In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA, **Plaintiff and Respondent,** **v.** **ASWAD POPS AND BYRON WILSON,** **Defendants and Appellants.**	**CAPITAL CASE** Case No. S087533

Los Angeles County Superior Court Case No. BA164899
The Honorable Curtis B. Rappe, Judge

RESPONDENT'S BRIEF

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STATEMENT OF THE CASE

In an amended information filed on June 28, 1999,[1] by the District Attorney of Los Angeles County, it was alleged that appellants committed the following crimes: the murder of Charles Hurd (Pen. Code,[2] § 187, subd. (a) [count 1]); the murder of Michael Hoard (§ 187, subd. (a) [count 2]); the murder of Shawn Potter (§ 187, subd. (a) [count 3]); the murder of Jessie Dunn (§ 187, subd. (a) [count 4]); four counts of second degree robbery (§ 211 [count 5 (Charles Hurd); count 6 (Michael Hoard); count 7 (Shawn Potter); count 8 (Jessie Dunn)]; and second degree commercial burglary (§ 459 [count 9 ("Wheels N' Stuff" carwash)]). Appellant Pops was also charged with the attempted murder of Jane Hernandez (§§ 664/187, subd. (a) [count 10]).[3] Regarding the murders in counts 1 through 4, the following special circumstances were alleged: multiple-murder (§190.2, subd. (a)(3)); burglary-murder (§ 190.2, subd. (a)(17)); and robbery-murder (§ 190.2, subd. (a)(17)). It was further alleged as to each count that a principal was armed with a firearm (§12022, subd. (a)(1)). As to counts 1 through 8 and 10, it was alleged that appellants personally used firearms (§ 12022.53, subd. (b)), personally and intentionally discharged firearms (§ 12022.53, subd. (c)), and that the personal and intentional discharge of firearms proximately caused great bodily injury to the victims (§ 12022.53, subd. (d)). Additionally, it was alleged that appellant Pops

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[1] The original information was filed on July 9, 1998. (2CT 384-396.)

[2] All further statutory references will be to the Penal Code, unless otherwise indicated.

[3] Appellant Wilson was also charged in the original information with the attempted murder of Hernandez (count 10) and an associated burglary (count 11). (2CT 393-394.) The court granted appellant Wilson's motion to dismiss the two counts (§ 1118.1) as to him. (4CT 993.) The court also granted appellant Pops motion to dismiss count 11 as to him.

had suffered two prior serious or violent felony convictions pursuant to sections 667, subdivisions (a)(1) and (b) through (i), and section 667.5. It was also alleged that appellant Wilson had suffered a prior serious or violent felony conviction pursuant to section 667, subdivisions (a)(1) and (b) through (i). (4CT 1030-1044.)[4]

Appellants pled not guilty and denied the special allegations. (2CT 382-383, 399-400.)

The jury returned its verdicts for the guilt phase on July 15, 1999. Appellants were found guilty of the four murders charged in counts 1 through 4. The jury found true the allegations that appellant Wilson personally and intentionally discharged a firearm which caused great bodily injury to Charles Hurd (count 1), Michael Hoard (count 2), and Shawn Potter (count 3). The jury found appellant Pops personally and intentionally discharged a firearm which caused great bodily injury to Jessie Dunn (count 4).[5] The other allegations alleged in theses counts were found true. The jury also found true the special circumstance allegations relating to counts 1 through 4, and the special circumstance of multiple-murder. (4CT 1091-1094, 1096-1099; 5CT 1102-1107, 1116-1121, 1129-1136, 1139-1143.)

Additionally, appellants were found guilty in count 5 of the second degree robbery of Charles Hurd with true findings as to all the allegations,

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[4] The original information filed on July 9, 1998, also charged Aziz Harris (appellant Pops's brother) with arson of property belonging to Jessie Dunn (§ 451, subd. (d) [count 12]) and receiving stolen property (§ 496, subd. (a) [count 13]). (2CT 395-396.) On September 15, 1998, Harris pled guilty to receiving stolen property and the arson charge was dismissed. His sentence was suspended, and he was placed on formal probation for three years. (Supp. II 1CT 60-64, 66-76.)

[5] The jury found the personal discharge of a firearm allegations not true in counts 1 through 3 as to appellant Pops, and not true in count 4 as to appellant Wilson.

except for a not true finding that appellant Wilson personally and intentionally discharged a firearm. (4CT 1095; 5CT 1108-1109, 1121.) The jury acquitted appellants of the attempted robberies charged in counts 6 and 7. (5CT 1112-1113, 1125-1126, 1127-1128, 1145-1146.) Further, the jury convicted appellants of the second degree robbery of Jessie Dunn in count 8, with findings of true as to all the allegations (except for the personal discharge of a firearm as to appellant Wilson), and second degree commercial burglary in count 9, with true findings of all the allegations. (4CT 1188-1089; 5CT 1111-1112, 1123-1124, 1137-1138.) Additionally, the jury convicted appellant Pops of the attempted murder of Jane Hernandez in count 10, with true findings as to all the allegations. (4CT 1030; 5CT 1112.) Lastly, the jury found true the allegations that appellant Pops suffered two prior felony convictions. (4CT 1087; 5CT 1112.) In a bifurcated proceeding, the trial court found true the allegation that appellant Wilson suffered a prior felony conviction. (5CT 1314.)

On August 2, 1999, following the penalty phase trial, the jury returned verdicts of death regarding counts 1 through 4. (6CT 1376-1377, 1380-1381.) The trial court denied appellants' motions for a new trial and for modification of the verdicts. (7CT 1682, 1694.)

On April 7, 2000, appellant Pops was sentenced to death in counts 1 through 4. The court further imposed a consecutive term of 60 years—three 20-year terms—for the section 12022.53, subdivision (c) firearm enhancements in counts 1 through 3. A 25-year-to-life term was also imposed for the section 12022.53, subdivision (d) personal use and discharge of a firearm enhancement in count 4.[6] As to count 10, the court imposed a consecutive high term of 18 years pursuant to the second strike

[6] The sentences for the other firearm enhancements in counts 1 through 4 were stricken by the court.

provision of the Three Strikes Law, plus a consecutive term of 25 years to life for the firearm enhancement. The prison sentences in count 5 (26 years consisting of double the high term of 36 months plus 20 years for the § 12022.53, subd. (b) enhancement), count 8 (35 years to life consisting of double the high term of five years plus 25 years to life for the § 12022.53, subd. (d) enhancement), and count 9 (16 years consisting of double the high term of 36 months plus 10 years for § 12022.5, subd. (a)(1) enhancement) were stayed pursuant to section 654. Appellant Pops was given credit for 879 days of presentence custody. Appellant Pops was ordered to pay a $10,000 restitution fine pursuant to section 1202.4, subdivision (b). A parole restitution fine of $10,000 was stayed. The court further ordered appellant Pops to make restitution, jointly and severally with co-appellant Wilson, in the amount of $4,000 to each of the four murder victims' families. (7CT 1681-1692, 1700-1702, 1706-1712; see 40RT 6473-6482.)

On April 7, 2000, the court also sentenced appellant Wilson to death in counts 1 through 4. The court further imposed a consecutive term of 75 years to life—three 25-year-to-life terms—for the section 12022.53, subdivision (d) personal use and discharge of a firearm enhancements in counts 1 through 3. A 20-year term was also imposed for the section 12022.53, subdivision (c) firearm enhancement in count 4.[7] The prison sentences in count 5 (35 years to life consisting of double the high term of five years plus 25 years to life for the § 12022.53, subd. (d) enhancement), count 8 (30 years to life consisting of double the high term of five years

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[7] The minute order and sentencing order inaccurately reflect that appellant Wilson was sentenced to 25 years to life for the section 12022.53, subdivision (c) enhancement. (See 7CT 1697, 1719; compare 40RT 6487 [oral pronouncement of sentence].) This error should be corrected on appeal. The sentences for the other firearm enhancements in counts 1 through 4 were stricken by the court.

plus 20 years to life for the § 12022.53, subd. (b) enhancement), count 9 (16 years consisting of double the high term of 36 months plus 10 years for the § 12022.5, subd. (a)(1) enhancement) were stayed pursuant to section 654. Appellant Wilson was ordered to pay a $10,000 restitution fine pursuant to section 1202.4, subdivision (b). A parole restitution fine of $10,000 was stayed. The court further ordered appellant Wilson to make restitution, jointly and severally with co-appellant Pops, in the amount of $4,000 to each of the four murder victims' families. (7CT 1693-1699, 1703-1705, 1713-1725; Supp. II 3CT 606; 40RT 6483-6490.)

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

STATEMENT OF FACTS

GUILT PHASE

I. PROSECUTION EVIDENCE

A. Introduction—Brief Overview

On the morning of January 25, 1998—Super Bowl Sunday—appellants went to the Wheels 'N Stuff carwash in Compton, each armed with a semiautomatic firearm. In addition to operating as a carwash, marijuana was sold at the business. Chris Williams, one of the proprietors, arrived and saw appellants sitting slouched down in a dark-colored Honda in the parking lot. Williams went inside the office building where Michael Hoard was working behind the counter. After a few minutes, Shawn Potter and Eric Thornton arrived. Williams left the office building and spoke briefly to appellants, who told Williams they were interested in purchasing a stereo system. Williams informed appellants that they were at the wrong store.

Williams drove away from the carwash. Moments later, Randy Bowie, a worker at the carwash arrived. Before Bowie could enter the office building, appellant Pops, who was sitting in the passenger seat of the Honda, pointed a Tech Nine semiautomatic firearm through the open car window at Bowie and told him not to move. Appellant Wilson, who was sitting in the driver's seat, pointed a Glock pistol at Bowie. At about this same time, Jessie Dunn arrived driving his El Camino that had customized chrome IROC wheel rims. Charles Hurd (known as "Spanky") also arrived, and he and Dunn walked into the office building.

Appellants got out of the Honda. They continued to hold Bowie at gun point. Appellants forced Bowie inside the office building, and ordered everyone inside to lie on the floor. Appellants demanded to know where the money and "shit" were kept. They moved to the back of the building.

Bowie heard rummaging sounds and some type of struggle. Bowie was closest to the exit and, seizing upon an opportunity to escape, got up and ran from the building. As he ran down the street, Bowie heard a series of gunshots.

A short time later, another worker at the carwash, Anthony Brown, arrived. At this point, appellant Wilson was in the driver's seat of Dunn's El Camino. He quickly backed the El Camino out of the driveway. He then made a hard right turn and hit the gate. Without stopping to check for damage, appellant Wilson sped away. Appellant Pops then exited the building, looked at Brown, and got into the Honda. Through the open window, appellant Pops pointed the Tech Nine gun at Brown and attempted to shoot. The gun jammed, however, and Brown was able to take cover inside his car. Appellant Pops drove away.

Brown approached the office building and yelled inside asking if anyone was there. The front metal sliding door was partially open, and Thornton got up from the floor. He came outside and told Brown, "They just killed Spanky (Hurd) and they shot everybody. I don't know why they didn't kill me." In fact, the other four men had been shot to death execution-style. Hurd, Potter, and Hoard were shot in their heads with the Glock pistol. Dunn had been shot in his head with the Tech Nine.

That afternoon, Larry Barnes went to a Super Bowl party barbecue with appellant Pop's brother, Aziz Harris. Appellants were also at the party when Barnes and Harris arrived. Appellant Pops's girlfriend drove Barnes and Harris a short distance from the party to an alley where Dunn's El Camino was parked. The customized chrome IROC rims had been removed from the vehicle. Barnes and Harris burned the El Camino as directed by appellants and then returned to the party.

On the afternoon of February 5, 1998, appellant Pops was at Jane Hernandez's apartment. Jane's daughter, Tamanika Hernandez, also lived

at the apartment. Tamanika dated Keith Salter. That night, Tamanika, her infant child, and Salter slept in the apartment's only bedroom. Jane slept in the living room. In the early morning hours of February 6, appellant Pops and another man—who resembled appellant Wilson—came to the backdoor of the apartment leading into the kitchen. Tamanika heard her mother answer the door. She then heard a gunshot. Tamanika crawled from the bedroom and, peeking around a wall that divided the living room from the kitchen, her mother lying on the floor screaming. Appellant Pops and the other man were standing in the doorway. Appellant Pops had a .12 gauge shotgun in his hands. He pointed the gun at Jane and fired again. The two men then ran away.

On February 10, 1998, Patreiner Gant was driving in her car with her cousin Keith Salter, who was sitting in the passenger seat. When they stopped at a stoplight, a man standing on the sidewalk waived to appellant Pops who also standing nearby. As the man waived to appellant Pops, he simultaneously pointed at Gant's car. Gant and Salter drove away. The next day, in the early morning hours, Gant was awakened by an explosion sound on the street outside her bedroom window. She looked out the window and saw that her car was on fire. Appellant Pops and another man were running away. Gant's car was completely burned, and she believed appellant Pops burned the car because he saw Salter driving with her.

On February 12, 1998, Long Beach Police Detective Conant stopped appellant Pops while he was driving his Camaro. Appellant Wilson, Harris, and Barnes were passengers in the car. The detective noted that the Camaro had chrome IROC rims similar to the ones that had been fitted on Dunn's El Camino.

Bowie identified appellants from photographs shown to him by the police. On February 22,1998, Bowie saw appellant Pops at a gas station in Long Beach. Appellant Pops was putting gas in his Camaro. Bowie noted

that the Camaro appeared to have the same chrome IROC rims as had been on Dunn's El Camino. Bowie immediately contacted Compton Police Homicide Detective Reynolds, who was investigating the carwash murders, and informed him of his observations.

On March 5, 1998, search warrants were simultaneously executed at two residences and appellants were arrested. Among the items seized at appellant Wilson's apartment were a newspaper article about the carwash murders, and an unexpended nine-millimeter cartridge that had been ejected from the same 9-millimeter firearm used during the carwash murders. Also recovered was a binder containing a list of monikers that included appellants' monikers (i.e., Nut and Bird), drawings of Glock and Tech Nine firearms, a drawing of appellant Pops standing in front of his Camaro with IROC wheels, and a drawing of Pops holding a firearm that resembled a Glock pistol. Harris was also present in the apartment with appellant Wilson.

At the other residence where appellant Pops was living, his Camaro was parked outside. It was later confirmed that the chrome IROC rims on his Camaro were the same ones that had previously been specially modified and fitted on Dunn's El Camino.

Bowie, Williams, and Brown identified appellants at a live lineup on June 9, 1998.

B. The Customized Chrome IROC Wheel Rims on Jessie Dunn's El Camino and the Standard IROC Wheel Rims on Appellant Pop's Camaro Before January 25, 1998

At one time, Charles Hurd (aka "Spanky") owned an El Camino automobile. In October 1997, Hurd had his friend Anthony Boochee[8] outfit

[8] On February 7, 1997, Boochee was convicted of felon in possession of a firearm. (16RT 2289.)

the car with customized chrome three-bar IROC wheel rims. IROC wheel rims were manufactured for the Camaro line of cars. To fit these rims on the El Camino, however, Boochee had to widen the existing holes on the back wheel rims by drilling them larger. He then used spacers, longer bolts, and Cragar lug nuts to attach the rims to the El Camino. (16RT 2251-2252, 2258-2259, 2267, 2270-2274; see also 12RT 1556-1558, 1609-1610.) At the same time that the IROC rims were modified and fitted on the El Camino, Hurd also had an expensive Alpine audio system installed in the car. (13RT 1727, 1730; 16RT 2261-2262; 17RT 2590; 19RT 3026, 3039.) Additionally, the car had a custom Nardi steering wheel. (13RT 1730-1731; 17RT 2581, 2589-2590.)

Jessie Dunn later purchased the El Camino from Hurd. (13RT 1726-1727; 16RT 2260-2261; 18RT 2688.) Kimberly Thomas, Dunn's girlfriend, noticed an oxidation spot on the right rear IROC rim of the car. Dunn told her that he intended to have the rim re-dipped in chrome. (17RT 2583-2584.)

Appellant Pops drove a light-colored Camaro.[9] The Camaro also had wheel rims that matched the light color paint on the car. (14RT 1949-1951; see Supp. II 1CT 111.) Larry Barnes was a close friend of appellant Pops. (14RT 1983.) He was also friends with Pops's brother, Aziz Harris, whom Barnes knew as "Scrap." (13RT 1868, 1871; 14RT 1983; 20RT 3123-3124.) Barnes knew appellant Pops by the name "Nut," and appellant Wilson by the name "Bird." (13RT 1865-1866.) Barnes was known as "Smurf," and had that name tattooed across his stomach. (13RT 1867-1869.)

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[9] The car was beige or off-white with gray primer paint on the front section. (Peo. Exh. 42.)

On the evening of January 24, 1998, Barnes and a group of his friends, including appellants and Harris, went to a bowling alley in Lakewood. The group of friends drove in two separate cars. Barnes rode with appellant Pops in his Camaro. (14RT 1917-1919, 1921.) On this date, appellant Pops's car had the same light-colored rims that matched the original paint on his car. The wheel rims were not chrome. (14RT 1949-1951; 18RT 2755-2757; Supp. II 1CT 111 [Peo. Exh. 84F].)

C. The Wheels 'N Stuff Carwash in Compton

Chris Williams and his friend Charles "Spanky" Hurd operated the Wheels 'N Stuff carwash located on Sportsman Drive at the corner of Atlantic Avenue in Compton. (13RT 1710, 1731-1733, 1775, 1777-1778.)[10] The carwash had been open for several months. (13RT 1700, 1749-1750, 1775-1776.) Williams and the men who frequented the carwash tended to smoke a lot of marijuana. When customers brought their cars to be washed and detailed, some also asked to buy marijuana from Williams. They then began selling marijuana at the location on a daily basis. (13RT 1709-1710, 1740, 1742-1743, 1796.)[11] The men who worked at the carwash generally carried large amounts of money. (13RT 1741.)

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[10] Williams and Hurd had been friends for most of their lives. (13RT 1711.)

[11] Williams testified at the preliminary hearing that marijuana was not sold at the location. (13RT 1707-1708.) Williams was not truthful because, at the time, he was on felony probation for possessing marijuana for sale and feared his probation might be revoked. Williams had also been convicted of receiving stolen property (a gun). One condition of his probation was that he not associate with anyone selling illegal drugs. By the time of the trial, Williams was no longer on probation. (13RT 1708-1709, 1744-1746, 1747-1748, 1799-1800, 1822 1828.) Williams had never served a prison term. (13RT 1709.) No promises were made to Williams by the prosecutor not to charge him with perjury or drug possession. (13RT 1747, 1833.)

Sometimes the men also engaged in gambling at the location. (13RT 1741-1742.)

There were no particular set hours for when the carwash was open, and they did not keep financial records as to how much money came in through the carwash business. (13RT 1750-1751.) Because the carwash had recently opened, and the owners wanted to build up their business and allow the workers to practice, they did not charge for car washes, but tipping was permitted. (13RT 1754-1755, 1787-1788.) Williams did not consider the workers to be actual employees yet as the owners were still attempting to get the business going. (13RT 1782.) The men who washed cars there were paid from time to time, but the primary source of their income came from tips. (13RT 1751-1752, 1766, 1785-1786.) They were permitted to keep their tips for simple carwashes, but expected to give the owners a portion of the proceeds for more expensive jobs like waxing. (13RT 1753, 1786-1787.) The rent for the carwash space was $1,500 per month. The rent was paid from the money made from selling marijuana. (13RT 1756, 1780.)

D. The Morning of January 25, 1998—Super Bowl Sunday—at the Wheels 'N Stuff Carwash Appellants Murder Four Men Execution-Style

On the morning of January 25, 1998, Williams arrived at the carwash. (13RT 1669, 1790.) He went there to invite his friends over to his house for a Super Bowl party, and to get some marijuana to smoke. (13RT 1736, 1795.) Williams got out of his truck and walked toward the office building. He noticed two Black men sitting in a dark-colored car—possibly a dark blue or black Honda—that was parked directly next to the right side of the building. (13RT 1703-1706, 1733.) Williams did not know the men, and they were somewhat slouched down in the front seats. (13RT 1703-1704,

1707.) Appellant Pops was seated in the passenger's seat of the car, and appellant Wilson was in the driver's seat. (13RT 1705-1706, 1761.)[12]

Williams went inside the building. (13RT 1700, 1705.) Michael Hoard was working behind the counter. No one else was inside the building. (13RT 1700.) There was about one pound of marijuana at the shop. (13RT 1737-1739, 1803, 1848.) Sometimes they stored marijuana inside a Pepsi brand beverage vending machine in the shop. (13RT 1737; see Peo. Exh. 2A.) Williams got one small bag of marijuana from Hoard. (13RT 1737, 1747, 1795.) He stayed inside the building for about 15 minutes. As Williams was leaving, Shawn Potter arrived. (13RT 1701, 1790.) Eric Thornton (known as "E.T.") also arrived, and he and Potter entered the building together. (13RT 1702.)

The car with appellants inside remained parked in the same spot. (13RT 1705.) Williams thought it curious that appellants had not gotten out of the car. (13RT 1713.) Because they were selling marijuana at the shop, Williams stopped and asked appellants what they were doing and needed. (13RT 1712-1713, 1811.) Appellant Pops stated that they were "looking for some sounds." (13RT 1713-1714.) Appellant Wilson reiterated, "Yeah, we're looking for some sounds, man. We trying to get some sounds today." Williams told appellants that they were at the wrong location, and needed to go over to another shop that sold car stereos

[12] Williams also testified at the preliminary hearing in which there were three defendants in court—both appellants and Aziz Harris (appellant Pops's brother). (13RT 1725; 20RT 3123-3124.) Williams indicated that one of the three defendants, Harris, was not at the carwash. (13RT 1725.) But he identified appellant Wilson as the driver and appellant Pops as the passenger. (13RT 1725-1726.) Williams was positive of his identifications. (13RT 1726.)

operated by Melvin Hoard. (13RT 1714, 1771-1772, 1812.)[13] Appellants asked Williams if he still worked at the car stereo shop. Williams said that he sometimes went to the other shop. (13RT 1714-1715, 1812.) Williams went to his truck and put water in the radiator. (13RT 1715-1716, 1811.) When he finished filling the radiator, Williams got in his truck and drove away. Appellants, however, remained in their car. (13RT 1716-1717, 1810-1811.)

Randy Bowie (aka Mac) had worked washing cars at the carwash for abut three weeks.[14] That morning, he walked to the carwash from his nearby residence. (12RT 1267, 1508-1509, 1573, 1618; 13RT 1751.) As Bowie approached the carwash, he saw Williams driving away from the business. (12RT 1510-1511, 1576.) When Bowie reached the gate of the carwash, he noticed the dark-colored Honda parked next to the right side of the building near a pay telephone. (12RT 1511-1512, 1523-1524.) Facing the building, the telephone was located at the front right hand side of the building, just to the right of the black metal sliding door entrance to the building. (Peo. Exhs. 90, 91.) The Honda had been backed into the parking lot. (12RT 1525.) The passenger side of the car was closest to the pay telephone. (12RT 1526.) Appellants were seated in the car. (12RT 1512-1513, 1518-1520.) Bowie had never before seen the two men. Bowie had received a message on his pager, and he went to the pay telephone to

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[13] Melvin was Michael Hoard's brother. Marijuana was sold at the car audio shop too. (13RT 1771-1772.)

[14] Bowie, age 41 at the time of trial, had several prior convictions and had spent time in prison. He had suffered prior convictions for misdemeanor burglary in 1977, first degree-residential burglary in 1978, possession of nunchuka sticks and marijuana in 1979, second-degree daytime residential burglary in 1981, possessing a knife in prison in 1982, and battery and possession of a dirk or dagger in 1992. (12RT 1520-1521, 1627-1628.)

place the return call. (12RT 1513, 1577-1578, 1632-1633.) When he passed the front door of the building, Bowie saw that Hoard and Potter were inside. (12RT 1514, 1632-1633.)

Appellants' car was parked approximately three or four feet away from Bowie. (12RT 1526-1527.) Before Bowie could finish dialing to place his call, appellant Pops, who was sitting in the passenger seat, raised a Tech Nine pistol and pointed it directly at Bowie through the open car window. (12RT 1514-1515, 1518-1519, 1528-1529, 1577-1578, 1632, 1636, 1642, 1644-1645.) He told Bowie not to move or warn anyone. (12RT 1515, 1529, 1637.) Appellant Wilson, who was sitting in the driver's seat, also pointed a Glock-brand pistol at Bowie. (12RT 1516, 1519-1520, 1529, 1579-1580, 1642.) Bowie stood frozen in place looking at appellants. (12RT 1528-1529, 1636.) While Bowie was being held at gunpoint, Jessie Dunn arrived driving his El Camino with the chrome IROC rims. (12RT 1515, 1556-1558, 1609-1610, 1636; 13RT 1728-1729; 17RT 2579-2582.)[15] Dunn got out of the car and walked into the building. (12RT 1515-1516.) Hurd also then arrived in his car and went into the building. (12RT 1516.) Bowie feared that if he warned Dunn or Hurd, appellants would shoot him. (12RT 1529-1530, 1640.)

Appellant Pops got out of the car first, and was followed by appellant Wilson. (12RT 1516-1517, 1519-1520.) Appellant Pops grabbed Bowie by the collar and pressed the gun into Bowie's side under his arm. Appellant Wilson put his gun against Bowie's back. They directed Bowie into the building. Appellants ordered everyone to get on the ground and not to move. Bowie lay on the ground nearest to the front door. Appellants demanded to know where the money and "shit" were kept. (12RT 1517,

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[15] Dunn was not an employee who washed cars at the carwash. He and Bowie were friends. (12RT 1574-1575.)

1580-1581.) Bowie saw Hurd lying on the ground near him, but could not see the others. (12RT 1517-1518, 1581, 1675-1676.)

Appellants moved to the back of the building. They rummaged around, and appellant Wilson searched a white Chevrolet Caprice that was parked inside the building along the far left wall. (12RT 1530-1532, 1568-1570, 1581; 13RT 1735; Peo. Exh. 2; Def. Exh. L.) Bowie heard what sounded like struggling or some type of commotion. (12RT 1672-1673.) A sliding door inside the building—located between the area where the white Chevrolet was parked and the counters—which could be moved to divide the shop was kicked or hit, causing it to slide toward the front area of the building. When this happened, Bowie found himself on the other side of the door and separated from appellants. (12RT 1231-1232, 1568-1569, 1581-1583, 1650-1651, 1674; Peo. Exh. 2A-B.) Bowie got up and ran from the building. As Bowie ran away, he could hear several gunshots. (12RT 1530, 1533, 1583-1584, 1584-1586, 1594, 1650, 1652.)

Bowie ran in the direction of Alondra Boulevard to a nearby storage facility on Atlantic Avenue. He jumped over a fence and hid in some bushes for a time because he did not know if appellants saw where he fled and whether they might come after him. Bowie then went to the storage facility office and asked an employee to call the police. He stated that his shop was being robbed and his friends had possibly been shot. (12RT 1533, 1584-1587, 1653-1654.)

Around this time, Anthony Brown—a worker at the carwash—arrived at the location.[16] (13RT 1766-1767; 19RT 2986, 3040-3042.) Brown had

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[16] Brown was found to be an unavailable witness, and his testimony from the preliminary hearing was read to the jury. (19RT 2985.) Brown had worked at the carwash since August 1997, after he was released from county jail. (19RT 3009.) Brown had suffered felony convictions for conspiracy and telephone fraud in 1993. (19RT 3009-3010, 3072.)

planned to attend the Super Bowl party with his coworkers later in the day. Before going to the party, Brown hoped to sell some T-shirts and wash any cars that might stop by for service that morning. (19RT 3010-3011, 3039-3040, 3047-3048.)[17]

Brown parked his car inside the fenced-area under a tarp tent located on the gravel area of the parking lot next to the stalls where cars were washed. (19RT 2987, 3014-3016, 3072.) Brown saw someone other than Dunn sitting in the driver's seat of Dunn's El Camino with its distinctive chrome IROC rims. (19RT 2987-2991, 3025-3026, 3072-3073-3074.) The person was a light-skinned Black male. Although Brown could not make a positive identification, he identified appellant Wilson as someone who most closely resembled the driver based on his light complexion. (19RT 2991, 3073-3075, 3082.) Brown did not know the man driving Dunn's car. (19RT 2992.)

The man first put the car in drive and moved it forward a slight distance. (19RT 2990, 3016, 3073-3074.) He then put to car in reverse, causing the tires to skid and "burn[] a little rubber." He then quickly backed the car out of the driveway. (19RT 2990, 3017.) The man turned the car hard right at the exit and hit the gate with the left side of the El Camino, knocking the gate over. (13RT 1849-1850; 19RT 2990.) Without stopping to inspect the damage, the man drove forward onto the street and turned left on Atlantic Avenue—heading north under the 710 Freeway overpass and toward Alondra Boulevard. (19RT 2990, 3079-3080.) Brown suspected that something was wrong. (19RT 3018.)

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[17] Brown was not aware that marijuana was sold at the carwash. From time to time, however, some people smoked marijuana there. (19RT 3009, 3043-3047.) Brown was aware of one prior drug-related arrest at the carwash. He was not present when the arrest occurred. (19RT 3049.)

Brown grabbed from the backseat of his car some of the T-shirts he planned to sale that day. As Brown was getting out of his car, appellant Pops walked out of the carwash office through the black metal door at the front. (19RT 2993, 3018-3020, 3081-3082.) Brown gestured with his hands up in the air in the direction of appellant Pops to indicate his perplexity as to what he had just witnessed with the El Camino hitting the gate. (19RT 2993.) Appellant Pops walked to the dark-colored Honda parked next to the pay telephone, and got into the driver's side. (19RT 2993-2994, 2996-2997, 3006-3007, 3012, 3020-3022, 3027.)

Appellant Pops then pointed the Tech Nine gun directly at Brown through the open window. (19RT 2994-2995, 3012-3013, 3021.)[18] Appellant Pops fumbled with the gun as if attempting to clear a jam. (19RT 2995-2996, 3021.) The gun did not fire. Taking the opportunity to get out of the line of fire, Brown dove into his car and scrambled toward the passenger door. He got out of the car on other side. Appellant Pops then drove the Honda out of the parking lot, and traveled the same direction as the El Camino—turning left on Atlantic Avenue. (19RT 2996, 3022, 3024, 3079-3080.)

Brown approached the carwash building, but did not enter. (19RT 2997-2999, 3005, 3032.) He yelled inside the building asking if anyone was there. Through the partially open sliding door, Brown saw a man in a yellow T-shirt get up from the floor near the white Chevrolet Caprice parked inside, and run toward him. (19RT 2997-2998, 3032-3034.) It was Thornton (E.T.). (19RT 2998, 3035.) Brown could also see a portion of Hurd's body on the floor inside the building. (19RT 2998-2999.) Thornton appeared scared and in shock. (19RT 2999, 3035, 3038.) Thornton told

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[18] Brown recognized the firearm as a Tech Nine because he was familiar with several types of guns. (19RT 3050.)

Brown, "They just killed Spanky [Hurd] and they shot everybody. I don't know why they didn't kill me." (19RT 3000.)

Thornton went back inside the building and attempted to find his car keys. (19RT 3000, 3036.) While Brown waited outside, Shawn Potter's mother Georgetta Hoard arrived in a car with another woman. (19RT 3000, 3037-3038.) When she got out of the car and walked to the carwash building, Brown stopped her and said she should not to go inside. (19RT 3000.) He told her that based on what he just learned from Thornton, it was "a terrible sight" inside. (19RT 3000-3001.) Brown went back to his car and was about to leave when Thornton approached him. Thornton said that the gunmen must have taken his car keys because he could not find them. (19RT 3001, 3037.) Brown said that he did "not want to be around this kind mess when the police come. . . ." (19RT 3001.) Thornton asked Brown for a ride, and they drove away. (19RT 3001-3002.)

E. Events Shortly After the Shootings

Compton Police Officer Bettye Jones was on patrol. At 11:36 a.m., she received a radio call to respond to a possible robbery and gunshot victim at the storage facility on Atlantic Avenue where Bowie had fled and asked the employees to call the police. (14RT 2023-2024.) En route, however, she was redirected by the dispatcher to the carwash on Sportsman Drive. (14RT 2024-2025.) Officer Jones arrived at the carwash at 11:44 a.m. Another patrol officer, Larry Urrutia, arrived at the same time. (14RT 2026, 2046-2047.) A unit of paramedics from the Compton Fire Department arrived shortly thereafter. (14RT 2026-2027.) Officer Jones saw two women standing by the front door. One of the women, Georgetta Hoard, was hysterical and said something about her son and brother. (14RT 2027-2028, 2038-2040, 2047-2048, 2067-2068.) After speaking to the women for a moment, Officer Jones looked through the window of the front door and could see a body on the floor. She then called for a

supervisor, and placed the women in the back of her patrol car. (14RT 2028, 2051-2052.)

Officers Jones and Urrutia entered the building with their guns drawn. (14RT 2028, 2041, 2048-2050.) They cautiously walked through the building as they did not know if any suspects were still present. (14RT 2028-2029, 2050, 2070-2071.) Four Black males lay face down on the floor just inside. (14RT 2029-2030.) Hurd, Potter, and Hoard were lying close together nearest the front door. When the officers walked around the white Chevrolet parked inside, they found Dunn lying on the floor next to the wall. (14RT 2072.) None of the men appeared to be breathing. (14RT 2069.) After the officers determined that the building was safe, a paramedic entered. The paramedic checked pulse points on the victims, and determined that the four men were deceased. (14RT 2030-2031, 2059-2060, 2070.) The paramedic did not disturb the bodies. (14RT 2070.)

Officer Jones secured the building and made sure that no evidence was disturbed. (14RT 2031, 2054, 2060, 2068.) She noted that a shelf inside the building was leaning over and its contents had fallen onto the floor. (14RT 2032.) The officer observed blood on the floor, and ensured that no one stepped in the blood puddles. (14RT 2032.) She noticed some bloody footprints on the floor. (14RT 2032-2033.)

The entrance gate to the carwash property had been hit. There were scratch marks and paint transfer on the gate. Also, glass fragments from what appeared to be a broken headlight were on the ground next to the gate. (13RT 1849-1850; 14RT 2036-2037.)

A short time later, Williams received a call from a friend who said that the men Williams had talked to went into the building after he left and killed everybody. (13RT 1790-1792.) Williams drove back to the carwash, which had already been cordoned off with yellow police tape. (13RT 1717, 1813.) Williams was later taken to the Compton Police Department and

interviewed. (13RT 1717-1718, 1758-1759.) He described the suspect who sat in the driver's seat of the Honda (appellant Wilson) as being 22 to 24 years old, and having a light or medium complexion. (13RT 1812-1813; Supp. II 2CT 715-716.) He had a thin build, some facial hair, and wore a cap. (Supp. II 2CT 716, 718.) Williams described the passenger suspect (appellant Pops) as having a "dark black" complexion. He appeared younger than the driver, possibly 21 years old, and had a thin build. (13RT 1813; Supp. II 2CT 718.) He said the suspects had short hair. (Supp. II 2CT 719.)

In the meantime, Brown and Thornton drove to the Nickerson Gardens housing project and stopped in the parking lot. (19RT 3002.) Brown used his cell phone to call Michael Hoard's brother, Melvin. They spoke for only a brief moment. Melvin was crying and asked who committed the shootings. The cell phone then disconnected. (19RT 3002-3004.) Brown also called his brother, and told him what had happened. Brown's brother advised him to return with Thornton immediately to the carwash. (19RT 3002-3003.) Brown and Thornton drove back the carwash. The police had already arrived. (19RT 3003.) Brown and Thornton spoke with Melvin and the police. (14RT 2037; 19RT 3004.) They were then taken to the police station and interviewed. (14RT 2063-2064.) Brown told the police that appellant Pops had hair braids, some facial hair, and "nappy frizzy sideburns." He may also have been wearing a hat. (19RT 3030-3031.) Brown further described the suspect as having a dark complexion, a stocky build, and being between five feet nine inches to six feet tall. (19RT 3028-3030.) The yellow T-shirt worn by Thornton was dirty and greasy with motor oil, indicating that he had earlier been forced to lie on the floor of the carwash. (14RT 2064; 19RT 3032.)

Bowie, who had run to the nearby storage facility, was terrified and shaken by the events. He asked an employee at the storage facility to drive

him to his brother's house. (12RT 1534-1535, 1587, 1654.) As they drove out of the facility to turn on Atlantic Avenue, Bowie looked to his right and saw that the police were arriving at the carwash. The man giving Bowie a ride asked if he wanted to be taken back to the carwash. Bowie replied, "No." They turned left on Atlantic and drove in the opposite direction away from the carwash. (12RT 1589-1590.)

As they drove on Alondra Boulevard, Bowie saw his brother's car turning into the parking lot of a store. Bowie asked the driver to stop. (12RT 1553, 1590-1591, 1656.) Bowie got into his brother's car. He was still shaking and barely able to stand. At his brother's insistence, they drove by the carwash. This occurred within an hour after the shooting. (12RT 1553, 1560-1561, 1590-1591, 1656.) Bowie observed a large crowd outside the carwash. The area was cordoned off with police tape, and police officers were there. (12RT 1561, 1656-1567.) They did not stop, however, because Bowie was terrified and did not want to have contact with anyone. (12RT 1561-1562.) They then drove to the brother's house, where Bowie stayed for most of the day attempting to compose himself. (12RT 1535, 1658.) Bowie did not immediately contact the police because he was scared and terrified. (12RT 1535.)

