *Gunder* pointed out, the "crucial" instruction is CALJIC No. 17.40, which expressly reminds jurors that they are "not bound to follow the remainder [of other jurors] in decision making." (*People v. Gunder*, *supra*, 151 Cal.App.4th at pp. 827-828.) Furthermore, even though the jurors herein were not instructed with CALJIC No. 17.11, *Gunder* establishes that CALJIC No. 17.11 "is mere icing on the cake." (*Ibid.*) Thus, because the jury in this case was given CALJIC No. 17.40, along with various other instructions that properly set forth the People's burden of proof, this Court should adopt the reasoning of *Pescador* and *Gunder* and reject appellant's claim.

E. Any Error Was Harmless

Appellant also claims that the purported instructional deficiency constituted a structural error requiring reversal of his conviction. (AOB 85-87.) Appellant argues that, under the challenged instructions, "a rational juror could have concluded that there was a reasonable doubt about the mental state required for first degree murder, but that s/he abandoned that position for lack of unanimous support." (AOB 86.) Not so.

"[I]nstructional error relieving the prosecution of the burden of proving beyond a reasonable doubt each element of the charged offense violates the defendant's rights under both the United States and California Constitutions." (*People v. Flood* (1998) 18 Cal.4th 470, 479-480.) In *Flood*, however, this Court held that instructional error that "improperly describes or omits an element of an offense, or that raises an improper presumption or directs a finding or a partial verdict upon a particular element, generally is not a structural defect in the trial mechanism that defies harmless error review and automatically requires reversal . . . ." (*Id.* at pp. 502-503.) Rather, this type of error "falls within the broad category of trial error subject to *Chapman* review." (*Id.* at p. 503; *Neder v. U.S.* (1999) 527 U.S. 1, 15 [119 S.Ct. 1827, 144 L.Ed.2d 35].) Here, the alleged error did not affect the prosecution's burden or the jury's finding beyond a reasonable doubt. (*Sullivan v. Louisiana* (1993) 508 U.S. 275 [113 S.Ct. 2078, 124 L.Ed.2d 182] [error undermined each and every finding underlying the guilty verdict].) Thus, the alleged error in this case is not reversible per se; rather, it would compel reversal unless this Court found it to be harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24 [87 S.Ct. 824, 17 L.Ed.2d 705].)

Here, any error in giving the challenged instructions was harmless beyond a reasonable doubt. (*Chapman v. California*, *supra*, 386 U.S. at p. 24.) First, as discussed, the jury was properly instructed as to the prosecution's burden of proof. The jury in this case was instructed that both the People and the defendant were "entitled to the individual opinion of each juror," and that each juror must "decide the case" for himself, and that a juror should "not decide any question in a particular way because a majority of the jurors, or any of them, favor that decision." (2CT 435; CALJIC No. 17.40; *People v. Gunder*, *supra*, 151 Cal.App.4th at p. 425 ["a reasonable juror will view the statement about unanimity [in CALJIC

No. 8.71] in its proper context of the procedure for returning verdicts, as indeed elsewhere the jurors are told they cannot return any verdict absent unanimity and cannot return the lesser verdict of second degree murder until the jury unanimously agrees that the defendant is not guilty of first degree murder"]; *People v. Pescador*, *supra*, 119 Cal.App.4th at p. 257.) In addition, the court correctly instructed the jury regarding the State's burden of proving that the killing was murder and not manslaughter. (2CT 424; CALJIC No. 8.50; *People v. Pescador*, *supra*, 119 Cal.App.4th at p. 258 [in addition to CALJIC No. 17.40, court relied on 8.50].) Likewise, the court instructed the jury that the prosecution had the burden to prove the murder was first degree (2CT 334-335; CALJIC No. 8.20), or second degree (2CT 336; CALJIC No. 830.) Moreover, the jurors here were further directed to "'[c]onsider the instructions as a whole and each in light of all the others.'" (2CT 372; CALJIC No. 1.01.)

Moreover, the court further instructed the jury with the crucial instructions regarding the prosecution's burden of proof - - the trial court instructed the jury that any fact or circumstance relied upon to prove appellant's guilt must be proven beyond a reasonable doubt (CALJIC No. 2.01; 2CT 377), that the People must prove beyond a reasonable doubt every element or charge against appellant (CALJIC No. 2.61; 2CT 388), and that appellant was innocent until proven guilty beyond a reasonable doubt (CALJIC No. 2.90; 2CT 390).

In addition, overwhelming evidence supported appellant's conviction for first degree murder. As discussed in Arg. I., *ante*, the record reflects that appellant and co-defendant Echeverria entered the restaurant Yoshinoya Beef Bowl looking for trouble. They immediately began approaching customers, asking about gang affiliations. (3RT 606-607, 617.) Appellant approached Lemus, Salazar, and Ramirez, who were sitting down and eating a meal, and asked where Lemus and the others were

from, meaning to which gang did they belong. (3RT 609, 617, 620.) Appellant then stated that he and Echeverria were "Harpys" gang members. (3RT 608-609.) Appellant and Echeverria were then over heard talking about taking "care of the business," or taking "care of the neighborhood." Appellant stated that he did not "want to be caught slipping." Mendez testified that this to meant that appellant and Echeverria had to protect their territory from other gangs. (3RT 635-637.) Mendez heard appellant tell Echeverria to get his gun. (3RT 642-643, 654-655.) Appellant was already armed with the 9-millimeter. (3RT 649-651, 655-656; 4RT 742-744, 746-748, 751, 786-789.)

Multiple witnesses then testified that appellant and Echeverria were standing outside the Yoshinoya when a car drove-up and parked in the lot. The passenger, Giovanni Guevara, got out of the car and went into Yoshinoya. The driver, Enrique Guevara, who had a cast on his leg, then got out of the car and walked past Yoshinoya towards the café located next door. (4RT 741-742.) Mendez, Turner, and Antelo all saw appellant and Echeverria with guns. Appellant and Echeverria, with guns drawn and cocked, walked towards Guevara and asked, "Don't I know you from somewhere?" After that, appellant and Echeverria argued with Guevara and began pushing him. The men wrestled as they pushed Guevara into the café next to Yoshinoya. Echeverria, also with a gun, stepped into the café and the shooting started. Appellant and Echeverria ran out of the café, got into a car, and drove away. Guevara lay dead on the floor of the café. (4RT 786-789.)

Guevara was shot nine times and died of multiple gunshot wounds. (4RT 820-831, 838-840, 850.) Fifteen bullet casings were recovered from the crime scene. Twelve of the casings belonged to a 9-millimeter and were all fired from the same gun. The remaining three casings belonged to

a .25 caliber handgun, and all were fired from the same gun. (4RT 846.) No one saw Guevara with a weapon. (4RT 742-744, 746-748, 751, 791.)

Accordingly, any alleged error in providing CALJIC Nos. 8.71 and 8.72 was harmless beyond a reasonable doubt. This claim fails.

III. THE TRIAL COURT PROPERLY RESPONDED TO THE JURY'S WRITTEN QUESTION

Next, appellant complains the trial court's response to the jury's question asking for clarification on what to do if the jury was split on whether the murder was in the first or second degree was inadequate and failed to provide the jurors with the guidance they needed to resolve their question. (AOB 91-98.) This claim was forfeited on appeal. Even if preserved for appeal, it is without merit. The court did not err by directing the jurors to review the jury instructions given to them, since the information the jury was requesting was contained in the existing jury instructions.

A. Background

During deliberations, the court received a note from the jury, which read: "Clarification from the Court: What happens if jury is unanimous for verdict of murder but cannot agree on 1st or second degree?" (2CT 365; 6RT 1057.) The trial court, after receiving agreement from both counsel as to the appropriate response, sent the following message back to the jury: "Answer: The jury's attention is directed to Instruction 8.71 on page 57 of the instructions." (2CT 365; 6RT 1057-1058.) The jury did not request further clarification from the court. The jury returned the verdict for first degree murder the following day. (2CT 444; 6RT 1058-1059.)

B. Appellant's Claim was Forfeited

Appellant contends that the court's response of simply referring the jury to the instructions already provided constitutes "reversible error." (AOB 91-98.) Appellant's claim was forfeited. The record shows that the attorneys were consulted before the court responded to the jury's request. (6RT 1057-1058.) Defense counsel approved of the court's response. "Where, as here, appellant consents to the trial court's response to jury questions during deliberations, any claim of error with respect thereto is waived." (*People v. Bohana* (2000) 84 Cal.App.4th 360, 373; see *People v. Rodriguez* (1994) 8 Cal.4th 1060, 1193 [claim of error waived by defendant's consent to responses given by court]; *People v. Cooper* (1991) 53 Cal.3d 771, 847 [claim of error waived by defense counsel's failure to suggest elaboration urged on appeal].)

C. Appellant's Claim of Error Lacks Merit

Even if not forfeited, appellant's claim lacks merit. Appellant argues the court's response was of no assistance to the jury. Section 1138 imposes upon the court a duty to provide the jury with information the jury desires on points of law. (*People v. Gonzalez* (1990) 51 Cal.3d 1179, 1212.) If, however, "'the original instructions are themselves full and complete, the court has discretion under . . . section 1138 to determine what additional explanations are sufficient to satisfy the jury's request for information.'" (*People v. Davis* (1995) 10 Cal.4th 463, 522, quoting *People v. Beardslee* (1991) 53 Cal.3d 68, 97; *People v. Gonzalez, supra*, 51 Cal.3d at p. 1213.)