The next day, Bowie called the Compton Police and stated that he had witnessed a crime. (12RT 1536, 1595.) He then went to the police station and was interviewed by Detective Cat Chavers. (12RT 1536-1537, 1595.) He gave descriptions of the suspects.[19] Before going to the police

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[19] He described the passenger of the car (appellant Pops) as a Black male with a dark complexion and hair in French rolls—which Bowie described as braids flipped up at the ends. The suspect wore dark clothing (possibly dark blue). Bowie guessed the suspect's age to be between 25 and 30 years. The suspect had a Tech Nine gun with a long clip. (12RT

(continued...)

department, Bowie did not know how many of his friends had been killed. (12RT 1562.)[20]

In addition to various pieces of evidence collected at the carwash, Dunn's Tommy Hilfiger watch that he wore to work that morning was recovered on the ground in the parking lot underneath a parked sport utility vehicle. (17RT 2582-2583; 18RT 2762-2763; Peo. Exh. 87.) Other jewelry that Dunn wore that morning—a link necklace, bracelet, and a ring with several diamonds—were not recovered. (17RT 2582-2583.)

(...continued)
1597.) Bowie estimated the suspect's weight, and did not give a height estimate. (12RT 1598.)

Bowie described the suspect driver (appellant Wilson) as a Black male with a lighter complexion than the passenger, and short. (12RT 1598.) Bowie did not recall if he stated at the time that this suspect had a funny shaped mouth. (12RT 1598, 1648.) Bowie could not recall the driver's build or the color of his clothing. He estimated the man to be between 25 and 30 years old. (12RT 1598.) Bowie did not give a weight or height estimate. (12RT 1598-1599.)

[20] On February 5, Bowie went to the sheriff's station to work with an artist to prepare composite sketches of the suspects. He was interviewed by Deputy John Shannon, a composite sketch artist. (12RT 1599-1600, 1658-1659; 17RT 2548.) Thornton was also there to help with the composite sketch. (12RT 1600.) Bowie described a few minor details about the suspects, but otherwise could not give sufficient information to the deputy for him to complete a composite sketch. (12RT 1600-1601, 1659, 1678; 17RT 2548.) Deputy Shannon noted that based on his experience, at least 10 to 20 percent of witnesses who have gotten a good look at a suspect cannot give enough information or articulate sufficient factors to the deputy for him to make a drawing. (17RT 2547.) Based on his conversation with Bowie, Deputy Shannon nevertheless believed that Bowie's inability to articulate sufficient information would not have precluded him from making an accurate identification if he saw the suspects again. (17RT 2548-2550, 2552.)

F. The Burning of Dunn's El Camino on the Evening of January 25, 1998, After the Chrome IROC Wheel Rims and Audio System Were Removed

In the late afternoon, sometime between 4:00 and 5:00 p.m., on January 25, 1998, Larry Barnes and Aziz Harris (appellant Pops's brother) went to a barbecue party at a house in Cerritos that belonged to relatives of appellant Pops. (13RT 1874-1876; 17RT 2627; 18RT 2759, 2802.) Appellants were also present at the gathering. (13RT 1885-1877; 18RT 2802.) After some time had passed, Harris told Barnes that they were going to leave the party and go to a location to burn a "G-ride." Barnes understood Harris to mean that they were going burn a stolen vehicle. (13RT 1881-1882; 18RT 2802.) Barnes and Harris left the party with appellant Pops's girlfriend, "V." She drove them in a dark-colored Honda a short distance, five-tenths of a mile, to an alley where Dunn's El Camino was parked. They retrieved a container of gasoline from V's car and poured it over the El Camino. Barnes and Harris lit the car on fire. The El Camino had standard tires, and there were no IROC wheel rims on the car when they burned it. The three then returned to the house where the barbecue was being held.[21] (13RT 1869-1870, 1877-1886, 1966-1967; 17RT 2626-2628, 2641; Peo. Exhs. 41A-41E [photographs of the burned El Camino]; Supp. II CT 104-106, 109-110 [interview transcript].)

That evening, Deputy Gina Cali was on patrol in Lakewood. (18RT 2764-2765.) Around 7:12 p.m. she was dispatched to an alley where she found the burning El Camino. (18RT 2765-2767.) No one else was near the car. (18RT 2769.) The fire department arrived and put the fire out. (18RT 2767.) The deputy noted that all four tires were in poor condition,

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[21] Barnes admitted in a later juvenile adjudication that he burned the El Camino and received camp community placement. He was still on juvenile probation at the time of trial. (13RT 1869; 14RT 1968-1971.)

and there was no stereo system in the vehicle. (18RT 2768.) A nine millimeter Lorcin pistol was discovered inside the carburetor air filter area that was covered by a lid. (18RT 2769-2271.) After the fire was extinguished, the car was impounded. (18RT 2767.)[22]

G. Autopsy Findings—All Four Victims of the Carwash Murders Were Shot in Their Heads

The autopsies of the four victims were performed on January 27, 1998.[23] Hurd suffered a single gunshot wound to the back of his head. The bullet entered the back right side of his head, traveled through his brain, and came to rest just beneath the skin of his right forehead. The wound was fatal. (14RT 1996, 1998, 2002-2003, 2011, 2091-2092.) The bullet traveled from back to front, right to left, and upward. (14RT 2003.) Four bullet fragments were recovered in the front area of his forehead. (14RT 1999-2000, 2091.) It was estimated that the gun used to inflict this wound was held more than two feet away from Hurd's head when it was fired. (14RT 2001-2002.)

Potter suffered three gunshot wounds to the back of his head. (14RT 2006-2007.) One bullet entered the left side of the back of his head behind his ear, passed through the brain. The bullet was recovered from the area of his right cheek. (14RT 2008, 2011, 2097.) Another bullet entered the back left side of Potter's head, traveled left to right and downward through the brain. The bullet exited through the area of Potter's right ear. The last bullet entered the back of Potter's head on the left side, traveled toward the

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[22] At trial, Bowie and Williams identified photographs of Dunn's El Camino taken after it was impounded. They noted the burned car had different wheel rims than the IROC ones that were on the car just before the murders. (12RT 1558; 13RT 1729; Peo. Exhs. 41A-41E.)

[23] Dr. Christopher Rodgers, a deputy medical examiner, reviewed the autopsy reports for the four victims, and testified regarding his expert opinion as to the findings. (14RT 1994.)

right, passing through the brain. The bullet was recovered in the soft tissue of Potter's neck. The two other bullets were recovered during the autopsy. (14RT 2008-2011, 2097-2099.) All three wounds were fatal. (14RT 2008, 2011.) The barrel of the gun was held more than two feet away from the back of Potter's head when the shots were fired. (14RT 2010-2011.)

Hoard suffered three gunshot wounds to the back of his head. (14RT 2012-2013.) One bullet entered the back of Hoard's head on the right side, passed through his brain, and exited in the upper portion of the left side. Another bullet entered the back side of the head on the right side, exiting on the left side of the head near the front. (14RT 2015.) The final projectile also entered on the back right side and exited on the left side of his forehead. (14RT 2015-2016.) All three were fatal wounds. (12RT 2014.) The gun that inflicted these wounds was held more than two feet from the victim's head. (14RT 2018.) No projectiles that caused these wounds were recovered during the autopsy. (14RT 2016.) There were also two non-fatal fragment wounds found on Hoard's left palm. (14RT 2013.) The two bullet fragments were recovered during the autopsy. (14RT 2013-2014.) One of the bullets was found on Hoard's left sleeve. (14RT 2016-2017.) Two fragments of the other projectile were recovered from inside the victim's left hand. (14RT 2017-2018.)

Dunn was shot five times. (14RT 2078.) One bullet entered Dunn's head above the left ear. There was gunpowder stippling on the scalp around the entrance wound, which indicated the barrel of the gun was held somewhere from a few inches to two feet away from Dunn's head when it was fired. (14RT 2079-2082, 2090-2091.) Dunn would not have been directly facing the killer when the gunshot wound was inflicted. (14RT 2091.) This wound was fatal. (14RT 2079.) A projectile was recovered. (14RT 2079, 2095.) There was another gunshot wound through the upper portion of Dunn's left ear, traveling front to back, with the bullet passing to

the front portion of the brain. (14RT 2082.) The projectile was recovered in the right front portion of Dunn's skull. (14RT 2082-2083, 2094-2095.) This wound too was fatal. (14RT 2083.) Stippling was also noted around this wound, indicating that the gun was fired from a close range. (14RT 2085.)

A third gunshot wound occurred when a bullet was fired into Dunn's left underarm area. The bullet traveled left to right and back to front in an upward direction. The bullet went into the chest, cutting through a large vein next to the heart, and stopped in the front of his chest. This wound was also fatal. (14RT 2084.) The projectile was recovered. (14RT 2084, 2093.) No stippling was observed around this wound, which indicated that the gun was fired more than two feet away from the victim. (14RT 2085-2086.) A fourth gunshot wound suffered by Dunn was to the area of his left shoulder blade. (14RT 2086.) The bullet went from left to right at an upward angle, fracturing the back part of the spinal bone, and stopped in the right shoulder blade. (14RT 2086-2088.) The angle of the wound was consistent with someone standing over Dunn as he lay on the floor and firing into his back. (14RT 2088.) This wound was potentially fatal because the bullet also created a bruise on the lung. (14RT 2086.) The projectile was recovered in the right shoulder. (14RT 2086, 2094.) A fifth and last wound was inflicted to the back part of Dunn's left forearm. The bullet traveled through the arm, injuring blood vessels and nerves, and broke one of the bones. The bullet exited the other side of the forearm. (14RT 2088-2090.) This wound too would have been potentially fatal. (14RT 2088-2089.) The wound was inflicted from greater than two feet away. (14RT 2089.) Fragments of the projectile were recovered. (14RT 2093-2093.)

Toxicology screenings performed on all four victims did not detect alcohol or illegal drugs (i.e., methamphetamine, heroin, and cocaine) in

their systems. The screenings, however, did not test for the presence of marijuana. (14RT 2004, 2018-2019, 2096.)

H. Ballistics Findings: Two Guns—a .40 Caliber Glock Pistol and a Nine-Millimeter, Likely A Tech Nine Firearm—Were Used in the Carwash Murders

Deputy Jeff Walley, a firearms and ballistics expert, identified and collected ballistics evidence at the crime scene. (13RT 1840, 1849; 18RT 2806-2809.) A total of nine .40 caliber Smith and Wesson cartridge casings were recovered at the crime scene. (18RT 2818, 2827-2838, 2856-2857.) The deputy recovered 10 expended .40 caliber bullets and bullet fragments. (18RT 2811, 2813, 2816-2818, 2820-2822, 2838-2841, 2843-2844; 19RT 2857-2858.) No unexpended rounds of .40 caliber ammunition were found at the scene. (19RT 2859.) Deputy Walley also examined the bullets and bullet fragments recovered during the autopsies of the victims. He found that Hurd, Potter, and Hoard had all been shot with .40 caliber bullets. (19RT 2858-2865, 2869.)

Deputy Walley concluded that a Glock semi-automatic pistol was used to fire the .40 caliber bullets recovered at the scene and during the autopsies of the victims. (19RT 2873-2874.) The deputy reached this conclusion because the manufacturer of Glock firearms uses a "polygonal rifling" method in manufacturing the barrels of its guns. The manufacturer uses a mandrel around which the barrels are formed. This type of riffling differs from the traditional rifling in other firearms, which occurs when the barrels are cut. The Glock company is also unique because it uses an elliptical firing pin, shaped like a half moon. The guns therefore leave distinct marks on expended cartridge cases. The expended .40 caliber bullets found at the crime scene and during the autopsies had polygonal rifling. The .40 caliber cartridge cases recovered at the scene had the elliptical firing pin impressions consistent with a Glock firearm. (19RT

2874-2875.) Deputy Walley explained that Glock is the only pistol brand that has both the elliptical firing pin and polygonal rifling. Therefore, a Glock had to have been the type of firearm used in this case. (19RT 2875.)

A total of five expended nine-millimeter caliber cartridge casings were found at the carwash. (18RT 2828-2829, 2841-2842, 2844-2846; 19RT 2856-2857.) One live round of nine-millimeter ammunition was also found at the scene. (13RT 1841; 18RT 2822-2824; Peo. Exh. 15.) In his examination of the bullets recovered during the autopsies, Deputy Walley determined that Dunn was shot with nine-millimeter caliber bullets. (19RT 2858, 2866-2869.) Based on general rifling characteristics of the nine-millimeter bullets recovered at the crime scene, Deputy Walley determined that the bullets could have been fired by one of five types of pistols (Llama, Star, Bryco, SWD, and Intratec). (19RT 2880.)[24] Of these firearms, only one—the Intratec Tech Nine—could be fitted with a barrel extension and looks significantly different from a standard pistol such as a Glock. (19RT 2881-2882.) The Tech Nine is also distinctive because the magazine fits into the center of the gun. (19RT 2882-2883.)

Based on the evidence collected at the carwash crime scene, only one .40 caliber Glock pistol and one nine-millimeter gun were used during the murders. (19RT 2894.) Additionally, Deputy Walley found evidence at the carwash crime scene that the nine-millimeter (Tech Nine) firearm jammed. (19RT 2889.) A jam occurs when the ammunition does not function properly and the gun does not fire. (19RT 2889) Deputy Walley explained that a Tech Nine is not a high quality firearm and has a tendency to jam. A nine-millimeter casing found at the crime scene (18RT 2845-2846; Peo.

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[24] The Lorcin nine-millimeter pistol found inside the carburetor of Dunn's burning El Camino could not have fired the expended nine-millimeter rounds recovered during the autopsy of Potter. (18RT 2769-2271; 19RT 2895.)

Exh. 29) was dented, thus indicating that it had jammed inside the firearm. (19RT 2890-2892.) A jam in a Tech Nine is cleared by pulling back the slide bolt and ejecting the jammed round. (19RT 2892.) Based on the presence of the live nine-millimeter round (13RT 1841; 18RT 2822-2824; Peo. Exh. 15) and the dented nine-millimeter casing (Peo. Exh. 29), the firearm used to fire the nine-millimeter bullets during the murders jammed. (19RT 2893.)

I. Appellant Pops Replaces the Light-Colored Wheel Rims on His Camaro with Dunn's Chrome IROC Rims

Around the beginning of February, Barnes noted that appellant Pops had replaced the light-colored standard rims on his Camaro with chrome IROC rims. (14RT 1951-1952, 1954-1955; 18RT 2755-2758; Supp. II 1CT 112-114 [Peo. Exh. 84-F (interview transcript)].) Barnes complimented appellant Pops on his newly acquired chrome rims. Barnes told appellant Pops that the rims were "tight," meaning they looked good. Appellant Pops responded, "I know nigger," and he and Barnes bumped their fists together. (14RT 1952-1953; 18RT 2755-2757; Supp. II 1CT 113 [Peo. Exh. 84-F].)

On the evening of February 12, 1998, Long Beach Detective Richard Conant and his partner stopped appellant Pops's Camaro. (14RT 1946-1947; 15RT 2116-2117, 2125; Peo. Exh. 42A-B.) Neither the driver nor the passenger were wearing seatbelts. (15RT 2130, 2132-2136, 2141-2142; 16RT 2328-2333, 2347-2349.) Appellant Pops was driving the Camaro. Appellant Wilson, Harris (Pops's brother), and Barnes were passengers in the car. (14RT 1947; 15RT 2118-2120.) Based on his knowledge of the murders at the Compton carwash through communication with Compton Police Department, Detective Conant was interested in looking at the rims on appellant Pops's car. (15RT 2120-2121, 2151.) He was aware that chrome rims had been taken from one of the murder victim's vehicles. (15RT 2151.) The detective looked at the rims, being careful not to alert

appellants as to the reason for the traffic stop. The rims where chrome IROCs, and appeared to be the same ones described to him by the Compton Police Department. (14RT 1948; 15RT 2119-2020, 2126-2127, 2150-2151.) Appellant Wilson, who was the sitting in the front passenger seat of the Camaro, became animated and verbally combative with the detectives. (15RT 2141-2143, 2149.) He was very upset that the detectives had stopped the car and were conducting officer-safety pat-down searches. (16RT 2333-2334, 2445.) The detective recalled that appellants were wearing gold jewelry. (15RT 2127-2129.) Barnes was the only one in the car arrested that night because he had an outstanding warrant. (16RT 2343-2344.)

J. Initial Photographic Lineup Displays and Bowie's Identification of Appellant Pops

Compton Police Detective Fredrick Reynolds assembled a number of photographs of possible suspects to show the witnesses. On February 19, 1998, Detective Reynolds showed Bowie a five-page mug book he had prepared with four photographs on each page. (12RT 1537-1538, 1563, 1601; 17RT 2593-2595, 2602; Peo. Exh. 51.) Bowie looked at the photographs on each page. He then closed the book, pushed it aside, and said none of those people were involved. (17RT 2595.) Bowie was next shown a six-pack photographic lineup. (17RT 2595-2596; Peo. Exh. 47.) He looked at the lineup very intently and then stated that none of the people were involved. (17RT 2596.)

The detective then showed Bowie two photographs together. (12RT 1538-1540; 17RT 2596-2597; 18RT 2727-2729; Peo. Exh. 58 [color photocopy of the two photograph].) When the two photographs were placed before Bowie, he immediately became visibly angry and then started crying. (17RT 2597-2598.) Bowie pointed at one of the photographs and emphatically stated, "That's the motherfucker right there, that's him, that's

the motherfucker"—identifying appellant Pops by repeatedly poking his finger at the photograph. (17RT 2598.) Bowie further stated that the man in the photograph (appellant Pops) was the one who sat in the passenger seat of the Honda and held a Tech Nine gun on him. (12RT 1538-1540; 17RT 2599-2600.)[25] On that day, Detective Reynolds had shown Bowie a total of 28 photographs, and he only identified appellant Pops. (17RT 2602; 18RT 2727-2729.) When Detective Reynolds showed Bowie this first group of photographs, he did not have a photograph of appellant Wilson. (17RT 2603.)

K. Bowie Sees Appellant Pops In His Camaro with Dunn's Chrome IROC Rims

On February 22, 1998, Bowie saw appellant Pops at a gas station located near Atlantic Avenue and Artesia Boulevard in Long Beach. (12RT 1540-1542; 17RT 2606.) Bowie was across the street from the gas station. (12RT 1607.) Appellant Pops was putting gas in the car. (12RT 1542, 1554-1555, 1608; Peo. Exhs. 42A-D [photographs of Camaro].) Bowie noticed that the Camaro had the exact same IROC wheel rims that had been on Dunn's El Camino. Bowie believed that they were, in fact, the rims from Dunn's car. (12RT 1554-1557, 1608.)

When appellant Pops drove away, Bowie immediately called a pager number that Detective Reynolds had given him. After entering the return telephone number, Bowie added "911." Detective Reynolds immediately called the telephone number, and Bowie described what he had just seen. (12RT 1542-1543, 1555-1556; 17RT 2607.) Bowie was very excited as he spoke, stumbling over his words and seemingly quite afraid. (17RT 2608.)

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[25] The other photograph of the two shown to Bowie (Peo. Exh. 58) was a picture of a person named Don Moseley. (17RT 2600.)

L. Additional Photographic Lineup Displays and Bowie's Identification of Appellant Wilson

Detective Reynolds prepared a photographic six-pack lineup with appellant Wilson's picture in position number two. (17RT 2602-2603; Peo. Exh. 50.) The detective showed the six-pack lineup containing appellant Wilson's photograph to Bowie on February 23, 1998, at the Compton Police Station. (12RT 1549; 17RT 2603.) Bowie briefly looked at the lineup and then became very excited. Bowie said that the picture in position number two—the photograph of appellant Wilson—was the man who was sitting in the driver's seat of the Honda and who had pointed the Glock pistol at him. (12RT 1547-1549, 1563, 1661; 17RT 2604.) Bowie stated, "I know for sure that's him, I know the shape of his mouth, that's the motherfucker, he was the driver." (12RT 1548-1549.) Although Bowie described the Glock as a nine-millimeter pistol, as he mentioned the gun, he pointed at Detective Reynolds's holstered department-issued semi-automatic Glock pistol—a .40 caliber firearm. (17RT 2605-2606.) On the victim/witness form signed by Bowie it read: "No. 2 was the driver. He was the one with the nine. It looks like the gun you—he has—indicating Detective Reynolds' gun, which is a Glock. I know for sure that's him. I know the shape of his mouth. That's the motherfucker. He was the driver." (17RT 2606.)

M. Chris Williams and Anthony Brown View the Lineup Photographs

On February 11, 1998, Williams was shown the five-page mug shot book prepared by Detective Reynolds (Peo. Exh. 51). (17RT 2608.) Williams said that none of the photographs looked like the men who were at the shop the day of the murders. (13RT 1718-1719, 1773, 17RT 2609.) The next day, on February 12, 1998, Williams was shown a photographic six-pack lineup (Peo. Exh. 47) containing a picture of Gerron Malone in

position number one. (17RT 2610.)[26] Williams would not make an identification and stated that he did not recognize any of the individuals pictured. He did indicate, however, that the picture in position number one looked similar to one of the men. (13RT 1719-1721; 17RT 2611, 2647-2648; 18RT 2702-2703, 2730-2733.)

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[26] Appellant Pops asserts that Detective Reynolds mistakenly testified that the photograph in position number one of Exhibit 47 is of Malone. Appellant believes it is instead a photograph of Don Moseley. (Pops AOB 39, fn. 21.) Appellant Pops notes that at a pretrial hearing on March 19, 1999, at which Bowie testified, it was indicated that the other individual in the two photographs shown side-by-side by Detective Reynolds to Bowie—later trial Exhibit 58—was of Malone. (7RT 615-619, 633.)

As appellant Pops notes, a comparison of the photograph on the right side of Exhibit 58 (i.e., the two photographs shown to Bowie on February 19) with the person in position number one of Exhibit 49, does appear to be the same person. Appellant Pops then concludes that if Malone is the same person in Exhibits 58 and 49, the person in position number one of Exhibit 47 must therefore be Moseley. Respondent disagrees with the conclusion that Malone is pictured in Exhibits 49 and 58.

At trial, Detective Reynolds testified that he placed *Moseley's* photograph in position number one of the six-pack identified as Exhibit 49. (17RT 2601.) Additionally supporting this testimony, Defense Exhibit HH, an enlarged copy of the photograph in position number one of Exhibit 47 (six-pack lineup), was identified by both Detective Reynolds *and* defense investigator Withers as Malone's picture. (See 18RT 2730; 23RT 3747-3749.) Moreover, Defense Exhibit H, an enlargement of the photograph in position number one of Exhibit 49 and the photograph on the right side of Exhibit 58, was identified by Mr. Mizel during his cross-examination of Bowie as a photograph of Don Moseley. (12RT 1603.)

Accordingly, it is more likely the attorneys and detective misspoke at the pretrial hearing when they identified the other man in the two photographs (Peo. Exh. 58 [right side photograph]) as Malone. As such, the trial testimony that Malone's photograph was placed in position number one of Exhibit 47 is probably accurate. The photograph of Malone (Exh. 47), is remarkably similar to appellant Wilson's photograph. (Compare Peo. Exh. 50, photograph in position number two, with Exh. 47 & Def. Exh. HH.)

After Bowie had identified appellant Pops's photograph on February 19, Detective Reynolds prepared a new photographic lineup containing Pops's picture in the fifth position. (17RT 2600-2601; Peo. Exh. 48.) Moseley's photograph—the second of the two photographs shown to Bowie (e.g., Peo. Exh. 58)—was placed in a different six-pack lineup in the first position. (17RT 2601; Exh. 49.) On February 23, Williams was shown the two six-pack photographic lineups that contained pictures of appellant Pops (Peo. Exh. 48) and appellant Wilson (Peo. Exh. 50). (17RT 2611.) Williams could not identify anyone from either lineup. Williams stated that one of the suspects had a light complexion and the other was very dark. (17RT 2612; 18RT 2703-2704.)

On February 11, 1998, Brown was also shown the mug shot booklet of photographs prepared by Detective Reynolds. (19RT 3058-3055; 25RT 4109[27] [Peo. Exh. 51] .) He did not identify anyone, but indicate some pictures looked similar to the suspects in complexion, size, etc. (19RT 3056-3057.) The next day, February 12, Brown was shown the photographic six-pack lineup that included Malone's picture in position number one. (17RT 2610; 19RT 3058-3060; 25RT 4109 [Peo. Exh. 47].) He indicated that the person in position number one—Malone—best fit the description of the man he saw driving the El Camino. He said, "I think n[umber] 1 was the driver of the El Camino." (19RT 3060-3062.) On February 24, Brown was shown the photographic six-pack lineup that included appellant Pops's picture in position number five. (17RT 2600-2601; 25RT 4109 [Peo. Exh. 48].) Brown did not identify anyone, but indicated that the person in position number five—appellant Pops—"looks closets to the dark guy but he is too light and too tall." (19RT 3062, 3080-

[27] Stipulation identifying the preliminary hearing exhibits by the current trial exhibit numbers and letters.

3081.) Brown told the police that he could not positively make an identification from a photograph, but that the man in the picture most closely fit his description. (19RT 3081-3082, 3087.) Brown made his comments after considering the person's size and body structure as reflected in the photograph. Brown did not believe the man in position number five was five feet nine inches tall. (19RT 3063-3065.)

N. The Execution of Search and Arrest Warrants at Appellants' Apartments on March 5, 1998

Detective Reynolds obtained search and arrest warrants for appellants' residences on Lime Avenue in Long Beach, and coordinated their execution with the local police department. (15RT 2122-2124; 17RT 2607, 2620-2621; 18RT 2748.) He also obtained arrest warrants for Harris and Barnes for the arson of Dunn's El Camino. (18RT 2748.) On March 5, 1998, the warrants were served with the assistance of the Long Beach Police Department, which first entered and secured the premises simultaneously at appellants' respective residences. (15RT 2152-2153.)

A search warrant was served at 5705 Lime Avenue, apartment no. 1, in Long Beach. Appellant Wilson, Harris (appellant Pops's brother), and a female were inside the apartment. (15RT 2122-2124, 2137-2138, 2161-2162.) At the time the police entered, appellant Wilson was lying on a couch in the living room, two or three feet from the front door. (15RT 2147.) Appellant Wilson and Harris were taken into custody pursuant to the arrest warrants. (15RT 2122-2123.) After the apartment was secured, it was turned over to investigators from the Compton Police Department to search. (15RT 2123, 2160-2161; 16RT 2336-2337.)

A live round of nine-millimeter ammunition, a man's wallet, and a .12 gauge shotgun, were found under the cushions of the couch where appellant Wilson had been lying when the officers entered the apartment. (15RT 2147-2148, 2154, 2164-2165 [Peo. Exh. 69: live round nine-millimeter

ammunition]; 16RT 2335-2336.) The wallet contained, among other items, a Hollywood Video rental card with the name "Byron Wilson" printed on it, and a blue GTE calling card also issued to appellant Wilson. (15RT 2174-2175.) Also, inside the wallet was a business card from R N J Guns & Ammo. On the back of the card were handwritten notations for two models of Glock pistols—it read: "Glock 26" and "Glock 30." (16RT 2247-2248.)

Another item recovered in the apartment was a three-ring photo album found on top of a small table in the living room near the couch. Inside the cover of the album was the front page of the Long Beach Press Telegram reporting that four men had been shot at a carwash in Compton. (15RT 2167-2168, 2183.) The newspaper front page was dated January 26,1998. An article reporting about the carwash murders appeared on the right-hand side of the page. On the other side of the front page was an article about the Super Bowl. (15RT 2168; Peo. Exh. 70.) No other newspapers were found inside appellant Wilson's apartment. (15RT 2168.)[28]

A blue writing tablet with lined paper was found on the kitchen table. (15RT 2170, 2179; Peo. Exh. 68.) The tablet contained several pages of hand drawings and a handwritten list of names. (15RT 2171-2174; Peo. Exh. 68A-68E.) An empty red and white K-Swiss tennis shoe box was located on the upper shelf of the closet. (15RT 2166-2167, 15RT 2180-2181.)

At the same time the search warrant was executed at appellant Wilson's apartment, other police officers entered an apartment located at 5509 1/2 Lime Avenue in Long Beach. Appellant Pops was there and

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[28] Other than the newspaper in the photo album that also mentioned the Super Bowl, no sports memorabilia was found in the apartment. (15RT 2168-2169.)

arrested pursuant to the warrant. (15RT 2124.) That location was secured and turned over to Compton Police investigators to be searched. (15RT 2124-2125.) A shotgun was found at appellant Pops's residence. (15RT 2154.) Appellant Pops's 1985 Camaro, which was parked outside the apartment, was seized and taken to the tow yard. The car was fitted with the chrome IROC wheel rims. (17RT 2621-2622; Peo. Exh. 42A-42D.)

1. The Live Round of Nine-Millimeter Ammunition Found at Appellant Wilson's Apartment Was Worked Through the Ejection Port of the Same Nine-Millimeter Firearm Used During the Carwash Murders

The live round of nine-millimeter ammunition found under the cushion at appellant Wilson's apartment was submitted to Deputy Walley, the ballistics expert, for analysis. (15RT 2165; 19RT 2870-2872; Peo. Exh. 69.) In Deputy Walley's opinion, the live nine-millimeter round of ammunition was worked through the action of the same firearm that fired the expended nine-millimeter cartridge cases found at the crime scene. (19RT 2872.) Deputy Walley explained when a round is fired, the extractor bolt inside the gun pulls the empty casing out. As the casing leaves the gun, it hits another piece of metal called an ejector that ejects the cartridge case out of the ejection port. This action leaves marks on the ejected casings. Deputy Walley found that the extractor marks left behind by the gun that fired the nine-millimeter cartridge cases at the crime scene—the Tech Nine—were also found on this live round of ammunition. (19RT 2885.) The live round would have been released through the ejection port of the Tech Nine by someone manually pulling the slide back to release the round that had been caught in the extractor. (19RT 2887-2889.) Deputy Walley had no doubt that the live round had been put in the same gun and ejected as the nine-millimeter casings recovered at the murder scene. (19RT 2889.)

2. Drawings and List of Names Found in the Writing Tablet Demonstrate the Connections Between Appellants, Harris, and Barnes

In addition to the newspaper article stored in a photo album that reported the murders at the carwash, the blue writing tablet found on the kitchen table included drawings and a list of names (15RT 2170-2174, 2179; Peo. Exh. 68) that showed connections between appellants, Harris, and Barnes. Barnes, who was close friends with appellant Pops and Harris, discussed the significance of several pages from the tablet. (14RT 1955-1962; Peo. Exh. 34A-34C [copies of individual pages from Peo. Exh. 68].) On one of the pages in the upper middle was a drawing that depicted appellant Pops's car with the IROC rims. (14RT 1957; Peo. Exh. 34A; see, e.g., 4CT 843.) The drawing also depicted street signs reflecting 55th Street and Lime Avenue—the location near where appellant Pops was arrested and his Camaro sized on March 5. (14RT 1958; 15RT 2124.) The page additionally had a caricature drawing of a muscled appellant Pops, with his moniker "Nut" written across the top of the page, and the words "The Monster Beefy" written across his Camaro that sported the IROC rims. (Peo. Exh. 34A.)

On another page, there was a list of moniker names. Barnes identified the number one moniker on the list, "Nut," as appellant Pops. The second name on the list was "Scrap," who Barnes identified as Harris (Pops's brother). The name "Bird" was appellant Wilson's moniker and third on the list. Barnes's moniker "Smurf" (spelled "Smerf" on the page) was number 18 on the list. (13RT 1865-1868; 14RT 1958-1959; Peo. Exh. 34C; see e.g., 4CT 846.) Barnes had this moniker tattooed across his stomach. (13RT 1868-1869.) A star was placed next to Barnes's moniker. According to a legend at the bottom right of the page, a star was placed by

names "fo all the niggaz locke up." Barnes was incarcerated in juvenile hall in March 1998. (14RT 1959-1960.)

A third page depicted someone's arm firing a large semi-automatic gun (possibly a Tech Nine). (14RT 1961.) Also, depicted on the individual's arm were the letters "Y M O." (14RT 1961-1962; see, e.g., 4CT 840.) The letters stood for "Young Mafia Organization"—to which appellant Pops, appellant Wilson, Harris, and Barnes belonged. (14RT 1962.) Appellant Pops had the same "Y M O" letters tattooed on his left and right forearms. (14RT 1962-1963, 1983-1984.)

O. No Latent Fingerprints Collected at the Carwash Were Attributed to Appellants

A total of 17 identifiable latent prints were collected at the carwash and at the lab from objects taken from the crime scene. (15RT 2201-2215, 2220-2221.) Fred Roberts, a latent print examiner for the Los Angeles County Sheriff's Department, determined that none of the 17 prints belonged to either appellant. Three of the latent prints were attributed to Chris Williams. (15RT 2189-2191, 2222-2224.) Based on his experience, Roberts explained that the carwash was not a location conducive to raising identifiable latent fingerprints and palm prints because there was a lot of dust and dirt in the building. (15RT 2222.)

P. Barnes Speaks to Detective Reynolds and the Prosecutor

Detective Reynolds interviewed Barnes on March 5, 1998. This was first time that the detective ever had contact with Barnes. (14RT 1936; 17RT 2622.) The interview occurred at the Los Padrinos Juvenile Hall in Downey. (17RT 2622-2623.)[29] Barnes said that he saw appellant Pops's

[29] Barnes was released a few days later. (14RT 1936-1937.) He was then placed back in custody for the arson of the El Camino. (14RT 1937.)

Camaro the night before the Super Bowl Sunday carwash murders, and the car had stock wheel rims. (17RT 2624.) He noted that appellant Pops had different rims on his car after Super Bowl Sunday. (17RT 2626.) Barnes admitted burning the El Camino with Harris, and discussed the circumstances of how that occurred. (17RT 2626-2628.) During the interview, Barnes expressed fear that appellant Pops could harm his mother, brother, and him if he cooperated with law enforcement. (14RT 1938-1941.)

In June 1998, the prosecutor and Detective Reynolds interviewed Barnes. Barnes again described the circumstances of burning the El Camino. He identified photographs of Dunn's El Camino that Barnes admitted burning. (14RT 1941-1944; 18RT 2758 Peo. Exh. 35G, 39A, 39B; Supp. II 1CT 104-106, 109 [Peo Exh. 84B, 84E].) Barnes stated that there were no IROC rims on the El Camino, just standard tires, when he and Harris burned the car. (14RT 1945; 18RT 2754; Supp. II 1CT 106 [Peo. Exh. 84C].)

Barnes also identified photographs of appellant's Pops's Camaro, and noted the change to the chrome IROC rims after Super Bowl Sunday. (14RT 1944-1946 [Peo. Exh. 42A-42D; Supp. II 1CT 111-112 [Peo. Exh. 84F].) Barnes expressed fear for his and his family's safety, if he implicated appellants at trial. (Supp. II 1CT 107-108 [Peo. Exh. 84D].)

Barnes showed Detective Reynolds the house where the barbecue was held on January 25, 1998. (13RT 1875; 17RT 2640-2641.) The detective determined that the distance between the location of the barbeque and the alley where the burnt El Camino was found was approximately five-tenths of a mile. (17RT 2640-2641.)

Q. Appellants Are Identified During Live Lineups By Bowie, Williams and Brown

On June 9, 1998, live lineups that included appellants in separate lineups were held at the Los Angeles County Jail. Bowie, Barnes, and Williams attended as witnesses. Detective Reynolds, who also attended, noted where all the witnesses sat. There was no communication between the witnesses. The sheriff deputies who ran the lineup were very strict about witnesses not communicating. (12RT 1614, 1676-1678; 15RT 1550-1552; 17RT 2616-2617.)

The first lineup, identified by the Sheriff's Department as "Lineup No. 5," included appellant Pops in position number six on the stage. (17RT 2619; Peo. Exh. 66A-66C [photographs of lineup].) Bowie[30] identified appellant Pops, and indicated he was the passenger in the car who had the Tech Nine firearm. (12RT 1549-1550, 1552-1553, 1564; 17RT 2617.) Williams[31] identified appellant Pops as the passenger suspect. (13RT 1723-1724.) Brown also positively identified appellant Pops as the person who pointed the Tech Nine gun at him, and who drove away from the carwash in the dark-colored Honda. (19RT 3008; 3081-3085.)

In the second live lineup—identified by the Sheriff's Department as "Lineup No. 6"—appellant Wilson was placed in position number three on the stage. (12RT 1554; 17RT 2619-2620 [Peo. Exh. 67A-67C [photographs of lineup].) Bowie selected appellant Wilson as the suspect

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[30] For purposes of the lineup proceedings, Bowie was identified only as "Witness No. 4." (12RT 1550; 17RT 2617.) Detective Reynolds drove Bowie to the lineup. (12RT 1613-1614.)

[31] Williams was identified at "Witness No. 5." (13RT 1722; 17RT 2618.) Melvin Hoard drove Williams and Brown to the lineup. (13RT 1766-1768.) Melvin's brother, Michael Hoard, and his nephew, Shawn Potter, had been killed at the carwash. (13RT 1768.) Melvin did not say that he had seen either appellant in court. (13RT 1769.)

whom he saw sitting in the driver's seat and who had the Glock handgun. (12RT 1553-1554.) Williams picked appellant Wilson as the driver suspect. (13RT 1725; 19RT 3086.)[32] Brown picked out appellant Wilson due to his complexion which was closest to the suspect who drove away in Dunn's El Camino. He could not be positive in his identification. (19RT 3008; 3075-3076, 3082.) Brown wrote on the identification card, "I only viewed from behind and a quick view of face but fits best description of Lineup No. 6." (19RT 3086-3087.)

R. Dunn's Distinctive Chrome IROC Rims Were on Appellant Pops's Camaro

Boochee, who had originally fitted the chrome Three-Bar IROC rims on the El Camino, positively identified that the IROC rims on appellant Pops's Camaro as the same ones that had been on Dunn's El Camino. (16RT 2252-2253; Peo. Exh. 44A-44D.) Boochee was able to identify the IROC rims based on the manner in which he had previously modified them to fit the El Camino—i.e., drilling lager five-eighths inch holes to accommodate the longer bolts and Cragar lug nuts. (16RT 2251-2252, 2256-2257, 2258-2260 2267, 2270-2274, 2284-2287.) Boochee noted that someone had re-drilled the rear wheels and put in an insert to make the holes smaller again. (16RT 2259-2260.)[33] Appellant Pops's Camaro still

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[32] Williams later testified at the preliminary hearing in which there were three defendants in court—appellants and Harris. Williams indicated that one of the three men was not at the carwash. (13RT 1725.) But he identified appellant Wilson as the driver and appellant Pops as the passenger. (13RT 1725-1726.) Williams was positive of his identifications. (13RT 1726.)

[33] Appellant Pops's Camaro had been taken to Fontenot's tow yard in Compton, which was the official impound lot for the Compton Police Department. (16RT 2298.) The Camaro was received by the tow yard on March 19, 1998. The owner of the tow company, Freeman Fontenot, thought that the Compton Police Department no longer needed the car as

(continued...)

had the same Cragar lug nuts that Boochee had originally installed onto the El Camino. (16RT 2264-2265; 17RT 2634-2635; 18RT 2725-2726.)

(...continued)
evidence because the department would normally have moved such a vehicle within 10 to 15 days. The car had been in the tow yard for five weeks, and on April 17, 1998, Fontenot obtained title to the car on a lien sale. Sometime after that date, Fontenot had one of his employees remove the rims. Fontenot then gave the chrome rims to Steve Wells, an officer with the Vernon Police Department. (16RT 2306-2314, 2299-2300, 2301-2302, 2304-2305, 2313-2316, 2324-2325.) Fontenot replaced the rims on appellant Pops's Camaro with other IROC rims from a Camaro that was to be junked. (16RT 2308-2309, 2316-2317, 2319-2321.)

It was not until June 16, 1998, when Detective Reynolds met Boochee at the tow yard, that he learned the chrome Three-Bar IROC rims had been removed. The detective had planned to video record Boochee removing the rims from the Camaro and put them on the El Camino to demonstrate that the rims actually came from the El Camino. (16RT 2309; 17RT 2633.) When Boochee saw the rims, he immediately noted that they were not from Dunn's El Camino. (16RT 2276-2281; 17RT 2633.) Detective Reynolds also looked more closely at the rims and compared them to the photographs taken when the car was first seized (Exh. 42A-42D), and realized they were not the same ones. (17RT 2633; Peo. Exh. 42A-42D.)

On that day, June 16, Boochee did remove two Cragar lug nuts from the Camaro that Boochee had originally installed on the El Camino. (17RT 2634-2635; 18RT 2725-2726.)

When Detective Reynolds contacted Fontenot about the missing rims, Fontenot initially denied knowing what had happened to the rims and implicated an employee. (16RT 2299, 2310-2311, 2325-2326; 17RT 2635.) Fontenot did not initially tell the detective the truth because he was embarrassed. (16RT 2300.) The detective began an investigation into what happened to the rims and called in a fingerprint expert to dust the replacement rims. (16RT 2311-2312; 17RT 2635.) The following day, June 18, 1998, Fontenot contacted Detective Reynolds and told him the truth. (16RT 2300-2302, 2312-2313; 17RT 2636.) Fontenot got the rims back from the police officer. Detective Reynolds picked up the rims from the tow yard on June 19, 1998, and booked them into evidence. (16RT 2302-2303, 2319-2320; 17RT 2636-2637; Peo. Exh. 44A-44D) Boochee examined the rims after they were retrieved by Detective Reynolds. (16RT 2256-2257, 2260.)

Kimberly Thomas, Dunn's girlfriend, also identified the chrome IROC rims in the courtroom. Thomas explained the weekend before Dunn was murdered, she noticed an oxidation spot on the right rear rim on the El Camino. Dunn stated that he intended to have it re-dipped in chrome. (17RT 2583-2584, 2588.) Thomas identified the oxidation spot on the rim (Peo. Exh. 44-C) near the "IROC-Z" cap. (17RT 2584-2586.) Based on the oxidization spot, Thomas had no doubt these were the rims that had previously been on Dunn's El Camino. (17RT 2586, 2589.)

S. February 6, 1998—Less Than Two Weeks After the Carwash Murders—Appellant Pops Shoots Jane Hernandez at the Apartment Where Keith Salter Was Staying

Tamanika Hernandez (Tamanika) lived with her infant daughter, and her mother Jane Hernandez (Hernandez) in an apartment on Linden Avenue in Long Beach. Keith Salter, Tamanika's boyfriend, sometimes stayed at the apartment. (16RT 2362-2363, 2423.) The apartment had one bedroom, a living room, a kitchen, and bathroom. (16RT 2363-2364.) Tamanika slept in the apartment's bedroom with her daughter and Salter. (16RT 2364.) Hernandez slept in the living room on a mattress. (16RT 2391.)

On the afternoon of February 5, 1998, Reggie Davis momentarily stopped by the Hernandez apartment to pick up Salter. (17RT 2480-2482, 2514.) He had been to the apartment several times when also visiting friends at a nearby apartment. (17RT 2480, 2512-2513.) Salter was known by the monikers, "BG," "No Good," and "Baby No Good." Davis was known as "Big No Good." (17RT 2482-2483.)[34] There were five or six people in the apartment, including appellant Pops, when Davis arrived.

[34] Davis was at one time a member of the Nutty Block gang in Compton. He was not active, however, and stopped being a gang member around 1995 or 1996. Davis knew appellant Pops belonged to a gang at one time, but did not know if he still was a member. (17RT 2511.)

(17RT 2481, 2516-2517.) He and appellant Pops shook hands, and Davis left the apartment. (17RT 2515-2517.) Davis had known appellant Pops for a couple of years. (17RT 2482.) Davis denied he was having any problems with appellant Pops. (17RT 2483, 2514-2515.) Davis had recently returned to town, and appellant Pops believed Davis had some money. (17RT 2484.) Davis heard from others that appellant Pops intended to take Davis's money. (17RT 2485.)

In the early morning hours of February 6, 1998, Tamanika was in her bedroom with Salter and her daughter. (16RT 2364.) Her mother was sleeping in the living room on a mattress. (16RT 2391.) Tamanika was awakened by the sound of a gunshot. (16RT 2364.) Tamanika got out of bed and crawled into the living room. (16RT 2364-2365, 2392.) She peeked around a corner of a wall and saw that her mother had been shot and was lying on the kitchen floor, screaming. (16RT 2365, 2392-2394.)

Tamanika saw two men standing at the back doorway of the kitchen. (16RT 2365-2366, 2386, 2394-2395.) One of the men was holding a .12 gauge shotgun. (16RT 2365.) The distance between the wall behind which Tamanika crouched and the backdoor was approximately eight feet. (20RT 3125; Peo. Exh. 72B.) The man holding the shotgun was tall, had two braids of hair, and wore a beanie. (16RT 2365-2366.) The other man was shorter and had curly hair. From seven or eight feet away from Tamanika's mother, the man with the shotgun fired it a second time. (16RT 2366-2368, 2386.) Although Tamanika could not see the men's faces, she could clearly identify the braids of the tall man holding the gun. (16RT 2395-2396, 2406-2407.) The two men then ran away. (16RT 2368.) Tamanika closed the door and called 911. (16RT 2368-2369.)

Salter came into the kitchen after the men had left, and he saw Hernandez lying on the floor. (16RT 2415-2417.) He did not know why someone would shoot Hernandez. (16RT 2417-2418.) When Salter lived

in Compton, he associated with the Nutty Block Crips. Salter knew appellant Pops as "Papa Nut." However, he did not know appellant Pops from that association. (16RT 2417-2418.)

Around 2:00 a.m., Long Beach Police Officer Brenda Relph responded to the apartment. Officer Relph entered a side door and found Hernandez lying nearby on the kitchen floor. (18RT 2739-2743; Peo. Exh. 73A-73B [photographs of Hernandez after being transported to the hospital].) Tamanika told Officer Relph that she had been in her bedroom asleep and was awakened by a knock on the door. She heard the door open and assumed her mother was opening the door. After a couple of seconds, Tamanika heard a gunshot. She walked out of her room and peeked around the corner from the living room. Tamanika said she observed a tall Black male with a shotgun shoot her mother a second time. (18RT 2743-2746.) She stated that another man, about five feet six inches tall, was with the taller man. Both men were in their twenties. (18RT 2744.)[35]

A couple of days after the shooting, Tamanika was walking with her child outside the apartment complex where Salter lived on Harding Street near Atlantic Avenue. She saw appellant Pops driving his Camaro on Harding Street. He looked at her. Tamanika was scared and walked through a gate back into the apartment complex. (16RT 2375-2377, 2397.) She recognized appellant Pops from his ponytail braids. (16RT 2381.) Tamanika went to an apartment within the complex and told Salter's cousin, Trina, what she had just observed. (16RT 2377-2378, 2405.)

On February 25, 1998, Detective Conant showed Tamanika a photographic six-pack lineup in which appellant Wilson was in position

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[35] Davis denied he told Detective Reynolds that on the day Hernandez was shot that appellant Pops was looking for him. (17RT 2483.) Davis did not know why the men who came to Hernandez's apartment asked for "No Good" moments before she was shot. (17RT 2484.)

number four. (18RT 2772-2773; Peo. Exh. 74.) Tamanika stated that the photograph of appellant Wilson looked like the man who was standing next to the shooter in the doorway. (16RT 2372-2375; 18RT 2774.)[36] He showed Tamanika another six-pack lineup that included a photograph of Aziz Harris, appellant Pops's brother, in position number four. Tamanika did not identify anyone in that lineup. (16RT 2375; 18RT 2774-2775.) A third six-pack lineup that included appellant Pops's photograph in position number four, was shown to Tamanika. (18RT 2775-2776; Peo. Exh. 77.) Tamanika indicated that appellant Pops's photograph looked like the shooter, and that two days after the shooting, she saw the same person driving "in a tan Camaro with a gray primer spot on the front of it." (16RT 2369-2371, 2375, 2384, 2387, 2397-2399; 18RT 2776-2777, 2786; Peo. Exh. 78.)

Tamanika also recognized appellant Pops because he had been in her apartment sometime before her mother was shot. (16RT 2384-2385, 2410.) At that time, there were quite a few other people in the apartment. (16RT 2385-2387.) Tamanika recalled previously seeing appellant Pops after a neighbor mentioned to her that she had seen him in the apartment sometime before the shooting. (16RT 2382-2386.)[37] Salter never told Tamanika that appellant Pops was mad at him. (16RT 2400.)

Deputy Walley, the ballistics expert, examined an expended shotgun shell found by the Long Beach Police Department at Hernandez's apartment after the shooting. They determined that neither of the two

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[36] She could not identify that man in court. (16RT 2375-2376.)

[37] During an interview with the prosecutor and Detective Reynolds on July 31, 1998, Tamanika stated that she could not identify the shooter. This was not true. She said that only because she was scared. (16RT 2378-2379.)

shotguns recovered during the searches of appellants' apartments were used to fire the shotgun shell. (19RT 2894.)

T. Appellant Pops Sees Salter Driving with Patreiner Gant and Burns Gant's Car the Next Day

In the afternoon of February 10, 1998, Patreiner ("Trina") Gant was driving her white Camaro with her cousin Salter as a passenger. (16RT 2419, 2428-2429.) While they were driving through the Carmelitos housing project, Salter nodded to a man named Terrance who was on a bicycle. (16RT 2429-2431; 17RT 2466-2467.) Terrance was looking away and waving in a different direction, but he was pointing at Gant's car. (16RT 2420, 2431, 2442-2444.) Gant looked in the direction that Terrance was facing and saw appellant Pops, whom she knew as "Papa Nut." (16RT 2431-2432, 2439-2443; 17RT 2467-2468.) Gant had known appellant Pops for a year or more, and had seen him around the apartments where she lived. (16RT 2432-2433.) Gant knew that appellant Pops was a member of the Nutty Block gang. (16RT 2434.)

In the early morning of February 11, 1998, Gant was asleep in her apartment located at 6201 Atlantic Avenue, apartment no. 31, at the corner of Harding Street, in Long Beach. At approximately 4:00 a.m., Gant was awakened by a loud boom sound. (16RT 2426-2427, 2435; 17RT 2468-2469.) She looked out her window that faced Harding Street and saw that her white Camaro was on fire. (16RT 2428, 2435-2437.) Appellant Pops and another man were running away from the car, crossing Harding toward Janice Street. (16RT 2427-2428, 2435-2437, 2439-2440; 17RT 2468-2469.) The two men turned onto Janice Street and ran out of Gant's sight. (16RT 2441; 17RT 2470.) Appellant Pops, the taller and skinnier of the two men, had long French braids in his hair. (16RT 2440 -2442.) Gant's car was completely burned. (16RT 2428.)

She reported to an arson investigator that appellant Pops was responsible. (16RT 2444-2446; 17RT 2470, 2475.) Gant may have also told the arson investigator that appellant Pops shot Hernandez by mistake, and intended to shoot Salter. (16RT 2434-2435, 2446, 2465-2466.) Gant had heard on the street that appellant Pops had shot Hernandez. (17RT 2465.) She did not have personal knowledge, however, that appellant Pops actually shot Hernandez. (17RT 2466.) Gant identified herself to the investigator as Salter's cousin. She noted that he had been riding in her car the previous day, and that was why appellant Pops burned it. (17RT 2465.) Gant had no personal knowledge that appellant Pops was after Salter. (17RT 2465-2466.) At the time Gant spoke to the investigator, Salter was in hiding. (16RT 2446.)

U. Davis Tells Gant that Appellant Pops Admitted Committing the Carwash Murders

Gant was friends with Reggie Davis. Approximately a month after the carwash murders, Davis told Gant that appellant Pops had admitted he committed the murders. (17RT 2524-2525.) Davis stated that appellant Pops personally told him that he went to the carwash to rob the people there. They would not give him the money, so "he laid them down and shot them." (17RT 2525, 2539-2540.) Davis told Gant that appellant Pops was bragging about what he did and was going to tell the wrong person. (17RT 2539.)[38]

On June 14, 1999, Gant, Davis, and Salter drove to the courthouse together. Davis was not under subpoena. Davis had lunch with Gant and Salter. (16RT 2424; 17RT 2519, 2534.) Sometime during the afternoon, the prosecutor spoke to Davis in the hallway and informed him that he

[38] Davis, however, denied at trial that appellant Pops ever talked to him about the carwash murders. (17RT 2509-2510, 2516-2517, 2486.)

would have to testify. After the prosecutor left, Davis again mentioned to Gant that appellant Pops had admitted he made the men lie down at the carwash and shot them. (17RT 2526-2527, 2534, 2538-2539.) Davis protested being called as a witness and said he did not know anything about the Hernandez shooting. Davis indicated, however, that if appellant Pops's attorney asked him questions it could make it worse for appellant Pops because he had told Davis about the carwash murders. (17RT 2517-2518, 2535-2536.) Davis stated that appellant Pops's attorney "wouldn't like his answers." (17RT 2537.)[39]

Gant gave Davis a ride home. (17RT 2519.) The next day, June 15, 1999, she gave him a ride to court. Before testifying, Davis was seated on a bench with Gant outside the courtroom. (17RT 2520.) When Gant entered the courtroom, she revealed to the prosecutor what Davis had told her: that appellant Pops had admitted to him that he committed the carwash murders. (17RT 2524-2525.) This was the first time Gant had told anyone about this statement. (17RT 2525-2526, 2532-2533.) Gant admitted she had prior opportunities to tell the prosecutor about appellant Pops's admission, but she was only asked about her car when they spoke. (17RT 2540-2542.) Gant also feared for her and her children's safety. She explained, "You don't broadcast news like that. People know where I stay. I have kids, you know." (17RT 2542.)

V. Appellant Pops's Recorded Jailhouse Conversations Indicating He Was Having Salter's Cousin Intercede on His Behalf and Get Tamanika To Retract Her Identification

Salter had a cousin named Lawrence Thomas, who went by the moniker "Whop." (16RT 2422, 2426.) Back on January 12, 1991, Thomas

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[39] At trial, Davis denied he had such a conversation with Gant in the hallway outside the courtroom. (17RT 2510, 2518.)

and appellant Pops were arrested in Los Angeles for the crime of robbery. (17RT 2567-2568, 2574-2577, 2578.) Thomas indicated that his moniker was "Whop." Thomas also had "Whop" tattooed on this right forearm. (17RT 2578.)

Pursuant to a court order, on April 2, 1998, Deputy Kurt Ebert monitored and recorded a conversation between appellant Pops and Rosette Hanna at the county jail. (18RT 2789-2790, 2793.)[40] Appellant Pops told Hanna that he had spoken to the cousin of Tamanika's boyfriend (i.e., Lawrence Thomas—aka "Whop"). The cousin said he would talk to Tamanika's boyfriend and have him tell Tamanika that appellant Pops was not the shooter. If Tamanika retracted her identification, appellant Pops explained, "[T]hen I walk, everything else is hearsay, I ain't gonna give a fuck about all that bullshit, just one more, get that one more I'll be home." (Supp. II 1CT 115; Peo. Exh. 85-B [transcript].)

Also, pursuant to the court order, on April 10, 1998, Deputy David Hebert monitored and recorded a conversation between appellant Pops and Tiontalayia Williams at the county jail. (18RT 2796-2797.)[41] During the conversation, appellant Pops said he heard that a witness against him could not be located. Appellant Pops was happy about this. He also mentioned that the cousin of Tamanika's boyfriend was going to speak to him "about his girlfriend, . . . they do that's I'm out of this mother fucker. . . ." (Supp. II 1CT 116; Peo. Exh. 86-B.)

At trial, Salter denied that Thomas ever told him that appellant Pops wanted him to talk to Tamanika about her testimony. (16RT 2423.)

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[40] A portion of the recording was played for the jury. (18RT 2791; Peo. Exh. 85A.)

[41] A portion of the recording was played for jury. (18RT 2797, 2799; Peo. Exh. 86A.)

II. DEFENSE EVIDENCE

A. Williams Indicated that a Picture of a Man From a Photographic Lineup Looked Similar to the Driver of the Black Honda

On February 12, 1998, Compton Police Sergeant Johnny Sawnson showed Williams a photographic six-pack. (20RT 3131-3132; Peo. Exh. 47.) The photograph in position number one was of a man with the moniker "Peanut."[42] Williams did not identify anyone in the lineup, but indicated that the person in position number one looked similar to the suspect he saw driving the black Honda and wearing a black wave cap with white writing. (20RT 3132-3133.) The sergeant, who was in charge of all the investigations at the Compton Police Department, did not authorize the arrest of Peanut—the person in position number one. (20RT 3133-3134.)

B. Fingerprint Evidence

Clarence Collins, a fingerprint expert, compared the 17 latent prints from the carwash crime scene with appellants' and Williams's prints. He confirmed Criminalist Fred Robert's determination that none of the prints belonged to appellants, and three were identified at Chris Williams's prints. (20RT 3148-3152, 3158.)

Collins, who had over 30 years experience, had never been able to lift identifiable latent prints from expended casings or a notebook. He noted that nationwide 92 to 94 percent of the time prints cannot be lifted from firearms. (20RT 3160-3162, 3164.)

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[42] During the prosecution's case, the person in position number one was identified as Gerron Malone. (17RT 2610; see also RB, *ante*, at p. 34, fn. 26.)

C. Expert Testimony Regarding the Bloody Shoe Imprints at the Carwash Crime Scene

On March 5, 1998, Compton Police Detective Duane Bookman assisted in the search of appellant Pops's residence. (20RT 3167-3168.) The detective seized four pairs of boots from the garage where appellant Pops was found. (20RT 3168-3171; Def. Exh. W1-W4.) The empty K-Swiss tennis shoe box seized at appellant Wilson's apartment was sent to Carol Hunter, a criminalist and shoe print expert, by defense counsel. (21RT 3202-3204, 3219-3220, 3234; see 15RT 2166-2167.) She noted that some K-Swiss shoes have herringbone pattern soles. The shoe size listed on the outside of the empty box was 10 and a half. (21RT 3234, 3240-3241.) Hunter did not know if the shoes that had been in the box had a herringbone pattern. (21RT 3241-3242.)

Hunter examined a pair of K-Swiss shoes taken from Randy Rollins during the execution of a search warrant at his residence by the Compton Police Department. In her expert opinion, those shoes were not the source of any of the shoe prints left at the carwash murder scene. (21RT 3239 [stipulation].)

D. Michael Dunn Saw Bowie and Appellant Pops Together at the Atlantic Avenue Apartment Complex Sometime Before the Shootings

1. Michael and Kimara Dunn's Testimony

Michael Dunn was a friend of appellant Pops's cousin Kiki, and he visited that family's home in Cerritos two to three times a month. It was at this house that Michael[43] was introduced to appellant Pops. (21RT 3271, 3278, 3288.) Their first meeting occurred four or five years before trial.

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[43] Respondent shall refer to witnesses with the last name Dunn by their first names as they share a common surname with victim Jessie Dunn. The witnesses, however, do not appear to be related to the victim.

(21RT 3270-2171, 3279-3280.) Michael did not know if he had ever met a person named "V." (21RT 3271-3272.) Michael had previously seen appellant Pops's brother, Aziz Harris, but did not know him personally. He did not know Lawrence Barnes (Smurf) or appellant Wilson. (21RT 3281.)

At various times, Michael lived with his sister, Kimara Dunn, at her apartment located at 6201 Atlantic Avenue in Long Beach.[44] She first moved into apartment no. 33 around 1995 and later moved into apartment no. 46. (21RT 3245-3247, 3254.)[45] Michael knew Patreiner Gant who lived in the apartment building. He did not know whether she had a cousin named Lawrence Thomas (Whop) or if appellant Pops visited that apartment. (21RT 3287.)

Michael saw appellant Pops with a particular man twice—sometime around 1996 or 1997. (21RT 3289-3290, 3292-3293.) A neighbor told Michael that the man's name was "Nutty." (21RT 3293-3294.) Michael described Nutty as five-eight or five-seven, and in his mid to late thirties. (21RT 3294.) He could not estimate the man's weight. (21RT 3294-3295.)

Apparently, the man Michael knew as Nutty also went by the name "Mac." Michael believed Mac lived in apartment unit no. 6. He did not know Mac as Randy Bowie. (21RT 3264-3265, 3315-3316.) Michael saw Mac together with appellant Pops on two or three occasions. The first time Michael saw the men together, was in late 1996 or early 1997. (21RT 3265, 3292-3293, 3312-3314, 3316.) Mac and appellant Pops were in front of apartment no. 6 together. They were talking and laughing as they left the complex. (21RT 3265-3266, 3313-3314.) Despite knowing appellant

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[44] This was the apartment building where Patreiner Gant lived. (16RT 2426.)

[45] The apartment address is also referred to as 500 East Poppy Street in Long Beach, which is located on the other side of the same apartment complex. (21RT 3282-3283, 3322.)

Pops, Michael did not speak to him on that occasion. (21RT 3314.) Michael saw Mac and appellant Pops again in the summer of 1997, talking to each other just outside the apartment complex. (21RT 3266, 3314-3315.) On one occasion, Michael saw appellant Pops leaving apartment no. 6. (21RT 3330.)

In October and September 1998, Michael was incarcerated at the Los Angeles County Jail for approximately six weeks. While there, he spoke with appellant Pops on three different occasions. (21RT 3284-3285, 3289.) Their cells were on the same floor in the jail. (21RT 3319-3320.) According to Michael, they did not discuss appellant Pops's case, but Pops did ask whether "the guy [Michael] had seen [Pops] with" still lived at the apartment complex. (21RT 3285-3286, 3321-3322.) It was a short time later that a defense investigator contacted Michael and interviewed him. (21RT 3322, 3283, 3295.) The first time Michael was interviewed by the defense investigator was while he was incarcerated in the county jail. The investigator told him that the person he knew as Nutty was known by a different name. (21RT 3283, 3295, 3297, 3300-3301, 3309.) He was not shown any photographs during the first interview. (21RT 3296-3297, 3308-3309.)

Later, a defense investigator came to Kimara's apartment looking for Michael. (22RT 3605.) Michael was not home, and the investigator interviewed Kimara. (22RT 3592, 3599.) She identified a DMV photograph of a man she knew as "Mac." (21RT 3248-3250; 22RT 3593, 3559-3560.) She believed he lived in apartment no. 6 with his girlfriend. (21RT 3248-3250.) Kimara did not personally know Mac or the name of his girlfriend. (21RT 3249, 3593.)[46] Kimara also knew Mac by the name

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[46] During the prosecution's case-in-chief, Bowie testified that his girlfriend lived in the apartment building. Bowie did not live there, but (continued...)

"Nutty." (22RT 3600.) Kimara knew Patreiner Gant, but did not know Keith Salter, Reggie Davis, or Lawrence Thomas. (22RT 3595-3596.) Kimara was also shown appellant Pops's photograph during another interview. (22RT 3597.) At first she did not remember appellant Pops, but her sister-in-law who was present during the interview remembered him and helped refresh Kimara's memory. (22RT 3606.) She saw appellant Pops only once at the apartment complex sometime around 1997, and was introduced to him through a mutual friend. (22RT 3594-3596.) Kimara never saw Mac with appellant Pops. (22RT 3594, 3596, 3598, 3611.)

She was shown only two individual photographs on separate occasions, one of Mac and the other of appellant Pops. She did not recall if appellant Pops's name was on the photograph. (22RT 3597.) A photograph—identified at trial as Defense Exhibit X—was a photograph of Mac, but it was not the picture shown to Kimara during the interview. (22RT 3600-3602, 3608.)

After his release from jail, Michael was again interviewed by a defense investigator on November 9, 1998, at Kimara's apartment. (21RT 3269, 3282-3283, 3301, 3322.) He told the investigator that the man he previously identified as Nutty was named "Matt" based on information from his sister. (21RT 3300-3302.) Michael had seen this person many times by apartment no. 6. (21RT 3322-3325.) The investigator showed him two photographs of different individuals. (21RT 3303-33043309.) One of the photographs was of appellant Pops, whom Michael identified. That photograph may have had appellant Pops's name and address printed on it. (21RT 3304-3308, 3316; Peo. Exh. 88.) He was then shown a single

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(...continued)
visited her. Bowie denied he knew Kimara or Michael. (12RT 1618.) He also denied ever associating with appellant Pops. (12RT 1618-1620.)

photograph of another individual. (21RT 3316-3317.) Michael did not recall if he was shown a photograph—Defense Exhibit X—by the investigator. Michael noted at trial, "He actually looks a little familiar but I'm not sure." Michael recognized the person in the photograph as "Nutty" and the person he saw standing in front of apartment no. 6 with appellant Pops. (21RT 3329-3330.)

2. Defense Investigator Isaac Withers's Testimony

On November 3, 1998, Isaac Withers, an investigator with the Public Defender's Office, went to Kimara Dunn's apartment looking to interview her brother Michael. (23RT 3738.) Michael was not there, but Withers asked Kimara if she knew someone named Randy Bowie. She did not know a person by that name. (23RT 3740.) Withers had one DMV photograph of Bowie with him and showed it to Kimara. (23RT 3739-3740, 3755-3756; Def. Exh. X.) Kimara said she had seen Bowie (whom she identified as "Mac") around the apartment complex, but did not know him personally. (23RT 3740-3741.) Withers also asked Kimara if she knew someone named Pops. She said that she did know someone by that name but not personally. (23RT 3741.) He only had the photograph of Bowie with him at the time he interviewed Kimara. (23RT 3760.)

On November 9, 1998, Withers interviewed Michael at Kimara's apartment. (23RT 3741.) Withers had with him a booking photograph of appellant Pops that he had just obtained. (23RT 3739-3739, 3741, 3775; Peo. Exh. 88.) Withers showed Michael the photographs of Bowie and appellant Pops. Michael identified the photograph of Bowie as a person he knew as Mac. He also identified the other photograph as a picture of appellant Pops. (23RT 3742, 3760.) Withers used his hand to obscure the writing on the bottom of appellant Pops's booking photograph. (23RT 3754.) Michael said he had met appellant Pops two years earlier at a house in Cerritos that belong to Pops's relatives. (23RT 3761.)

Neither Michael nor Kimara ever referred to Bowie as Matt or Nutty. (23RT 3760-3761.)

On February 1, 1999, Withers returned to the apartment complex and attempted to speak to a woman named Trina in apartment no. 36. Withers told her that he worked for the attorney representing appellant Pops. She refused to be interviewed, and said, "Fuck that motherfucker, I wouldn't want to help him if my motherfucking life depended it." (23RT 3743-3744.) She entered her apartment. Five or six men came outside, and one of the men told Withers it was probably best that he leave. (23RT 3744-3745.) Withers then left. (23RT 3745.)

E. Testimony Regarding the Manufacture and Production of IROC Rims

Joseph Black was employed as a project engineer for Hayes Lemmerz International—which was formerly known as Western Wheel Corporation. The company manufactured IROC rims for General Motors. In 1984, another company, Superior Industries, also manufactured the IROC rims for GM. (22RT 3451.) In 1984, Hayes Lemmerz could manufacture 200 car sets of IROC rims a day or 48,000 sets per year. (22RT 3452.) Black identified a photograph of an IROC rim (Def. Exh. N) as one that started production in 1984. (22RT 3452-3453.) The type of rims from Jessie Dunn's car (Exh. O [photographs]) replaced the 1984 model wheels when the company started production for the 1988 model year. (22RT 3453.) The rims for the El Camino were a different style than the rim in the defense photograph (Def. Exh. N). (22RT 3465.) Black explained that in 1988 GM began manufacturing a different Camaro model and changed the wheels style. (22RT 3453-3455.) Black's company, however, did not manufacture the rims that had been on the El Camino. They were manufactured by a different company. (22RT 3462-3464.)

Black examined in the courtroom the IROC wheels from the El Camino. He observed that one of the rims (Peo. Exh. 44C) had been dipped in chrome. (22RT 3459.) There were some areas on that rim where the chrome was peeling. He pointed out some discoloration of the chrome near the IROC cap. (22RT 3460.) The rim, Black noted, needed to be re-dipped in chrome. (22RT 3461.)

Black did not believe that IROC rims needed to be altered or modified to fit on an El Camino. "You just put them on," noted Black. (22RT 3458.) He had never put IROC rims on an El Camino himself, but knew some people who had used them on late 1980's model El Caminos. (22RT 3458-3459.) Black thought that the term "three-bar" for IROC rims was a street term, as opposed to an official one. The term was used for both the 1984 and 1988 models and did not refer to any specific type of rim. (22RT 3454-3455.)

F. Melvin Hoard's Involvement in the Investigation

Compton Police Detective Timothy Brennan, assigned to the gang investigation unit, assisted in interviewing witness after the carwash murders. (23RT 3783-3784.) He assisted because the case was a homicide, not because it was a gang-related case. (23RT 3792-3792.) Detective Brennan asked Melvin Hoard to assist in finding witnesses regarding the murders. (23RT 3785.) Chris Williams came to the station and was interviewed. (23RT 3791.)[47] After conducting interviews of some people on January 25, 1998, the detective had no further involvement in the case, except for serving some warrants. (23RT 3793-3794.)

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[47] The video recording of Williams's interview was played for the jury. (23RT 3796-3797 [Def. Exhs. AAA (recording) & AAA-1 (transcript)].)

G. Detective Reynolds's Investigation and Use of Photographs with the Witnesses

Detective Reynolds, who had been promoted to sergeant, had been a police officer for over 13 years. In January through March 1998, he was a homicide detective. (24RT 3965.) He believed that he conducted himself in a fair manner during the investigation of this case. He did not do anything to suggest to a witness who he thought might be guilty. (24RT 3966.) When he interviewed Lawrence Barnes, Detective Reynolds showed him a group of four individual photographs. Three of the photographs were of appellants and Aziz Harris. (24RT 3966-3969, 3977, 3982-3983.) The pictures were recent DMV photographs. (24RT 3980, 3983.) This was not improper, explained the detective, because Barnes knew the men. Additionally, the detective did not tell Barnes who the men were in the photographs. Rather, he laid all four photographs on a desk and simply asked Barnes to identify each person. Barnes correctly identified "Nut" (appellant Pops), "Scrap" (Harris), and "Bird" (appellant Wilson) in three of the photographs. (24RT 3969-3970, 3980, 3982-3983.) The photographs did not contain any identifying information such as the individuals' names. (24RT 3980-3981, 3983.)

The photographic six-pack lineup that contained appellant Pops's picture in position number five (Peo. Exh. 48), and the one with appellant Wilson's picture in position number two (Peo. Exh. 50), were shown to Brown on February 24, 1998. Brown said that he could not identify anyone from either array. (24RT 3970-3971, 3975-3976.) Brown told the detective that one of the suspects was real dark and other had a light complexion. (24RT 3971-3972.) Brown did not say anything about the body structure of the dark suspect. (24RT 3972.) Brown did, however, say that the photograph of appellant Pops (Peo. Exh. 48) looked closest to the dark suspect, but that he was "too light and too tall." He said that the dark

suspect was much darker than anyone depicted in either lineup. (24RT 3976.)

When Brown viewed the other lineup (Peo. Exh. 50), he said that the man in position number two—appellant Wilson—had the same complexion as the light-skinned suspect. (24RT 3978-3977.) Brown stated, "I can't say for sure that it's him. I really didn't get a good look at him." (24RT 3977.)

Detective Reynolds had Barnes show him the house of appellant Pops's relatives where he went on Super Bowl Sunday to the barbecue. (24RT 3978.) The detective later returned to the area without Barnes, and showed a next-door neighbor four or five eight-by-ten photographs. Detective Reynolds showed the neighbor a group of photographs because he wanted to determine if she had ever previously seen appellants. (24RT 3979.) He did not show one photo of appellant Pops as defense investigator Withers had done when he interviewed Michael Dunn. (24RT 3979-3982.)

H. Jeanmarie Klingenbeck, a Close Friend of One of Appellant Pops's Defense Attorneys and a Fellow Deputy Public Defender, Was Present at the Live Lineups and Allegedly Saw Some "Unusual Activity" Between Two Witnesses

Deputy Public Defender Jeanmarie Klingenbeck was a close friend of Deputy Public Defender Cheryl Jones, one of appellant Pops's trial attorneys. (22RT 3467, 3479.) She did not assist in the preparation of this case. (22RT 3467.) On June 9, 1998, Klingenbeck had dinner with Ms. Jones. Either before or after dinner, Klingenbeck accompanied Ms. Jones to the live lineup conducted at the county jail. (22RT 3468, 3479-3480.) Klingenbeck had discussed the case with Ms. Jones, and was aware that she was representing a man who was accused of four murders at a Compton carwash. (22RT 3489-3490.) Klingenbeck did not remember if she signed

in at the lineup, but she probably did and would have indicated that she was a deputy public defender. (22RT 3474-3476.)

She observed three Black male witnesses sitting at small school desk-type seats in the front row of the theater with approximately two or three seats separating each witness. (22RT 3469-3470, 3496, 3502, 3508; Def. Exh. DD.) One of the witnesses (Bowie) sat in the far left seat and wore a skullcap. (22RT 3470.) Another witness—Williams—sat one or two seats to the right in the middle, and wore a baseball cap. The third witness—Brown—sat to the far right on the isle, with one or two seats, approximately six to eight feet, separating him from the second witness. Brown was heavy set. (22RT 2471-3472, 3506, 3567.) The witnesses moved around in their seats a bit because they were large men and were probably uncomfortable. (22RT 3506-3508.)

Klingenbeck sat five rows back from the stage and a couple of seats in. (22RT 3491-3492, 3500.) She recalled that Detectives Reynolds and Chavers sat behind her. (22RT 3492-3493.) She recalled that the prosecutor, Mr. Monaghan, sat somewhere in front of her and to the right at some point in time during the lineups. (22RT 3493.)

The witnesses were given an admonition sheet of paper on which to write their identification selections. During the first lineup (i.e., Lineup No. 5), Klingenbeck witnessed the man sitting in the middle seat (Williams) "sort of" turn his paper to the right and angle toward the heavyset man (Brown) sitting on the far right. (22RT 3472, 3490-3491, 3497, 3505.) Klingenbeck did not recall if the witness lifted the paper from the desk. (22RT 3497, 3505.) The heavyset man looked at the paper. (22RT 3491, 3501-3504.) Klingenbeck described the situation as "like kids would do when they were copying off papers." (22RT 3472-3473, 3569.) She could not see what was written on the paper, and did not know if the witness had yet made a selection. (22RT 3499-3501.) She did not know when, or if,

Brown made an identification and wrote it down on the paper. (22RT 3512.) She did not observed the man sitting to the far left (i.e., Bowie) do anything inappropriate. (22RT 3496-3499, 3510.) She believed the sheriff's deputies who ran the lineup were standing near a computer on the right hand side of the room, located approximately five rows back. (22RT 3491-3492.)