In *People v. Beardslee* (1991) 53 Cal.3d 68, the California Supreme Court discussed section 1138, and explained the trial court's obligation to clarify the legal principles for the jury:

> Defendant contends the court's refusal to further explain the instructions violated section 1138, which provides that when

> the jury "desire to be informed on any point of law arising in the case, . . . the information required must be given . . . ." The court has a primary duty to help the jury understand the legal principles it is asked to apply. [Citation.] This does not mean the court must always elaborate on the standard instructions. When the original instructions are themselves full and complete, the court has discretion under section 1138 to determine what additional explanations are sufficient to satisfy the jury's request for information. [Citation.] Indeed, comments diverging from the standard [instructions] are often risky. [Citation.] The trial court was understandably reluctant to strike out on its own. But a court must do more than figuratively throw up its hands and tell the jury it cannot help. It must at least consider how it can best aid the jury. It should decide as to each jury question whether further explanation is desirable, or whether it should merely reiterate the instructions already given.

(*Id.* at p. 97; see *People v. Gonzalez, supra*, 51 Cal.3d at p. 1213 [court's advisement to jury to reread malice and homicide instructions in context resolved the jury's questions]; see *People v. Posey* (2004) 32 Cal.4th 193, 217 [the trial court did not err when, in answering a request from the jury for clarification of the latter instruction, it stated that the jury should apply the law as stated by the court]; see also Penal Code section 1138.)

In this case, the jury's question could be answered simply by referring the jury to CALJIC No. 8.71, which informed the jury that if it had a reasonable doubt as to whether the murder was first or second degree, they "must give the defendant the benefit of that doubt and return a verdict fixing the murder as of the second degree." (2CT 426.) The original instruction was full and complete. Under the circumstances, the trial court and both parties decided that the request could be effectively resolved by directing the jury's attention to the instruction it had previously been given. (See *People v. Gonzalez, supra*, 51 Cal.3d at pp. 1212-1213 [the court refused to clarify malice but suggested that the jury read the instructions; no error or prejudice found]; *People v. Hill* (1992) 3 Cal.App.4th 16 [conspiracy].)

This is not a case where the trial court refused to answer any questions or refused to clear up the jury's confusion. The court did not "figuratively throw up its hands and tell the jury it cannot help." (*People v. Beardslee*, *supra*, 53 Cal.3d at p. 97.) On the contrary, the court considered how it could best aid the jury, proposed an option for counsel, and then with the agreement of counsel, responded to the jury's inquiry correctly and adequately by directing them to the instruction given to them. The jury's question did not specifically indicate that it was confused with CALJIC No. 8.71. The jury stated only that it had unanimously found appellant guilty of murder, but was unsure of how to figure first or second degree. Under the circumstances, the trial court could reasonably infer that the jury had overlooked CALJIC No. 8.71 and that the instruction provided the answer to their question. This inference is supported by the fact that the jury's question was apparently answered because the record shows the jury did not request further clarification on the issue. There was no abuse of discretion under the circumstances.

In the alternative, appellant, relying on *People v. Dewberry* (1959) 51 Cal.2d 548, contends the trial court had a sua sponte obligation to instruct the jury with CALJIC No. 17.11.[9] (AOB 96-98.) This contention must be rejected as well.

Here, the jury was instructed with CALJIC No. 17.10. The weight of authority holds that CALJIC No. 17.10 satisfies the requirements of *Dewberry*. (See, e.g., *People v. Barajas* (2004) 120 Cal.App.4th 787, 793

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[9] CALJIC No. 17.11 provides,

> If you find the defendant guilty of the crime of [murder], but you have a reasonable doubt as to whether it is of the first or second degree, you must find him guilty of that crime in the second degree.

["CALJIC No. 17.10 satisfies the requirements of *Dewberry*."]; *People v. St. Germain* (1982) 138 Cal.App.3d 507, 521 ["[i]n giving CALJIC No. 17.10, the trial judge adhered precisely to *Dewberry* and section 1097 which that decision took pains to interpret."]; see also *People v. Gonzalez* (1983) 141 Cal.App.3d 786, 793 ["CALJIC Nos. 17.10 and 17.11 are tailor-made to express the *Dewberry* concept. . . ."].) Accordingly, there was no sua sponte duty to instruct as appellant contends. This claim fails.

Finally, any error was harmless. A violation of Penal Code section 1138 does not warrant reversal unless prejudice is shown. (*People v. Gonzalez*, 51 Cal.3d at pp. 1212-1213; see *People v. Robinson* (2005) 37 Cal.4th 592, 635-636.) That is, appellant must show it is reasonably probable that he would have obtained a more favorable result if the court had responded to the jury's inquiries in the manner suggested by appellant. (*People v. Solis* (2001) 90 Cal.App.4th 1002, 1015 [applying test under *People v. Watson* (1956) 46 Cal.2d 818, 836]; see *People v. Robinson*, supra, 37 Cal.4th at p. 635 ["Any state law error in this regard would have been harmless under the 'reasonable probability' test of *Watson, supra*, 46 Cal.2d 818, 836 and, indeed any alleged federal constitutional error also was harmless under the 'beyond a reasonable doubt' test of *Chapman, supra*, 386 U.S. 18, 23-24"].) Here, it can reasonably be inferred that the court's response apparently answered the jury's question as the jury did reach a verdict after it was referred to the original instruction. As discussed above, the jury's question did not specifically indicate that it was confused with the language of CALJIC No. 8.71. The jury stated only that it had unanimously found appellant guilty of murder, but was unsure of how to determine if the murder was first or second degree. It was more probable that the jury was unsure which instruction addressed its question. Consequently, if the jury still needed more information after being referred to CALJIC No. 8.71, it knew to request it but did not, suggesting that after

being directed to the applicable instruction, their question was answered appropriately. It must be assumed that the jury, upon reflection, was satisfied with the original instruction (*People v. Mickel* (1991) 54 Cal.3d 140, 174) and correctly understood it (*People v. Rodriguez, supra*, 42 Cal.3d at p. 776).

Moreover, as discussed in Argument II, *ante*, given the strength of the prosecution's evidence, there is no reasonable probability that appellant would have obtained a more favorable result if the court had responded differently to the jury's question. Accordingly, appellant's claim must be rejected.

IV. APPELLANT'S CLAIM THAT THE TRIAL COURT ERRED IN FAILING TO INSTRUCT THE JURY THAT HE HAD NO DUTY TO WITHDRAW IS FORFEITED; IN ANY EVENT, THE CLAIM IS MERITLESS; FURTHERMORE, ANY ERROR WAS HARMLESS

Appellant next argues that he was denied due process by the trial court's improper instruction on the right of self-defense. Specifically, appellant argues that the trial court erred when it read an "incomplete" version of CALJIC No. 5.56. (AOB 99-104.) Appellant forfeited the right to raise this claim for failing to object to the given instruction at trial. In any event, this claim fails on the merits. Finally, any alleged error was harmless beyond a reasonable doubt.

A. Background

The jury was instructed with CALJIC No. 5.56, Self-Defense -- Participants In Mutual Combat, as follows:

> The right of self-defense is only available to a person who engages in mutual combat if she 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.

(2CT 408; 5RT 967.) Defense counsel did not request any modifications or additions to these standard jury instructions. (5RT 967.)

During closing arguments, the prosecutor argued that appellant was not entitled to claim self-defense. (5RT 1008-1009.) The prosecutor also discussed self-defense for an initial aggressor:

> But what if they are the aggressors, are they entitled to any benefit under the law of self-defense? They are. But only in a certain situation.
>
> The law says that if you're the aggressor, you're only entitled to self-defense if the person, the aggressor has actually tried in good faith to refuse to continue fighting, that the aggressor has clearly informed his opponent that he wants to stop fighting and three, he has clearly informed his opponent that he has stopped fighting.
>
> We don't have any of that here, not one lick of evidence to suggest that any of that took place. Because based upon [Echeverria's] version, all that happened was, the victim pulled out his gun. He had no idea that it was coming, the victim just started shooting. He doesn't even admit to being the aggressor.

(5RT 1010-1011.)

The prosecutor then discussed the concept of mutual combat, reiterating the instruction given by the court. The prosecutor then argued that appellant had not met the four requirements outlined in the instruction.

The prosecutor then reiterated that self-defense did not apply to appellant because appellant and Echeverria were the aggressors, and that this was not a situation involving mutual combat. Finally, the prosecutor argued that appellant and Echeverria never gave Guevara the opportunity to stop fighting. (5RT 1011-1012.)

B. Applicable Law

The general rule is that

> "'in criminal cases, even in the absence of a request, the trial court must instruct on the general principles of law relevant to the issues raised by the evidence. [Citations.] The general principles of law governing the case are those closely and openly connected to the facts before the court, and which are necessary for the jury's understanding of the case.' [Citation.]"

(*People v. Breverman* (1998) 19 Cal.4th 142, 154.)

> We determine whether a jury instruction correctly states the law under the independent or de novo standard of review. [Citation.] Review of the adequacy of instruction is based on whether the trial court "fully and fairly instructed on the applicable law." [Citation.] . . . "Instructions should be interpreted, if possible, so as to support the judgment rather than defeat it if they are reasonably susceptible to such interpretation." [Citation.]

(*People v. Ramos* (2008) 163 Cal.App.4th 1082, 1088.)