When Klingenbeck noticed this "unusual activity," she began to take notes. (22RT 3476, 3555; Peo. Exh. 89.) She described Brown in her notes as "big fat bug-eye." (22RT 3519-3520, 3525.) She did not, however, notify the sheriff's deputies in charge of the lineup of her observations. (22RT 3476-3477.) Rather, she informed the attorneys who were representing appellant Pops. (22RT 3477.) Klingenbeck did not say anything to the sheriff's deputies after her first observation because, based on her past experiences (she had previously been to approximately 10 lineups), she did not think they would have done anything about it. (22RT 3477-3478, 3480.) Nor did Klingenbeck say anything about her observations to Detective Reynolds who was also in attendance, and whom she knew to be a homicide investigator. (22RT 3480-3482.) She had never before been to a lineup where she thought cheating was occurring. (22RT 3478-3479.) Klingenbeck "may have said something" to one of the attorneys when she made her observation or she might have said something in between the two lineups. (22RT 3482-3484.) She did not have a specific recollection of whether she pointed out the misconduct to Ms. Jones or asked for a piece of paper. (22RT 3484, 3495.) Ms. Jones did not notify the sheriff's deputies of any misconduct. (22RT 3484-3485.)

Klingenbeck also watched the second lineup (i.e., Line No. 6). It appeared to Klingenbeck that Brown was looking over toward the man in the middle seat. The witness in the middle seat, however, did not appear to notice and did not angle his paper. When sheriff's deputies collected the

papers from the witnesses, they started on the far left side with Bowie. (22RT 3473, 3526-3528, 3537, 3540-3542, 3544-3545.) When they reached Brown, it appeared to Klingenbeck as though he was attempting to see what the others put down on their papers. (22RT 3473-3474.) Klingenbeck did not recall if she told appellant Wilson's attorneys or Ms. Jones about her observations of the second lineup. (22RT 3538-3539.)

Ms. Jones "didn't really talk to [Klingenbeck] about what [Klingenbeck] had seen after [she] told [Ms. Jones] what [she] had seen." (22RT 3485.) Klingenbeck did not believe she had an affirmative obligation as an attorney to report the alleged misconduct at the time of her observations. (22RT 3487-3488.) Klingenbeck felt that one of the witnesses at the lineup "kept mad-dogging" her. (22RT 3522.) She did not put that observation in her handwritten notes. (22RT 3533.) Klingenbeck was not called to testify at the preliminary hearing concerning her observations about the lineup. (22RT 3486, 3553-3554.) She did not believe her testimony would have made a difference as to whether or not appellant Pops would have been held to answer. (22RT 3486-3487, 3555-3556.) Approximately two or three months before trial, Klingenbeck gave a statement to Ms. Jones over the telephone so that a typed report could be made and provided to the prosecution. (22RT 3521-3523, 3554.) On the day she testified, Klingenbeck turned over to the prosecutor her original handwritten notes purportedly taken at the time of the lineup. (22RT 3523.)

I. Curt Michael Douglas, a Convicted Felon and Former Police Informant, Claims Randy Rollins Confessed to Him About Committing the Carwash Murders

1. "Killer Curt's" Testimony

In the 1980's, Curt Michael Douglas—who called himself "Killer Curt"—had acted as a police informant for the Compton Police Department. He was sometimes paid for the information he provided.

(23RT 2859-3860, 3876, 3903-3904.) Douglas was previously convicted of felony dissuading a witness in his brother's trial for raping two school teachers. He was first put on probation and later sent to state prison for a probation violation. (23RT 3879-3883; 24RT 3953.) Douglas also had felony convictions for escape from a custodial facility, felony receiving stolen property, and kidnapping a child under the age of 14 years. (23RT 3891.) Douglas sometimes smoked cocaine mixed with marijuana. (24RT 3954.) He denied, however, that the drugs had any effect on him. (24RT 3955-3956.)

Douglas knew a man named Randy Rollins, who also went by the nickname "Rambo." (23RT 3860.) Rollins lived in an area claimed by the Spook Town Crip gang. (23RT 3865.) Rollins associated with men from the Fronthood Compton Crips gang. (23RT 3866.) Rollins, Douglas, and a few other men used to meet every day at a liquor store located on El Segundo Boulevard and Willowbrook Avenue in Compton. (23RT 3867.)

Sometime in late January 1998, Rollins told Douglas that he had a "jack move lined up"—meaning a robbery—and asked Douglas to join him. (23RT 3861, 3872, 3893.) Douglas declined the invitation to join the robbery. (23RT 3862.) The next day, Douglas saw Rollins at a liquor store located on El Segundo Boulevard and Willowbrook Avenue in Compton. Rollins said to Douglas, "See, nigger, I told you to come with me." Rollins opened the trunk of a two-toned blue Monte Carlo car and showed Douglas marijuana, a ring with the initials "C" and "H" and a diamond centered between the letters, a Rolex bracelet, a Rolex chain, and some money. (23RT 3862-3863, 3866-3867, 3872.) Rollins's girlfriend Shonti was sitting in the front seat of the car. (23RT 3863.) Rollins said, "I laid those niggers down at the shop on Atlantic." (23RT 3863-3864.) Douglas had previously been to the carwash. (23RT 3902-3903.)

Rollins did not say anything else about taking the jewelry from anyone. (23RT 3864.) He did not state any specifics about how the incident occurred or if others were involved. (23RT 3905-3906.) Rollins stated he wanted to sell the ring, and Douglas said he would help him. (23RT 3865.)

That day, Rollins took Douglas and a girl named Diane to the swap meet. Rollins had lots of money with him. Rollins purchased for them various items, including tennis shoes, shirts, and earrings. He had never before purchased items for Douglas. (23RT 3868, 3871.) Rollins bragged about "coming up"—which meant in gang jargon that he had robbed somebody. (23RT 3868-3869.)

Douglas believed he reported this information to the Compton Police within a few days of seeing the items in the trunk. (23RT 3892; 24RT 3948-3949.) Douglas first spoke to Sergeant Willie Moseley on the telephone. (23RT 3907.) The sergeant met Douglas and drove him to the Compton Police Department. (23RT 3908.) Douglas spoke with Sergeant Swanson and then was interviewed by Detective Reynolds. (23RT 3908-3912; 24RT 3949-3951.) Douglas denied that he first contacted the Compton Police Department on February 6, 1998, after seeing Rollins entering Martin Luther King Hospital. (24RT 3949.) He further denied seeing Rollins at the hospital. (24RT 3945-3946.) Douglas also denied that he thought he could make some money from the Compton Police Department by telling them that Rollins committed the murders. (23RT 3879.)

When Detective Reynolds began coming around, Rollins told Douglas, "I got to get out of town because I know they on me. . . ." (23RT 3869.) Rollins appeared nervous and said he was leaving town after he had his operation. (23RT 3870.) Rollins had plans to leave town, but the police raided his house the next day. (23RT 3870.)

Around the time of trial, Douglas had seen Rollins in the county jail. (23RT 3871.) In Douglas's opinion, Rollins was not the same as when he knew him out of custody. Douglas observed that Rollins no longer spoke much or laughed. (23RT 3873-3874.) Douglas did not know appellants. (23RT 3874-3875.) He identified Rollins's photograph on page three of the five-page mug shot book. (23RT 3875; Peo. Exh. 51.) Douglas agreed that Rollins looked different than either appellant and no one would confuse them. (23RT 3875-3878 [Douglas reviewing and comparing appellants' photographic lineups, Peo. Exhs. 74 & 77].)

Douglas was interviewed by defense investigator Withers. At trial, Douglas denied that he told the investigator that Rollins had a ring inscribed with the initials "R H," instead of "C H." (23RT 3893-3896.)

At trial, Douglas further denied telling Withers that, on the same day he saw the marijuana and ring in the trunk, he asked a girl named Diane if she had heard about the carwash murders. (23RT 3897.) He did not recall if he told Withers that Diane replied she had heard about it. (23RT 3897-3898.) He did not recall saying that he did not tell Diane that Rollins had shown him jewelry and money. (23RT 3898.) He did tell Withers that a detective named Fred approached him and said that he knew Douglas and others at the liquor store were involved in the murders. (23RT 3898-3899.) He did not remember telling Withers that he denied involvement and told the detective what Rollins had allegedly told him. (23RT 3899.) He denied saying that Rollins was going to flee to Mississippi. (24RT 3947-3948.) He denied telling Withers that a few days later, a man "asked where he could cop some weed." (23RT 3900.) He did tell Withers that he called Rollins and said someone wanted to buy some weed. He did not tell Withers that Rollins came over and sold the weed. (23RT 3900.)

Douglas told Withers that he saw Detective Fred Reynolds later and the detective said that Mexicans were responsible for the murders. (23RT

3901-3902.) Douglas did not recall telling Detective Reynolds that Rollins had a steering wheel that he said he stole from one of the victims. (23RT 3905.)

2. Randy Rollins Denied Any Involvement in the Carwash Murders

Randy Rollins, who was nicknamed "Rambo," knew Curt Michael Douglas. (23RT 3799, 3811.) Rollins occasionally saw Douglas at a liquor store at Willowbrook and El Segundo, but they did not "hang out with each other." (23RT 3799.)[48] Rollins usually went to the liquor store twice a week in 1998 because he had a friend who lived nearby. (23RT 3800, 3812.) Douglas often asked Rollins for money. (23RT 3835-3836.)

Rollins denied he had any involvement in the murders at the carwash, and denied he ever told anyone that he was involved. (23RT 3800-3802, 3806, 3811-3812, 3828, 3833-3834, 3840-3841.) In fact, he had never been to the carwash. (23RT 3803, 3833.) Nor did he know anyone named "Spanky." (23RT 3827-3828, 3831.) Rollins never had a diamond ring inscribed with the initials "C H." (23RT 3802-3803.)

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[48] In 1994, Rollins was convicted of a carjacking. (23RT 3807.) He stole a car that was left running in front of a liquor store. (23RT 3826.) His attorney at the time advised him to plead guilty. (23RT 3826-3827.) Around the time period of January 25, 1998, Rollins had recently been released from prison and was on parole. (23RT 3806.) His and Douglas's parole office was in Carson. (23RT 3806-3807.) One time he and Douglas were at the same pay telephone to call their respective parole agents in Carson. (23RT 3812-3813, 3836.) That was when Rollins learned that Douglas was also on parole. (23RT 3836-3837.) Rollins was convicted of selling marijuana on February 19, 1998. (23RT 3825.) At the time of trial, he was in prison for the marijuana conviction. (23RT 3825-3826.) Rollins is six feet tall and weighs 243 pounds. (23RT 3825.) Rollins was diagnosed as a paranoid schizophrenic and was taking medication. (23RT 3841-3845.)

Rollins never said he needed to get out of town after having surgery. (23RT 3803-3804, 3828-3829.) He never told anyone that he had to go to Mississippi. (23RT 3829.) He did tell Douglas that he was having an operation on his knee at Martin Luther King Hospital. (23RT 3804, 3813.) His knee had been "messed up for years." He did not tell Douglas he injured himself during the carwash murders. (23RT 3837-3838.) Douglas saw Rollins at the hospital because Douglas was visiting his niece who had been shot. Rollins passed by Douglas while he was standing by the front doors taking a cigarette break, and they spoke. (23RT 3838-3839.)

On December 17, 1998, defense counsel Ms. Jones and defense investigator Withers visited Rollins at Patton State Hospital. Rollins did not know they were coming. They did not advise him that he had a right to a lawyer. (23RT 3829-3830.) Any questions the two asked Rollins, he answered truthfully. (23RT 3830.) They did not ask Rollins if he knew Charles Hurd. (23RT 3830.) Rollins said he had no knowledge of the Wheels N' Stuff carwash in Compton. (23RT 3831.) He told them he once owned a ring with the initial "R" on it, a couple of silver rings with eagles on them, and a necklace with an eagle on it. (23RT 3831-3832.) He sold them at a pawn shop. It was the only jewelry he had ever pawned. (23RT 3832.)

At trial, Rollins identified a photograph of himself on the upper right corner of page 3 in the five-page mug shot book. (23RT 3846-3848; Peo. Exh. 51.) Rollins had braids in the picture. He had an appointment with his parole agent, Miguel Larma, on February 11, 1998, and told him that he had cut his hair a few weeks before that date. (23RT 3848-3849.) He needed to have it cut because he "had a curl at that time and it got messed up in county [jail]" and some of his hair fell out, so he had to cut it. (23RT 3849, 3855.)

3. Detective Duane Bookman's Interview with Douglas on February 6, 1998

Detective Duane Bookman of the Compton Police Department spoke with Douglas on February 6, 1998. On that day, Douglas had called the detective around noon and said he had some information about the carwash murders. (24RT 4030, 4032.) The detective told him to come to the police station. (24RT 4032-4033.)[49]

Douglas was interviewed by Detective Bookman at the direction of Sergeant Swanson, the head of the homicide unit. Douglas indicated he had information about the carwash murders, and Detective Bookman took his statement. No one else was present during the interview. (24RT 4012-4015, 4024-4025, 4027-4028, 4031.) This was the first contact Douglas had with the detective concerning the quadruple murder. (24RT 4019-4021.) Douglas wanted money in exchange for the information. The first thing he asked Detective Bookman, "Where's the green?" (24RT 4021, 4028.) Douglas had objective signs that he smoked cocaine. He also had once admitted to the detective that he smoked cocaine and needed money to buy more. (24RT 4022-4024.)

Douglas first told Detective Bookman that a man named "Rambo" was currently at Martin Luther King Hospital getting his knee operated on, and if he went there and "leaned on him" the police could clear this case. (24RT 4020.) Douglas did not say that he had seen Rambo at the hospital, but rather had earlier learned about the surgery from Rambo while they

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[49] Douglas had previously worked as a confidential reliable informant for the police. (24RT 4008-4009.) He had provided information to the detective on five occasions that proved to be reliable and which led to arrests of suspects for narcotics and a robbery. (24RT 4012, 4021-4022, 4028.)

were visiting in a parking lot of a liquor store located on El Segundo Boulevard and Willowbrook Avenue. (24RT 4020-4021.)

Douglas reported that "Rambo" had "come upon a jack move" at the carwash on Atlantic Avenue and Sportsman Drive. According to Douglas, Rambo said he and "another homey laid out Spanky and the rest of those fools." (24RT 4016.) Douglas reported that Rambo had said he took a stereo, some jewelry, and marijuana. Rambo purportedly told Douglas that he had taken a metal ring with the initials "C H" and a diamond in the center. (24RT 4017.) He also said that the inside band of the ring was inscribed with the name "Charles." (24RT 4018.)

Douglas informed the detective that Rambo "hung out" at a liquor store parking lot on Willowbook Avenue just south of El Segundo Boulevard. Douglas said that Rambo had been "going around the neighborhood bragging about how he and his homeys laid them fools out." (24RT 4018.) Douglas said that Rambo was showing everyone the gold ring and stated that the ring belonged to Spanky. (24RT 4019.)

Douglas's interview with Detective Bookman lasted approximately three and a half hours. Detective Bookman typed Douglas's statement and read it back to him. Douglas said he had nothing else to add to the report. Douglas lied when he testified that he did not speak with Detective Bookman about this case. (24RT 4025.) Sergeant Swanson was informed about Douglas's statement. The Compton Police Department took seriously the information provided by Douglas, but Rollins was not arrested for the carwash murders. (24RT 4024-4025, 4029.)

J. Whether Charles Hurd Had a Ring with the Initials "CH"

Charmaine Hurd was Charles Hurd's sister. (24RT 4001.) She believed that Charles had a ring inscribed with the initials "C H" "a long time ago." She was not sure if the ring had a diamond between the initials.

She did not recall seeing Charles wear that ring in recent times. (24RT 4001, 4006-4007.)

III. REBUTTAL EVIDENCE

A. Charles Hurd Did Not Have a Ring Inscribed with the Initials "C H"

Schantel Williams spent the morning of January 25, 1998, with Charles "Spanky" Hurd. (25RT 4111.)[50] He left her residence to go to the carwash around 11:00 a.m. (25RT 4111-4112.) He drove to the carwash in his Chevrolet Tahoe. (25RT 4113-4114; Peo. Exh. 96 [photograph of vehicle in parking lot of carwash].) This was the last time Williams would see Hurd alive. Hurd was wearing a gold wedding ring imbedded with some diamonds. The ring did not have any initials inscribed on it. He also wore a gold chain necklace that had the name "Spanky" on it, and likely wore a diamond bracelet. (25RT 4112.) Williams estimated that Hurd had approximately $1,000 in the right front pocket of his pants. (25RT 4113.)

Williams never saw Hurd wear a ring inscribed with the initials "C H" and a diamond in the center. Nor had she ever seen such a ring. (25RT 4114-4115.) Although Hurd had other jewelry and rings, he only wore one ring at a time. (25RT 4115-4116.)

B. Defense Investigator Michael Beard's Interview with Michael Dunn, and Beard's Observations of the Witnesses at the Live Lineup

1. Michael Dunn's Statements to Beard Impeached His Trial Testimony

Michael Beard, a defense investigator, interviewed Michael Dunn at the county jail on October 5, 1998. (25RT 4120.) This was the first

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[50] Williams was convicted of two counts of perjury on June 9, 1999. (25RT 4116-4117.)

interview the Public Defender's Office conducted with Michael. No photographs were shown to him during this first interview. (25RT 4121.) Beard asked him if he knew a man named "Mac." During the interview, Michael never referred to anyone named "Nutty" or "Matt." (25RT 4122.)

Michael said that he had known appellant Pops for just over one year. Michael indicated that he first met appellant Pops at the apartment complex located at 6201 Atlantic Avenue in Long Beach. (25RT 4123, 4125-4126, 4134-4135.) Michael did not state that he had first met appellant Pops through Kiki—Pops's cousin—at her house in Cerritos. (25RT 4123-4125.)

2. Beard Did Not Observe Any Inappropriate Behavior by the Witnesses at the Live Lineups

Beard also attended the live lineups conducted in this case on June 9, 1998, at the jail. Beard had previously worked as a peace officer with the Los Angeles County Sheriff's Department. (25RT 4126.) In that capacity and as a defense investigator, he had attended numerous live lineups. (25RT 4126-4127.) Beard did not see any of the witnesses look at other witnesses' cards during the live lineup held in this case. (25RT 4127-4128.) Beard had no recollection of anyone mentioning that a witness showed his lineup card to another witness. (25RT 4129-4130.)

C. Defense Investigator Withers's Interviews with Rollins and Douglas

1. Withers's Interview with Rollins

Withers and Ms. Jones, one of appellant Pops's defense attorneys, interviewed Rollins on December 17, 1998, at Patton State Hospital. (25RT 4136-4138.) Rollins told Withers and Ms. Jones that he knew nothing about the carwash murders. (25RT 4138-4139.) Rollins did not know anyone named Charles Hurd or Spanky. He further indicated that he

had no knowledge of the business in Compton named Wheels N' Stuff. (25RT 4139.)

Rollins was asked about the types of rings he owned. Rollins said he once owned a ring with the letter "R" on it. He also owned a couple of silver rings and a necklace with an eagle attached to it. He sold the jewelry at Blake's Pawn Shop in Compton. That was the only jewelry he had ever pawned. (25RT 4140.) This was the only interview Withers conducted with Rollins. (25RT 4141.)

2. Douglas's Statements to Beard Impeached His Trial Testimony

On May 29, 1999, Withers interviewed Douglas. At the time of the interview, Douglas was serving a sentence in state prison. He was angry that he had been brought to the Los Angeles County Jail, but eventually agreed to be interviewed. (25RT 4142-4143.) Douglas indicated he knew Detective Bookman and Rollins. (25RT 4143-4144.)

Douglas did not recall the last time he had seen Rollins. Douglas said that he and Rollins used to "kick it" at a liquor store on El Segundo Boulevard and Willowbrook Avenue. According to Douglas, one day Rollins asked him if he wanted to go with him and some other people "to take care of some business." (25RT 4144.) Douglas declined, saying that he did not have time. (25RT 4145.)

The next day, Rollins told Douglas that he should have gone with them because they "took care of a lot." Douglas asked what Rollins meant, and Rollins opened the trunk of his car. Douglas said that he saw some jewelry and a stack of money in the trunk. (25RT 4145, 4155.) One piece of jewelry Douglas said he saw was a gold ring with the initials "*R H*"—not "C H"—inscribed on it with a diamond in the center. (25RT 4145-4146.) Douglas did not give a description of the other jewelry he allegedly saw in the trunk. (25RT 4146.) Douglas told Withers that this encounter with

Rollins occurred the day after the murders at the carwash. Rollins told Douglas that it was he and "his boys that took care of the thing at the carwash." (25RT 4146.)

Douglas had heard about the murders from watching television. He asked a woman named Diane, who was at the liquor store, if she had heard of the murders. She said that she had. Douglas then told her what Rollins had said to him. Douglas told Withers that he did not tell Diane that Rollins had shown him jewelry and money that allegedly came from the carwash. (25RT 4147, 4155-4156.) Several days after speaking with Diane, according to Douglas, a Compton Police detective, whom he knew only as "Fred," approached Douglas. (25RT 4147-4148.) Douglas indicated that this was the first contact he had with anyone from the Compton Police Department concerning the carwash murders. (25RT 4148-4149.)

Douglas told Withers that the detective accused Douglas and others who frequented the liquor store of being involved in the carwash murders. Douglas denied any involvement. He then told the detective what Rollins had allegedly said to him, and that Douglas had seen jewelry—including a gold ring with the "R H" initials—and money in the trunk of Rollins's car. (25RT 4149.) Douglas again did not say the initials were "C H," but instead "R H." (25RT 4150.)

Douglas also told Withers that he later saw the detective named Fred and Sergeant Swanson, and asked them what had happened to Rollins. (25RT 4150.) They purportedly told Douglas that no jewelry was found during a search of Rollins's residence, and that they had checked with the Hurd family regarding the description of the ring. (25RT 4151, 4157.) The officers said that they determined Rollins was not involved in the carwash murders. The officers allegedly told Douglas that Mexicans were responsible for the murders. (25RT 4151.)

During his interview with Withers, Douglas stated that he had been to the carwash on several occasions before the murders to look at wheels. Douglas also said that he knew the men who worked there were dealing drugs out of the carwash. (25RT 4151.) Douglas knew Hurd by sight, but did not know him personally and did not know any of the other men who worked there. (25RT 4151-4152, 4156.)

Douglas admitted during the interview that he had been a paid informant for the Compton Police Department, providing information about narcotics cases, but had not done so since 1981 or 1982. Douglas said that he had *not* provided information about the case to Detective Bookman. (25RT 4152.) Douglas did not tell Withers during the interview that he had contacted Sergeant Moseley and said he had information about the case. (25RT 4152-4153.) Nor did Douglas say that he had been interviewed by Detective "Fred." (25RT 4153.) Douglas told Withers that he did not go to the Compton Police Department, but rather the police officers had come to him. (25RT 4154.)

Douglas did not mention that he was at Martin Luther King Hospital on February 6, 1998, to visit his niece who was being treated for a gunshot wound. (25RT 4153-4154.)

D. Douglas's Niece Was Treated at the Hospital For A Gunshot Wound

Annette Douglas was Curt Douglas's mother, and the grandmother of Shiwana Skinner. On February 1, 1998, Skinner was admitted to Martin Luther King Hospital for the treatment of a gunshot wound. She remained in the hospital through the end of February 1998. (25RT 4227-4228.)

E. Detective Reynolds Only Met Douglas for the First Time on February 6, 1998, at the Compton Police Department

Detective Reynolds did not meet Douglas a day or two after the carwash murders as Douglas testified. Detective Reynolds never approached Douglas at the liquor store on El Segundo Boulevard and Willowbrook Avenue. The detective never told Douglas that he believed that Douglas and others at the liquor store were responsible for the murders at the carwash. He did not recall telling Douglas that no jewelry was found at Rollins's residence. (25RT 4230.) Detective Reynolds never told Douglas that Mexicans were the ones responsible for the murders. (25RT 4231.) He did not tell Douglas that the police checked with the victim's family about a ring on which the initials "C H" were inscribed. (25RT 4241.)

Detective Reynolds first met Douglas on February 6, 1998, at the Compton Police Department. (25RT 4229-4231.) On that day, Sergeant Swanson directed Detective Bookman to interview Douglas. Detective Reynolds, however, did not take part in the interview. (25RT 4231-4232, 4238.) Douglas told Detective Bookman that one of the items taken during the carwash robbery-murders was a steering wheel. Detective Reynolds later inspected Dunn's burned El Camino and confirmed that the car still had a steering wheel. (25RT 4235-4237.) He did not know, however, if it was a Nardi-brand steering wheel in the burnt El Camino. (25RT 4245.) The detective also contacted Charmaine Hurd to confirm whether Charles Hurd had a ring inscribed with the initials "C H." (25RT 4241-4242.)

F. The Search of Rollins's Residence Did Not Reveal Any Evidence Linking Him to the Carwash Murders

Douglas assisted in a narcotics investigation of Rollins that lead to the police obtaining a search warrant. (25RT 4240-4241.) Douglas's contact

within the police department was Officer Pilcher. (25RT 4241.) Rollins's residence was searched on February 19, 1998. Detective Reynolds assisted in the service of the search warrant and specifically searched for items connected to the carwash murders. No ballistics evidence was recovered. (25RT 4233.) No newspaper articles written about the carwash murders were found. No drawings similar to those found at appellant Wilson's apartment were found. Nothing at Rollins's residence connected him to the murders. (25RT 4234.)

A pair of K-Swiss tennis shoes was seized from Rollins's residence. These shoes were later given to Carol Hunter of Forensic Analytical for analysis to determine whether they could have made the bloody shoe prints at the carwash murder scene. (25RT 4237; 27RT 4387-4388 [Peo. Exh. 101]; 27RT 4390-4392.) Hunter determined that the shoes seized from Rollins's residence could not have made the bloody shoe prints at the carwash murder scene. (27RT 4398-4404.) An empty K-Swiss tennis shoe box that had contained size 10 and a half shoes, however, was seized during the search of appellant Wilson's apartment. (27RT 4386-4387 [Peo. Exh. 81C [photo of box]; Peo. Exh. 100 [K-Swiss shoe box].) Hunter could not eliminate a size 10 and a half K-Swiss shoe with a herringbone pattern on the bottom as having left one set of bloody shoe prints. (27RT 4396-4398.)

During the course of the investigation in this case, Detective Reynolds never found any evidence whatsoever that connected Rollins to the carwash murders. (25RT 4237-4238, 4246.) Based on what Douglas told the police, Detective Reynolds put Rollins's photograph in the mug shot book that he prepared. (25RT 4234-4235; Peo. Exh. 51.) None of the witnesses in this case ever selected Rollins's photograph. (25RT 4235.)

At some point in time, Douglas said that he needed money to feed his kids and did not want to "do something stupid" and get sent back to jail. Detective Reynolds gave Douglas $20. (25RT 4232, 4239-4240.) After

that, Douglas began coming to the Compton Police Department on a regular basis asking for money. Douglas became so persistent asking for money that Detective Reynolds instructed the receptionist to tell Douglas that he was not in the office. (25RT 4240.)

G. The Witnesses at the Live Lineups Were Monitored by Sheriff's Deputies and Any Attempt By a Witness to Look at Another's Written Identifications or to Otherwise Communicate Would Not Have Been Permitted

Sheriff's Deputy William Gilbert supervised the live lineups held on June 9, 1998, at the Los Angeles County Jail. (25RT 4159, 4167, 4170-4173, 4213.) Gilbert explained that there is a set procedure followed for all lineups conducted by the jail. (25RT 4159-4170.) In the room where the lineups were conducted, each row had seven chairs across. The three witnesses who viewed the lineups on that date were seated in the front row as follows: one witness in the far right end, one in the middle, and one in the far left seat. There were two chairs separating each witness. (25RT 4167-4168.) After the witnesses were seated, they were read and given the standard Sheriff's Department admonition card used for lineups. (25RT 4169-4170.) One of admonitions states that witnesses are not to talk to each other during the lineup. (25RT 4169, 4225-4226.)

All peace officers and attorneys who attended the lineup are required to identify themselves and state their reason for being there. The information is then transcribed onto a document prepared by the supervising deputy. The documentation prepared in relation to the lineups in this case reflected that Deputy Gilbert was present with Deputy Hennessey who assisted him in running the lineup. Also present were the following people listed on the log: Detectives Reynolds and Chavers from the Compton Police Department, both sets of appellants' attorneys (i.e., Mizel, Jones, Brodie, and Thomas), defense investigator Beard, a court-

appointed attorney (Aziz Harris's attorney, Mr. Hud), and the prosecutor. (25RT 4173-4175.) Also present was attorney Jeanmarie Klingenbeck. Klingenbeck told Deputy Gilbert that she was from the Public Defender's Office and intimated that she represented one of the defendants. Deputy Gilbert explained that had Klingenbeck stated that she was merely tagging along to later have dinner with Ms. Jones, Klingenbeck would have been asked to step outside the room and wait. Only attorneys with official business relating to the case were allowed to stay in the lineup room. (25RT 4176-4177, 4221-422.)

While the lineups were in progress, Deputy Gilbert and his assisting deputy would monitor the witnesses to make sure no communication occurs between them. Deputy Gilbert would look at the witnesses through the window in the front of the stage. The assisting deputy would move to a position just behind the witnesses. Deputy Gilbert explained that if any type of communication was observed, the lineup would have been stopped immediately and canceled. (25RT 4177-4178.) One of Deputy Gilbert's responsibilities in running the lineups was to ensure that the witnesses do not communicate. (25RT 4178-4179.) Deputy Gilbert noted that when the lineups are in progress, the lights are turned down in the room where the witnesses are seated. The lighting would not be sufficient for a person to read written material. The witnesses also sit approximately five to six feet apart. (25RT 4179-4181.) The attorneys who are present are seated six to eight rows behind the witnesses. (25RT 4226.) Deputy Gilbert would pay close attention to the witnesses to make sure that any movement was not related to showing others what was written on their cards. (25RT 4182-4183.)

The documentation filled out for the lineups included a space for "notable incidents" and written objections by the attorneys. Written objections were received for appellant Pops's lineup (Lineup No. 5) from

his defense counsel. Both attorneys, Mr. Mizel and Ms. Jones, signed the objection page. (25RT 4183-4185; Peo. Exh. 98.) Nowhere in the written objections did appellant Pops's attorneys indicate that any witness showed or made movements to show another witness his identification card. (25RT 4185, 4193-4195.)[51] Further, there was no statement from anyone that a witness was attempting to show another witness his identification card. (25RT 4187-4188, 4224-4225.) Objections are accepted throughout the lineup process. (25RT 4225.) Any attorney present at the lineup who sees something he or she feels is improper may approach the assisting deputy and report the problem while the lineup is in progress. (25RT 4213-4214.)

H. Douglas's Testimony at an Evidence Code Section 402 Hearing

It was stipulated that Douglas testified on June 21, 1999, outside the presence of the jury that Rollins said he needed "go to Mississippi for a while because things were hot." (25RT 4246-4248.)

IV. APPELLANT POPS'S SURREBUTTAL EVIDENCE

Vendetta Smith, a custodian of records for the Martin Luther King Drew Medical Center, brought all of the medical records pertaining to Shiwana Skinner from the hospital. (27RT 4408-4410; Def. Exh. CCC.) The hospital records reflected that Skinner was admitted and treated for a gunshot wound on December 3, 1997. (27RT 4410-4413.) She was discharged from the hospital on December 22, 1997. (27RT 4415.) The records reflected that Skinner was scheduled for a follow-up treatment on February 6, 1998, but that she called and cancelled the appointment. (27RT

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[51] The objections complained that the witnesses arrived with Melvin Hoard, a relative of one of the victims, and that appellant Pops appeared to be the tallest, thinnest, and only one with thick sideburns in the lineup. (25RT 4195-4198, 4208-4209; Peo. Exh. 98.)

4413-4414.) There was no record that she was treated on February 6, 1998. (27RT 4415.) The records indicated that she was seen at the hospital on February 11 and 27, 1998. (27RT 4414.)[52]

It was stipulated that the Los Angeles County Sheriff's Department database for tracking gang members in Los Angeles County, called Cal Gang Systems, showed that on or about July 19, 1990, Randy Bowie admitted membership in the Nutty Block gang to Compton Police Detective Bookman. (27RT 4419-4420.)

PENALTY PHASE

I. PROSECUTION EVIDENCE

A. Appellant Pops's 1991 Arrest for Robbery

In the early morning hours of January 12, 1991, Terence Bow and his friend, Josh Nixon, left a Fat Burger restaurant and walked to Bow's pickup truck. (31RT 4996-4997.) Bow unlocked the truck and got in the driver's side. (31RT 4997-4998.) Bow looked over to the passenger side and saw that Nixon was being held at gunpoint by Laurence Thomas (Whop). Thomas directed Bow to get out of the truck and walk around to the back. (31RT 4998-4999.) Bow did as he was directed. (31RT 4999-5001.) Thomas pointed the gun directly at Bow and demanded his wallet. Bow looked over and saw that appellant Pops was holding Nixon. (31RT 5001-5002, 5007, 5009.) Thomas took Bow's wallet and jacket. (31RT 5002-5003.) Appellant Pops and Thomas got into a nearby waiting car with a third man inside. (31RT 5003-5004.) As the men were driving out of the parking lot, Bow saw a passing police car. Bow and Nix flagged down the

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[52] According to the hospital records, Skinner had appointments scheduled for follow-up treatment on the following dates: February 2, 4, 6, 9, 13, 18, 20, 23, and 25, 1998. (27RT 4416.)

police officers and reported that they had just been robbed. (31RT 5005.) The police car gave chase, and helicopters shined down lights. (31RT 5005-5006.)

Around this time, Edith Wolfrey was asleep in her bedroom. She was awakened by the sound of helicopters flying overhead. She went to the window and saw police cars on the street. (31RT 5014.) She heard a noise in back of her house. She then found appellant Pops crawling on the floor inside her house. Appellant Pops said, "I'm not going to hurt you. I'm running from the police." He asked Wolfrey to call his mother. (31RT 5014-5015, 5018.)

Officer Paul Stropkai, a K-9 handler, responded to the area with his dog. (31RT 5041-5042.) As he and his dog walked down a narrow walkway near a garage, the officer saw someone hiding behind a tree and pointing a gun at him. (31RT 5042-5043.) The person pointing the gun was Thomas. Officer Stropkai used his dog to assist in arresting Thomas. (31RT 5043-5044.)

Wolfrey saw that the police were in her backyard with a dog by the tree. (31RT 5015.) Wolfrey encouraged appellant Pops to surrender to the police, but he refused and crawled toward Wolfrey's bedroom. After Thomas was taken into custody, Officer Stropkai observed that the backdoor of the house had been kicked in. Officer Stropkai, his dog, and two other officers entered the residence. (31RT 5016, 5044-5045.) Wolfrey motioned towards her bedroom. (31RT 5016, 5045.) The police found appellant Pops hiding under a bed. (31RT 5045-5046.) A short time later, the police returned Nixon's jacket to him. However, he did not get his wallet back. (31RT 5002, 5006-5007.)

About two weeks later, Wolfrey found a wallet in a bathroom near where appellant Pops had kicked in the door to gain entry into the house.

Wolfrey mailed the wallet back to the person whose name was on the identification. (31RT 5016-5017.)

B. Appellant Wilson's 1995 Robbery Conviction

On September 1, 1995, 53-year-old Judie Lynn Smith had just cashed her AFDC check, and she and a male companion were walking near the intersection of 10th Street and Locust Avenue in Long Beach. A man named Daron Williams approached Smith and her companion and said, "Give me your money." Smith replied, "I don't have any." Williams then told Smith, "I know you've got money and you better give me your money or I will kill your husband." Williams had his hand in his pocket and was simulating a gun which he was pointing at Smith's companion. (31RT 5083.)

Williams then grabbed the purse Smith had strapped to her shoulder. (31RT 5083-5084.) Smith screamed. Williams tore the purse from the strap. He ran with the purse to a parked car approximately 50 feet away and got into the passenger side. The car then drove away. The driver of the car was later identified as appellant Wilson. (31RT 5084.)

A police helicopter observed the car driven by appellant Wilson on the Long Beach Freeway. A felony traffic stop was made. Appellant Wilson and Williams were arrested without incident. On September 12, 1995, appellant Wilson pled guilty to robbery. He received a grant of formal probation for three years and was ordered to serve 120 days in county jail. (31RT 5084.)

C. Victim Impact Testimony of Charmaine Hurd

Charmaine Hurd, Charles Hurd's younger sister, testified about the impact of her brother's death on the family. (31RT 5077-5078.) They came from a close family and were raised by a mother and father. They were poor, but Hurd never robbed or killed anyone. (31RT 5078-5080.)