C. The Claim Is Forfeited, and in Any Event, Without Merit

Because appellant did not object to the CALJIC instructions regarding a "sudden and deadly counter assault," and he made no request for any modification, "he may not be heard now. 'Generally, a party may not complain on appeal that an instruction correct in law and responsive to the evidence was too general or incomplete unless the party has requested appropriate clarifying or amplifying language.' [Citation.]" (*People v. Guiuan* (1998) 18 Cal.4th 558, 570; see *People v. Miceli* (1951) 101

Cal.App.2d 643, 648-649 [where self-defense instruction adequately conveys the law, defendant must request modification to address a theory of "sudden and perilous" counterassault].) In any event, appellant's claim fails on the merits.

Appellant argues that the trial court should have instructed the jury that where an attack is "sudden and perilous" and the defendant cannot retreat, he is entitled to use deadly force in self-defense. (AOB 100, citing *People v. Quach* (2004) 116 Cal.App.4th 294, 303.) Here, however, there was no error in omitting the "sudden and perilous" language, because the facts did not support the language. *Quach* concerned a shootout between rival gangs, where there was conflicting evidence as to which group drew a gun or fired first. The court held that the defendant was entitled to an instruction that a killing may be justified when a simple assault is met by a deadly counter assault that is "so sudden and perilous" that there is no opportunity to withdraw. (*Quach*, *supra*, 116 Cal.App.4th at p. 303.)

The rule enunciated in *Quach* is inapplicable here because there was not a simple assault countered by a deadly assault. Guevara and his nephew drove up to the restaurants, looking to get something to eat. Meanwhile, appellant and Echeverria were looking for trouble. Appellant and Echeverria approached Guevara with guns drawn and confronted him. This was not a "simple assault," but assault with a deadly weapon. (*Quach*, *supra*, 116 Cal.App.4th at p. 303.) Unlike the witnesses in *Quach*, none of the witnesses here saw Guevara ever possess a gun or act in an aggressive manner towards Echeverria, let alone appellant.

Appellant points to the fact that Echeverria was also shot, and claims that it was Guevara who shot first. However, the evidence demonstrates that Echeverria was shot with his own gun during the encounter, after he and appellant confronted Guevara with guns drawn. (Compare *People v. Quach*, *supra*, 116 Cal.4th at p. 303 [one version had the gun fired at

Quach before he took out his own pistol].) Guevara was merely defending himself from appellant's and Echeverria's deadly assault upon him. And Echeverria was somehow shot during the process. According to Echeverria's testimony, it was he who struggled with Guevara, not appellant. In addition, Echeverria testified that it was he alone who shot Guevara, not appellant. Appellant's defense was that he did not even shoot once at Guevara, and that if someone else was shooting, it was Guevara's cousin. (6RT 1033-1034.) Therefore, there was no evidence supporting an instruction regarding a "sudden and perilous" attack *on appellant*. As such, there was no error in omitting the inapplicable "sudden and perilous" language from the standard CALJIC instruction. (See *People v. Hecker* (1895) 109 Cal. 451, 464 [describing right of initial aggressor to defend self against a "counter assault . . . so sudden and perilous that no opportunity be given to decline or to make known to his adversary his willingness to decline the strife" and "if he cannot retreat with safety, then as the greater wrong of the deadly assault is upon his opponent, he would be justified in slaying, forthwith, in self-defense"].)

In any event, any error was harmless. The court in *Quach* assessed error under the harmless-beyond-a-reasonable doubt standard set forth in *Chapman v. California*, *supra* 386 U.S. at p. 24. Applying that standard, reversal is not required. As already described, appellant was not acting in any type of self-defense. Multiple witnesses testified that both appellant and Echeverria had guns. No one saw Guevara with a gun, and no one saw him confront or instigate any argument or conflict with appellant and Echeverria. The witnesses saw both appellant and Echeverria, with guns drawn and cocked, confront and attack him. Appellant and Echeverria were seen firing their weapons into the café. (4RT 810-811.) It was stipulated that 15 bullet casings were recovered from the crime scene. Twelve of the casings belonged to a 9-millimeter and were all fired from the same gun.

The remaining three casings belonged to a .25 caliber handgun, and all were fired from the same gun. (4RT 846.) Thus, the bullet casings recovered from the crime scene belonged to *only* two guns. If Guevara had a gun, and fired at appellant and Echeverria first as appellant contends, there would have to be casings or bullets from a third gun at the scene. There was none. Clearly, the proper inference deduced from these facts was that Echeverria was somehow shot with his own gun after he and appellant confronted and attacked Guevara with their guns drawn. Therefore, Guevara was merely defending himself from appellant's and Echeverria's unwarranted attack. Additionally, appellant had the opportunity to leave, but instead chose to confront an unarmed Guevara, who was just going to the café to grab something to eat. Based on the facts as set forth, the omission of the "sudden and deadly counter assault" language from CALJIC No. 5.56 was harmless beyond a reasonable doubt.

V. THE TRIAL COURT DID NOT COMMIT REVERSIBLE ERROR BY FAILING TO INSTRUCT THE JURY TO VIEW APPELLANT'S PRE-OFFENSE STATEMENTS WITH CAUTION

During trial, there was testimony that appellant may have made some statements prior to committing the murder of Guevara. Lemus and Salazar testified that appellant and Echeverria approached their table and questioned where they were from and whether they were in a gang. Neither Lemus nor Salazar, however, could recall if it was appellant that made the statement. (3RT 607-608, 620.) Mendez testified that she overheard appellant state that he did not "want to be caught slipping." Mendez believed this to mean that appellant and Echeverria had to protect their territory from other gangs. (3RT 635-637.) Mendez also heard appellant tell Echeverria to get the "cuete." (3RT 642-643, 654-655.) Finally, Turner testified that he heard either appellant or Echeverria ask Guevara, "Do I know you from somewhere?" (4RT 785.) Appellant contends the

trial court erred in failing to instruct sua sponte that evidence of his pre-offense statements should be viewed with caution. Specifically, he contends the court should have given CALJIC No. 2.71.7.[10] (AOB 105-112.) Appellant claim must be rejected.

An instruction that evidence of pre-offense statements should be viewed with caution, when applicable, must be given sua sponte. (*People v. Williams* (1988) 45 Cal.3d 1268, 1315; *People v. Beagle* (1972) 6 Cal.3d 441, 455.) "The purpose of the cautionary instruction is to assist the jury in determining if the statement was in fact made." (*People v. Beagle*, *supra*, 6 Cal.3d at p. 456.) "The omission, however, does not constitute reversible error if upon a reweighing of the evidence it does not appear reasonably probable that a result more favorable to defendant would have been reached in the absence of the error." (*Id.* at p. 455.)

First, the statements overheard by Turner, Salazar, and Lemus are not applicable because they cannot necessarily be specifically attributed to appellant. Accordingly, a cautionary instruction was not required with regard to these statements.

Nevertheless, although it appears the statements overheard by Mendez constituted pre-offense statements warranting a cautionary instruction, any error in failing to give the cautionary instruction sua sponte was harmless in this case. Thus, the reversal sought by appellant is unwarranted. In this regard, in addition to contending that the trial court erred as a matter of

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[10] CALJIC No. 2.71.7 states:

> Evidence has been received from which you may find that an oral statement of [intent] [plan] [motive] [design] was made by the defendant before the offense with which [he][she] is charged was committed. [¶] It is your duty to decide whether such a statement was made by [a][the] defendant. [¶] Evidence of an oral statement ought to be viewed with caution.

state law in not giving such a cautionary instruction, appellant further posits that such an error is "of [federal] constitutional dimensions." (AOB 112.) This part of appellant's claim must be rejected. As the California Supreme Court has repeatedly explained in rejecting identical claims,

> "Defendant argues a violation of state law also violates federal due process, thus mandating the more stringent standard for federal constitutional error. He is wrong. Mere instructional error under state law regarding how the jury should consider evidence does not violate the United States Constitution. (*Estelle v. McGuire* (1991) 502 U.S. 62, 71-75 [112 S.Ct. 475, 481-484, 116 L.Ed.2d 385].) Failure to give the cautionary instruction is not one of the '"very narrow[]"' categories of error that make the trial fundamentally unfair. (*Id.* at p. 73 [].)"

(*People v. Dickey* (2005) 35 Cal.4th 884, 905, quoting *People v. Carpenter* (1997) 15 Cal.4th 312, 393.) Rather,

> The standard of review for erroneous failure to give the cautionary instruction is "the normal standard of review for state law error: whether it is reasonably probable the jury would have reached a result more favorable to defendant had the instruction been given. (*People v. Stankewitz* (1990) 51 Cal.3d 72, 94 []; *People v. Beagle*, *supra*, 6 Cal.3d at p. 456.)"

(*People v. Dickey*, *supra*, 35 Cal.4th at p. 905.)

Here, because the record shows it was not reasonably probable the jury would have reached a result more favorable to appellant had the instruction been given, any error must be deemed harmless. Where there was no issue of conflicting evidence concerning the precise words used, their meaning or context, or whether the oral admissions were remembered and repeated accurately, it may be concluded that the instructional error was harmless. (*People v. Dickey*, *supra*, 35 Cal.4th at p. 906; *People v. Bunyard* (1988) 45 Cal.3d 1189, 1224.) Appellant's defense was that Guevara attacked Echeverria, and that appellant did not have a gun, nor did he fire a gun. Appellant thereby claimed that he was not the shooter and he

and Echeverria were justified in defending themselves. Thus, the disputed issue was whether appellant was the aggressor and a shooter, not whether any of the statements were made, since appellant did not testify or otherwise deny making the statements. Here, therefore, the question for the jury was whether Mendez was a credible witnesses or had instead fabricated her reports of appellant's statements. (See *People v. Wilson* (2008) *supra*, 43 Cal.4th 1, 20; *People v. Dickey*, *supra*, 35 Cal.4th at p. 906; *People v. Bunyard*, *supra*, 45 Cal.3d at pp. 1225-1226.) Thus, there was no prejudice.

In addition, as in *Wilson*, here, while the trial court did not give the cautionary instruction, it gave full and thorough instructions on evaluating the credibility of a witness. (*Ibid.*) In this regard, the jury was instructed that it was the sole judge of the credibility or believability of the witnesses and, more specifically, on the significance of prior consistent or inconsistent statements, discrepancies in a witness's testimony or between her testimony and that of others, witnesses who were willfully false in one material part of their testimony being distrusted in other parts, weighing conflicting testimony, and assessing a witness's bias, interest, or other motive, his ability to remember the matter in question, and any admission of untruthfulness (2CT 380, 381, 382; CALJIC Nos. 2.13, 2.20, 2.21.1). (See *People v. Wilson*, *supra*, 43 Cal.4th at p. 20; *People v. Dickey*, *supra*, 35 Cal.4th at p. 906; *People v. Bunyard*, *supra*, 45 Cal.3d at pp. 1225-1226.)

On cross-examination of Mendez, appellant's counsel highlighted inconsistencies in her trial testimony when compared to both her earlier statement to detectives and her testimony in Echeverria's trial. (See 3RT 667-670, 672-673, 674-675, 679-682, 684, 688-689.) A central theme of appellant's counsel's closing argument to the jury was that Mendez was a liar, her testimony was untruthful, and her statements about the shooting

and appellant's identity as the shooter should not be credited as true. (5RT 1021-1025.) Given the jury instructions given regarding credibility issues, the efforts by the defense to impeach Mendez's credibility, and the parties' arguments which particularly focused on Mendez's credibility, the jury was "unquestionably aware" that Mendez's testimony and evidence of her out-of-court statements, including her statements about what appellant said, had to be critically evaluated and viewed with caution. (See *People v. Wilson*, *supra*, 43 Cal.4th at p. 20; *People v. Dickey*, *supra*, 35 Cal.4th at pp. 906-907.)

As summarized above, the evidence, especially when viewed as a whole, convincingly and unerringly established appellant's identity as an aggressor and shooter in this case. Under the circumstances, it is not reasonably probable the jury would have reached a verdict more favorable to appellant had CALJIC No. 2.71.7 been given. Indeed, on the instant record, any error in failing to give the cautionary instruction would have to be deemed harmless beyond a reasonable doubt. Because any error in failing to give the cautionary instruction was harmless, appellant's contention should be rejected.

VI. THE SUPREME COURT'S HOLDING IN *ROPER V. SIMMONS* (2005) 543 U.S. 551 [125 S.CT. 1183, 161 L.ED.2D 1], DOES NOT PROHIBIT THE USE OF PRIOR MURDER CONVICTIONS, COMMITTED WHEN APPELLANT WAS A JUVENILE, AS AN AGGRAVATING CIRCUMSTANCE TO RENDER APPELLANT DEATH ELIGIBLE FOR A MURDER COMMITTED WHILE HE WAS AN ADULT

The special circumstance alleged in this case was a prior murder conviction arising out of an attempted robbery-murder that took place when appellant was 17 years old. After being found guilty of first degree murder for the shooting death of Guevara, appellant waived his right to a jury trial on the special circumstance, and admitted his prior conviction for first

degree murder. (2CT 449; 6RT 1068.) Appellant was sentenced to death following a penalty phrase trial. (6RT 1144.) Appellant now claims that his death sentence violates the Eighth Amendment because it was imposed due to a murder he committed when he was a juvenile. (AOB 113-130.) Appellant's contention must be rejected because a prior juvenile conviction may be used as an aggravating factor to impose a death sentence.

In *Roper v. Simmons*, the United States Supreme Court determined that sentencing someone to death for a crime committed when that person was a juvenile violated the Eighth Amendment. (*Roper v. Simmons* (2005) 543 U.S. 551, 578 [125 S.Ct. 1183, 161 L.Ed.2d 1].) *Roper* is inapplicable to appellant's case because he was not a minor when he murdered Guevara, the crime for which he was sentenced to death. *Roper* says nothing about using a prior juvenile murder conviction as a "special circumstance" to make an adult defendant death-eligible. Thus, his claim fails.

Nevertheless, appellant asks this Court to expand *Roper* and, in essence, prevent a jury from giving any weight to crimes committed as a juvenile when determining whether the death penalty is appropriate for a later murder committed as an adult. (AOB 118-119.) Contrary to appellant's assertion otherwise, such a rule is not mandated by *Roper*, nor does it comport with well-established sentencing considerations, which legitimately allow the sentencer to consider the effects of recidivism, including criminal acts committed when the defendant was a juvenile. (*Boyd v. Newland* (9th Cir. 2006) 467 F.3d 1139, 1152 [*Apprendi v. New Jersey* (2000) 530 U.S. 466, 490 [120 S. Ct. 2348, 147 L. Ed. 2d 435] does not preclude the use of nonjury juvenile adjudications to enhance the sentence of an adult offender]).) Further, it ignores the distinction between double sentencing for a prior crime versus taking the fact of a defendant's criminal history into account when determining the appropriate sentence for continued criminal behavior.

The Supreme Court discussed this distinction in *Witte v. United States* (1995) 515 U.S. 389 [115 S.Ct. 2199, 132 L.Ed.2d 351]. In denying relief on a claim that enhanced punishment based upon a prior offense violated double jeopardy, the Court held:

> In repeatedly upholding such recidivism statutes, we have rejected double jeopardy challenges because the enhanced punishment imposed for the later offense "is not to be viewed as either a new jeopardy or additional penalty for the earlier crimes," but instead as "a stiffened penalty for the latest crime, which is considered to be an aggravated offense because a repetitive one."

(*Id.* at 400 [quoting *Gryger v. Burke* (1948) 334 U.S. 728, 732 [68 S.Ct. 1256, 92 L.Ed.2d 1683].) The Court went on to state:

> These decisions reinforce our conclusion that consideration of information about the defendant's character and conduct at sentencing does not result in "punishment" for any offense other than the one of which the defendant was convicted.

(*Witte, supra*, 515 U.S. at p. 401; see also *Moore v. Missouri* (1895) 159 U.S. 673, 677 [16 S.Ct. 179, 40 L.Ed. 301] [under a recidivist statute, "the accused is not again punished for the first offence" because "'the punishment is for the last offence committed, and it is rendered more severe in consequence of the situation into which the party had previously brought himself'"].)

Here, appellant was sentenced to death for the murder of Guevara because this murder was committed while he was an adult, and he had been properly convicted for his participation in a previous murder, "a situation into which [he] had previously brought himself." (*Moore v. Missouri, supra*, 159 U.S. at p. 677.) Such a finding comports not only with this Court's precedent (see *People v. Roldan* (2005) 35 Cal.4th 646, 737 [jury may consider evidence of juvenile violent criminal misconduct as an aggravating factor under section 190.3, factor (b)]; *People v. Lucky* (1988)

45 Cal.3d 259, 296), but with the principles established in the California Constitution and legislation. (See Cal. Const., art. I, § 28(g) [allowing use of any prior felony conviction, whether adult or juvenile, to enhance a sentence]; Pen. Code, § 667, subd. (d)(3)(b) [setting the criteria for the use of juvenile adjudications for purposes of the habitual offender enhancement].)

Contrary to appellant's assertion (AOB 113-114, 118), *Graham v. Florida* (2010) __U.S.__ [130 S.Ct. 2011], is also inapposite. *Graham* holds that sentencing juvenile offenders to life without the possibility of parole is unconstitutional in non-homicide offenses, forbidding states from deciding "at the outset" that a juvenile offender will never be fit to reenter society. (*Graham v. Florida*, *supra*, 130 S.Ct at p. 2029.) *Graham* is inapplicable. Notwithstanding the fact that appellant committed the underlying crime as an adult, his juvenile conviction was for homicide, and he was not sentenced to life without parole for that prior homicide. Hence, *Graham* does not apply here.

Appellant also contends that California's system of charging juveniles as adults is arbitrary and violates due process (AOB 120-125), and equal protection (AOB 126-129). This contention must also be rejected.

In *Manduley v. Superior Court* (2002) 27 Cal.4th 537, 567–573, this Court rejected a similar argument. The *Manduley* court rejected the argument that an amendment to Welfare and Institutions Code section 707, subdivision (d), that gave prosecutors discretion to file certain charges against specified minors directly in criminal court without a judicial determination that they were unfit for juvenile court disposition constituted a violation of due process and equal protection. The court concluded that the fact that the law gave prosecutors the discretion in determining whether to file charges against a minor in criminal court rather than wardship petitions in juvenile court did not render it unconstitutional.

With regard to the due process claim, the *Manduley* court stated,

> minors who commit crimes under the circumstances set forth in section 707(d) do not possess any statutory right to be subject to the jurisdiction of the juvenile court. Although the juvenile court has jurisdiction over minors accused of most crimes (§ 602), under the statutory provisions adopted by the enactment of Proposition 21, the criminal court also has jurisdiction over those minors who come within the scope of section 707(d), when the prosecutor files charges in that court. (§ 707(d)(4).) In these circumstances, when governing statutes provide that the juvenile court and the criminal court have concurrent jurisdiction, minors who come within the scope of section 707(d) do not possess any right to be placed under the jurisdiction of the juvenile court before the prosecutor initiates a proceeding accusing them of a crime. Thus, the asserted interest that petitioners seek to protect through a judicial hearing does not exist.

(*Manduley v. Superior Court, supra*, 27 Cal.4th at p. 565.)