Hurd cared for their grandmother, and she missed him. (31RT 5079.) Hurd had five children of his own ranging in ages from 12 to three years old. (31RT 5080.)[53]

II. APPELLANT WILSON'S EVIDENCE IN MITIGATION

A. Appellant Wilson Suffered From Attention Deficit Hyperactivity Disorder

Barry Carlson was appellant Wilson's special education teacher for a time when Wilson attended elementary school. Appellant Wilson was placed in special education because it was determined he had the learning disability of attention deficit disorder. (31RT 4972, 4977-4980, 4989-4990.) When appellant Wilson was taught on an individual basis, he learned well and had normal development for his age group. (31RT 4985, 4988.) He was, however, easily distracted and severely hyperactive. (31RT 4985-4986, 4989.) Although appellant Wilson had low self-esteem, Carlson recalled that he was "always smiling a lot, appearing to be happy" when he was taught on a one-on-one basis. But appellant Wilson would very quickly begin quarreling with others. (31RT 4990.) He had poor impulse control, and did not get along well with other children. (31RT 4993-4995.) Appellant Wilson presented himself well-dressed and groomed in school. (31RT 49092.) Carlson had no further contact with appellant Wilson after Wilson left his class in 1987. (31RT 4992-4993.)

Dr. Efrain Beliz, a clinical psychiatrist, reviewed appellant Wilson's school records and an interview with Barry Carlson. Dr. Beliz opined that appellant Wilson suffered from Attention Deficit Hyperactivity Disorder

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[53] Several pages of photographs were introduced as People's Exhibit 105, but not shown to the jury during Charmaine's testimony. (31RT 5080-5081.)

(ADHD) as a young child through adolescence. Individuals who suffer from the condition do not outgrow it. (32RT 5290, 5296, 5318-5332, 5341, 5345, 5372, 5388; Def. Exh. JJ [school records].) In reaching his opinion, the doctor also interviewed appellant Wilson on two occasions. (32RT 5349, 5351-5352, 5355, 5372, 5391.)[54] At the direction of defense counsel, he did not interview appellant Wilson's parents, and did not consider Wilson's family background in reaching his opinion. (32RT 5339-5343, 5379-5380.) He did not review records from Long Beach Adult School that appellant Wilson was attending several days a week to get his G.E.D. at the time of his arrest. (32RT 5347-5349.)

This ADHD condition, explained the doctor, causes children to have short attention spans, difficulty learning, be disruptive, and impulsive. (32RT 5296-5309, 5315-5316, 5329.) Children with the condition are at a high risk for delinquency and substance abuse. (32RT 5316.) The doctor has found that due to poor social skill development, adolescents tend to "hang out" on the street and are vulnerable to being taken advantage of by more manipulative people. (32RT 5309-5311.) They are also vulnerable to getting involved with gangs. (32RT 5311-5312, 5337.)

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[54] During his interviews with Dr. Beliz, appellant Wilson denied any involvement in the carwash murders. (32RT 5369.) He also denied any gang involvement. (32RT 5369-5370, 5374-5375.) Some material reviewed by the doctor, however, suggested to him that appellant Wilson was involved in a gang. (32RT 5375-5376.) He told the doctor that he received the nickname "Bird" from his cousins who thought he looked like a bird. (32RT 5370.)

Appellant Wilson admitted that he knew that the people at the carwash were selling marijuana, and he estimated that they were making a thousand dollars a day. (32RT 5370-5371.) Appellant Wilson stated that he had his own marijuana business and made $200 a day. (32RT 5371.) He told the doctor that the marijuana sold at the carwash did not "match [his] weed," "[b]ut [he] couldn't compete with them." (32RT 5371-5372.)

B. Byron, Sr. and Tonya Wilson's Testimony

Both of appellant Wilson's parents testified at trial. Byron Wilson, Sr. (Byron) was appellant Wilson's father,[55] and Tonya Wilson (Tonya) his mother. (34RT 5733, 5768.) Appellant Wilson was born April 10, 1977. (34RT 5736, 5768.)[56] He was Byron and Tonya's only child. (34RT 5765, 5768.) Appellant Wilson was a loving and very active child, but tended to keep to himself. (34RT 5770-5771.) He was restless and had a slight problem with concentration. He became easily bored. (34RT 5771.)

When appellant Wilson was very young, the family lived in Bellflower. (34RT 5737, 5787-5788.) Byron worked in housekeeping at Fairview State Hospital. (34RT 5737.) He received an education in electronics at Compton Community College and the California Trade Technical College. (34RT 5738, 5786.) He subsequently took a job at Univox as an electronic technician doing troubleshooting. The company, located in Compton, had approximately 75 employees, about 70 percent of whom were Black. (34RT 5738.) He worked there from 1983 to 1987. (34RT 5786.) Tonya worked as a secretary in the Compton Unified School District. (34RT 5787.) During this period, Byron snorted cocaine and drank alcohol. He did not consider his drug use, however, to be a problem. (34RT 5739.) His wife Tonya also drank alcohol and used drugs such as marijuana and possibly PCP, on a casual basis. (34RT 5739-5740.)

Tonya oversaw most of appellant Wilson's schooling, and communicated with his teachers. (34RT 5743, 5748.) The teachers

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[55] Byron was 43 years old at the time of trial. (34RT 5733-5734.)

[56] A photograph taken of appellant Wilson on his first birthday surrounded by family members was shown to the jury. (34RT 5736-5737; Def. Exh. KK [upper left photograph].) Tonya identified a photograph of appellant Wilson's two-year-old son Shawn, and two more photographs of appellant Wilson at ages seven and 12. (34RT 57695770; Def. Exh. KK [top right, and bottom photographs].)

complained that he was disruptive and a "class clown." (34RT 5771.) During appellant Wilson early schooling, he was placed in special education classes. (34RT 5772.)

During the early 1980's, Byron and Tonya had an "okay" marriage. There were brief periods of infidelity to each other. (34RT 5740.) Appellant Wilson sometimes stayed with his paternal grandmother. (34RT 5740-5741.)

On one occasion, appellant Wilson saved his mother's life by calling 911 after she collapsed due to an ectopic pregnancy. (34RT 5773.) On a couple of occasions, Tonya had other serious health problems and was bedridden. Once she was in a car accident after having taken PCP. Another time, she suffered from cancer. (34RT 5741-5742.) Appellant Wilson, who was seven or eight years old, changed his mother's bed pan and assisted his father in bathing her. (34RT 5742.)

Appellant Wilson had a few friends who would come over to the house to play. After a short period of time, however, appellant Wilson would go off by himself. (34RT 5743, 5748-5749.)

From 1987 to 1989, Byron was employed at Avenal State Prison to design and install a surveillance system, work with electronics, and train inmates. (34RT 5744, 5788.) Avenal was a small agricultural town. It took Tonya and Byron some time to adjust to the new location. (34RT 5773-5774.) Appellant Wilson attended regular classes because the school did not have special education classes. (34RT 5774.)

During this time period, Byron smoked cocaine and drank alcohol. Tonya also smoked cocaine. Byron's drug habit was getting worse, and he considered it a problem. (34RT 5745.) When Byron and Tonya smoked cocaine, they usually sent appellant Wilson upstairs or off to a friend's house to play. (34RT 5745-5746.) Because Avenal was a small town, a friend of Byron's who was an officer advised Byron that he was under

surveillance due to his drug purchases. During this time, Byron's marriage with Tonya "wasn't too bad." (34RT 5747.)

In 1989 to 1991, Byron began working at San Quentin State Prison, and his family eventually moved to Novato. Byron designed and installed the prison's internal trouble alarm system. (34RT 5749-5750, 5775-5776.) When they first moved to the Bay Area, the family lived in motels in San Francisco and San Rafael. (34RT 5775, 5788-5789.) Tonya worked as a secretary for the Contra Costa Unified School District. (34RT 5789.) Both Byron and Tonya continued to use drugs, and the problem worsened. (34RT 5750.) Tonya described the family as dysfunctional due to her and Byron's drug and alcohol abuse. (34RT 5776-5777.) Appellant Wilson was 12 or 13 years old and aware of his parents' drug use. (34RT 5751.) He attended Sinaloa Middle School, but there were no special education classes. (34RT 5776.) Appellant Wilson was a loner and kept to himself most of the time. (34RT 5777-5778.) On a number of occasions, appellant Wilson had friends stay for weekend visits, but he would become withdrawn and Tonya would have to call the friends' parents to come pick them up. (34RT 5778-5779.) Appellant Wilson was a "follower" in his interactions with his friends. (34RT 5779.)

Byron was next transferred to Wasco State prison, where he worked from 1991 to 1994, and the family lived in the Bakersfield area. (34RT 5751-5752, 5779-5780.) Tonya also worked at the prison in a clerical position. (34RT 5780, 5789-5790.) Byron and Tonya's drug use continued to get worse. (34RT 5752-5753, 5780.) The family was becoming more dysfunctional. (34RT 5780.) They also used drugs with friends. (34RT 5753.) Appellant Wilson, who was around 14 years old and in high school, began socializing with Byron and Tonya's friends and their children. (34RT 5753-5754, 5780-5781.) Sometimes when Tonya would drink and "get high," "she became a changed person." Quite a few times she

physically attacked appellant Wilson and Byron. Several times, Byron used makeup to cover the injuries he suffered. (34RT 5756-5757.) Appellant Wilson witnessed his mother attacking his father. (34RT 5757.) Byron was embarrassed by the physical abuse. Byron recalled, however, that "[t]here were breaks in between all this madness. . . [and] we still had good times." (34RT 5758-5759.) At one point while at Wasco, Tonya was placed under house arrest for driving under the influence. (34RT 5759.)

Byron next took a job in Los Angeles at the Southern Reception Center for the California Youth Authority. (34RT 5759-5760.) Neither Tonya nor appellant Wilson wanted to move back to Los Angeles. They had a better life living in small towns. (34RT 5781-5782.) Byron moved in with his parents due to financial problems. Byron's problems with drugs got much worse. (34RT 5760.) Once back in Los Angeles, everything—the marriage and family—"pretty much fell apart." (34RT 5782.) Appellant Wilson did not adapt well to moving back to Los Angeles and became very depressed. (34RT 5783.) Byron was eventually forced to resign from his job due to his drug problems and a back injury. (34RT 5763-5764.) Byron and Tonya separated and, in August 1997, they divorced. (34RT 5761, 5782-5783.) After Tonya's mother died in 1997, Tonya relapsed into taking drugs. She was arrested and convicted of a felony. (34RT 5784.) Byron lost contact with appellant Wilson. (34RT 5761.) Tonya and appellant Wilson had a falling out, and she too lost contact with her son. (34RT 5782-5783.) Byron felt that over the years, Tonya's brothers were also a bad influence on appellant Wilson because they encouraged him to sell marijuana. (34RT 5754-5755.)

Byron testified that he would feel badly if his son received the death penalty because appellant Wilson is his only child. (34RT 5765-5766) Tonya loved appellant Wilson and did not want him to get the death penalty. (34RT 5784-5785.)

C. Marcellette James, a Family Friend Who Had Not Had Contact with Appellant Wilson for 15 Years, Fell in Love With Him After He Was Arrested for the Carwash Murders

Marcellette James and her mother were friends with members of appellant Wilson's family. James was approximately seven years old when appellant Wilson was born in 1977. She thought of appellant as a little cousin, and saw him frequently. (33RT 5538-5545.) As a small child appellant Wilson was very energetic, and always smiling and laughing. He was also smart and perceptive about other people. (33RT 5545-5546, 5563.) James believed that appellant Wilson's father and extended family provided him with loving support. (33RT 5561-5562.)

James moved with her family to Portland, Oregon in 1984, to escape the rising crime and gang violence of Los Angeles. (33RT 5542, 5546.) At the time of trial, James still lived in Portland with members of her family. (33RT 5546-5547.) She had not seen appellant Wilson for about 15 years, and it was only when she testified at trial that she saw Wilson face-to-face since she moved to Portland. (33RT 5547.)

James learned in 1998 that appellant Wilson had been arrested. (33RT 5547-5548.) She, along with some members of her family, began writing to appellant Wilson in jail. (33RT 5548-5549.) From August 1998, until she testified on July 21, 1999, James had written appellant Wilson over 70 letters, sent him Christian pamphlets, and over 20 cards. (33RT 5549.) They also communicated over the telephone. After about the third telephone call and writing a few letters, James began to fall in love with appellant Wilson. (33RT 5550-5551.) Eventually, appellant Wilson told James that he felt the same about her. (33RT 5567.) At some point appellant Wilson's telephone privileges were taken away, but they continued to write each other. (33RT 5556.) That appellant Wilson was

charged and convicted of murdering four people did not change the way James felt about him. (33RT 5551-5553, 5569.)

James considered appellant Wilson to be a "very mature man," who did not act rashly or without thinking. (33RT 5564-5565.) Appellant Wilson did not tell James anything specific about the murders, and she did not inquire. Nor did appellant Wilson deny having committed the murders. (33RT 5556.) James believed, however, that appellant Wilson was innocent. (33RT 5557-5561, 5569-5570.)

James felt that if appellant Wilson received the death penalty, "it could be killing a part of [her] too," because Wilson was "definitely part of [her.]" Through their communications, he had given her "encouragement" and she had "also learn[ed] more about [herself], and [she] even matured spiritually because of him." (33RT 5553-5554.) Appellant Wilson had advised James, however, that "if worst comes to worst [] he would have to let [her]go." (33RT 5555.)

III. APPELLANT POPS'S EVIDENCE IN MITIGATION

A. Appellant Pops's Troubled Family Background

1. Appellant Pops's Early Childhood and the Shooting of His Stepfather by Police

In 1969, Van Arthur Pops (Van),[57] appellant Pops's father, married Gail Bright[58] in Seattle, Washington, where Gail's family lived. (31RT 5139.) They then moved to Phoenix, Arizona, where appellant Pops was born in February 1971. (31RT 5140, 5156-5157.) While in Phoenix, Van

[57] To avoid confusion, respondent will refer to individuals by their first names if they share a common surname with appellant Pops or his brother Aziz Harris.

[58] At some later point, Gail adopted the name Karimah Shabazz. (31RT 5095-5096, 5132, 5208.)

was employed by the "Parks and Recreation and stuff like that, off and on." (31RT 5140.) In 1972, Van was arrested for stealing securities and traveler's checks. He was sentenced to six years in a federal penitentiary. (31RT 5140-5141.) It was while Van was in prison, that he learned that Gail had divorced him and married Eugene Henry Harris, Jr. (Eugene). (31RT 5141; see 31RT 5086-5088, 5092 [testimony of Eugene's cousin Curtis Beachem].) Van served 40 months in prison and was released in 1975. (31RT 5141, 5152.)

After Gail and Eugene married, they had three children together: daughter Naisha Harris, born July 1, 1973; son Abu Aziz Harris, born March 28, 1975; and daughter Naeemah Harris, born September 22, 1977. (31RT 5156-5157.) Naisha was born in Phoenix, Arizona. She was young when Eugene moved the family to Los Angeles around 1974. (31RT 5157; see 31RT 5089.) They lived at various residences in and around Los Angeles. The first residence was at 416 East 101st Street in Los Angeles. (31RT 5157; Def. Exh. EEE1.) That residence was located behind the main house occupied by Eugene's aunt, Barbara Andrews.[59] (31RT 5157-5158.)

Later, the Harris family moved to an apartment at 376 East Imperial Highway in Los Angeles. (31RT 5090, 5158, 5210; Def. Exh. FFF.) On November 7, 1978, Beachem received a telephone call from a cousin who said that Eugene had been shot. (31RT 5090.) Beachem and his brother ran from their house to the Imperial Highway address. (31RT 5090-5091.) Eugene had been shot by the police and was lying in the driveway handcuffed. An ambulance arrived at the scene, but the police sent it away without rendering aid to Eugene. Eugene died. (31RT 5091.) Beachem,

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[59] Barbara Andrews was the half-sister of Eugene's mother, Mildred Andrews. (31RT 5087-5088.) Curtis Beachem, who testified at trial, was Barbara's son and Eugene's cousin. Beachem grew up at this residence. (31RT 5086-5089.)

who was kept across the street from the family's residence, observed three of Gail's children—appellant Pops, Aziz Harris, and Naisha—looking out a window at Eugene. (31RT 5091-5092.) Beachem heard that Eugene's death occurred when he attacked two police officers with an axe. During the attack, one police officer was accidently shot by his partner. (31RT 5108.) Nevertheless, Beachem considered Eugene to be a good man and provider for his family. (31RT 5107, 5110.) Beachem was unaware that Eugene was also beating or threatening Gail on the day he was shot by the police. (31RT 5110.) He was told that Eugene was "high" on something when he was shot, but this was out of character for Eugene. Beachem had never previously seen Eugene "high like that." (31RT 5107.)[60]

Verlena Harvey, Eugene's aunt by marriage,[61] also went to the East Imperial Highway address after learning that Eugene had been shot. She saw him lying face down on the curb. (31RT 5132.) Gail was standing across the street from Eugene and was distraught. (31RT 5132-5133.) Eugene's body remained on the sidewalk for a considerable amount of time. (31RT 5133.) Harvey's daughter, Donna Brown,[62] also went to the location. She saw that Eugene had been shot in the back and was lying handcuffed on the curb. (31RT 5209-5210.) After the shooting, Gail and her four children moved in with Harvey and her family for approximately one month. (31RT 5133, 5211.) Harvey noted that appellant Pops became

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[60] At the time of trial, Beachem had not seen appellant Pops for 10 years, and they had not communicated during that time. (31RT 5092, 5094-5095, 5109.) When Beachem entered the courtroom to testify, he did not even recognize appellant Pops. (31RT 5093.)

[61] Harvey was married to Luvell Andrews, Eugene's mother's half-brother. (31RT 5131.)

[62] Years later, it was at Brown's house in Cerritos where the 1998 Super Bowl Sunday barbecue party was held. (31RT 5224-5225.)

withdrawn after the shooting of his stepfather. (31RT 5133-5134.)[63] Naisha was quite young when her father died. She remembered everyone crying and very hysterical. (31RT 5162.)

The coroner's report reflected that this was an officer-involved shooting and one of the officers had been shot. (31RT 5112.) The report noted that Eugene had been threatening two police officers with a pick axe. Eugene tested positive for P.C.P. (31RT 5123.)

Gail and her children next moved to an apartment located at 10750 Barlow Avenue in Lynwood, where they lived for a few years. (31RT 5158, 5162.) Gail worked the graveyard shift as a pharmacy technician at Cedars Sinai Medical Center. (31RT 5163.) She usually had a babysitter to watch the children. On no more than six occasions, Gail could not find a babysitter and took the children to work with her. (31RT 5163-5165.)

2. Van Reappears in Los Angeles, and Gail Begins to Use Drugs

Van moved to Los Angeles in 1983 or 1984. (31RT 5141, 5154.) At first, Van did not know Gail was living in Los Angeles and had not seen appellant Pops since before he was sent to prison. (31RT 5141-5142.) Van then started to have some contact with them when appellant Pops was about 13 years old. (31RT 5141, 5152-5153.)

Gail and her children had moved to 1117 Bullis Road in Compton. (31RT 5158, 5165.) According to Van, he only visited this address and occasionally spent the night. Naisha recalled that Van lived at this address for a few months. (31RT 5142-5143, 5166.) He drank heavily and frequently took drugs. According to Naisha, Van was physically abusive.

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[63] Prior to trial, the last time Harvey saw appellant Pops out of custody was sometime in the Fall of 1997, when he came to the house of Harvey's daughter (Donna Brown). (31RT 5134-5136.) Prior to that visit, Harvey had infrequent contact with appellant Pops. (31RT 5137-5138.)

(31RT 5166.) He would beat appellant Pops and Aziz with belts and cords. (31RT 5166-5167.) Naisha saw Van abuse Gail a couple of times. Gail sustained black eyes, bruises, and scars. (31RT 5167.) Gail dismissed the abuse saying that she "bruised very easy." (31RT 5167-5168.) The police were called regarding these incidents. (31RT 5168.) Van, however, denied that he ever abused Gail or the children. (31RT 5145.) Van also molested Naisha. (31RT 5167.) Van did admit to using illegal drugs. He started using drugs in 1965 when he got out of high school. Van was arrested for possession of drugs with intent to sell in 1986, and was placed on probation. (31RT 5145-5146.) Van claimed to have never used drugs with Gail. (31RT 5146.) Donna Brown visited the Bullis Road residence on a frequent basis and saw Van there. (31RT 5213.) Appellant Pops was in the family residence when Van was intoxicated or on drugs. (31RT 5214.)

Gail and her children next moved to a residence located at 11112 Peach Avenue in Lynwood. (31RT 5158.) Around 1989, Beachem lived in a converted garage behind the residence. (31RT 5170, 5092, 5094-5095.) Van would visit Gail and the children at this home too. (31RT 5097, 5142-5143.) Beachem occasionally saw Van drink alcohol with some Hispanic men across the street from the house. After Van became intoxicated, he would attempt to force his way into the house. (31RT 5095.) On one occasion, Gail was visiting Beachem at his place behind the main house. Van attempted to force his way into the house, and another man who was also visiting hit Van on the head with a hammer. (31RT 5097.)

While living on Peach Avenue, Gail had a relationship with a man named Chicago. Naisha described him as an "awful man." He was a pimp, and drug dealer. On one occasion, she saw Chicago with another woman. When Naisha approached, Chicago told her, "I'm trying to regulate my bitch[,] so go home." (31RT 5170.) According to Naisha, Chicago was violent toward Gail. He would hit her and beat her with chains. On one

occasion, Naisha saw her mother come home crying and bloody. Chicago followed behind her carrying a chain. He had also threatened her with axes. (31RT 5171.) Appellant Pops attempted to defend their mother from Chicago. (31RT 5171-5172.) Once when Naisha stood up to Chicago, he burned her arm with an iron. At the time of trial, Naisha still had discoloration on her arm where she had been burned. He also tried to handcuff Naisha to a table a couple of times. (31RT 5172.) He also tried to fight appellant Pops and Aziz. (31RT 5172-5173.) He even put a lock on the refrigerator at the house. (31RT 5173.) Beachem described Chicago as a "wild drug dealing insane type of man." (31RT 5097.) But Beachem never saw Chicago physically abuse Gail. (31RT 5099.) Chicago had a favorite expression he used whenever he argued with people: "I'll knock a patch of hair out of your head." (31RT 5100.) At some point in time, appellant Pops had Van go to a Laundromat in Long Beach to get Gail. Chicago was there and shot Van in the leg. Van did not know if appellant Pops witnessed him being shot. (31RT 5147.)

During this time, money was tight because Gail did not work and the only money the family received was a Social Security death benefit from her father. (31RT 5102-5103, 5173.) Appellant Pops worked for tips pumping gas at a local gas station. (31RT 5174.) He used the money he earned to buy food for the family. (31RT 5174-5175.) The children had to wear shabby clothing. (31RT 5175-5176.) Naisha and appellant Pops were teased by the other children in the neighborhood who called their mother a "whore," a "drug head," and said she "lived with a pimp." (31RT 5175.) Sometimes Gail left the children alone for a day or two, telling them that she was going to a bar or out with friends. Naisha's cousins and neighbors took care of her and the other children when their mother would leave. (31RT 5176, 5188.) Beachem recalled that around this time Gail also dated rich men. (31RT 5101-5102.) When she returned from the dates—

sometimes not until early the next morning—Gail would have a lot of money. (31RT 5102-5103.)

On one occasion, Gail came home with blood all over her face from a cut on her face by someone at a local bar. (31RT 5177.) Appellant Pops and Naisha went to the bar looking for the person who had cut their mother, but could not find the person. (31RT 5178.)

Beachem saw Gail use crack cocaine "maybe once or twice" when they lived on Peach Avenue. (31RT 5100.) Naisha never saw her mother use drugs, but believed she did based on her behavior and the presence of cocaine pipes. (31RT 5168-6169.) Appellant Pops did not like their mother using drugs, and he destroyed the drug paraphernalia on occasion. (31RT 5169.) Brown continued to have contact with Gail and the children after they moved to the Peach Avenue residence. (31RT 5214.) Brown, who had used crack cocaine for about eight or nine years, also smoked it with Gail and Van at the Peach Avenue residence. (31RT 5215-5214.) They never, however, used drugs in front of the children. (31RT 5214.) Brown believed the children suffered as a result of Gail's drug use. The family sometimes ran out of food. Brown recalled that appellant Pops had to pump gas to make money to buy beans for the family to eat. (31RT 5219.)

After leaving the Peach Avenue address, Gail and her children moved to 3628 Josephine Court in Compton with a man named "Crazy Johnny." (31RT 5158, 5178.) He was called that because he took Prozac or a similar type of medication. (31RT 5178.) The children stayed at that location only briefly and then moved to the Imperial Courts public housing project on East Imperial Highway in the Watts area of Los Angeles. They lived at that location for about one year with Van's sister and appellant Pops's aunt, Clarice. (31RT 5159, 5178.) Gail, however, stayed with Crazy Johnny. (31RT 5179.)

Around 1989 or 1990, Gail and her children moved to an apartment located at 1513 Kay Street. (31RT 5159-5161.) This was a violent and dangerous location. (31RT 5181.) While they lived at that location, Gail was a mistress to a married man named Johnny (a different man than Crazy Johnny). (31RT 5179-5180.) Johnny sometimes stayed at their residence. He tried to help Gail by paying some of the bills. (31RT 5180.) Johnny did not use drugs, but did get them for Gail to use. (31RT 5180-5181.) Gail also drank beer. (31RT 5182.) According to Naisha, Gail began to exhibit unusual behavior. Sometimes Gail would meditate in the middle of the street or on the sidewalk. She would also yell out "in her own little language." Gail told Naisha that she was speaking Arabic, but Naisha believed she "just mumble[d]" "a lot of gibberish." (31RT 5182.)

Occasionally, the children lived with their grandmother at her residence on Osborn Road in Pacoima. (31RT 5159.) Their younger sister Naeemah lived with their grandmother for about two years. Naisha stayed with her grandmother during summer breaks and sometimes on the weekends. Appellant Pops lived with her for less than six months. (31RT 5160.)

3. Appellant Pops Moves in with His Future Wife Angela

Appellant Pops met his future wife Angela when she lived across the street from him on Kay Street. (31RT 5161-5162, 5204-5205; 32RT 5269.) A few weeks after they met, appellant Pops went to live with Angela when he was 18 years old because he was having problems at home with his mother and siblings. (32RT 5270, 5282.) Angela described Gail drinking alcohol from morning to night. (32RT 5271.) Angela also witnessed Gail act oddly. On one occasion, Gail stood in a "full-fledged karate position" when two girls came by the house to visit appellant Pops. (32RT 5272-5273, 5281-5282.) Gail sometimes yelled while out on the street. She once

threatened a neighbor. (32RT 5274.) On another occasion, Gail poured talcum powder on Angela. (32RT 5274-5276.) Gail made a drunken giggle and ran away. (32RT 5276.) Appellant Pops was embarrassed by his mother's actions. (32RT 5276.)

Angela and appellant Pops eventually married when Pops was incarcerated in prison for robbery. (32RT 5269, 5280-5281.) He was incarcerated during most of their marriage. (32RT 5283.) Angela did not know most of the people with whom appellant Pops associated on the streets when he was not incarcerated. (32RT 5283.) She met appellant Wilson, whom she knew as Bird, once in 1998 during a time when Angela and appellant Pops were not living together. (32RT 5284-5286, 5288.) She also was introduced to Barnes, whom she knew as Smurf, by Aziz in 1997. (32RT 5285-5286.) Angela went to the 1998 Super Bowl Sunday barbecue. Appellant Pops, Aziz, and Barnes also attended. She was not sure if appellant Wilson was present. (32RT 5287.) She did not know a person named "V." (32RT 5287-5288.)

Angela was not living with appellant Pops when he was arrested in March 1998 for this case. (32RT 5289.) When appellant Pops was in county jail pending trial in this case, Angela may have used the call-forwarding feature on her telephone to forward Pops's calls to others when he called her collect. (32RT 5277-5278.)

4. Witnesses' Thoughts About and Recollections of Appellant Pops

a. Van Author Pops

Since the time that appellant Pops lived on Peach Avenue, Van had minimal contact with him. (31RT 5147-5148.) Van considered Gail a good mother to appellant Pops. (31RT 5153.) He never saw Gail use

narcotics. (31RT 5154.) Van regretted not being present in appellant Pops's live as he grew up. (31RT 5152.)[64]

b. Naisha Harris

Naisha had had a close relationship with appellant Pops. He let her "hang out" with him and his friends. They did a lot of activities together like skating and bike riding. (31RT 5187.) Appellant Pops walked Naisha to school. (31RT 5188.) Naisha described appellant Pops as friendly and generous to others. (31RT 5189.) Naisha loved her brother and wanted him to live. (31RT 5191.)

Naisha did not have much contact with appellant Pops during the substantial periods of time when he was incarcerated. (31RT 5191-5192.) She did not know the people with whom he associated over the decade before trial. (31RT 5192.) She met appellant Wilson only briefly in 1997 or 1998. (31RT 5192-5193.) Naisha knew Lawrence Barnes by his moniker "Smurf," and had met him around four times. He was introduced to her by Aziz. (31RT 5195-5196.) She saw Barnes at Donna Brown's house on Super Bowl Sunday 1998. (31RT 5197.) Appellant Pops also once introduced Naisha to a woman named "V." (31RT 5203.)

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[64] Van read that his son had been arrested for the carwash murders. (31RT 5148.) Van learned from his sister that appellant Pops's defense attorneys wanted to speak to him. (31RT 5148-5149.) Van did not contact the attorneys. When defense investigator Withers contacted him, Van stated that he had nothing to say. (31RT 5149.) Van was arrested in January 1999, for possession of cocaine. (31RT 5149-5150.) Van was brought to the attorney room at jail where defense counsel Mr. Mizel was waiting. They had a brief conversation, and Van walked out of the room. Mr. Mizel accused Van of "holding something back." (31RT 5150.) Van came to court for the trial because he was subpoenaed by the defense, but he would have come without a subpoena. (31RT 5151.)

c. Donna Brown

Donna Brown recalled that once when appellant Pops was 13 or 14 years old, he interceded and defended Brown when her husband physically abused her. (31RT 5219-5220.) Brown worked at night, and appellant Pops would check on her children. He also helped Brown around her house. Appellant Pops was close to Brown's children, and he was a godfather to one daughter. He advised Brown's children to stay in school and get an education. (31RT 5220.) Brown believed that appellant Pops "loved people." She would be devastated if he received the death penalty. (31RT 5221.)

Brown met Barnes (Smurf) once, but never had much contact with appellant Pops's other friends. She did not know with whom appellant Pops associated. (31RT 5223.) Brown also knew Michael Dunn (the defense witness who claimed to have seen Bowie with appellant Pops). He had been to her house once or twice. (31RT 5225.) It was at Brown's house that the barbecue party was held on Super Bowl Sunday 1998. Appellant Pops, Aziz, and Naisha attended the barbecue. She did not recall seeing Barnes or appellant Wilson at her house. (31RT 5224-5225.)

d. La-Keasha Brown

Appellant Pops was La-Keasha Brown's cousin and godfather. At the time of trial, La-Keasha was 16 years old. When she was younger, appellant Pops babysat her, her sister, and cousins. He took them swimming, to the park, and visited them at home. He gave them candy, and made them happy. (34RT 5706-5707.) As La-Keasha got older, appellant Pops took her to the movies, the beach, and bowling. They spent a lot of time talking almost every day. Appellant Pops encouraged her to stay in school and graduate from high school. (34RT 5707-5708.) La-Keasha testified that she would feel badly is appellant received the death penalty

because he had been a constant in her life. He was "like a brother, a father," and also a cousin. She loved him. (34RT 5708.)

e. Naeemah Harris

Naeemah Harris, appellant Pops's half-sister and the daughter of Eugene and Gail, was about one and a half years old when her father was killed. (34RT 5710.) After her father's death, when Naeemah was three or four years old, she recalled that the family moved a lot. Her mother worked a night-shift at Cedars Sinai Medical Center, and Naeemah and her siblings were sometimes left alone. Other times, the children stayed with their grandmother at her residence in the San Fernando Valley. On occasion, they went to work with their mother and "camp[ed] out" in the family's van. (34RT 5719, 5722-5723.)

After their mother lost her job, the family could not keep a permanent residence and moved frequently. (34RT 5719.) Their mother also drank heavily and possibly took drugs. (34RT 5719-5720.) On occasion in the middle of the night, their mother would break almost every dish in the kitchen, yell, and bang pots when there were a few dirty dishes left in the sink. The children were forced to get out of bed and clean the mess. (34RT 5720-5721.) Their mother often went to a local bar, and sometimes did not return home until the next day. (34RT 5721-5722.) Naeemah was between five and seven years old when this occurred. (34RT 5722.) There were times when the family did not have food. Sometimes the children had to borrow food from neighbors or eat at their houses. (34RT 5724-5725.) Naeemah recalled an occasion where appellant Pops brought home a substantial amount of groceries and they were able to eat for a couple of weeks. (34RT 5725.)

For a time, Naeemah and her siblings lived with their aunt Clarice in a small two-bedroom house. (34RT 5725-5726.) Naeemah and her three siblings slept on the floor in the other room. They referred to themselves as

"Flowers in the Attic," after a movie they had seen by the same name in which the mother left her children in the attic by themselves in order to pursue relationships in hope of finding a husband. (34RT 5726.)

Naeemah recalled that when appellant Pops was a teenager, he was chased by gang members. She recalled one incident when appellant Pops was chased by a gang member who had a gun. The gang member followed appellant Pops into the house, and Pops had to jump out a second story window to escape. (34RT 5727-5728.)

Naeemah testified that she would feel badly if appellant Pops received the death penalty because he was the only father figure in her life. (24RT 5728.)

B. Expert Opinion Testimony: Young Black Men Who Are Raised in Concentrated Poverty Areas, Who Have Dysfunctional Families, Who Do Not Finish High School, Who Are Exposed to Lethal Violence, and Who Have Criminal Records, Are Unlikely to Find Employment and Are Prone to Violence

James H. Johnson, Jr., Ph.D., an "urban social geographer," testified as an expert regarding the economic structure of South Central Los Angeles, Lynwood, and Compton, and the impact that the economic structure might have on the rates of violence among young Black men. (33RT 5576.)[65] In 1980, he received his Ph.D. in urban geography and urban affairs. (33RT 5578; 34RT 5646.) He taught at U.C.L.A. for 14 years, where he was the director of the Center for the Study of Urban Poverty. (33RT 5578.) At the time of trial, Dr. Johnson was a distinguished professor and director of the Urban Investment Strategies

[65] Dr. Johnson did not prepare a report in anticipation of his testimony in this case. (34RT 5630.) He spent about 40 hours preparing for this case. He did not personally interview any witnesses. (34RT 5639, 5641-5642.)

Center at the University of North Carolina, Chapel Hill. (33RT 5576.) He also ran two programs for young men in economically distressed neighborhoods in Durham, North Carolina to help them complete high school and get into college. (33RT 5576-5577; 34RT 5665-5666.) He had written two books pending publishing that related to the topic of his testimony and specifically the Los Angeles area. (33RT 5578-5579.) He had also published over 50 peer-reviewed scholarly articles, and numerous other articles for journals and newspapers. (33RT 5578-5582.)

Based on his research, Dr. Johnson concluded that "it is extremely difficult for young Black men, particularly those who have not finished high school, who live in some of the most economically distressed areas of South Central Los Angeles, and who have had some prior experience with the criminal justice system, that it is very difficult for them to take advantage of employment opportunities that may exist." (33RT 5585-5584.)

In the 1950's and 1960's, Los Angeles had an economic base that encouraged Blacks from other states to move to the area, and South Central Los Angeles became the social center of the Black community. (33RT 5584-5586.) During this time period, a young Black man who was not necessarily college educated could find well-paying highly unionized manufacturing jobs. (33RT 5586.) Beginning in the mid to late 1970's, however, the Los Angeles economy began restructuring and many of the manufacturing plants closed and relocated out of the country. (33RT 5586-5587.) This situation, known as "deindustrialization," had an adverse effect on employment opportunities for subsequent generations, with around 200,000 jobs lost by the 1990's. (33RT 5587-5589, 5595; Def. Exh. NNN ["Plant Closings in the Los Angeles Area and Aswad Pops' Residences" chart].) Additionally, the civil unrest in 1992 resulted in about 100,000 more jobs lost. (33RT 5589-5590.) Appellant Pops's various residences

where he lived in South Central Los Angeles were close to the areas of major job loss. (33RT 5590.)

A cross-racial study conducted in 1994 showed that the unemployment rate among Black men in the Los Angeles area was 23.1 percent. By contrast, the unemployment rate for White men was 8.6 percent. (33RT 5591-5592, 5596; Def. Exh. OOO [survey chart].) The unemployment rate for light-skinned Black men was 20 percent versus a 27 percent rate for dark-skinned men.[66] The study showed the impact that race and skin tone play in the labor market. (33RT 5593-5594.) Additionally, the unemployment rate jumped to 47.7 percent for Black men with criminal records. The survey found that light-skinned Black men with criminal records had a slightly lower unemployment rate of 41.7, versus dark-skinned men at 54.1 percent. The rate for White men with criminal records, however, was 25 percent. (33RT 5594.)

As the area deindustrialized from heavy industry jobs, other types of jobs in the craft-specialty (i.e., garment, jewelry, and furniture) and hospitality industries emerged. (33RT 5595-5597; Def. PPP1 [chart].) These jobs were usually filled by "newly arriving immigrant labor," who were recruited informally and paid low wages. Dr. Johnson compared the jobs to 19th-century sweat-shop-tye operations. (33RT 5598-5601.) A survey of employers in these industries indicated an aversion to hiring Black males. (33RT 5599.) "[T]hey oftentimes perceive[d] young Black men in particular as being lazy, inarticulate, untrainable, and most importantly dangerous." (33RT 5599-5600.) Again, appellant Pops's various residences were located within the areas of these new industries. (33RT 5600, 5602-5603; 34RT 5647-5648; Def. PPP2 [chart of appellant

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[66] Blacks were designated as light-skinned, explained Dr. Johnson, if their skin was lighter than a brown paper bag.