Summarizing *Kent v. United States* (1966) 383 U.S. 541 [86 S.Ct. 1045, 16 L.Ed.2d 84], the Court explained that "where a statute confers a right to a judicial determination of fitness for a juvenile court disposition, the due process clause requires that the determination be made in compliance with the basic procedural protections afforded to similar judicial determinations." (*Manduley v. Superior Court, supra*, 27 Cal.4th at p. 566.) According to the United States Supreme Court, "'the essentials of due process and fair treatment'" include "the right to the effective assistance of counsel, access to the records considered by the juvenile court, and a statement of reasons for the juvenile court's decision." (*Id.* at p. 565.) Neither the United States nor the California Supreme Courts necessarily found that basic procedural protections of a juvenile court judicial determination included a full evidentiary hearing.

Nevertheless, appellant maintains that decisions determining whether minors are amenable to juvenile court treatment "run afoul of federal

constitutional due process requirements." (AOB 124-125.) However, this contention was rejected in *Manduley* as follows:

> As the Court of Appeal in the present case recognized, however, *Kent*, *supra*, 383 U.S. 541, 86 S.Ct. 1045, 16 L.Ed.2d 84, held only that where a statute confers a right to a judicial determination of fitness for a juvenile court disposition, the due process clause requires that the determination be made in compliance with the basic procedural protections afforded to similar judicial determinations. A statute that authorizes discretionary direct filing in criminal court by the prosecutor, on the other hand, does not require similar procedural protections, because it does not involve a judicial determination but rather constitutes an executive charging function, which does not implicate the right to procedural due process and a hearing.

(*Manduley v. Superior Court*, *supra*, 27 Cal.4th at pp. 565-566.) The court then noted that numerous decisions from other jurisdictions supported the conclusion that a prosecutor's discretionary decision to file charges against a minor in criminal court does not give rise to procedural protections ordinarily afforded in connection with a judicial decision. (*Manduley v. Superior Court*, *supra*, 27 Cal.4th at p. 566.)

Here, similar to *Manduley*, the prosecutor – who traditionally has been entrusted with the charging decision – has discretion whether to file charges against a minor directly in criminal court. Therefore, a prosecutor's decision to file charges in criminal court does not implicate any protected interest of appellant that gives rise to the requirements of procedural due process.

Appellant also contends that the use of a juvenile's previous murder conviction does not survive equal protection scrutiny. (AOB 126-129.) With regards to the equal protection claim, this Court has previously rejected this claim. The Court found that

> petitioners cannot establish a violation of their right to the equal protection of the laws by showing that other minors in

> circumstances similar to those of petitioners can be prosecuted under the juvenile court law. [Welfare and Institutions Code section 707[, subdivision] (d) limits the prosecutor's discretion to file charges in criminal court to minors of a specified age who commit enumerated crimes under certain circumstances, and at the preliminary hearing the magistrate must find reasonable cause to believe that the minor has committed such a crime under those circumstances. In addition, the prosecutor's decision is subject to constitutional constraints against invidious discrimination [citation] and against vindictive or retaliatory prosecution [citation]. Therefore, . . . the prosecutor's decision is not unfettered or entirely without standards. The prosecutor's discretion to select those statutorily eligible cases in which to seek a criminal disposition against a minor . . . does not violate the equal protection clause.

(*Manduley v. Superior Court*, supra, 27 Cal.4th at pp. 570–571.)

Appellant's equal protection challenge must also be rejected. Clearly, under *Manduley v. Superior Court*, *supra*, 27 Cal.4th at 537, it is properly within the discretion of the prosecutor to charge a juvenile either as a juvenile or as an adult.

Thus, appellant's claim must be rejected.

VII. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION WHEN CONDUCTING VOIR DIRE

Appellant contends the trial court's denial of his motion for individually sequestered voir dire violated his rights under the federal Constitution and parallel provisions of the California Constitution. (AOB 131-172.) His contention lacks merit.

A. Underlying Proceedings

At a pretrial hearing, defense counsel requested that the trial court use written jury questionnaires as part of the jury selection. The trial court denied the request and indicated that it was going to "just do the voir dire myself, on doing a full voir dire on the death penalty issues." (1ART 48-

49.) The court then stated, "At this point I plan to do voir dire unless there is some reason not to." (1ART 50.) Later, defense counsel renewed his request for a written jury questionnaire. (1ART 64.) Once again, the trial court denied the request. Citing Code of Civil Procedure, section 223, the court stated, "Jurors are straight with you. I'm able, I think, to get them to tell us their true attitudes. (1ART 83-84.)

When the court brought in the first panel of prospective jurors, the court conducted hardship excusals. (1RT 264; 2RT 271-282.) The court then moved on to the death-qualification portion of the voir dire. The court explained the stages of a capital trial, and the jury's duty to weigh aggravating and mitigating evidence before reaching a penalty decision. The court then explained that anyone who would automatically vote for death or for life without parole, would not be allowed to sit on the jury. The judge then outlined four categories to which jurors had to indicate they belonged. The first category was for people "that don't believe in the death penalty" and would never vote anyone to death. (1RT 297-298.) The second category was for people who would always vote for death. (1RT 298.) The third category was for people who believed in the death penalty, but who could not vote for it even if the aggravating evidence substantially outweighed the mitigating evidence. Finally, the fourth category was for people who could "keep an open mind," and base their decision on what the evidence dictated. (1RT 398-300.) The next day, a second panel of jurors were brought in. The court conducted the voir dire in the same manner. (2RT 512-516.)

B. The Trial Court Properly Exercised Its Discretion When Conducting Voir Dire

"It is established that a trial court 'is in the best position to assess the amount of voir dire required to ferret out latent prejudice, and to judge the

responses' [citation], and hence a trial court has '"great latitude in deciding what questions should be asked on voir dire."' [Citation.]" (*People v. Robinson* (2005) 37 Cal.4th 592, 617; see *People v. Waidla* (2000) 22 Cal.4th 690, 713–714 [applying abuse of discretion standard of review].) '"Unless the voir dire by a court is so inadequate that the reviewing court can say that the resulting trial was fundamentally unfair, the manner in which voir dire is conducted is not a basis for reversal."' (*People v. Carter* (2005) 36 Cal.4th 1215, 1250; see *People v. Robinson*, *supra*, at p. 617.) More specifically, individual sequestered jury selection is not constitutionally required, and jury selection is to take place "where practicable . . . in the presence of the other jurors in all criminal cases, including death penalty cases." (Code Civ. Proc., § 223; see *People v. Lewis* (2008) 43 Cal.4th 415, 493.) Accordingly, in reviewing a trial court's denial of a defendant's motion for individual sequestered jury selection, the reviewing court must apply the "abuse of discretion standard," under which the pertinent inquiry is whether the court's ruling "falls outside the bounds of reason." (*People v. Lewis*, *supra*, 43 Cal.4th at p. 494.) Group voir dire may be "'impracticable when, in a given case, it is shown to result in actual, rather than merely potential, bias.'" (*Ibid.*, quoting *People v. Vieira* (2005) 35 Cal.4th 264, 288.)

Initially, appellant contends that any restriction on individual and sequestered voir dire on death-qualifying issues, including that imposed by Code of Civil Procedure section 223, violated his rights to an impartial jury under the Eighth and Fourteenth Amendments to the federal Constitution. (AOB 140-143.) This Court has consistently rejected this contention. (See, e.g., *People v. Lewis*, *supra*, 43 Cal.4th at p. 494; *People v. Avila* (2006) 38 Cal.4th 491, 559; *People v. Vieira*, *supra*, 35 Cal.4th at pp. 287–288; *People v. Stitely* (2005) 35 Cal.4th 514, 537.)

Nevertheless, appellant contends that under the facts of this case, the court abused its discretion in deciding whether group voir dire was practical. Appellant contends that the court's voir dire was improper because the line of questioning the court was using made it appear that a juror would be qualified to serve as long as they stated they would look at both mitigating and aggravating evidence before reaching a verdict, regardless of his or her views on the death penalty. (AOB 143-145.) This claim must also be rejected.

A trial court has broad discretion over the number and nature of voir dire questions concerning the death penalty. (*People v. Stitely*, *supra*, 35 Cal.4th at p. 540.) As this Court previously recognized, a trial court should be evenhanded in questioning prospective jurors during death-penalty qualification and should inquire into the jurors' attitudes both in favor of and against the death penalty. (*People v. Champion* (1995) 9 Cal.4th 879, 908–909.) Clearly, here, the court was trying to be evenhanded. The court was verifying whether a juror could or even would look at all the evidence no matter what his or her view on the death penalty was. (See *Wainwright v. Witt* (1985) 469 U.S. 412, [105 S.Ct. 844, 83 L.Ed.2d 841] ("juror who is substantially impaired in his or her ability to impose the death penalty under the state-law framework can be excused for cause; but if the [prospective] juror is not substantially impaired, removal for cause is impermissible.").) This was proper.

Appellant points to the fact that several jurors answered the same when questioned by the court. However, as appellant notes (AOB 145), the court immediately recognized this and made it clear that it was okay for the jurors to indicate that he or she belonged to any one of the four categories. Thus, the court clearly did not abuse its discretion.

Next, appellant contends the trial court abused its discretion in the manner in which it conducted group death-penalty-qualification voir dire of

the prospective jurors. Specifically, appellant asserts that the group voir dire procedure employed by the trial court was inadequate to identify prospective jurors whose views on the death penalty rendered them partial and unqualified to serve. As a result, he asserts, the court was unable to determine whether any of the prospective jurors who sat on the jury in his case held disqualifying views that impaired their ability to judge him in accordance with the court's instructions. Appellant claims a written questionnaire would have prevented these errors. (AOB 148-172, fn. 89.) Appellant's claim must be rejected.

The trial court did not abuse its discretion in conducting group voir dire. Appellant fails to "describe any specific example of how questioning prospective jurors in the presence of other jurors prevented him from uncovering juror bias." (*People v. Navarette* (2003) 30 Cal.4th 458, 490.) Appellant claims the court did not ask enough questions to resolve the some of the ambiguities shown in the jurors' answers. However, this Court

> "pay[s] due deference to the trial court, which was in a position to actually observe and listen to the prospective jurors. Voir dire sometimes fails to elicit an unmistakably clear answer from the juror, and there will be times when "the trial judge is left with the definite impression that a prospective juror would be unable to faithfully and impartially apply the law . . . . [T]his is why deference must be paid to the trial judge who sees and hears the juror."

(*People v. Griffin* (2004) 33 Cal.4th 536, 559.) Here, the trial court's questioning was thorough enough to discern whether a potential juror was death-qualified. Therefore, this claim fails.

Next, appellant contends that group voir dire was not "practicable" within the meaning of Code of Civil Procedure section 223 because prospective jurors were influenced by the responses of others. (AOB 143-145.) "The possibility that prospective jurors may have been answering questions in a manner they believed the trial court wanted to hear,"

however, "identifies at most potential, rather than actual, bias and is not a basis for reversing a judgment." (*People v. Vieira*, *supra*, 35 Cal.4th at p. 289.) Indeed, the purpose and effect of the "group voir dire" requirement of Code of Civil Procedure section 223 would be obviated if nonsequestered questioning were deemed "[im]practicable" because of the speculative concern that one prospective juror's death penalty responses might influence the responses of others in the venire. It is precisely this premise of *Hovey v. Superior Court* (1980) 28 Cal.3d 1, that Proposition 115's adoption of Code of Civil Procedure section 223 was intended to overrule. (*People v. Vieira*, *supra*, 35 Cal.4th at p. 288.) Thus, this claim fails.

Appellant also contends that the court's voir dire was inadequate because the court's four category self-assessment improperly relied on jurors to accurately assess whether they hold views which would substantially impair their ability to sit on the case. (AOB 166.) Appellant is merely claiming that the questioning was flawed because it appeared to have been done quickly and certain potential jurors may have been overlooked with regards to questions on the death penalty. This Court has routinely rejected this claim. (See *People v. Stitely*, *supra*, 35 Cal.4th at p. 538; *People v. Stewart* (2004) 33 Cal.4th 425, 441.)

Appellant claims, however, that the cases where this Court has rejected claims that voir dire was "hasty" or "perfunctory," all the trial courts used jury questionnaires to supplement oral voir dire. (AOB 167 fn. 89.) Appellant is mistaken.

In *People v. Hernandez* (2003) 30 Cal.4th 835, the trial court did not use jury questionnaires. Hernandez claimed the trial court conducted a "perfunctory" and "cursory" inquiry into the prospective jurors' views on capital punishment. (*Id.* at p. 855.) Nevertheless, this Court found no constitutional error because the trial court, as here, had orally questioned

the jurors and counsel was allowed to ask follow-up questions. Thus, appellant's claim must be rejected.

Next, appellant contends that the inadequate group voir dire led to the seating of a juror, Juror No. 10, who was not death-qualified. (AOB 167-170.) This claim must be rejected.

Juror No. 10, whose original juror number was 5613, entered the court room with the second panel of prospective jurors. After granting hardship excusals, the trial court began with death qualifications. The court explained that people who would always vote for death or who would never vote for death could not sit on the jury. The court stated,

> We need jurors who can consider all the evidence, all the good evidence, all the bad evidence and to make a decision based upon the evidence; jurors who are able to vote for the death or able to vote for life depending upon what the evidence proves to them.

(2RT 511.) The court then told the potential jurors that it would ask them whether or not they could or could not impose the death penalty depending on the evidence, and outlined the categories most people fall into. (2RT 511-513.)

The court began questioning the prospective jurors. Most jurors indicated their feelings about the death penalty. (2RT 514-533.) Juror 10, however, did not state to which category she belonged. The court asked her the same follow-up questions asked of all the jurors. (2RT 544-545, 552, 558, 562-563, 564.)

First, appellant did not object to this juror being seated during voir dire and therefore has forfeited the claim for appeal. (*People v. Benavides* (2005) 35 Cal.4th 69, 88.) Appellant did not preserve this issue for appeal because he did not exercise a peremptory challenge to excuse Juror Number 10, and the defense did not utilize all of its peremptory challenges. (2RT 574.) "To preserve a claim of error in the denial of a challenge for

cause, the defense must exhaust its peremptory challenges and object to the jury as finally constituted." (*People v. Hillhouse* (2002) 27 Cal.4th 469, 487.) Appellant had ample peremptory challenges remaining to remove Juror Number 10.

Nevertheless, appellant's challenge to the adequacy of the voir dire of the juror also lacks merit. A prospective juror's personal views concerning the death penalty do not necessarily afford a basis for excusing the juror for bias in a capital case. (*Uttecht v. Brown* (2007) 551 U.S. 1, 6 [127 S.Ct. 2218, 167 L.Ed.2d 1014] ["'[a] man who opposes the death penalty, no less than one who favors it, can make the discretionary judgment entrusted to him by the State,' [citation] . . ."].) Rather, "[t]o achieve the constitutional imperative of impartiality, the law permits a prospective juror to be challenged for cause only if his or her views in favor of or against capital punishment 'would "prevent or substantially impair the performance of his . . . duties as a juror" 'in accordance with the court's instructions and the juror's oath." (*People v. Blair* (2005) 36 Cal.4th 686, 741, quoting *Witt, supra*, 469 U.S. at p. 424.) Under this standard, a prospective juror is properly excluded in a capital case if he or she is unable to follow the trial court's instructions and "conscientiously consider all of the sentencing alternatives, including the death penalty where appropriate. [Citations.]" (*People v. McWhorter* (2009) 47 Cal.4th 318, 340; see also *People v. Jenkins* (2000) 22 Cal.4th 900, 987.) The analysis is the same whether the claim is the failure to exclude prospective jurors who exhibited a pro-death bias, or wrongful exclusion of prospective jurors who exhibited an anti-death bias. (See *People v. Hoyos* (2007) 41 Cal.4th 872, 906.)

Here, the trial court informed all the jurors regarding the process that was taking place. The court asked the individual jurors to state their feelings in regard to the death penalty. Clearly, the jurors understood this to mean that they must tell their thoughts on the death penalty, and whether

they could make a decision based upon the evidence presented regardless of their beliefs. Although Juror Number 10 did not specifically state her views on the death penalty, she was questioned by the court, and had every opportunity to state her beliefs one way or another. In other words, if Juror Number 10 was in a category in which the jurors were being removed, she would have stated as much.

Nevertheless, Juror Number 10's answers to other questions indicated that she was not biased, and could evaluate the evidence properly. Juror Number 10 had a brother who had spent many years in prison, and in fact, was still in prison. Yet, she had no problem with the criminal justice system. (2RT 552-554.) In addition, Juror Number 10 had served on a criminal trial previously that had reached a verdict. (2RT 562-563.) Finally, she stated that she had no problem with anyone who personally owns a gun. (2RT 563.) Accordingly, on this record, appellant is merely speculating that Juror No. 10 held views that would prevent or substantially impair the performance of her duties as a juror. This claim must be rejected.

Contrary to appellant's assertion to the contrary (AOB 170), appellant has failed to establish that "any juror who eventually served was biased against him." (*People v. Cash* (2002) 28 Cal.4th 703, 722-723 [absolute barring any voir dire beyond facts alleged on the face of the charging document created a risk that a juror who would automatically vote to impose the death penalty on a defendant who had previously committed murder was empanelled and acted on those views, violated defendant's due process right to an impartial jury]; *People v. Avena* (1996) 13 Cal.4th 394, 413.) Unlike *Cash*, here, the trial court conducted a thorough voir dire, specifically inquiring into juror's beliefs about the death penalty. Although Juror No. 10 was not specifically asked her views on death, she was present when every other juror was asked and knew to speak up if she had a view

that would subject her to challenge. Therefore, appellant is not entitled to reversal.

Appellant has not established that the trial court's questioning impermissibly prejudiced the jury or that the court abused its discretion in conducting group voir dire. The court clearly recognized its obligation to comply with section 223 of the Code of Civil Procedure. Thus, appellant fails to establish that the voir dire procedure followed by the trial court constituted an abuse of discretion or violated any provision of the federal Constitution. (*People v. Avila*, *supra*, 38 Cal.4th at p. 491.)

VIII. NO CUMULATIVE ERROR RESULTED

Appellant contends the cumulative effect of the alleged errors discussed in the previous arguments requires reversal. (AOB 173-178.) The claim is without merit because the foregoing arguments demonstrate "there was no error . . . to cumulate" (*People v. Phillips* (2000) 22 Cal.4th 226, 244), or there was no prejudice from any alleged error (*People v. Jenkins*, *supra*, 22 Cal.4th at p. 1056 ["trial was not fundamentally unfair, even if we consider the cumulative impact of the few errors that occurred"]; accord, *People v. Elliot* (2005) 37 Cal.4th 453, 487; *People v. Sapp* (2003) 31 Cal.4th 240, 287, 316; *People v. Jones*, *supra*, 29 Cal.4th at p. 1268). A defendant is entitled to a fair trial, not a perfect one. (*People v. Welch* (1999) 20 Cal.4th 701, 775.) Appellant received a fair trial.