Pops's residences within poverty area].)[67] Due to the low-paying jobs, South Central became an area of concentrated poverty. (33RT 5601.) Dr. Johnson explained that in the 1950's and 1960's, the Black communities were heterogeneous and most everyone worked. (33RT 5602.) Back then, children had as role models successful people who went to work everyday. (33RT 5604.) As poverty concentrated, however, children saw only idle people who were "neither at work nor in school." (33RT 5604, 5607.)[68]

As communities became economically distressed, community-based organizations that encouraged children to pursue mainstream social and economic mobility and discouraged dysfunctional or antisocial behavior were eliminated. (33RT 5603-5604, 5607; 34RT 5690-5691.) The quality of education in these communities also suffered. (33RT 5604.)

Based on his studies, Dr. Johnson found common characteristics of Black men living in concentrated poverty areas and violence. First, many young Black men who are involved in "lethal violence" tend to grow up in distressed neighborhoods. (33RT 5605.) Second, these men grow up in families that are weakly attached or unattached to the labor market. (33RT 5605-5606.) Dr. Johnson observed that more often than not the men come from families that have a history of abuse, domestic abuse, spousal abuse,

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[67] The aerospace and defense industries were also creating jobs in the San Fernando Valley, outside the confines of South Central. These jobs required a higher level of education. (33RT 5597-5598; 34RT 5648-5654; Def. Exh. PPP1.) The concentrations of employment data reflected in the charts prepared by Dr. Johnson had not been updated since 1990. (34RT 5653-5654, 5661-5662.) The chart showing the concentration craft-specialty industries reflected data up to 1990. The representation of appellant Pops's residence covered a period after 1991. (34RT 5662; Def. Exh. PPP2.)

[68] During the 14 years that Dr. Johnson lived in Southern California, he lived in Baldwin Hill, Sherman Oaks, and Venice. He did not live in the South Central, Lynwood, or Compton areas. (34RT 5644-5645, 5689-5690.)

and sometimes child abuse. Additionally, they are often exposed to lethal violence at a young age. (33RT 5606; 34RT 5692.) Since the 1980's "crack epidemic," it was very common to have parents and relatives with serious drug problems. (33RT 5606.) These problems in turn caused instability in the family. (33RT 5607.) Dr. Johnson noted that people who live in concentrated poverty areas are socially and spatially isolated from mainstream economic and educational opportunities. (33RT 5607-5608.) These various factors create conditions that foster lethal violence among young Black men. (33RT 5608; 34RT 5690-5691.) These conditions do not excuse the violence, they merely explain it. (34RT 5683.)

Dr. Johnson had previously worked on approximately two dozen death penalty cases for the defense in California and other states, and testified in approximately 15 of those cases. He noted that a large number of the men grew up in similar neighborhood-type situations as appellant Pops. (33RT 5608-5609; 34RT 5631-5639, 6544.) Dr. Johnson had never conducted the type of qualitative research where he interviewed inmates on California's death row about their upbringings. But he had spoken to individuals before they were sent to death row. Dr. Johnson clarified, however, that he did not rely on this type of qualitative personal interview research for his findings. Rather, he relied on his "social science expertise." Talking to inmates on death row about how they ended up there, was "not my point in my research," noted Dr. Johnson. (34RT 5684.) The witnessing of lethal violence, explained Dr. Johnson, can be devastating for young Black men if they do not get the proper social and psychological counseling. (33RT 5609.) Not all Black men who grow up in concentrated poverty areas and in dysfunctional families are prone to violence. (33RT 5609-5610.)

Dr. Johnson quoted a survey that found White males who had not finished high school and had a criminal record had a 43 percent probability

of getting a job. Whereas, a Black male, with the same characteristics of not finishing high school and a criminal record, had only a seven percent probability of employment. (33RT 5615-5615.)

Based on his review of interviews with appellant Pops's family and data from published sources, Dr. Johnson concluded that the probability and likelihood of appellant Pops engaging in criminal activity was high. (34RT 5642.) Given hypothetical situations identical to appellant Pops's life history—i.e., witnessing lethal violence (seeing a stepfather shot to death), witnessing violence within the family (seeing a mother abused), exposure to physical abuse (beaten by his father), and residential instability (drug abuse by a mother and living with a pimp)—were all examples of what Dr. Johnson testified to as precursors to violence. (34RT 5692-5694.)

C. Appellant Pops Was Briefly Employed with an Organization that Helped Autistic Children

In 1989, Angela Rodriguez ran the Jay Nolan Center in Long Beach, a non-profit program for people with developmental disabilities, which provided community, social, and recreational activities on Saturdays for children and adults with autism. (34RT 5697, 5701-5702.) Angela, appellant Pops's future wife, worked as a staff member at the Center taking small groups out for various recreational activities. (34RT 5698.) Appellant Pops also very briefly worked for the Center as an aide taking autistic children on day-long outings in the community. (34RT 5699-5700, 5703-5704.) Rodriguez recalled that appellant Pops was shy and quiet, but worked well with the autistic children. (34RT 3700.) He appeared to be a stable person, who did not seem to be suffering from the effects of a bad childhood. (34RT 5702.) Rodriguez recalled that appellant Pops left his employment with the Center because he had gotten another job. (34RT 5704.)

ARGUMENT

I. THE IDENTIFICATION PROCEDURES UTILIZED WITH BOWIE WERE NOT UNDULY SUGGESTIVE AND BOWIE'S AND BROWN'S IDENTIFICATIONS WERE NEVERTHELESS RELIABLE UNDER THE CIRCUMSTANCES

Appellants contend they suffered violations of due process because Randy Bowie's and Anthony Brown's identifications of them were tainted by unduly suggestive procedures, and the trial court erred in not excluding the evidence because it was unreliable under the circumstances. More specifically, appellant Pops asserts that the manner in which his photograph was first presented to Bowie resulted in a suggestive identification, and that Brown's identification was also tainted because he saw appellants in court prior to the live lineup. He further asserts that the circumstances under which the witnesses saw appellants made for unreliable identifications. Appellant Wilson focuses his argument on what he deems to be dissimilarities between him and the subjects in the photographic six-pack lineup in which Bowie made his identification because Wilson purportedly had a unique facial feature around his mouth (that Bowie described as a "smirk") that no one else had. Appellant Wilson also makes the same allegation as his co-appellant regarding Brown's identification. (Pops AOB 175-190 [Arg. V]; Wilson AOB 19-73 [Arg. I].)

Except for appellant Pops's claim that the manner in which Detective Reynolds showed the initial photograph of Pops to Bowie was unduly suggestive, all of the other arguments are forfeited because they were either never raised in the trial court or appellants did not seek a ruling from the trial court. Moreover, the claims lack merit. The procedures used with Bowie were not unnecessarily suggestive. In any event, the identifications were reliable under the circumstances, particularly because he had a very good opportunity to view appellants at the carwash. Additionally, under

the totality of the circumstances, Brown's identification of appellant Pops was also sufficiently reliable.

A. Procedural Background of Appellant Pops's Motion, Joined by Appellant Wilson, to Suppress the Identifications Made by Bowie and Brown

Prior to the start of trial, appellant Pops moved to suppress the identifications made by Randy Bowie and Anthony Brown. (3CT 712-717.) Appellant Pops asserted that the Bowie's identification of him was the product of an unduly suggestive procedure because the witness was shown two photographs together and identified Pops. (3CT 714-715.) He further asserted that Brown's identification of appellant Pops at the live lineup and later at the preliminary hearing should be suppressed because the identifications occurred after the witness saw appellants in court. (3CT 715-716.) Appellant Wilson joined the motion at the subsequent suppression hearing. (7RT 622.)

1. Bowie's Testimony at the Suppression Hearing

Bowie testified at the suppression hearing. He described how he walked to the carwash on January 25, 1998—Super Bowl Sunday—and encountered appellants who were sitting in a parked dark-colored car on the right side of the building next to a pay telephone. (7RT 579-583, 622, 626.) Bowie had received a page. When he entered the lot, Bowie went directly to the pay telephone to call the person who had paged him. (7RT 583, 622-623.) He could see Michael Hoard and Shawn Potter inside the building. (7RT 585.) Appellant Pops was seated in the passenger seat of the dark-colored car and appellant Wilson was in the driver's seat. Bowie had "[n]o doubt whatsoever" that appellants were the men he saw. (7RT 580-581.)

As Bowie picked up the receiver of the telephone, appellant Pops, whose position in the car was closest to where Bowie was standing, told Bowie not to move and pointed a Tech Nine gun at him. (7RT 581, 583-

584, 623-624.) Bowie also saw appellant Wilson with a Glock pistol. (7RT 581-582.) While Bowie was held at gunpoint, Jessie Dunn and "Spanky" Hurd arrived. (7RT 585-586, 624.) Hurd was driving his El Camino that had distinctive IROC wheel rims. (7RT 593-594, 604-605.) The two men walked into the building. (7RT 585-586.) Appellants got out of the car while continuing to point their guns at Bowie. They forced him inside the building and made everyone inside lie on the floor. (7RT 584-586.) Bowie got up and ran from the building. As he ran away, Bowie heard gunshots and hid in some bushes until he believed he was safe. (7RT 586-587, 605-606.) Bowie asked some people at a nearby mini storage facility to call the police. He told the people at the storage facility that the carwash had been robbed and his friends had been shot. (7RT 587, 626-627.)

Bowie contacted the police the next day, and was interviewed by Detective Chavers. (7RT 587, 607, 628-629.) He described the passenger of the dark-colored car as a Black male with a dark complexion. (7RT 608-609.) Bowie estimated the passenger was about twenty-five to thirty years old. (7RT 609.) A few days later, Bowie was asked to assist a graphic artist in preparing a composite sketch of the suspects. Bowie, however, was unable to adequately describe the suspects to help the artist prepare sketches. (7RT 610) Bowie told the artist that he could identify the suspects if he saw them again. (7RT 629.)

Then, in February, Bowie was shown a series of photographs by Detectives Reynolds and Chavers. (7RT 588-589, 610-611.) Before viewing any photographs, Bowie signed a victim witness admonition form. (7RT 598.) Bowie sat at a desk in the police department when he viewed the photographs. (7RT 611-612.) He was first shown a mug book with five

pages; each page had four color photographs of different Black men.[69] He thus had viewed a total of 20 photographs at that point. (7RT 588-589, 612.) Bowie did not pick anyone out of those photographs. The detectives next showed Bowie a six-pack photographic lineup. (7RT 590, 613.) He did not identify anyone from the six-pack lineup. (7RT 615.) The detectives then showed Bowie two additional photographs. (7RT 589.)[70] Bowie selected the photograph of appellant Pops and identified him as the passenger in the car. (7RT 589-590, 617-618.) Bowie stated that the man in the photograph was the one who had the Tech Nine gun. (7RT 598.) On a Xerox copy of the two photographs Bowie circled the picture of appellant Pops, dated and initialed the page. (7RT 618-619.) At the suppression hearing, on cross-examination, Bowie noted that he had "seen several pictures . . . not just one." (7RT 613.) Bowie did not recall the sequence in which he was shown the various photographs. (7RT 614-615.)

After making this identification, Bowie saw appellant Pops standing alone putting gasoline in a Camaro at a service station in Long Beach. (7RT 591-592, 620-621.) Bowie was standing across the street from the service station. (7RT 620.) He noted that the IROC wheel rims on the Camaro had belonged to his friend Jessie Dunn, who had been killed at the carwash. (7RT 592-594.) Bowie testified at the hearing, "I got a real good look at [the rims]." (7RT 621.) Bowie immediately called Detective Reynolds and reported what he had just witnessed. (7RT 594-595.)

On February 23, 1998, the detectives showed Bowie a photographic lineup, and he identified appellant Wilson. (7RT 595-597.) Bowie told the detectives that the photograph was of the man he saw sitting in the driver's

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[69] Bowie too was Black as were appellants. (7RT 588-589.)

[70] One of the photographs was of appellant Pops. The other was Don Moseley. (See, e.g., RB, *ante*, at p. 34, fn. 26.)

seat and who had the Glock pistol that was similar to the one carried by Detective Reynolds. Bowie stated, "I know for sure that's him. I know the shape of his mouth. That's the motherfucker. He was the driver." (7RT 597, 627.) When Bowie first went to the police station after the shooting, he did not mention to the detective that he could identify the driver by a "smirk" on his face. (7RT 627-628.)

At a later point, Bowie attended live lineups at the Los Angeles County Jail. (7RT 598-599.) In one lineup, be selected appellant Pops (identifying him as the passenger) and, in another lineup, he picked out appellant Wilson (identifying him as the driver). (7RT 599-602.) At the preliminary hearing, Bowie again consistently identified appellants. (7RT 602-603.)

Prior to the preliminary hearing, a man who identified himself as being from the District Attorney's Office interviewed Bowie. Bowie answered all of the man's questions honestly, and was positive as to his identifications of appellants. After the interview, the man gave Bowie a business card that indicated he was actually from the Alternate Public Defender's Office. (7RT 603-604.)

2. Detective Reynolds's Testimony at the Suppression Hearing

Detective Reynolds also testified at the suppression hearing. He first interviewed Bowie on February 19, 1998. (7RT 632.) Bowie was transported to the Compton Police Department, and sat at a desk in the Detective's Bureau. (7RT 642-643.) Detectives Reynolds and Chavers stood behind Bowie as he reviewed the various photographs. (7RT 643.) Bowie first read a photographic admonition form. (7RT 643.) Detective Reynolds placed the mug book with the 20 photographs in front of Bowie. (7RT 632, 644.) After looking at all of the photographs, Bowie pushed the book aside and said, "None of these." (7RT 632, 644.) He then was

shown the six-pack photographic lineup. (7RT 632, 644-645.) Bowie did not identify anyone in the six-pack lineup. (7RT 645.)

After that, Bowie was shown two loose photographs, one was of appellant Pops. (7RT 632-633, 645-646.) He identified the photograph of appellant Pops. (7RT 634-635.) On cross-examination at the suppression hearing, Detective Reynolds explained that he did not have time to put the photograph of appellant Pops in a six-pack lineup because he had received the photograph from the Long Beach Police Department just before it was shown to Bowie. (7RT 647.) On February 11, 1998, the detective had learned from some informants that appellant Pops had been involved in the murders. (7RT 647-648.) On February 12, 1998, Detective Conant of the Long Beach Police Department stopped appellant Pops in his car and filled out an F.I. card. (7RT 648.)

Appellant Pops's photograph was later put in a photographic lineup. The new lineup array was not shown to Bowie. (7RT 635-636.)

Three days after identifying appellant Pops, Bowie paged Detective Reynolds with a return telephone number followed by "911." (7RT 636.) The detective called the number back and spoke to Bowie, who relayed that he had just seen the passenger suspect (appellant Pops) at a gas station. (7RT 637.)

On February 23, 1998, Detectives Reynolds and Chavers showed Bowie a photographic six-pack lineup, and he identified appellant Wilson. (7RT 637-639.) At the time, Bowie pointed to Detective Reynolds's .40 caliber Glock service pistol and stated that it looked like the gun used by the driver. (7RT 639.) Detective Reynolds recalled that the photographic six-pack lineup containing appellant Wilson's photograph was shown to Bowie at his residence. (7RT 648-649.) Detective Chavers wrote the words that appeared in the comment section of the witness admonition form signed by Bowie. (7RT 650.)

Bowie also attended the live lineups held on June 9, 1998, in which he identified both appellants. (7RT 640-641.)

3. The Trial Court's Ruling as to Bowie; the Suppression Matter Relating to Brown Was Deferred and Not Reasserted

Defense counsel for appellant Pops, Mr. Mizel, argued at the suppression hearing that the manner in which the detectives presented the two loose photographs to Bowie, instead of placing them in a photographic six-pack lineup, was an unduly suggestive procedure. (7RT 651-652.) The court observed, however, that the testimony offered at the hearing showed that the various photographs were simply put in front of Bowie one group after another, and there was no indication that the detectives said anything to suggest that the photograph of appellant Pops was a picture of a suspect. (7RT 651-652.) Appellant Wilson's defense counsel, Mr. Brodie, "submitted" without additional argument. (7RT 652.)

The court denied the motion finding that the utilized "procedure in and of itself [was] not unduly suggestive. And there was nothing in the facts that were presented to [the court] in this particular case to indicate that anything made it so." The court further noted that there was "absolutely no testimony" suggesting that the detectives emphasized to the witness which photograph they thought he should select. (7RT 653.)

As to Anthony Brown, any ruling on the suggestiveness of his pretrial identifications was deferred pending that witness's presence in court to testify on the subject. The prosecutor explained that Detective Reynolds had been working to find Brown and secure his presence in court. Brown had received threatening telephone calls from a jail inmate on appellants' behest. That prisoner, Tracy Batts, had warned Brown not to testify against appellants. The main witness in Batts's own murder case had been recently brutally murdered. Batts had a reputation in the community of being an

extremely dangerous person. Brown thus informed Detective Reynolds that he took the threats seriously. (7RT 653-655.) The prosecutor observed that "it's going to take some time to get [Brown] in" to court. (7RT 655.)

Ultimately, the prosecution was unable to secure Brown to testify. The court found him to be an unavailable witness and his preliminary hearing testimony was read to the jury. (19RT 2985.) At no time did either appellant reassert their claim and ask the trial court to rule on whether Brown's pretrial identifications should be suppressed because they may have been tainted when Brown saw appellants in the courtroom prior to the live lineups.

B. All But One of the Arguments Advanced by Appellants Are Forfeited

As discussed in the foregoing procedural background section, the only argument advanced and ruled upon by the trial court was whether the manner in which the detectives showed appellant Pops's photograph to Bowie was unnecessarily suggestive. Appellant Wilson, however, never objected to the photographic six-pack lineup in which his picture was placed and identified by Bowie as being unduly suggestive due to alleged dissimilarities between him and the other five men pictured. As such, absent a timely and specific objection, the new assertions condemning the admission of this evidence—even if prejudicial—are forfeited. (*People v. Romero* (2008) 44 Cal.4th 386, 411 ["As a general rule, the failure to object to errors committed at trial relieves the reviewing court of the obligation to consider those errors on appeal. This applies to claims based on statutory violations, as well as claims based on violations of fundamental constitutional rights" (internal quotation marks and citations omitted)]; *People v. Partida* (2005) 37 Cal.4th 428, 434; *People v. Cunningham* (2001) 25 Cal.4th 926, 989 [suggestiveness claim forfeited]; *People v. Cain* (1995) 10 Cal.4th 1, 28; *People v. Champion* (1995) 9 Cal.4th 879, 918;

People v. Clark (1992) 3 Cal.4th 41, 127-128; *People v. Green* (1980) 27 Cal.3d 1, 22, fn. 8, overruled on other grounds, *People v. Martinez* (1999) 20 Cal.4th 225, 241.)

All of the arguments relating Brown's identifications are likewise forfeited. Although a motion for an Evidence Code section 402 hearing on the matter was initially advanced in pretrial proceedings, it was deferred in anticipation that Brown's presence in court could be secured. After Brown was found to be an unavailable witness, the trial court ruled that his testimony for the preliminary hearing could be read to the jury. Appellants, however, failed to pursue their objection as to Brown's identifications based on suggestiveness. Accordingly, their failure to pursue a ruling in the trial court has the same effect as a failure to object and the assertions must be deemed forfeited. (*People v. Kaurish* (1990) 52 Cal.3d 648, 680.) In any event, even if the claims are not forfeited (or to preclude a future claim of ineffectiveness of counsel), they are also meritless.

C. Governing Law

Due process requires that a defendant be identified by a method that is fair and reliable under the circumstances. (*Simmons v. United States* (1968) 390 U.S. 377, 384 [due process offended by use of impermissibly suggestive procedures].) An identification of a defendant from a procedure that is "so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification" is constitutionally defective and must be excluded from evidence. (*Ibid.*; *Neil v. Biggers* (1972) 409 U.S. 188, 198 (*Biggers*) [the primary evil to be avoided is a substantial likelihood of misidentification]; accord, *People v. Blair* (1979) 25 Cal.3d 640, 659.) A defendant must show "unfairness as a demonstrable reality, not just speculation." (*People v. DeSantis* (1992) 2 Cal.4th 1198, 1222.)

To determine whether the admission of identification evidence violates a defendant's right to due process of law, a court first considers

whether the identification procedure was unduly suggestive and unnecessary, and, if so, whether the identification itself was nevertheless reliable under the totality of the circumstances. (*People v. Alexander* (2010) 49 Cal.4th 846, 901-902.) "'A procedure is unfair which suggests in advance of identification by the witness the identity of the person suspected by the police.'" (*People v. Ochoa* (1998) 19 Cal.4th 353, 413 (*Ochoa*), quoting *People v. Slutts* (1968) 259 Cal.App.2d 886, 891.)

In determining whether a suggestive identification procedure nevertheless results in a reliable identification, an appellate court reviews the totality of the circumstances under which the identification was made, considering such factors as the opportunity of the witness to view the suspect at the time of the offense, the witness's degree of attention at the time of the offense, the accuracy of his or her prior description of the suspect, the level of certainty demonstrated at the time of the identification, and the lapse of time between the offense and the identification. (*Biggers, supra*, 409 U.S. at pp. 199-200; *Manson v. Brathwaite* (1977) 432 U.S. 98, 114 (*Brathwaite*); *Alexander, supra*, 49 Cal.4th at pp. 901-902; *People v. Cunningham, supra*, 25 Cal.4th at p. 989 (*Cunningham*).)

The constitutionality of an identification procedure presents a mixed question of law and fact. An appellate court reviews "deferentially the trial court's findings of historical fact, especially those that turn on credibility determinations, but [it] independently review[s] the trial court's ruling regarding whether, under those facts, a pretrial identification procedure was unduly suggestive." (*People v. Gonzalez* (2006) 38 Cal.4th 932, 943 (*Gonzalez*).) "Only if the challenged identification procedure is unnecessarily suggestive is it necessary to determine the reliability of the resulting identification." (*People v. Yeoman* (2003) 31 Cal.4th 93, 125 (*Yeoman*).)

D. The Photographic Identification Procedure Used For Bowie In Which Appellant Pops Was Selected Was Not Unduly Suggestive and His Identification Was Nevertheless Reliable Under the Circumstances

Appellant Pops attacks the validity of Bowie's pretrial identification by isolating the last two photographs shown to the witness. (Pops AOB 179-181.) This Court has specifically held, however, that even a single-person showup is not inherently unfair. (*Ochoa, supra*, 19 Cal.4th at p. 413.) As the testimony at the suppression hearing shows, Bowie was actually shown a total of 28 photographs in succession. Although the procedure used here was not what has become the typical manner of showing sets of six-pack arrays, the significantly large total number of photographs shown to Bowie at this sitting weighs against any suggestiveness by the detectives. Moreover, the detectives stood behind Bowie while he sat at a desk, and there is no evidence they made any suggestive comments or pointed to a particular photograph. At trial, Detective Reynolds explained that the last two photographs shown to Bowie were simply placed on top of the second array (i.e., the six-pack) of photographs. (17RT 2597.)

Further limiting any suggestiveness, Bowie read before viewing the 28 photographs the standard witness identification admonition which cautions a witness not to assume that the photograph of a suspect is in the group of photographs.[71] (7RT 598, 643.) Bowie himself understood that

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[71] The admonition given to Bowie read as follows: "You will be asked to look at a group of photographs. The fact that the photographs are shown to you should not influence your judgment. You should not conclude or guess that the photographs contain the picture of the person who committed the crime. You are not obliged to identify anyone. It is just as important to free innocent persons from suspicion as to identify guilty parties. Please do not discuss the case with other witnesses nor indicate in any way that you have identified someone." (17RT 2598-2599.)

the photographs were given to him to view as a group. At the suppression hearing on cross-examination, Bowie insisted that he had "seen several pictures . . . not just one." (7RT 613.) He did not even specifically recall the order in which the various photographs were given to him. (7RT 614-615.)[72] As the trial court observed, there is nothing in the record to suggest that the detectives did anything to influence Bowie before he made his initial identification of appellant Pops. The challenged procedure was therefore not impermissibly suggestive, and the inquiry into the due process claim ends. (*Ochoa, supra*, 19 Cal.4th at p. 412.)

Even if the Court were to find the procedure utilized was somewhat suggestive, employing the nonexclusive factors described by the United States Supreme Court in *Biggers* and *Brathwaite*—and which were adopted by this Court in *Alexander* and *Cunningham*—Bowie's identifications were sufficiently reliable under a totality of the circumstances. The record clearly shows that Bowie had a very good and extended opportunity to observe appellants at close range. When Bowie arrived in the morning at the carwash, he walked to the pay telephone located directly next to where appellants were sitting in the dark-colored Honda—parked a mere three or four feet away. (12RT 1526-1527.) Appellant Pops, who was in the passenger seat and closest to Bowie, first drew Bowie's attention by pointing a Tech Nine gun and telling him not to move. (12RT 1528.) Appellant Wilson also pointed his Glock pistol at Bowie. (12RT 1529.)

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[72] Appellant Pops's assertion that only one of the two photographs matched Bowie's description of appellant Pops (Pops AOB 183-184), is unavailing because some of the other photographs in the total number could also be said to resemble Bowie's description of the other suspect. Moreover, at the time, the detectives were looking for two suspects, and Bowie's descriptions of them were distinctly different. Thus, nothing in the manner in which the photographs were shown to Bowie "suggested" any particular one.

This encounter lasted for a significant period of time as Bowie stood looking at appellants while Dunn and Hurd arrived in their respective cars, parked, and each walked into the building. (12RT 1515-1516, 1556-1558, 1609-1610, 1636; 13RT 1728-1729; 17RT 2579-2582.) Bowie then had additional time to observe appellants as they got out of the car, grabbed him, and forced him into the building at gunpoint. (12RT 1516-1517, 1519-1520, 1580.) There were no issues of lighting conditions as Bowie saw appellants outside in broad daylight.

Bowie was certain of his identification. Immediately upon seeing appellant Pops's photograph, Bowie became emotional and began to cry. He repeatedly poked his finger at the photograph and emphatically stated, "That's the motherfucker right there, that's him, that's the motherfucker." (17RT 2598.) He told the detectives that the man in the photograph was the one who sat in the passenger seat and pointed the Tech Nine gun at him. (12RT 1538-1540; 17RT 2599-2600.) This identification occurred a relatively short time—25 days—after Bowie first encountered appellants. (17RT 2593-2594.) (See *United States v. Rivera-Rivera* (1st Cir. 2009) 555 F.3d 277, 284-285 [finding that six months between crime and in-court identification is "*de minimis* compared to other cases"].) Both Bowie and appellants were Black, thus reducing any cross-racial infirmities in his identifications. (See, e.g., *Arizona v. Youngblood* (1988) 488 U.S. 51, 72, fn. 8 ["'Cross-racial identifications are much less likely to be accurate than same race identifications'"]; *People v. Reyes* (2008) 159 Cal.App.4th 214, 221 [two Hispanic witnesses identified Hispanic suspect, "reducing any cross-racial infirmities in their identifications"]). Bowie was also certain of his identification when he saw appellant Pops at a gas station three days later, and immediately contacted Detective Reynolds. (12RT 1540-1543, 1555-1556; 17RT 2606-2607.) He was again certain of his identification at the live lineup. (12RT 1550-1553.) Given the totality of the circumstances

under which he initially had contact with appellants and his degree of certainty at the time when he first viewed the photograph of appellant Pops, Bowie's identification was reliable.

E. Any Error Concerning Bowie's Identification of Appellant Pops Was Harmless

Here, the jury heard extensive testimony concerning the identification process, and the jury was made fully aware of any potential problems relating to suggestiveness. Bowie was thoroughly cross-examined about his initial descriptions of the suspects, his inability to assist a sketch artist, and his later selection of appellant Pops's photograph. (12RT 1597-1607, 1647-1648, 1658-1661.) Detective Reynolds was also examined about the manner in which he showed Bowie the last two photographs without using a six-pack or larger array and any potential for suggestiveness. (17RT 2593-2602, 2641-2645; 20RT 3965-3966.) Any error resulting from the admission of evidence regarding the witness's pretrial identification was rendered harmless by this testimony. (See *Brathwaite, supra*, 432 U.S. at p. 116. ["eyewitness identification evidence, is for the jury to weigh. . . . Juries are not so susceptible that they cannot measure intelligently the weight of identification testimony that has some questionable feature"]; *Simmons v. United States, supra*, 390 U.S. at p. 384 [danger of misidentification substantially lessened by cross-examination at trial that exposes method's potential for error]; *People v. Gordon* (1990) 50 Cal.3d 1223, 1243-1244 ["It may well be, as defendant strenuously urges, that [the witness'] identification was not the most reliable. But the admission of such testimony does not violate due process in and of itself. . . . Here defense counsel did indeed cross-examine [the witness] on her identification and argued against its reliability, and did so vigorously. There was no denial of due process"].)

The jury was also properly instructed on how to evaluate the witnesses' testimony. It was instructed as to witness credibility (29RT 4750-4751; 5CT 1177 [CALJIC No. 2.20]), discrepancies in testimony (29RT 4752; 5CT 1178 [CALJIC No. 2.21.1]), weighing conflicting testimony (29RT 4753; 5CT 1180 [CALJIC No. 2.22]), and the presumption of innocence and the prosecution's burden of proving guilt beyond a reasonable doubt (29RT 4760-4761; 5CT 1191 [CALJIC No. 2.90]). In particular, the jury was instructed as to both the prosecution's burden of proving identity based solely on eyewitnesses (29RT 4761-4762; 5CT 1192 [CALJIC No. 2.91]) and the factors to consider in proving identity by eyewitness testimony (29RT 4762-4764; 5CT 1193-1194 [CALJIC No. 2.92]). The jury is presumed to have followed the instructions. (*People v. Sanchez* (2001) 26 Cal.4th 834, 852; *People v. Hill* (1992) 3 Cal.4th 959, 1011, overruled on other grounds in *Price v. Superior Court* (2001) 25 Cal.4th 1046, 1069, fn. 13.)

Moreover, overwhelming evidence—which also corroborated Bowie's testimony—makes any error in the admission of the pretrial identification harmless. First, Williams—whose identifications of appellants were not challenged as suggestive in the trial court—had an extended opportunity to view the suspects. Appellant Wilson's attempt to discredit Williams's identification of him (Wilson AOB 59-68) is not persuasive. When Williams first arrived at the carwash, he saw appellants sitting in the dark-colored Honda parked next to the shop just as described by Bowie. (13RT 1703-1706, 1733.) Williams identified appellant Pops as the suspect sitting in the passenger seat of the car and appellant Wilson as the driver. (13RT 1705-1706, 1711-1712, 1761.) When Williams left the shop, he approached appellants, who were still sitting in the car, and engaged them in a conversation. (13RT 1705, 1712-1714.)

Appellant Wilson's assertion that Williams had but a fleeting look at appellants is not accurate. (Wilson AOB 62-63.) Williams's testimony, read in context, was that although he did not stare at the suspects for an extended length of time, he did make several glances at them as he passed by their car two or three times to put water in the radiator of his truck that was parked nearby. (13RT 1711, 1811.) Further, Williams did not, as appellant Wilson suggests (Wilson AOB 62-63), view the suspects through a tinted window. The windows of the car were rolled down. (12RT 1642 [passenger side window open]; 19RT 2994-2995, 3012-3013, 3021 [driver's side door window open].) Thus, Williams was able to have a conversation with appellants as they sat in the car.

The record here also suggests that although Williams indicated a photograph of Gerron Malone (Peo. Exh. 47 in position number one) looked similar to one of the suspects, he did not definitively identify Malone as the driver. (13RT 1719-1721; 17RT 2611, 2647-2648; 18RT 2702-2703; but see 18RT 2730-2733.)[73] It appears that Williams further indicated that appellant Wilson's photograph in the six-pack array (Peo. Exh. 50) also looked similar to the driver. (13RT 1772-1774.) Appellant Wilson's argument also contradicts itself to a certain extent. On one hand appellant Wilson argues that the passage of time between the crime and the live lineup precluded an accurate identification by Williams. But, on the other, he suggests that his appearance in the photograph six-pack (Peo. Exh. 50) shown to Williams around the same time period as the murders was suggestive and led to his identification at the live lineup. (Wilson AOB 66-67.) Appellant Wilson has made no showing that the inclusion of his

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[73] Nevertheless, a comparison of Malone's photograph (Peo. Exh. 47) with appellant Wilson's photograph in position number two of People's Exhibit 50, reveals remarkable similarities between the two men.

photograph in a six-pack lineup four months before the live lineup tainted Williams's subsequent identification. (*People v. Cook* (2007) 40 Cal.4th 1334, 1355; *People v. DeSantis, supra,* 2 Cal.4th 1198 at p. 1222 ["'Defendant bears the burden of showing unfairness as a demonstrable reality, not just speculation'"]; *People v. Phan* (1993) 14 Cal.App.4th 1453, 1461.) Nor was appellant Wilson's complexion "lighter and brighter" than the other lineup participants as he asserts. (Wilson AOB 66.) All of the men in appellant Wilson's lineup were similar in complexion, height, facial features, and hair styles. (See Peo. Exh. 67 [photograph of Lineup No. 6].) A more likely and reasonable take on the situation was that Williams identified appellant Wilson at the live lineup because he saw him *in person* at the carwash on the day of the murders. Such was an "apples- to-apples" comparison. Given his opportunity to view appellants and interact with them at the carwash, Williams's identification of them at the live lineups and in court should not be discredited.[74]

Brown too had a good opportunity to view appellant Pops as he was leaving the building after the shootings. (19RT 2993-2997, 3006-3007, 3012, 3018-3022, 3027, 3081-3085.) Although Brown's identifications are challenged on appeal as the product of suggestive lineups (discussed *post*), he nevertheless described the very same type of weapon—a nine-millimeter Tech Nine—that Bowie identified as the gun brandished by appellant Pops and ultimately used to kill Dunn. (19RT 2858, 2866-2869, 2880-2883, 2994-2995, 3012-3013, 3021, 3050.) Brown's accurate identification of the

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[74] That Williams admitted lying during the preliminary hearing about selling marijuana at the carwash has no impact on his identifications, as appellant Wilson suggests. (Wilson AOB 59-62.) Williams explained, he lied in order to avoid a possible revocation of his probation. (13RT 1707-1709.) This untruth had nothing to do with Williams's powers of observation.

weapon used by appellant Pops reinforces both Bowie's and Brown's identifications of Pops. Brown also described appellant Pops's unique braided hairstyle and dark complexion when he was interviewed by the police shortly after the shootings. (19RT 3030-3031.)

Barnes's testimony and pretrial statements too are powerful evidence of appellants' guilt. Barnes was a close friend of appellant Pops and his brother Harris. (13RT 1868, 1871; 14RT 1983.) Barnes and Harris attended the Super Bowl Sunday barbeque at the residence in Cerritos that belonged to appellant Pops's relatives. (13RT 1874-1876; 17RT 2627; 18RT 2759, 2802.) From there, appellants dispatched Barnes and Harris to burn Dunn's El Camino parked in an alleyway a mere five-tenths of a mile away. When the El Camino was burned, it no longer had on it the chrome IROC rims. (13RT 1869-1870, 1877-1886, 1966-1967; 17RT 2626-2628, 2641; 18RT 2765-2767; Peo. Exhs. 41A-41E [photographs of the burned El Camino]; Supp. II CT 104-106, 109-110 [interview transcript].)

Not long thereafter, appellant Pops put the chrome IROC rims taken from the El Camino on his Camaro. (12RT 1554-1557, 1608; 14RT 1948, 1951-1952, 1954-1955; 15RT 2119-2020, 2126-2127, 2150-2151; 17RT 2621-2622; 18RT 2755-2758; Supp. II 1CT 112-114 [Peo. Exh. 84-F (interview transcript)]; Peo. Exhs. 42A-42D.)

Further, appellant Pops was connected to appellant Wilson's apartment through drawings and the list of monikers in the writing tablet found on Wilson's kitchen table. Some of the drawings depicted appellant Pops standing with his Camaro fitted with the stolen IROC rims, Pops holding a Glock pistol, and a forearm with the same "Y M O" initials as Pops's forearm tattoos and firing a Tech Nine gun. The list with the monikers included that of appellants, Harris, and Barnes. (13RT 1865-1868; 14RT 1958-1959, 1961-1963, 1983-1984 ; 15RT 2124, 2170-2174, 2179; Peo. Exhs. 34A-34C, 68A-E.) The list of monikers was written close

in time to the shootings because it reflected that Barnes was incarcerated at the time of its making, and Barnes was in custody in March 1998. (13RT 1959-1960.)

Also found under the couch cushion at appellant Wilson's apartment was the unexpended nine millimeter cartridge round that had been worked through the ejector of the very same firearm (i.e., the Tech Nine) used in the murders. (15RT 2164-2165; 19RT 2870-2872, 2885, 2889.)[75] Further connecting appellants to the carwash murders was the front page of the newspaper folded and stored inside the photo album on the table in the living room. This trophy of appellants' misdeeds reported the four grisly murders and was dated the day after the shootings. (15RT 2167-2168, 2183; Peo. Exh. 70.)