IX. CALIFORNIA'S DEATH PENALTY LAW IS CONSTITUTIONAL

Appellant contends California's death penalty scheme is unconstitutional for various reasons. (AOB 179-197.) However, as he concedes, this Court has previously rejected each of his claims (AOB 179) and respondent submits this Court should do so once again.

A. Section 190.2 Is Not Impermissibly Broad

Appellant contends his death penalty is invalid because section 190.2 is impermissibly broad. (AOB 179-180.) This Court has repeatedly rejected such arguments and should continue to do so. (*People v. Elliot*, *supra*, 37 Cal.4th 453, 487; *People v. Snow* (2003) 30 Cal.4th 43, 126-127; *People v. Anderson*, *supra*, 25 Cal.4th at p. 601.)

B. Section 190.3, Subdivision (a), Is Not Being Applied in an Arbitrary or Capricious Manner

Appellant contends that the "circumstances of the crime" factor in Penal Code section 190.3, subdivision (a), "has been applied in such a wanton and freakish manner that almost all features of every murder" have been used as "aggravating" factors by prosecutors, amounting to a violation of the Fifth, Sixth, Eighth and Fourteenth Amendments. (AOB 180-181.) This Court has repeatedly rejected claims such as this. (See, e.g., *People v. Elliot*, *supra*, 37 Cal.4th at p. 487; *People v. Smith* (2005) 35 Cal.4th 334, 373; *People v. Turner* (2004) 34 Cal.4th 406, 438.) In doing so, this Court has noted that the "seemingly inconsistent range of circumstances" that "can be culled from death penalty decisions" shows "that each case is judged on its facts, each defendant on the particulars of his offense. Contrary to defendant's position, a statutory scheme would violate constitutional limits if it did not allow such individualized assessment of the crimes but instead mandated death in specified circumstances." (*People v. Brown* (2004) 33 Cal.4th 382, 401; *see also People v. Jenkins*, *supra*, 22 Cal.4th at pp. 1052-1053.) Therefore, appellant's claim must be rejected.

C. The Constitution Does Not Require That the Jury Find Any Aggravating Factors True Beyond a Reasonable Doubt or Find That the Aggravating Factors Outweighed the Mitigating Factors Beyond a Reasonable Doubt

1. Appellant's Death Sentence is Constitutional

Appellant contends his constitutional right to a jury determination beyond a reasonable doubt was violated because the jury was not instructed that it had to find any aggravating factors true beyond a reasonable doubt or that the aggravating factors outweighed the mitigating factors beyond a reasonable doubt before deciding whether to impose the death penalty. Appellant further argues that recent decisions by the Supreme Court have rejected this Court's prior determinations on these issues. (AOB 182-183.) These claims are of no avail because they have all been rejected previously by this Court. (*People v. Elliot, supra*, 37 Cal.4th at p. 487; *People v. Panah* (2005) 35 Cal.4th 395, 499; *People v. Vieira, supra*, 35 Cal.4th at p. 300.) And as noted previously, the Supreme Court's decisions in *Blakely v. Washington* (2004) 542 U.S. 296 [124 S.Ct. 2531, 159 L.Ed.2d 403], *Ring v. Arizona* (2002) 536 U.S. 584 [122 S.Ct. 2428, 153 L.Ed.2d 556], and *Apprendi v. New Jersey, supra*, 530 U.S. 466, have not changed this Court's analysis on this issue. (*See, e.g., People v. Elliot, supra*, 37 Cal.4th at p. 487; *People v. Ward* (2005) 36 Cal.4th 186, 221-222; *People v. Stitely, supra*, 35 Cal.4th at p. 573; *People v. Morrison, supra*, 34 Cal.4th at p. 730; *People v. Danks* (2004) 32 Cal.4th 269, 316 ["trial court did not err in failing to require the jury to make unanimous separate findings of the truth of specific aggravating evidence" and "[n]othing in *Ring* . . . or *Apprendi* . . . affects our conclusions in this regard"]; *People v. Crew* (2003) 31 Cal.4th 822, 860; *People v. Prieto* (2003) 30 Cal.4th 226, 262-263, 275.) Thus, there was no error.

2. The Sixth, Eighth and Fourteenth Amendments Do Not Require the State to Bear the Burden of Persuasion at the Penalty Phase

This Court has specifically rejected appellant's claim (AOB 184-185) that the constitutional guarantees of equal protection and due process and Evidence Code section 520, which imposes the burden of proof on the prosecution, require the prosecution to bear the burden of persuasion in the penalty phase of a capital trial. (See *People v. Lenart* (2004) 32 Cal.4th 1107, 1135-1136.) Because of the individual and normative nature of the jury's sentencing determination, the trial court need not instruct that the prosecution has the burden of persuasion on the issue of penalty. (*People v. Combs* (2004) 34 Cal.4th 821, 868; *People v. Kipp*, *supra*, 26 Cal.4th at p. 1137.) Because appellant offers no valid reason to overturn these past decisions, his claim should be rejected. This Court should decline appellant's invitation to revisit this conclusion. Nor does the federal or state Constitution require an instruction explaining that there is no burden of proof in the penalty phase. (*People v. Farley* (2009) 46 Cal.4th 1053, 1133.)

3. The Constitution Does Not Require Unanimous Jury Findings

a. The Constitution Does Not Require That the Jury Find Any Aggravating Factors True Beyond a Reasonable Doubt or Find That the Aggravating Factors Outweighed the Mitigating Factors Beyond a Reasonable Doubt

Appellant contends his constitutional right to a jury determination beyond a reasonable doubt was violated because the jury was not instructed that it had to find any aggravating factors true beyond a reasonable doubt or that the aggravating factors outweighed the mitigating factors beyond a reasonable doubt before deciding whether to impose the death penalty.

Appellant further argues that recent decisions by the Supreme Court have rejected this Court's prior determinations on these issues. (AOB 185-186.) These claims are of no avail because they have all been rejected previously by this Court. (*People v. Elliot*, *supra*, 37 Cal.4th at p. 487; *People v. Panah*, *supra*, 35 Cal.4th at p. 499; *People v. Vieira*, *supra*, 35 Cal.4th at p. 300.) And as noted previously, the Supreme Court's decisions *in Blakely v. Washington*, *supra*, 542 U.S. 296, *Ring v. Arizona*, *supra*, 536 U.S. 584, and *Apprendi v. New Jersey*, *supra*, 530 U.S. 466, have not changed this Court's analysis on this issue. (See, e.g., *People v. Elliot*, *supra*, 37 Cal.4th at p. 487; *People v. Ward*, *supra*, 36 Cal.4th at pp. 221-222; *People v. Stitely*, *supra*, 35 Cal.4th at p. 573; *People v. Morrison*, *supra*, 34 Cal.4th at p. 730; *People v. Danks* (2004) 32 Cal.4th 269, 316 ["trial court did not err in failing to require the jury to make unanimous separate findings of the truth of specific aggravating evidence" and "[n]othing in *Ring* . . . or *Apprendi* . . . affects our conclusions in this regard"]; *People v. Crew* (2003) 31 Cal.4th 822, 860; *People v. Prieto*, *supra*, 30 Cal.4th at pp. 262-263, 275.) Thus, there was no error.

b. The Use of Appellant's Unadjudicated Criminal Activity Did Not Violate His Constitutional Rights

Appellant also claims that instructing the jury that it could consider unadjudicated criminal activity as an aggravating factor violated his rights to due process, trial by an impartial jury, a reliable determination of guilt, and equal protection. He also argues that the failure to require a unanimous jury finding on the unadjudicated acts of violence violated his right to a jury trial and absent a requirement of jury unanimity on the unadjudicated acts of violence, the instructions allowed jurors to impose the death penalty on unreliable factual findings that were never deliberated, debated or discussed. (AOB 186-187.)

This claim, too, is one this Court has rejected many times.

> The jury may properly consider evidence of unadjudicated criminal activity involving force or violence under factor (b) of section 190.3 and need not make a unanimous finding on factor (b) evidence.

(*People v. Brown*, *supra*, 33 Cal.4th at p. 402; *citing People v. Anderson*, *supra*, 25 Cal.4th at p. 584; *People v. Prieto*, *supra*, 30 Cal.4th at p. 263.) Neither *Ring v. Arizona* nor *Apprendi v. New Jersey* affects California's death penalty law. (*People v. Smith* (2003) 30 Cal.4th 581, 641-642; *People v. Prieto*, *supra*, 30 Cal. 4th at p. 272 ["*Ring* does not apply to California's penalty phase proceedings"]; *People v. Navarette* (2003) 30 Cal.4th 458, 520-521.)

4. The Jury Instructions Were Not Impermissibly Broad

Next, appellant challenges the instruction that, "[t]o return a judgment of death, each of you must be persuaded that the aggravating circumstances are so substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole." He asserts that the phrase "so substantial" is impermissibly broad. (AOB at 188.) This Court has routinely rejected this contention. (*People v. Page* (2008) 44 Cal.4th 1, 55–56; *People v. Breaux* (1991) 1 Cal.4th 281, 316.) Because appellant offers no valid reason to overturn these past decisions, his claim should be rejected.

5. The Jury Instructions Did Not Fail to Delete Inapplicable Language

Next, appellant contends that the trial court erred in failing to delete inapplicable mitigating factors. (AOB at 188.) This argument has been repeatedly rejected by this court. (*People v. Turner* (1994) 8 Cal.4th 137, 207–208; *People v. Clark* (1992) 3 Cal.4th 41, 169.) Because

appellant offers no valid reason to overturn these past decisions, his claim should be rejected.