Inside appellant Wilson's wallet was a business card from a gun store. Written on the back of that card were two different models of Glock pistols and their prices. (16RT 2247-2248.) This tended to suggest that appellants had disposed of the murder weapons, and appellant Wilson was looking to purchase a replacement Glock pistol. (16RT 2247-2248.) Further suggesting that appellants rid themselves of items connected to the murders was the empty K-Swiss tennis shoe box found in appellant Wilson's closet. (15RT 2166-2167.) The shoes that had been in the box were size 10 and a half, and the defense shoeprint expert could not eliminate that type and size of shoe as having left some of the bloody shoeprints at the scene. (21RT 3234, 3240-3242; 27RT 4398.)

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[75] While there is no way to determine when the round was deposited there, it is noteworthy that the gun jammed when appellant Pops attempted to shoot Brown. (19RT 2995-2996, 3021.) The jam could have been cleared after the murders when appellants returned to the apartment. The firearms expert also noted that Tech Nine firearms had a tendency to jam. (19RT 2890-2892.)

Given the state of the evidence here, any error in admitting Bowie's pretrial identification of appellant Pops was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24 (*Chapman*); see also *People v. Carlos* (2006) 138 Cal.App.4th 907, 912 [applying *Chapman* standard to erroneous admission of identification evidence]; cf. *People v. Rodriguez* (1994) 8 Cal.4th 1060, 1119, fn. 22; *People v. Sandoval* (1977) 70 Cal.App.3d 73, 86.)

F. Identification Procedure Used For Appellant Wilson Was Not Unduly Suggestive, and Bowie's Identification Was Nevertheless Reliable

Appellant Wilson too contends that Bowie's pretrial identification of him was tainted by suggestiveness. He adopts appellant Pops's argument. (Wilson AOB 21, fn. 9.) Appellant Wilson additionally contends that the photographic six-pack lineup was unduly suggestive because his mouth is unusually shaped—which Bowie described as a "funny shaped mouth" and a "smirk." Appellant Wilson argues that the men in the other five photographs did not have this facial feature. He also asserts that the subjects in the other photographs were significantly dissimilar based on skin complexion and hair, thus making appellant Wilson's photograph stand out. (Wilson AOB 23-35.) Appellant Wilson further asserts that Bowie's identification of him was unreliable for various reasons, including arguments that the witness could not clearly see the driver of the car (i.e., appellant Wilson) from his position standing next to the passenger side, a potential weapons focus, an inadequate description of the driver to the police, that Bowie's certainty should not be credited, and the interval of one month between Bowie's observations and picking Wilson's photograph was too long to permit an accurate identification. (Wilson AOB 36-48.) As noted above, however, appellant Wilson never argued in the trial court that his photograph was dissimilar to the other subjects in the photographic six-

pack lineup or that Bowie's identification of him was unreliable for the above reasons. Since these theories were not advanced below, they are forfeited now on appeal. Nevertheless, the claim lacks merit.

A valid lineup does not require that a defendant be surrounded by people "'nearly identical'" in appearance. (*People v. Wimberly* (1992) 5 Cal.App.4th 773, 790.) "Nor is the validity of a photographic lineup considered unconstitutional simply where one suspect's photograph is much more distinguishable from the others in the lineup." (*People v. Brandon* (1995) 32 Cal.App.4th 1033, 1052.) The courts have upheld the validity of lineup identifications despite disparities among the participants. (See, e.g., *People v. Johnson* (1992) 3 Cal.4th 1183, 1215-1218 [the defendant was the only person in jail clothing]; *People v. DeSantis*, *supra*, 2 Cal.4th 1198 at p. 1222 [the defendant was the only man in a red shirt]; *People v. Guillebeau* (1980) 107 Cal.App.3d 531, 556-557 [defendant had the darkest skin color].) Consequently, a photographic lineup will not be deemed unduly suggestive where the defendant's picture "was similar to that of the others." (*Cunningham, supra*, 25 Cal.4th at p. 990.)

In *People v. Smith* (1980) 109 Cal.App.3d 476, the court rejected a similar claim where the defendant was the only individual in a six-person lineup with a bad eye. The court found it "questionable whether the mere fact that the defendant was the only person in the photographs with a bad eye was improperly suggestive, as it represents only one of many physical characteristics of a face which could be readily identifiable. The difficulty of finding photographs of individuals with bad eyes similar to that of defendant is also apparent." (*Id.* at p. 487.)

Gonzalez, supra, 38 Cal.4th 932, is also instructive. There, the defendant claimed that a photographic lineup was unduly suggestive because (1) he was the only subject wearing gang-type clothing; (2) he had a "droopy eye" in the photograph; and (3) his photograph was discolored.

(*Id.* at p. 943.) This Court rejected the contentions, explaining nothing about any of the photographs suggested that the defendant's picture should be picked over the others. (*Ibid.*)

> "Because human beings do not look exactly alike, differences are inevitable. The question is whether anything caused defendant to 'stand out' from the others in a way that would suggest the witness should select him." [Citation.] Here, nothing in the lineup suggested that the witness should select defendant. . . . We cannot discern any significant distinctiveness about defendant's eye. In any event, none of the witnesses described the gunman as having a distinctive eye, so any distinctiveness in the photograph would not suggest the witness should select that photograph. Moreover, "it would be virtually impossible to find five others who had" a similar eye "and who also sufficiently resembled defendant in other respects." [Citation.]

(*Ibid.*)

Here, an independent review of the photographic six-pack lineup that included appellant Wilson's picture shows there is nothing particularly remarkable about any of them. (Peo. Exh. 50.) All six men in the array are generally similar in appearance. All are Black men with lighter complexions. They all appear to be around the same age, with short hair styles and similar facial features. While appellant Wilson (position number two) appears to have full lips, there are no scars or other types of disfigurements around his mouth or on his face. Remarkably, five of the six photographs depict young men with similar full upper and lower lips (i.e., positions one, two, three, five, and six). The man in position number four has a full lower lip and a thinner upper lip. Nothing of significance stands out in any of the photographs in the six-pack array.[76] Even if the

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[76] The only photograph that could be said to somewhat stand out is in position number five because that individual's eyes are slightly elongated (continued...)

shape of appellant Wilson's mouth is somewhat different, as the Court has noted, "it would be virtually impossible to find five others who had" a particularly unique facial feature "and who also sufficiently resembled defendant in other respects." (*Gonzalez, supra*, 38 Cal.4th at p. 934.) In sum, the facial characteristics among the six men were no more marked than those which normally distinguish one person from another.

The record here tends to suggest that during his first interview with Detective Chavers, Bowie did not described the driver suspect as having an odd shaped mouth. (See 12RT 1596-1599, 1648.) On cross-examination, after attempting to have Bowie refresh his recollection with the detective's report, defense counsel asked the following: "So on January 26th, 1998, you did not tell Detective Chavers that you could recall the shape of the driver's mouth? Bowie responded, "I don't recall." (12RT 1648 .) Williams too did not mention anything about the shape of the driver's mouth to the detectives. Apparently, it was only *after* viewing the array that Bowie first said he found the shape of appellant Wilson's mouth significant. Under the circumstances, "any distinctiveness in the photograph would not suggest the witness should select that photograph." (*Gonzalez, supra*, 38 Cal.4th at p. 943.)

But, even if the photo array was unduly suggestive, for the exact same reasons discussed above, Bowie's identification of appellant Wilson was also reliable. Bowie had a good opportunity to view both appellants for an extended period of time and in close proximity. Moreover, he was just as certain of his identification of appellant Wilson. When he was shown the array that contained appellant Wilson's photograph, Bowie became very

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(...continued)
giving them an Asian appearance, and his hair his more bushy than the others. But his lips, skin tone, and age are consistent with the others.

excited and identified Wilson's picture as the man who sat in the driver's seat and pointed the Glock pistol at him. (12RT 1547-1549, 1563, 1661; 17RT 2604-2606; Peo. Exh. 50.) The same facial feature of appellant Wilson's mouth that he asserts was so distinctive as to make the photographic array suggestive, would necessarily tend to make misidentification unlikely. Bowie was equally certain of his later identification at the live lineup. (12RT 1553-1554.) Just 30 days had passed between the shooting and the identification. (17RT 26003.) Additionally, Bowie's descriptions of the suspects—that the driver had a lighter complexion than the passenger who had a dark complexion, that the driver was short as compared to the passenger, and that the passenger had braided hair—were accurate. (12RT 1596-1599)

Where the totality of the circumstances does not suggest there is a substantial likelihood of irreparable misidentification, identification properly becomes an issue of credibility for the jury at trial. (*People v. Arias* (1996) 13 Cal.4th 92, 168; *Brathwaite, supra*, 432 U.S. at p. 116.) Here, as discussed, the *Biggers* factors indicate Bowie's identifications of appellants were reliable, and therefore the trial court did not err when it allowed the identifications to go to the jury.

The circumstances of the identifications were disclosed to the defense and subject to thorough cross-examination. (See *Alexander, supra*, 49 Cal.4th at p. 903.) The jury was able to evaluate the reliability of the identification, by evaluating the Bowie's credibility, comparing the descriptions of the suspects to appellants' physical characteristics and viewing the photographs of appellants that had been shown to Bowie. "'Juries are not so susceptible that they cannot measure intelligently the weight of identification testimony that has some questionable feature.'" (*Ibid.*, quoting *Brathwaite, supra*, 432 U.S. at p. 116.)

Moreover, the same overwhelming evidence of appellants' guilty, the jury instructions given as to witness identification, and the cross-examination of the witnesses on the subject discussed in subpart E, *ante*, renders any infirmity with the Bowie's pretrial identification of appellant Wilson harmless.

G. Brown's Identification of Appellant Pops Was Reliable Under the Circumstances, and His Identification of Appellant Wilson Was So Equivocal As Not To Even Constitute An Identification

Appellants also assert that it was error for the trial court not to exclude Brown's identifications, and this failure violated due process. (Pops AOB 181-182, 186; Wilson AOB 48-54.) As discussed above, appellants' claims are forfeited because they did not seek a ruling from the trial court on the admissibility of Brown's identifications. Nevertheless, Brown's identification of appellant Pops was reliable under the circumstances, and because the witness offered such an equivocal identification of appellant Wilson, it was essentially not an identification at all.

1. Background Relating to Brown's Identifications

On February 11, 1998, Brown was shown the five-page mug shot booklet of photographs prepared by Detective Reynolds. (19RT 3058-3055; 25RT 4109[77] [Peo. Exh. 51].) He did not identify anyone, but indicated some pictures looked similar to the suspects. (19RT 3056-3057.) The next day, February 12, Brown was shown the photographic six-pack lineup that did not include either of appellants' pictures. Malone's picture was in position number one. (17RT 2610; 19RT 3058-3060; 25RT 4109 [Peo. Exh. 47].) Brown indicated that the person in position number one—Malone—best fit the description of the man he saw driving the El Camino.

[77] Stipulation identifying the preliminary hearing exhibits by the current trial exhibit numbers and letters.

He said, "I think no. 1 was the driver of the El Camino." (19RT 3060-3062.)

On February 24, 1998, the photographic six-pack lineups that contained appellant Pops's picture in position number five (Peo. Exh. 48), and the one with appellant Wilson's picture in position number two (Peo. Exh. 50), were shown to Brown. Brown said that he could not identify anyone from either array. (17RT 2600-2601; 24RT 3970-3971, 3975-3976; 25RT 4108-4110 [trial exhibit numbers corresponding preliminary hearing exhibits].) As to the photographic six-pack lineup that included appellant Pops's picture, Brown indicated that Pops's photograph "looks closets to the dark guy but he is too light and too tall." (19RT 3062, 3080-3081; 24RT 3976.) Brown told the detectives that he could not positively make an identification from a photograph, but that the man in the picture most closely fit his description. (19RT 3081-3082, 3087.) Brown made his comments to the detectives after considering the person's size and body structure as reflected in the photograph. Brown did not believe the man in position number five was the correct height. (19RT 3063-3065.)

When Brown viewed the other lineup (Peo. Exh. 50), he said that the man in position number two—appellant Wilson—had the same complexion as the light-skinned suspect. (24RT 3978-3977.)[78] Brown stated, however, "I can't say for sure that it's him. I really didn't get a good look at him." (24RT 3977.)

Brown had been subpoenaed to appear on for the preliminary hearing scheduled for May 20, 1998. Appellants were present in the courtroom on

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[78] A comparison of the photograph in position number one of People's Exhibit 47 (originally chosen by Brown as the suspect driving away in the El Camino) with appellant Wilson's photograph in position number two of People's Exhibit 50, reveals remarkable similarities between the two men.

that date, and the preliminary hearing was continued to June 23, 1998. (18RT 2679-2680; 19RT 3077-3078; 1CT 61-75.)

At the live lineups held on June 9, 1998, Brown picked out appellant Wilson due only to his complexion. (19RT 3008; see 17RT 2619-2620; Peo. Exh. 67.) Brown wrote on the witness identification card, "I only viewed from behind and a quick view of face but fits best description of lineup . . . ." (19RT 3286-3087.) Brown later testified that he could not tell for certain if appellant Wilson was the person he saw driving away in Dunn's El Camino. (19RT 3082.)

At the live lineup, Brown positively identified appellant Pops as the person who pointed the Tech Nine gun at him after leaving the building and who drove away in the Honda. (19RT 3008; see 17RT 2619; Peo. Exh. 66.) Brown testified that he had no doubt of his identification of appellant Pops. (19RT 3081-3082.)

2. Analysis: Identifications Were Reliable Under the Circumstances

Here, respondent assumes for the sake of argument that the identification procedure was suggestive to some degree because Brown likely, but inadvertently, saw appellants in the courtroom prior to the live lineups. (*Alexander, supra*, 49 Cal.4th at p. 902.) Nevertheless, under a totality of the circumstances, the pretrial and in-court identifications were sufficiently reliable to be considered by the jury.

First, as to appellant Wilson, Brown admittedly had but a fleeting glance of the suspect with the light complexion when he drove away in Dunn's El Camino. Brown consistently was unable to identify appellant Wilson. In the photographic six-pack lineup (Peo. Exh. 50), shown to Brown in February 1998, *before* Brown first saw appellants in the courtroom, he tentatively picked appellant Wilson's photograph only because the person in the picture had the same complexion as the light-

skinned suspect. (24RT 3978-3977.) Even after presumably seeing appellant Wilson in court, Brown would only state at the live lineup that Wilson's complexion was similar to the person he observed. (19RT 3086-3087.) Brown's testimony was even more equivocal as he could not say for certain that it was appellant Wilson who drove away in the El Camino. (19RT 3082.) Simply, where a witness does not identify a defendant in court, the photographs or live lineup viewing could not have tainted the later in-court testimony relating to identification. (*Alexander, supra*, 49 Cal.4th 902.) Moreover, the limits of Brown's identification of appellant Wilson were apparent to the jury. (*Id.* at p. 903.)

As to appellant Pops, Brown had a good opportunity to view him as he left the building after the murders. Brown looked at appellant Pops, made eye contact with him, and gestured indicating his perplexity at what he had just witnessed with the man driving away in Dunn's car. (19RT 2993, 3018-3020, 3081-3082.) Brown watched appellant Pops get into the driver's side of the dark-colored Honda. (19RT 2993-2994, 2996-2997, 3006-3007, 3012, 3020-3022, 3027.) He then saw appellant Pops point the Tech Nine gun at him. Fortunately for Brown, the gun jammed. (19RT 2994-2995, 3012-3013, 3021.) Brown thus had an extended opportunity to view appellant Pops in broad daylight. There were no cross-racial issues. That Brown could accurately identify the type of firearm used by appellant Pops further demonstrated an attention to detail. Brown also indicated that the photograph of appellant Pops from the six-pack lineup looked quite similar to the suspect. (17RT 2600-2601; 19RT 3062, 3080-3082, 3087; 25RT 4109 [Peo. Exh. 48].) Based on a totality of the circumstances under which Brown saw appellant Pops at the crime scene, his live lineup and in-court identifications were reliable. Moreover, for the reasons discussed in subpart E, *ante*, the other evidence of appellants' guilt was overwhelming and any error must be considered harmless.

II. APPELLANT POPS HAS FORFEITED HIS *WADE-GILBERT* CLAIM AS TO WITNESS BROWN'S IDENTIFICATION, NOR WAS AN "ILLEGAL LINEUP" HELD WHEN BROWN MAY HAVE INADVERTENTLY SEEN APPELLANTS IN THE COURTROOM PRIOR TO THE LIVE LINEUP

As discussed in the proceeding argument, it appears Brown entered the courtroom when appellants were present with their attorneys on a day that the preliminary hearing was scheduled to start, but was ultimately continued. This happened after Brown indicated that a photograph of appellant Pops in an array looked similar to the man with the Tech Nine gun, but before Brown conclusively identified Pops at the live lineup held at the county jail.

Appellant Pops now contends that Brown's entrance into the courtroom was the equivalent of a live lineup, and he was essentially denied his Sixth Amendment right to counsel because his attorney did not know Brown was in the courtroom. Appellant Pops asserts that it was error not to exclude Brown's subsequent identification because the prosecutor did not show by clear and convincing evidence that the identification had a source independent of the "illegal lineup" in court. (Pops AOB 191-197 [Arg. VI].) The claim is forfeited, however, as it was not raised in the trial court. In any event, Brown's unexpected entrance into the courtroom was not a formal lineup invoking the constitutional principles asserted by appellant Pops. Nevertheless, clear and convincing evidence suggests Brown's identification of appellant Pops was the product of seeing him at the carwash on the day of murders, and not the result of an in-court viewing.

Under the Sixth Amendment to the United States Constitution, a defendant has a right to have counsel present at a live lineup held after criminal proceedings have commenced. (*United States v. Wade* (1967) 388 U.S. 218, 236-237 (*Wade*); *Gilbert v. California* (1967) 388 U.S. 263, 272-

273 (*Gilbert*); see also *Moore v. Illinois* (1977) 434 U.S. 220, 224-227; *Kirby v. Illinois* (1972) 406 U.S. 682, 689; *People v. Cook, supra*, 40 Cal.4th at pp. 1352-1353.) The rules requiring the presence of counsel "were adopted for two primary reasons: to enable an accused to detect any unfairness in his confrontation with the witness, and to insure that he will be aware of any suggestion by law enforcement officers, intentional or unintentional, at the time the witness makes his identification." (*People v. Williams* (1971) 3 Cal.3d 853, 856.) When a live lineup violates a defendant's Sixth Amendment rights, evidence of identifications made at the lineup is subject to a *per se* exclusionary rule. (*Gilbert*, at pp. 272-273; *Wade*, at pp. 236-237; *People v. Yokely* (2010) 183 Cal.App.4th 1264, 1271-1272.) A witness who participated in such an improper lineup may only identify the defendant at trial if the prosecution establishes by clear and convincing evidence that the in-court identification had an origin independent of the improper lineup. (*Wade, supra*, at p. 241; *Yokely, supra*, at pp. 1272, 1276.)

A. Forfeiture

The claim is forfeited. The record here indicates that the defense did not object to, or move to strike or suppress, the identification evidence on *Wade-Gilbert* grounds. Rather, the defense claimed only that a prior in-court viewing of appellants made the later live lineup suggestive. (See 3CT 715-716.) Moreover, as noted *ante*, the defense never sought a ruling from the trial court on the suggestiveness issue relating to Brown. "It is now well established that the issue of the presence of counsel at lineup or showup confrontations cannot be raised for the first time on appeal." (*People v. Najera* (1972) 8 Cal.3d 504, 515-516, citing *People v. Williams* (1970) 2 Cal.3d 894, 909; see *People v. Martin* (1970) 2 Cal.3d 822, 828-830; see also *People v. Elliott* (1977) 70 Cal.App.3d 984, 997.) As explained in *Najera* and *Williams*, had appellant Pops objected to this

evidence on *Wade-Gilbert* grounds, the prosecution would have had the opportunity to show that Brown's in-court identification of appellant Pops had an origin independent of the previous viewing in court. (*Wade, supra*, 388 U.S. at p. 241.)

B. The *Wade-Gilbert* Rules Are Inapplicable As No State-Sponsored Lineup Occurred

Speaking for the court in *Stovall v. Denno* (1967) 388 U.S. 293, 297, Justice Brennan said: "*Wade* and *Gilbert* fashion exclusionary rules to deter law enforcement authorities from exhibiting an accused to witnesses before trial for identification purposes without notice to and in the absence of counsel." Respondent submits that where there is no state action initiating a lineup, but merely by happenstance that a witness walks into a courtroom where defendants are present, the exclusionary rules announced in *Wade* and *Gilbert* are not applicable. In the case at bar, the evidence suggests that Brown, who was in the courthouse because the preliminary hearing was schedule to begin and he was a witness, entered the courtroom on his own accord. There is absolutely no evidence that the prosecution had asked Brown to enter the courtroom to view appellants.

C. Brown's Identification Was From An Independent Origin

The record here strongly indicates Brown's identification came from seeing appellant Pops at the carwash on the day of the murders. As discussed *ante*, the same factors that demonstrate the reliability of Brown's identification are applicable here. Brown had an excellent opportunity to view appellant Pops at the carwash, and described him and the type of gun he carried. Then, in February 1998, Brown was shown a photographic lineup that contained appellant Pops's picture. Brown indicated that appellant Pops's photograph looked similar to the man he saw leaving the carwash and who pointed the Tech Nine gun at him. But, likely due to the

lighting in the photograph, and mere assumptions about the subject's size, Brown said, "Number five [photo of Pops] looks the closest to the dark guy, but he is too light and too tall." (19RT 3062, 3080-3082.)

Moreover, if the identification were based on Brown's viewing in court, Brown would have also unequivocally identified appellant Wilson as the man he saw driving away in Dunn's El Camino. Brown presumably had the same opportunity to see appellant Wilson as he did appellant Pops in the courtroom. Instead, it is clearly apparent that the source of his identification was from the carwash as Brown refused to identify appellant Wilson, only noting that his complexion was similar to the other suspect he briefly saw.

In any event, assuming arguendo that Brown's identification testimony regarding appellant Pops should have been excluded, there was no harm under any standard since Brown's identification testimony was to a large extent cumulative of Bowie's and Williams's. Moreover, as noted *ante*, there was additional and overwhelming evidence that appellants committed the carwash murders. (*Chapman, supra*, 386 U.S. at p. 24; *People v. Watson* (1956) 46 Cal.2d 818, 836 (*Watson*) [reversal is not compelled unless "it is reasonably probable that a result more favorable to [appellant] would have been reached in the absence of the error".) Appellant Pops's claim should therefore be rejected.

III. THE PROSECUTION FULFILLED ITS OBLIGATION OF GOOD FAITH AND DUE DILIGENCE TO OBTAIN BROWN'S PRESENCE BEFORE HIS PRELIMINARY HEARING TESTIMONY WAS ADMITTED AT TRIAL

Appellants contend that the trial court erred in allowing the prosecution to introduce the preliminary hearing testimony of witness Anthony Brown. Appellants assert that their due process rights were violated because the prosecution did not exercise due diligence to produce

Brown at trial. Appellant Pops also claims he did not have an adequate opportunity to cross-examine Brown at the preliminary hearing. Appellant Wilson further contends that Brown was not "unavailable" in the constitutional sense as envisioned by the Framers because one who makes himself unavailable, as did Brown by purposefully avoiding Detective Reynolds, was not considered "unavailable" under common law at the time of the adoption of the Constitution. (Pops AOB 93-129; Wilson AOB 74-126.) The claims lack merit because the facts here demonstrate prosecutorial good faith and due diligence.

A. Background

1. Brown's Initial Cooperation Before He Was Threatened and Pretrial Proceedings

Anthony Brown, who arrived at the carwash just after the shootings as appellants were leaving the scene, was initially a cooperative witness. He returned to the crime scene (14RT 2037; 19RT 3002-3004), was interviewed by the police on several occasions (14RT 2037; 17RT 2645; 18RT 2683, 2702-2703; 19RT 3004-3005, 3049), attended the live lineup (17RT 2653; 18RT 2705; 19RT 3008, 3050-3065), responded to the prosecution's subpoenas to appear on May 20 and June 23, 1998, and testified on June 24, 1998, at the preliminary hearing (18RT 2678-2679; 1CT 272; Supp. II 2CT 320-401).

On October 30, 1998, a pretrial hearing concerning outstanding discovery was held. Among the matters requested by the defense was the date that Brown appeared in court and observed appellants prior to the preliminary hearing. (3RT 155.) The deputy district attorney explained that Detective Reynolds had spoken to Brown and asked him to come to court that day to be questioned on the matter. At that point, there was no indication that Brown was an uncooperative witness. (3RT 156.) This issue was again addressed at a pretrial conference on November 20, 1998.

At that time, the prosecutor noted that he had been unable to contact Brown, but anticipated speaking with him soon. The prosecutor noted that Brown did not recall the exact date he was previously in court before the preliminary hearing. (4RT 296-297.) The court suggested that the prosecutor merely needed to look at the date the witness was subpoenaed to be in court. The prosecutor believed, however, that Brown had come to court on the date in question without a subpoena. (4RT 297.) Again, there was no indication that Brown was not cooperating.[79]

On March 5, 1999, during another pretrial conference, the prosecutor informed the court that Detective Reynolds had spoken to Brown earlier that day. Brown told the detective that he was receiving telephone calls from a jail inmate named Tracy Batts. Batts told Brown that he was calling on behalf of appellants and that he better not testify. Brown told Detective Reynolds that he would not come to court unless he was dragged in. (6RT 554.) The prosecutor was confident that Brown could be served and brought to court. He was not sure, however, if that could be done within a week. (6RT 555.)

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[79] Appellant Pops mistakenly states that on November 20, 1998, the court issued a body attachment for Brown (who, at the time, was identified as Witness No. 3) and Eric Thornton. He further states that on December 9, 1998, "Brown was in custody and would be released pending an interview with defense investigators . . . ." (AOB 96.) The record here, however, is quite clear that the prosecution sought a body attachment for only Thornton (identified as Witness No. 1) at the request of the defense who sought to interview the witness, and that Thornton was later arrested pursuant to the attachment. (4RT 289-294 [body attachment sought and issued for Witness No. 1], 4RT 324-333 [Witness No. 1 (Thornton) in custody will be released after interview with defense]; 3CT 639A [Attachment of Defaulter in confidential envelope], 640; Supp. III 1CT 70-76 [sealed version: unredacted declaration of prosecutor "Re: Efforts to Locate Witness # 1"]; see Supp. II 2CT 322 [Brown identified as Witness No. 3].) Thornton was ordered to appear on March 29, 1999. (4RT 333-334.)

On March 19, 1999, the suppression hearing regarding Bowie's and Brown's pretrial identifications was conducted only as to Bowie's identifications of appellants. The prosecutor explained that Detective Reynolds had been working to find Brown and secure his presence in court. The prosecutor again noted that Brown had received threatening telephone calls from jail inmate Batts on appellants' behest. Batts had warned Brown not to testify against appellants. The prosecutor explained that the main witness in Batts's own murder case had been recently brutally murdered. Batts had a reputation in the community of being an extremely dangerous person. Brown thus informed Detective Reynolds that he took the threats seriously. (7RT 653-655.) The prosecutor observed that "it's going to take some time to get [Brown] in" to court. (7RT 655.)

During the proceedings held on June 7, 1999, the prosecutor reported that Brown was served with a subpoena that directed him to appear on May 21, 1999, but was then put on call and he agreed to meet with Detective Reynolds on that Friday afternoon. Brown signed the subpoena.[80] He did not, however, show up for the meeting. (12RT 1686.) Brown then indicated he would meet Detective Reynolds on Saturday afternoon, but again he failed to attend the meeting. (12RT 1686-1687.) According to the prosecutor, it appeared that due to the telephone calls from the jail threatening Brown's life, he was no longer living at his residence.[81] The prosecutor then asked for, and the court issued, a body attachment with bail set in the amount of $50,000. (12RT 1687; 4CT 945 [Attachment for

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[80] The subpoena was served on May 20, 1999. Someone wrote on the subpoena "refused," but Brown had signed his name over the word. (4CT 938 [subpoena in confidential envelope].) There is no indication in the record who wrote the word "refused."

[81] The prosecutor observed that appellant "Pops may have outdone himself with phone calls from the jail." (12RT 1687.)

Defaulter in confidential envelope].) The prosecutor also indicated that if Detective Reynolds could not find Brown within the next couple of weeks, he would seek to introduce his preliminary hearing testimony. (12RT 1687.)

On June 14, 1999, the prosecutor indicated that it might be necessary to read Brown's preliminary testimony to the jury. The prosecutor noted that Brown testified extensively at the preliminary hearing and was cross-examined by both sides. (16RT 2451-2452.) The next day, June 15, the prosecutor informed the court that they were still having difficulty finding Brown. (17RT 2613.) Brown had called Detective Reynolds and indicated he would come to court the next day. (17RT 2613-2614.)

2. The Due Diligence Hearing

On June 17, 1999, the court conducted a due diligence hearing on the prosecution's efforts to secure Brown's attendance at trial. Detective Reynolds testified that he personally knew Brown from their prior contacts in this case. The detective was present at the preliminary hearing and observed Brown testify at that proceeding. (19RT 2940-2941.) Prior to that, on June 9, 1998, Brown voluntarily attended the live lineup at the county jail. (19RT 2941.) Brown was supposed to be in court on March 19, 1999, but did not appear. (19RT 2948-2949.)

On May 20, 1999, Detective Reynolds went to Melvin Hoard's shop and served a subpoena on Brown to appear in court on May 21 at 8:30 a.m. Brown signed the subpoena acknowledging having received it. (19RT 2941, 2943, 2950-2951.) Brown informed Detective Reynolds that Tracey Batts had told him not to testify in this case. Brown felt intimidated by Batts. (19RT 2947, 2949-2950.) Batts was in jail for murder. An eyewitness to that murder had recently been murdered. Batts had a notorious reputation in the Compton community. He had a conviction for

shooting sheriff's deputies. Batts's brother had an outstanding arrest warrant for threatening witnesses. (19RT 2948.)

May 20, 1999, was the last time the detective saw Brown. Since the day he served the subpoena and Brown failed to appear as ordered, Detective Reynolds had been looking for him. (19RT 2942.) After court on May 21, Detective Reynolds went to the location where he had served Brown the previous day. Brown was not there, and the owner of the establishment did not know Brown's whereabouts nor had he heard from him all day. (19RT 2942-2943.) The detective then went to Brown's last known residence, but no one answered the door. (19RT 2943.)

On May 25, 1999, Brown called Detective Reynolds. Brown said he wanted to testify but was afraid. Detective Reynolds told Brown to meet him at Hoard's shop later that day, but Brown did not show up. On June 3, 1999, Detective Reynolds returned to the shop, but the owner said he had not seen Brown. While Detective Reynolds was there, Brown called and they spoke. Brown agreed to meet the detective at the shop the next day. (19RT 2943.)

On June 4, 1999, Detective Reynolds, accompanied by the prosecutor, went to the shop at the appointed time. Brown, however, did not come. (19RT 2943.) Melvin Hoard paged Brown, and Brown called him back. The detective spoke to Brown on the telephone. Brown said he was unable to come, and they agreed to meet the next day. After speaking with Brown on the telephone, the detective and prosecutor went to Brown's last known residence. No one was there. They spoke to a neighbor who knew Brown, and she told them that she had not seen Brown for at least two months. The next day, Saturday, June 5, Detective Reynolds went to the shop to meet Brown, but he did not show up. (19RT 2944.)

Brown called Detective Reynolds on June 8, and apologized for not keeping the appointment. Brown continued to refuse to provide the

detective with an address and telephone number where he could be reached. Brown said he would meet the detective at the police station later that day, but never showed up. (19RT 2944.)

On Friday, June 11, while Detective Reynolds was in court, Brown called the station and left a message with a callback number. (19RT 2944-2945.) The detective called the number, which was to a cell phone, and spoke to Brown. The detective told Brown that he needed to be in court that day. Brown said that he was too far away. Detective Reynolds then instructed Brown to be in court the following Monday, and directed him to come to the police station in the morning so he could be driven to the courthouse. He also told Brown to meet him at the police station that evening, but Brown did not show up. On Saturday, June 12, the detective again went to Melvin Hoard's shop looking for Brown. He learned that Brown had not been there recently. (19RT 2945.)

Brown did not go to the police station or court on Monday, June 14. Detective Reynolds had arranged with another detective to be at the courthouse and to arrest Brown if he appeared. (19RT 2945.)

On June 15, Brown called Detective Reynolds and apologized. He offered another excuse and promised to meet at the police station the next morning to be driven to the courthouse. In speaking with Brown, Detective Reynolds got the impression that Brown feared being arrested. (19RT 2945-2946.)

Brown did not go to the police station on June 16, as he had promised. Detective Reynolds then went to Brown's last known address, but no one was home. Another detective went with Detective Reynolds to the courthouse with the intention of arresting Brown if he appeared. Brown, however, did not go to the courthouse. Later that day, Detective Reynolds checked the computer records to determine if Brown had been arrested. He was not in custody. (19RT 2946.)

After court, Detective Reynolds went back to Brown's last known residence. He spoke to Brown's ex-girlfriend, Nichole Washington. She stated that Brown moved away two or three months after the murders. Washington said that Brown called her from time to time, but he would never tell her where he was living. She noted that Brown was terrified of what would happen to him if he went to court. Washington also said that she had received collect calls from an unknown man who was in jail, asking for Brown. (19RT 2946.) Detective Reynolds next went to another location that, he was told, Brown sometimes frequented. Brown was not there, however. The detective then returned to Melvin Hoard's shop around 6:40 p.m. Hoard said he had not seen or heard from Brown. (19RT 2947.) Detective Reynolds returned to Brown's last known address, and conducted surveillance for 30 to 45 minutes. (19RT 2951.)

Detective Reynolds did not attempt to find another mailing address for Brown through the United States Post Office. (19RT 2951-2952.) He did not check to see if Brown was receiving public assistance at another address. He did not check the hospitals. (19RT 2952.) The detective did not check voter registration rolls because Brown was a convicted felon who was ineligible to vote. Other than the one neighbor who had not seen Brown for a couple of months, no other neighbors were interviewed. (19RT 2952-2953.)

The defense argued to the court that the failure to obtain a material witness bond precluded a showing of due diligence. (19RT 2954-2955.) The court disagreed. It noted that many cases in which violent crimes occurred, witnesses were reluctant to testify because they were scared of the defendants. (19RT 2955-2956.) The court observed that in such cases, it "would unduly penalize almost any potential witness in any violent crime" to have to obtain a material witness bond in order to show due diligence. The court found, as Detective Reynolds testified, that Brown had

been in regular contact with the detective—the last time being June 15, with plans to meet at the police station the next day. It was clear, the court observed, that Brown had been on the run since May 20, the last time Detective Reynolds had physical contact with him, and he was "making active efforts to avoid the officer." (19RT 2956.) The court further noted: "This isn't the typical kind of case where you check the hospitals and you check the rolls and find him. [¶] This is someone that is actively out there evading the officer." The court believed that it was not until May 21, when Brown failed to appear after being served a subpoena the previous day, that the detective was required to obtain a material witness bond. The court determined that sufficient due diligence had been exercised to locate Brown. (19RT 2957.)

B. Governing Law and Analysis

Under the confrontation clause of the Sixth Amendment to the United States Constitution, a criminal defendant has the right to confront the prosecution's witnesses. An exception to the confrontation requirement is where a witness is "unavailable" and has given testimony at previous judicial proceedings against the same defendant and was subject to cross-examination. (*People v. Herrera* (2010) 49 Cal.4th 613, 621; Evid. Code, § 1291.[82]) A witness is considered unavailable for purposes of the Sixth Amendment when the prosecution has made a good-faith effort to secure his presence at trial. (*Ohio v. Roberts* (1980) 448 U.S. 56, 74, overruled on other grounds by *Crawford v. Washington* (2004) 541 U.S. 36.) Similarly,

[82] Evidence Code section 1291 provides in relevant part: "(a) Evidence of former testimony is not made inadmissible by the hearsay rule if the declarant is unavailable as a witness and: [¶] ... [¶] (2) The party against whom the former testimony is offered was a party to the action or proceeding in which the testimony was given and had the right and opportunity to cross-examine the declarant with an interest and motive similar to that which he has at the hearing."

Evidence Code section 240 provides that a witness is unavailable when he or she is "[a]bsent from the hearing and the proponent of his or her statement has exercised reasonable diligence but has been unable to procure his or her attendance by the court's process." (Evid. Code, § 240, subd. (a)(5).) "The constitutional and statutory requirements are 'in harmony.'" (*People v. Smith* (2003) 30 Cal.4th 581, 609, quoting *People v. Enriquez* (1977) 19 Cal.3d 221, 235.) On appeal, this Court reviews the trial court's resolution of disputed factual issues under the deferential substantial evidence standard, and independently reviews whether the facts demonstrate prosecutorial good faith and reasonable or due diligence. (*Herrera, supra*, 49 Cal.4th at p. 623).