6. The Trial Court the Trial Court Is Not Constitutionally Required to Instruct the Jury That Certain Sentencing Factors Are Relevant Only to Mitigation

Next, appellant contends the trial court was required to instruct that statutory mitigating factors were relevant solely as potential mitigators. (AOB 189.) This Court has previously rejected this contention and should also do so here. (*People v. Elliot*, *supra*, 37 Cal.4th at p. 488; *People v. Panah*, *supra*, 35 Cal.4th at p. 500; *People v. Smith*, *supra*, 35 Cal.4th at pp. 373-374; *People v. Kraft*, *supra*, 23 Cal.4th at pp. 1078-1079.) Because appellant offers no valid reason to overturn these past decisions, his claim should be rejected.

7. Appellant Was Not Entitled to an Instruction on Lingering Doubt

Next, appellant contends the trial court erred in denying his request that the jury be instructed that a lingering may still be considered as a mitigating factor at the penalty phase. (AOB at 189-190.) There was no error. Such an instruction is not required by the federal Constitution. (*Franklin v. Lynaugh* (1988) 487 U.S. 164, [174, 108 S.Ct. 2320, 101 L.Ed.2d 155].) As this Court has stated,

> [W]e repeatedly have held that although it is proper for the jury to consider lingering doubt, there is no requirement that the court specifically instruct the jury that it may do so. [Citations.]

(*People v. Slaughter* (2002) 27 Cal.4th 1187, 1219.) Because appellant offers no valid reason to overturn these past decisions, his claim should be rejected.

8. The Jury Instructions Properly Informed the Jury That the Central Determination Is Whether Death Is the Appropriate Punishment

Next, appellant complains that the instruction failed to inform the jurors that the central determination entrusted to them is whether the death penalty is the appropriate punishment, not merely an authorized punishment (AOB at 190-191.) In rejecting this claim, this Court has explained, however,

> [b]y advising that a death verdict should be returned only if aggravation is "so substantial in comparison with" mitigation that death is "warranted," the instruction clearly admonishes the jury to determine whether the balance of aggravation and mitigation makes death the appropriate penalty. [Citations.]

(*People v. Arias* (1996) 13 Cal.4th 92, 171; see also *People v. Taylor* (2009) 47 Cal.4th 850, 899–900; *People v. Griffin* (2004) 33 Cal.4th 536, 593.) Having offered no persuasive reason why this Court should not follow its prior decisions, appellant's claim should fail.

9. The Trial Court Properly Instructed the Jury

Appellant also contends that the trial court failed to inform the jury that if it found the factors in mitigation outweighed the factors in aggravation, it was required to impose a sentence of life imprisonment without the possibility of parole. (AOB at 191-192.) This Court has rejected this contention as follows:

> [CALJIC No. 8.84.2] clearly stated that the death penalty could be imposed only if the jury found that the aggravating circumstances outweighed mitigating. There was no need to additionally advise the jury of the converse (i.e., that if mitigating circumstances outweighed aggravating, then life [imprisonment] without [the possibility of] parole was the appropriate penalty).

(*People v. Duncan* (1991) 53 Cal.3d 955, 978.) Similarly, here, the jury was instructed with CALJIC No. 8.88, which provides, to return a judgment of death, each of you must be persuaded that the aggravating circumstances are so substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole." (3CT 480-481.) Having offered no persuasive reason why this Court should not follow its prior decision, appellant's claim should fail.

10. The Instructional Errors Did Not Violate the Sixth, Eighth, and Fourteenth Amendments

Appellant contends that all the instructional errors violated the Sixth, Eighth, and Fourteenth Amendments by failing to inform the jury regarding the standard of proof and the lack of need for unanimity as to mitigating instructions. (AOB 192-193.) Not so. As this Court has stated,

> "'The Eighth and Fourteenth Amendments do not require that a jury unanimously find the existence of aggravating factors or that it make written findings regarding aggravating factors.' [Citations.] '[N]either the cruel and unusual punishment clause of the Eighth Amendment, nor the due process clause of the Fourteenth Amendment, requires a jury to find beyond a reasonable doubt that aggravating circumstances exist or that aggravating circumstances outweigh mitigating circumstances or that death is the appropriate penalty. [Citations.]'" [Citation.] Moreover, the statute "'is not unconstitutional because it does not contain a requirement that the jury be given burden of proof or standard of proof instructions for finding aggravating and mitigating circumstances in reaching a penalty determination.' [Citation.]"

(*People v. Cowan* (2010) 50 Cal.4th 401, 508–509.) In addition,

> [n]othing in the United States Supreme Court's recent decisions interpreting the Sixth Amendment's jury trial guarantee (e.g., *Cunningham v. California* (2007) 549 U.S. 270 [127 S.Ct. 856, 166 L.Ed.2d 856]; *Ring v. Arizona* (2002) 536 U.S. 584 [122 S.Ct. 2428, 153 L.Ed.2d 556]; *Apprendi v. New Jersey* (2000)

530 U.S. 466 [120 S.Ct. 2348, 147 L.Ed.2d 435]) compels a different answer to these questions.

(*People v. Cowan*, *supra*, 50 Cal.4th at p. 509.) Having offered no persuasive reason why this Court should not follow its prior decisions, appellant's claim should fail.

11. The Trial Court Properly Instructed the Jury Regarding Presumption of Life

Next, appellant contends that the trial court should have instructed on the presumption of life. (AOB at 194.) Not So. The trial court need not instruct that there is a presumption of life. (*People v. Gamache* (2010) 48 Cal.4th 347, 407.) Having offered no persuasive reason why this Court should not follow its prior decisions, appellant's claim should fail.

D. Written Findings for the Death Verdict Were Not Required

Appellant invites this Court to reconsider its previous ruling that a capital jury is not required to submit written findings for its death verdict. (AOB 195.) Because this Court has repeatedly declined such an invitation, it should do so again here. (See *People v. Elliot*, *supra*, 37 Cal.4th at p. 488; *People v. Yeoman* (2003) 31 Cal.4th 93, 164-165; *People v. Martinez*, *supra*, 31 Cal.4th at p. 701; *People v. Smith* (2003) 30 Cal.4th 581, 641-642.)

E. Intercase Proportionality Review Is Not Constitutionally Required

Appellant contends that the lack of intercase proportionality review violates the Eighth and Fourteenth Amendments. (AOB at 195.) This Court has repeatedly rejected this contention and should do so here. (See, e.g., *People v. Elliot*, *supra*, 37 Cal.4th at p. 488; *People v. Panah*, *supra*, 35 Cal.4th at p. 500; *People v. Smith*, *supra*, 35 Cal.4th at p. 374;

People v. Burgener, *supra*, 29 Cal.4th at p. 885; *People v. Anderson*, *supra*, 25 Cal.4th at p. 602.)

F. The California Sentencing Scheme Does Not Deny Equal Protection

Appellant contends California's sentencing scheme violates the Equal Protection Clause because it denies certain procedural safeguards to capital defendants that are afforded non-capital defendants. (AOB 195-196.) This Court has previously rejected this contention and should also do so here. (*People v. Elliot*, *supra*, 37 Cal.4th at p. 488; *People v. Panah*, *supra*, 35 Cal.4th at p. 500; *People v. Smith*, *supra*, 35 Cal.4th at p. 374; *People v. Allen* (1986) 42 Cal.3d 1222, 1286-1288.)

G. California's Death Penalty Procedure Does Not Violate International Law

Appellant contends that California's death penalty scheme violates international law. (AOB 196-197.) This Court has rejected this contention and has specifically rejected the argument that California's scheme violates the International Covenant of Civil and Political Rights. (See, e.g., *People v. Roldan*, *supra*, 35 Cal.4th at p. 744; *People v. Ramos* (2004) 34 Cal.4th 494, 533-534; *People v. Brown*, *supra*, 33 Cal.4th at p. 404.) Therefore, appellant's claim must be rejected here, as well.

CONCLUSION

Respondent respectfully requests that the judgment and sentence be affirmed.

Dated: July 23, 2012

Respectfully submitted,

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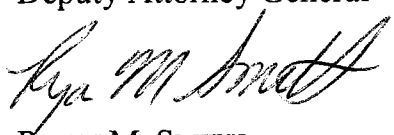

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CERTIFICATE OF COMPLIANCE

I certify that the attached Respondent's Brief uses a 13 point Times New Roman font and contains 22,376 words.

Dated: July 23, 2012

KAMALA D. HARRIS
Attorney General of California

RYAN M. SMITH
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DECLARATION OF SERVICE

CAPITAL CASE

Case Name: ***People v. Magdaleno Salazar*** Number: **S077524**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business. On July 23, 2012, I served the attached

RESPONDENT'S BRIEF

by placing a true copy thereof enclosed in a sealed envelope in the internal mail system of the Office of the Attorney General at 300 South Spring Street, Suite 1702, Los Angeles, CA 90013, addressed as follows:

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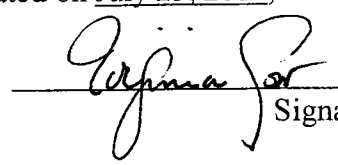
On July 23, 2012, I caused an original and 13 copies of the Respondent's Brief in this case to be delivered to the California Supreme Court at 350 McAllister Street, San Francisco, CA 94102 by Federal Express.

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 July 23, 2012, at Los Angeles, California.

Virginia Gow
Declarant


Signature

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