Here, the record shows that the prosecution exercised due diligence in attempting to secure Brown as a witness at trial. As chronicled above, Brown was initially a very cooperative witness, and the prosecutor had no reason to go to unusual lengths to secure his attendance at trial. He had voluntarily met with the detectives on several occasions, attended the live lineup, and appeared and testified at the preliminary hearing on June 24, 1998.[83] (Supp. II 2CT 321-401.) It was not until May 21, 1999, that the prosecution had grounds to arrest and to seek a material witness bond for Brown. Although Brown was asked to be in court on a couple of dates prior to May 1999, but did not appear, the record does not reflect whether he was simply asked to be there or if subpoenas were served and he disobeyed the process of the court. The prosecutor's representations to the court and Detective Reynolds testimony tend to suggest the former situation. In any event, the record is clear that Detective Reynolds maintained fairly regular contact with the witness. When the detective served Brown with a

[83] In fact, Brown appeared the previous day and followed the court's order for him to return the next day. (1CT 272-273.)

subpoena for trial on May 20, 1998, Brown was tracked down at Melvin Hoard's shop—a place where Brown worked or regularly frequented.[84]

Appellant Wilson's suggestion that the prosecution should have sought a material witness bond as early as March 5, 1999—"over 100 days prior to the trial'' (Wilson AOB 94-98)—is unsupportable by the facts and the law. Such a detention would have been unconstitutional. (*Dres v. Campoy* (9th Cir. 1986) 784 F.2d 996, 1000, citing Cal. Const., art. I, § 10 [providing in part that "[w]itnesses may not be unreasonably detained"].) A state appellate court has expressed "grave doubt" as to whether it would be permissible to hold a material witness for 18 days. (*Graver v. Jesus B.* (1977) 75 Cal.App.3d 444, 451-452.) To obtain a material witness for months would certainly be unconstitutional. (*Ibid.*)

By March 1999, the prosecution was aware that Brown had been threatened and was scared.[85] But, as the trial court later noted here, fear and reluctance of witnesses to violent crimes is not uncommon. (19RT 2956.) As this Court has explained,

> we could not properly impose upon the People an obligation to keep "periodic tabs" on every material witness in a criminal case, for the administrative burdens of doing so would be prohibitive. Moreover, it is unclear what effective and reasonable controls the People could impose upon a witness who plans to leave the state, or simply "disappear," long before a trial date is set. Certainly, resort to the subpoena or "material witness" processes would have been premature in this case.

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[84] Appellant Wilson speculates Brown wrote "Refused" on his subpoena and then signed his name over it. (Wilson AOB 96.) Nothing in this record, however, reflects who wrote that word. Moreover, at the time Detective Reynolds served the subpoena, he had received assurances from Brown that he would appear as ordered.

[85] As discussed above, appellant Pops's assertion that the prosecution was on notice as of November 20, 1998, of Brown's unwillingness to appear is factually wrong. (Pops AOB 96)

(*People v. Hovey* (1988) 44 Cal.3d 543, 564 (*Hovey*).) "Also, the prosecution is not required, absent knowledge of a '*substantial risk* that this important witness would flee,' to 'take adequate preventative measures' to stop the witness from disappearing. [Citations.]" (*People v. Wilson* (2005) 36 Cal.4th 309, 340, italics added.)

"[T]he term 'due diligence' is 'incapable of a mechanical definition,' but it 'connotes persevering application, untiring efforts in good earnest, efforts of a substantial character.' [Citations.]" (*People v. Fuiava* (2012) 53 Cal.4th 622, 675.) To establish due diligence and unavailability, "the prosecution must show that its efforts to locate and produce a witness for trial were reasonable under the circumstances presented." (*Herrera, supra*, 49 Cal.4th at p. 623.) "Considerations relevant to the due diligence inquiry 'include the timeliness of the search, the importance of the proffered testimony, and whether leads of the witness's possible location were competently explored.'" (*Id.* at p. 622.)

Here, it was not until May 21, 1999, or shortly thereafter, that a conclusion could be reached that Brown was actively avoiding coming to court and hiding from Detective Reynolds. Detective Reynolds began actively searching for Brown on May 21. The detective went to Hoard's shop where he had last met with Brown the day before, and then went Brown's last known address. (19RT 2942-2943.) A few days later, on May 25, Brown spoke to the detective on the telephone and promised to meet him. When Brown made no further contact, the detective returned to Hoard's shop on June 3, and spoke to Brown on the telephone, getting an agreement from Brown to meet the next day at the shop. (19RT 2943.) On June 4, when Brown did come to the shop, Hoard paged Brown and Detective Reynolds again spoke to Brown on the telephone when he called back. That day, the detective again went to Brown's last known residence. A neighbor with whom the detective spoke said she had not seen Brown for

at least two months. The following day, June 5, the detective went again to Hoard's shop to meet Brown as promised, but Brown did not show up. (19RT 2944.)

On June 8, Brown contacted the detective by telephone and apologized for failing to keep their appointment. Brown would not reveal where he was living or his telephone number. They again agreed to meet later that day, but Brown did not appear. (19RT 2944.) Brown again called the detective on June 11, leaving a callback number for a cell phone. The detective called him back and tried to convince Brown to come to the courthouse that day or the following court day (a Monday). He also encouraged Brown to meet at the police station. The next day, June 12, Detective Reynolds again went to Hoard's shop looking for Brown. Brown had not been there for quite some time. (19RT 2945.)

Brown yet again called the detective on June 15, and apologized. Despite an agreement to appear, Brown did not go the police station or to the courthouse on June 16. (19RT 2945-2946.) Later that day, Detective Reynolds checked the computer records and determined that Brown was not in custody. (19RT 2946.) The detective again went to Brown's last known address. This time, Brown's ex-girlfriend was home, and she informed the detective that Brown had moved away shortly after the murders because he was terrified of testifying. Brown had not even told his ex-girlfriend where he was living. She confirmed that she had received calls from a man in jail looking for Brown. (19RT 2946.) The detective received a lead on a location sometimes frequented by Brown. Detective Reynolds went to the location, but Brown was not there. The detective went again to Hoard's shop, but Hoard had not seen or heard from Brown. (19RT 2947.) Thereafter, the detective returned to Brown's last known address and waited outside for a time hoping, but without success, that Brown would appear. (19RT 2951.)

In the case at bar, Detective Reynolds undertook reasonable and comprehensive actions under the circumstances to locate Brown. The detective went to Hoard's shop, a place where Brown was known to frequent, no less than seven times between May 21 and June 16. The detective went to Brown's last known address at least four times and spoke with a neighbor, who had not seen Brown for quite some time. He also spoke with Brown's ex-girlfriend, who informed the detective that Brown had moved away after the shootings and kept his new location a secret. The detective also followed up on a lead and went to another location where Brown was thought to frequent. Interestingly, throughout the time the search for Brown occurred, Brown called and spoke to Detective Reynolds at least six times. Each time they spoke on the telephone, Brown promised to appear. The record clearly establishes that Detective Reynolds would have arrested Brown after May 21, had he encountered this witness again. Detective Reynolds's actions searching for Brown were timely commenced, and leads as to the witness's possible whereabouts were competently explored. That all these efforts failed is not indicative of a lack of diligence but of a witness's determination and calculated effort to avoid testifying.

While Brown was somewhat of an important percipient witness, he was not crucial. In *Hovey* this Court distinguished the decision upon which appellant Pops relies, *People v. Louis* (1986) 42 Cal.3d 969 (Pops AOB 99-101), because the witness at issue in *Hovey*, like Brown in the present case and unlike the witness in *Louis*, could not be deemed a "'critical' or 'vital'" witness. (*Hovey, supra*, 44 Cal.3d at p. 564; see also *People v. Fuiava, supra*, 53 Cal.4th at pp. 676-677.) Brown's testimony, in many respects, was cumulative of Bowie's and Williams's trial testimony. Brown confirmed, consistent with Bowie's testimony, that appellant Pops was carrying a Tech Nine firearm. Brown also confirmed Bowie's and

Williams's testimony, that the gunmen drove a dark-colored Honda. On the other hand, Brown could not positively identify appellant Wilson. He merely offered that Wilson's complexion was similar to the man he saw only briefly drive away in Dunn's El Camino.

Appellant Wilson's laundry list of other actions the prosecution could have undertaken in an effort to find Brown (Wilson AOB 100-102), is unavailing when considering what actions Detective Reynolds *actually took* to find this witness who did not want to be found. (*People v. Smith, supra*, 30 Cal.4th at p. 611; *People v. Cummings* (1994) 4 Cal.4th 1233, 1298.) "[T]he prosecution need not exhaust every potential avenue of investigation to satisfy its obligation to use due diligence to secure the witness." (*People v. Guiterrez* (1991) 232 Cal.App.3d 1624, 1641, fn. omitted, disapproved on other grounds in *People v. Cromer* (2001) 24 Cal.4th 889, 901.) For example, in *Ohio v. Roberts, supra*, 448 U.S. 56 (*Roberts*), the high court found the prosecution used good faith to find a witness who departed the jurisdiction soon after testifying at the preliminary hearing. Her parents informed the prosecutor that they had heard from her only once in the prior year, she was traveling outside the state, she did not disclose her whereabouts, but a social worker reported the witness filed a welfare application in San Francisco. The prosecutor issued subpoenas for the witness at her parents' home on five occasions over a period of several months. (*Roberts, supra*, at pp. 59-60.) *Roberts* held the prosecution established the witness's unavailability. While the prosecutor might have tried to locate the San Francisco social worker, *Roberts* held that "[o]ne, in hindsight, may always think of other things. Nevertheless, the great improbability that such efforts would have resulted in locating the witness . . . neutralizes any intimation that a concept of reasonableness required their execution." (*Id.* at pp. 75-76.) Simply put, Brown did not want to be found and was actively avoiding Detective Reynolds. The

benefit of hindsight permits appellant Wilson to articulate additional steps that the prosecution might have taken, but does not defeat the prosecution's showing of diligence. (See *People v. Diaz* (2002) 95 Cal.App.4th 695, 706.)

Appellant Wilson suggests that the prosecutor had little interest in securing Brown's attendance at trial because "Brown, a person on probation with multiple felony convictions . . . , was the only one of theses witnesses who testified at the preliminary hearing." (Wilson AOB 5.) This assertion is incorrect as both Bowie and Williams testified at the preliminary hearing. (See 1CT 120-271 [Bowie]; Supp. II 2CT 403-476 [Williams].) Appellant Wilson further insinuates that the prosecutor had some nefarious intention all along to use Brown's preliminary hearing testimony because the prosecutor obtained a material witness bond for Barnes, but not Brown. (Wilson AOB 85-86.) Barnes and Brown were hardly similarly situated. Barnes was a minor on felony probation, a close friend of appellant Pops and Harris, and an accessory after the fact to the murders when he helped burn Dunn's El Camino. Barnes failed to appear pursuant to subpoenas, fled from the courthouse, evaded service of process, was aided by his mother (Beverly Destouet) to avoid testifying, and had plans to flee to another state. Appellant Pops, Harris, and appellant Wilson (identifying himself as "Bird") called Barnes and his mother multiple times from jail. Destouet told Harris that Barnes intended to retract the statements he gave to the police. (3RT 213-215, 222-258.) Barnes offered critical testimony regarding the burning of Dunn's car the evening after the carwash murders. His testimony also explained appellants' YMO associations and friendship connections. The importance of Barnes's testimony and his continual refusal to obey subpoenas made a material witness bond appropriate.

The prosecution therefore showed due diligence in attempting to locate Brown to testify at trial.

C. Any Claims of Shortcomings In Confrontation Arising From Brown's Failure to Appear for Trial Are Forfeited by Appellants' Own Wrongdoings and, In Any Event, Appellants Were Afforded an Adequate Opportunity for Effective Cross-Examination at the Preliminary Hearing

1. Forfeiture by Wrongdoing

Appellant Pops further asserts that the cross-examination of Brown during the preliminary hearing was insufficient because some witnesses like Brown had theretofore been identified only by number due to threats, appellants did not learn of Brown's name until just before he testified, and the scope of the preliminary hearing did afford appellants an adequate opportunity for meaningful cross-examination. (Pops AOB 102-116.) Appellants, and especially Pops, are foreclosed from complaining about any alleged infirmities in their ability to confront Brown as his absence from trial was caused by their own wrongdoing.

Where a defendant intentionally engages in conduct designed to prevent a witness from testifying, he will forfeit by wrongdoing any claim relating to complaints of lack of confrontation at trial. (*Giles v. California* (2008) 554 U.S. 353, 368 (*Giles*); Evid. Code, § 1390.) While the rule of forfeiture by wrongdoing usually arises in the context of non-confrontation testimonial hearsay, such forfeiture would logically also encompass situations like here where appellants *did* have the opportunity to cross-examine the witness at the preliminary hearing, but later threats caused the witness to become unavailable.

Forfeiture by wrongdoing is an equitable doctrine based on the principle that "one who obtains the absence of a witness by wrongdoing forfeits the constitutional right to confrontation." (*Davis v. Washington* (2006) 547 U.S. 813, 833.) In *Giles*, the high court stated, "The common-law forfeiture rule was aimed at removing the otherwise powerful incentive

for defendants to intimidate, bribe, and kill the witnesses against them—in other words, it is grounded in 'the ability of courts to protect the integrity of their proceedings.'" (*Id.* at p. 374, citing *Davis v. Washington, supra*, 547 U.S. at p. 834.) The *Giles* court clarified that the forfeiture by wrongdoing exception applies where the defendant engages in conduct designed to prevent the witness from testifying. (*Giles, supra*, at p. 359.)[86]

Here, the record aptly shows that appellants, Harris, and their surrogate, fellow inmate Batts, were making concerted efforts to threaten and intimidate prosecution witnesses so as to make them unavailable. Their threats were so serious that the prosecution was forced to obtain *ex parte* orders to allow the witnesses to be identified by number and to terminate appellants' telephone privileges. The trial court was well aware of the nature of the threats to the various witnesses. (2RT 31-33, 37-38; 3RT 67-

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[86] Appellant Wilson asserts that since *Crawford*, determining whether a witness is "unavailable" must be based on what that term meant at common law in 1791 when the Sixth Amendment to the Constitution was ratified. Appellant Wilson posits that a witness who "simply chose to make himself unavailable to testify" was not unavailable at common law in the late eighteenth century. (AOB 75-84.) This Court need not reach appellant Wilson's claim since common law, well-before the Sixth Amendment was adopted, permitted the introduction of statements of a witness whose absence was caused by the wrongdoing of the accused. (See *Giles, supra*, 554 U.S. at pp. 359-360, citing, e.g., *Lord Morley's Case*, 6 How. St. Tr. 769, 771 (H.L. 1666).) "Later cases repeated [the] rule [set forth in *Morley's case*] and followed it, admitting depositions where, e.g., 'there ha[d] been evidence given of ill practice to take [the witness] out of the way,' *Harrison's Case*, 12 How. St. Tr. 833, 868 (H. & L. 1692), where 'the prisoner ha[d], by fraudulent and indirect means, procured a person that hath given information against him to a proper magistrate, to withdraw himself,' *Lord Fenwick's Case*, 13 How. St. Tr. 537, 594 (H. & C. 1696), where the prisoner 'had resorted to a contrivance to keep the witness out of the way,' *Queen v. Scaife*, 117 Q.B. 238, 242, 117 Eng. Rep. 1271, 1273 (Q. & B. 1851), and so forth." (*Giles, supra*, at p. 382 (dis. opn. of Breyer, J.)

38; 7RT 653-655 [Brown]; 12RT 1686-1687 [Brown]; 14RT 1928-1936 [Barnes]; 16RT 2422-2423 [Hernandez]; 2CT 314-321 [motion for protective order]; Supp. II 1CT 115 [Hernandez]; Supp. III 1CT 1-9 [People's motion in support of protective order], 47-69 [People's response to motion to unseal in camera proceedings].) During the due diligence hearing on the prosecution's attempts to secure Brown's presence at trial, Detective Reynolds testified extensively regarding the intimidating calls Brown received from inmate Batts on appellants' behalf telling him not to testify. (19RT 2946-2950.)

When appellants further objected to the introduction of the preliminary hearing testimony based on confrontation grounds (19RT 2958-2962), the prosecutor noted appellant Pops's intimidation of witnesses. The prosecutor pointed out, "The People in this case laid out for the magistrate what the court may well decide was just unbelievable conduct on the part of Mr. Pops regarding witnesses in this case." (19RT 2696.) The prosecutor then went on to chronicle appellants Pops various actions to threaten and dissuade witnesses from testifying. (19RT 2962-2964.) "Now, we know that once [appellants] got Mr. Brown's name that he's been receiving phone calls from Tracey Batts," the prosecutor further noted. (19RT 2963.) When the court overruled appellants' objection, implicit in the court's ruling was appellant Pops's wrongdoing. Appellant Pops has therefore forfeited any claim of lack of confrontation as his wrongful actions caused Brown to be unavailable at trial.

2. Appellants Had a Constitutionally Sufficient Opportunity for Meaningful Cross-Examination

Shortly after the *Crawford* decision, this Court settled the law in California regarding applicable statutory provisions implementing the confrontation right, holding:

> A criminal defendant has the right under both the federal and state Constitutions to confront the witnesses against him. [Citations.] This right, however, is not absolute. The high court recently reaffirmed the long-standing exception that "[t]estimonial statements of witnesses absent from trial have been admitted only where the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine." [Citations.] Evidence Code section 1291 codifies this traditional exception. [Citation.] When the requirements of Evidence Code section 1291 are met, "admitting former testimony in evidence does not violate a defendant's right of confrontation under the federal Constitution. [Citations.]" [Citation.]

(*People v. Wilson, supra*, 36 Cal.4th at p. 340; restated in *People v. Thomas* (2011) 51 Cal.4th 449, 499.)

Crawford did not alter settled law that a witness's preliminary hearing testimony is admissible, without violating state or federal constitutional rights, where the witness is unavailable. (*People v. Seijas* (2005) 36 Cal.4th 291, 303 [unavailability based on proper assertion of Fifth Amendment].) *Crawford* made a prior opportunity to cross-examine a witness "'dispositive' of the admissibility of his testimonial statements, 'and not merely one of several ways to establish reliability,'" and *Crawford* overruled longstanding contrary precedent in *Roberts, supra*, 448 U.S. 56. (*Wilson, supra*, 36 Cal.4th at p. 343.) "*Crawford* . . . made clear that reliability is not part of the inquiry under the confrontation clause: 'To be sure, the Clause's ultimate goal is to ensure reliability of evidence, but it is a procedural rather than a substantive guarantee. . . .' [Citation.]" (*Ibid.*) The same is true under Evidence Code section 1291: "'As long as defendant was given the opportunity for effective cross-examination, the statutory requirements were satisfied; the admissibility of this evidence did not depend on whether defendant availed himself fully of that opportunity. [Citations.]' [Citations.]" (*Id.* at p. 346.)

Generally, at a preliminary hearing and at trial, a defendant's underlying interest and motive for cross-examination of a witness for the prosecution are similar, that is, to discredit the witness's account of the criminal activity. (*People v. Wharton* (1991) 53 Cal.3d 522, 590.) The interests, however, need not be identical. The Constitution is not offended by the introduction of prior testimony of an unavailable witness, "not because the opportunity to cross-examine the witness at the preliminary hearing is considered an exact substitute for the right of cross-examination at trial [citation], but because the interests of justice are deemed served by balancing of the defendant's right to effective cross-examination against the public's interest in effective prosecution." (*People v. Zapien* (1993) 4 Cal.4th 929, 975; accord, *People v. Carter* (2005) 36 Cal.4th 1114, 1172-1173 [applying reasoning of *Zapien* after *Crawford* decision; "'as long as a defendant was provided the opportunity for cross-examination, the admission of preliminary hearing testimony under Evidence Code section 1291 does not offend the confrontation clause of the federal Constitution simply because the defendant did not conduct a particular form of cross-examination that in hindsight might have been more effective'"]; see also *People v. Smith, supra*, 30 Cal.4th at p. 611 ["we have routinely allowed admission of the preliminary hearing testimony of an unavailable witness"].)

In the case at bar, appellants not only availed themselves of the opportunity to cross-examine Brown, but they did so extensively. Among other things, Brown was questioned by the defense about the following: his position relative to the suspects at the carwash (19RT 3012-3015, 3019-3024); whether from his vantage point and the short amount of time he had an ability to view the suspects (19RT 3022-3024, 3026-3027, 3072-3073); his inability to positively identify appellant Wilson due to a fleeting observation (19RT 3016-3016, 3073-3075); his purported "state of shock"

reported to the police during a recorded interview (19RT 3017-3018, 3024); the descriptions of the suspects he gave to police (19RT 3027-3031, 3071); his knowledge of, and relationships with, the other men who worked or visited the carwash (19RT 3035-3036 [Thornton], 3043-3044, 3071 [Bowie], 3044-3046 [Hurd], 3046 [Dunn], 3047 [Hoard]); the circumstances under which he and Thornton left the crime scene without calling police but returned a short time later (19RT 3078-3079); his knowledge of whether the carwash was a legitimate business for washing cars, or a front for selling marijuana (19RT 3040-3049); the two prior recorded interviews with police (of which the defense had transcripts) (19RT 3052-3054); his failure to identify appellants in photographic lineups and his identification of a person other than an appellant in one array (19RT 3058-3065, 3075-3076, 3087); the probability that he saw appellants in court prior to the live lineup (19RT 3077-3078, 3087); the possibility of others who attended the live lineup influencing his selections (19RT 3075-3077); and, his prior felony convictions in 1993 for fraud (19RT 3072; see also 2CT 342).

As the record demonstrates, this was not a preliminary hearing where any limitation imposed by the court denied appellants of their rights, or prevented appellants from exercising them. The defense attorneys thoroughly cross-examined Brown. Appellant Pops's claim about the narrow scope of a preliminary hearing mandated by Proposition 115 (Pen. Code, § 886, subd. (c)) (Pops AOB 111-112) is contradicted and precluded by the record here.

Appellant Pops further argues that not knowing Brown's name prior to the preliminary hearing hindered cross-examination because the defense did not have sufficient time to prepare. (Pops AOB 112-113.) The record again contradicts this claim. Appellants were provided with extensive discovery that included the police reports, witness statements, tape

recordings and transcripts of Brown's interviews with police, and his prior convictions. (See, e.g., 1CT 118-119, 2CT 318, 515; Supp. II 2CT 322, 354 [witness's recollection refreshed with transcript of interview; "page 84347 of People's discovery"], 387.) The defense attorneys, as reflected in their cross-examination of Brown, were clearly prepared.

Appellant Pops speculates that another avenue of questioning was Brown's probation status and whether his testimony was influenced by a desire to curry favor with the prosecution. (Pops AOB 116.) At trial, however, defense counsel admitted there was no evidence of pressure by the prosecution placed on Brown. Absent such evidence, it is doubtful the court would have permitted that inquiry. (19RT 2967-2968.) In any event, appellant Pops cannot demonstrate this line of questioning could have produced a significantly different impression of Brown's credibility, since he was already impeached with his prior convictions involving fraud. (See, e.g., *People v. Chatman* (2006) 38 Cal.4th 344, 374 [limitation on cross-examination of probation violation as impeachment was proper].) Finally, contrary to appellant's suggestion (Pops AOB 116), further questioning of Brown regarding the carwash as a "front" for marijuana sales would not likely have rendered new evidence favorable to the defense. As the court correctly observed, "Whether he was aware marijuana was being sold out of there really is a collateral issue to this case. [¶] What you want to do is you want him to get up and say I didn't know there was and the fess up, yeah, that did." (19RT 2968.)

In sum, defense counsel fully cross-examined Brown as to his conduct and observations, and impeached him with a felony conviction for fraud. Appellants' interest and motive for cross-examining Brown during the preliminary hearing were sufficiently similar to those existing at trial to permit the admission of Brown's prior testimony. The circumstances of the defense's cross-examination of Brown comported with the confrontation

clause's guarantee of an opportunity for effective cross-examination. (*United States v. Owens* (1988) 484 U.S. 554, 559 ["'[T]he Confrontation Clause guarantees only "an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish'" (Citations omitted)"].) Appellant Pops's claims should be rejected.

In any event, if appellants' confrontation rights were violated, any error was harmless beyond a reasonable doubt. (*People v. Jennings* (2010) 50 Cal.4th 616, 652 [*Crawford* error does not requirement reversal of a conviction if it was harmless beyond a reasonable doubt]; *People v. Geier* (2077) 41 Cal.4th 555, 608.) The record viewed as whole shows that Brown's testimony was, for the most part, cumulative of Bowie's and Williams's. As discussed above (see Arg. I, *ante*), there was also overwhelming evidence that appellants committed the carwash murders even absent Brown's testimony. Appellants' claim should be rejected.

IV. THE TRIAL COURT PROPERLY DENIED APPELLANTS' SECTION 995 MOTION TO SET ASIDE THE INFORMATION BASED ON THE NONDISCLOSURE OF WITNESSES' IDENTIFICATION INFORMATION PRIOR TO THE PRELIMINARY HEARING

Appellant Pops contends the court erred in failing to grant his motion to set aside the information under section 995 based a purported inability to effectively cross-examine Brown at the preliminary hearing due to the nondisclosure of the witness's name until just before he testified. (Pops AOB 130-138.) This claim too, like the previous one relating to an alleged lack of confrontation with Brown, should be deemed forfeited since

appellant Pops's caused Brown's absence through threats.[87] (See Arg. III, *ante*.) But, in any event, appellant Pops has not shown that he was denied a fair trial or otherwise suffered prejudice as a result of the alleged error.

Section 995, subdivision (a)(2) permits the court to set aside an information on a finding that the defendant was not "legally committed by a magistrate" or "had been committed without reasonable or probable cause." A defendant who has been convicted of a criminal charge by a jury and thereafter asserts error at the preliminary hearing must "show that he was deprived of a fair trial or otherwise suffered prejudice as a result of the error at the preliminary examination." (*People v. Pompa-Ortiz* (1980) 27 Cal.3d 519, 529; accord *People v. Stewart* (2004) 33 Cal.4th 425, 461-462; *People v. Konow* (2004) 32 Cal.4th 995, 1022-1023.) On appeal, "an erroneous denial of a section 995 motion justifies reversal of a judgment of conviction only when a defendant is able to demonstrate prejudice at trial flowing from the purportedly inadequate evidentiary showing at the preliminary hearing. [Citations.]" (*People v. Crittenden* (1994) 9 Cal.4th 83, 136-137.)

During the hearing on the section 995 motion in the trial court, appellant Pops argued, as he does here, that the court's order allowing for the nondisclosure of witnesses' identification under section 1054.7[88]

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[87] Respondent does not address appellant Pops's assertion that "through no fault of appellant, Brown disappeared before trial" (Pops AOB 138), as the contrary is overwhelming reflected in the record. (See Arg. III, *ante*.)

[88] Section 1054.7 provides in pertinent part: "The disclosures required under this chapter shall be made at least 30 days prior to the trial, unless good cause is shown why a disclosure should be denied, restricted, or deferred. . . . 'Good cause' is limited to threats or possible danger to the safety of a victim or witness, possible loss or destruction of evidence, or possible compromise of other investigations by law enforcement. [¶] Upon the request of any party, the court may permit a showing of good cause for (continued...)

amounted to a denial of his right of confrontation guaranteed under the Sixth Amendment. (3RT 105-106; see 2CT 467-469 [defense motion].) The court denied the motion. (3RT 115.)

Nondisclosure orders withholding the identifying information of witnesses, where good cause has been shown, do not offend either the federal or California Constitutions as long as the information pertaining to crucial witnesses is not permanently withheld from the defense. (*Alvarado v. Superior Court* (2000) 23 Cal.4th 1121, 1126, 1134-1136, 1151-1152 [delaying disclosure of witnesses' identity justified but only until start of trial].) As a legal matter, "'There is no general constitutional right to discovery in a criminal case'" and that "'"[t]he Due Process Clause has little to say regarding the amount of discovery which the parties must be afforded."'" (*People v. Valdez* (2012) 55 Cal.4th 82, 109-110, quoting *Weatherford v. Bursey* (1977) 429 U.S. 545, 559-561.)

As noted, based of the evidence presented by the prosecution at *in camera* hearings in this case, the magistrate found good cause existed to permit the prosecution to withhold the identities of the witnesses because disclosure was likely to pose a serious danger to their safety. (See RT Sealed Proceedings of May 8, 1998, before Judge Glenette Blackwell; Supp. III 1CT 1-9, 47-69.) Appellant Pops does not assert that the evidence supporting good cause was insufficient. Rather, he attacks the nondisclosure solely on confrontation grounds. Prior to the preliminary hearing, all defense counsel were provided with, inter alia, copies of all police interviews with Brown, Bowie, and Williams, along with the transcripts of taped interviews. (1CT 118-119, 2CT 318, 515; Supp. II 2CT

(...continued)
the denial or regulation of disclosures, or any portion of that showing, to be made in camera."

322, 354 [reference "page 84347 of People's discovery"], 387.) Also, all counsel were present when these three witnesses attended the live lineups at the county jail prior to the preliminary hearing. (25RT 4173-4175.) Additionally, defense counsel received copies of court-approved redacted rap sheets for these witnesses. (See, e.g., 2CT 515.) Brown was identified by name when he testified at the preliminary hearing. (Supp. II 2CT 321-322; 19RT 2986.)

As discussed in the preceding argument, the defense, armed with this vast amount of discovery obtained prior to the preliminary hearing, extensively cross-examined Brown. A review of the preliminary hearing transcript clearly indicates that defense counsel were thoroughly prepared to cross-examine all of the witnesses, including Brown. The additional cross-examination topics that appellant Pops has identified were either supplementary to what was already testified to (i.e., Brown's prior felony convictions), or was simply collateral (i.e., Brown was on probation or whether he *really* did not know that marijuana was sold at the carwash). The alleged inability to cross-examine Brown on these few topics "did little, if anything, negatively to impact his case." (*Valdez, supra*, 55 Cal.4th at pp. 114-115.)

Moreover, the preliminary hearing occurred one year before trial and appellants knew Brown's identity during that entire time—a reason why they had the ability to threaten Brown during that time. The court did not foreclose the possibility that appellants could present relevant evidence about Brown that might have been discovered through independent investigation during that time. (See, e.g., 19RT 2964-2965 [prosecutor noting defense may present additional relevant evidence about Brown, and court agreeing that defense can impeach with felony conviction], 2966-2968.) No additional evidence, however, was put forth at trial by the defense concerning this now-known witness.

Appellant Pops's claim must be rejected because he has not shown that he was deprived of a fair trial or otherwise suffered prejudice as a result of the nondisclosure of Brown's identity until the preliminary examination.

V. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION ALLOWING THE ADMISSION OF THE LIST OF MONIKERS AND SELECTED DRAWINGS FOUND AT APPELLANT WILSON'S APARTMENT AS THEY WERE OFFERED FOR A NONHEARSAY PURPOSE, AND ANY ERROR WAS NOT PREJUDICIAL

Appellants contend that the court erred in allowing the prosecution to introduce a list of monikers and several drawings from the blue writing tablet recovered from appellant Wilson's apartment after the search. Appellants assert the material was inadmissible hearsay, never authenticated, and prejudicial. (Pops AOB 139-164 [Arg. III]; Wilson AOB 205-234 [Arg. VI].) Respondent disagrees. The list of monikers and drawings testified to by Barnes (Peo. Exh. 34A-34C) was offered for the nonhearsay purpose of showing a relationship between appellants, Harris, and Barnes. This, in turn, was circumstantial evidence that supported Barnes's testimony regarding his involvement as an accessory after the fact and his knowledge of appellants' relationship. It was also circumstantial evidence of appellant Pops's connection to appellant Wilson's apartment. Any error, however, was not prejudicial.

A. Background

When the search warrant was executed at appellant Wilson's apartment, a blue writing tablet that contained various drawings and a list of monikers was found on the kitchen table near where a female was sitting. (14RT 1960; 15RT 2170 [Peo. Exh. 68 for identification only (entire tablet not introduced in evidence)].)

1. Pretrial Discussions and Rulings

The issue of the admissibility of the material first arose prior to trial when appellant Pops moved to sever his trial from appellant Wilson based, in part, on the belief that material contained in the writing tablet—while possibly admissible against his codefendant[89]—was inadmissible hearsay as to him. According to defense counsel, a juvenile named Everett Rivers was responsible for some of the writings. (8RT 709-716, 728-730; 3CT 725-751 [severance motion]; 4CT 833-854 [supplemental points and authorities and exhibits].) The prosecutor argued that some of the material fell within an exception to the hearsay rule as to both appellants (8RT 716-726) and, was also admissible for the nonhearsay purposes of corroborating Barnes's testimony and showing an association between appellants and Barnes. (8RT 720, 722). The court tentatively agreed that the evidence was admissible to show a relationship between appellants and appellant Pops's connection to Wilson's apartment, but requested the parties submit supplemental briefing. (8RT 730-731, 734-739, 743-744.) The court also noted that it would give a limiting instruction on the use of the evidence if one was offered by the defense. (8RT 827-829.)

The parties filed additional briefing as requested. (4CT 833-854 [Pops], 855-863 [the People]; 864-889 [Wilson].) Additionally, on May 21, 1999, at a hearing held pursuant to Evidence Code section 402, Tanesha Martin testified that she first rented the apartment located at 5705 Lime Avenue, Apartment No. 1, in Long Beach, sometime in 1996. (8RT 786-

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[89] Mr. Mizel, appellant Pops's defense counsel, noted that some of the drawings "obviously, deal with the carwash murders," and might demonstrate a consciousness of guilt as to appellant Wilson since the tablet was found in his apartment. (8RT 711.) None of the drawings, observed Mr. Mizel, resembled appellant Wilson. (8RT 713.)

787.) At some point, appellant Wilson—who was also known as "Bird"—moved into the apartment. (8RT 787.)

Appellant Pops was one of appellant Wilson's friends who visited the apartment. (8RT 788-789.) Martin saw appellant Pops at the apartment three or four times. Appellants were close friends. (8RT 789.) Martin saw appellant Pops with appellant Wilson at the apartment on the evening of Super Bowl Sunday [January 25,] 1998. (8RT 790.) Martin also once saw appellant Pops's brother at the apartment with appellants. She knew him by his moniker, "Scrap." (8RT 795.)

Martin moved out in February 1998, and appellant Wilson continued to live there. (8RT 787-788.) The last time Martin was at the apartment was the weekend before appellant Wilson was arrested. (8RT 788.)

Martin had never before seen the blue writing tablet found on the kitchen table inside the apartment. (8RT 791-792 [tablet marked as Exh. 1 for hearing; later Peo. Exh. 68].) As far as Martin knew, the blue tablet was not in the apartment when she moved out in February. (8RT 792.) One page of the tablet entitled "Nut-Loco," had a drawing of a man whom Martin identified as appellant Pops holding a gun.[90] (8RT 792.) Another page entitled "Nut and the Monster Beefy," depicted a drawing that looked somewhat like appellant Pops and his Camaro.[91] (8RT 793-794.) Another page had the words "money," "power," and "respect" printed on it several times. That page also had appellant Wilson's nickname, "Bird," printed on it.[92] (8RT 794-795.)

Defense counsel for appellant Pops argued that the drawings were inadmissible hearsay because there was no evidence that either appellant

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[90] See, i.e., 4CT 844; People's Exh. 68C.
[91] See, i.e., 4CT 843; People's Exh. 68D.
[92] See, i.e., 4CT 841.

adopted them as admissions of guilt.[93] (8RT 797-799, 805-808.) Defense counsel for appellant Wilson additionally argued that the drawings lacked authentication since there were people going in and out of the apartment, and there was no evidence the tablet was possessed by appellant Wilson. (8RT 809-813.) The prosecution argued that the drawings were made close in time to the murders, and constituted circumstantial evidence of appellants' guilt. (8RT 813-818.)

The prosecutor further argued that the list and drawings were admissible as circumstantial evidence of a relationship between appellants, and between appellants and Barnes. He noted that the material tended to corroborate Barnes's testimony. (8RT 819.) The prosecution sought to have six pages from the tablet admitted as evidence: the list of monikers (8RT 819 [see, i.e., 4CT 846]); the two drawings of appellant Pops (8RT 820 [see, i.e., 4CT 843, 844; later Peo. Exh. 68B]); a drawing of a Tech Nine gun being fired and a portion of a shotgun barrel (8RT 768, 820 [see, i.e., 4CT 854; later Peo. Exh. 68A]); a drawing of a person's chest area, a forearm that was tattooed with the initials "Y M O" (the same as appellant Pops's tattoo) and holding a semi-automatic pistol similar to the Tech Nine (8RT 767-768, 820 [see, i.e., 4CT 840; later Peo. Exh. 68E]); and the drawing of the hooded figure firing a Tech Nine gun at a person's head (8RT 820 [see, i.e., 4CT 839]).

The court ruled that, with the exception of the drawing of the hooded figure shooting at someone's head,[94] the other five items could be admitted

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[93] With the exception of one drawing depicting a hooded figure firing a Tech Nine into someone's head, the court disagreed with the defense's representation that some of the other drawings directly related to the carwash murders. (8RT 799-803.)

[94] The court excluded the drawing of a hooded figure firing a Tech Nine into someone's head finding it more prejudicial than probative under (continued...)

"for the limited purpose of connecting [appellant Pops] to the location involved and associating him with [appellant Wilson]." (8RT 1464.) Additionally, during Barnes's testimony, the court clarified that the evidence could also be used to show circumstantially a relationship between Barnes, Harris, and appellants. (14RT 1897-1907.) The court again noted that it would give a limiting instruction as to the use of the evidence if the defense drafted one. (14RT 1907.)

2. Use of the Exhibits with Barnes at Trial

At trial, Compton Homicide Detective Branscomb testified as to the search of appellant Wilson's apartment, and described finding the blue writing tablet on the kitchen table. The tablet was marked as People's Exhibit 68 for identification. (15RT 2170.) The five pages that the court ruled admissible were marked as People's Exhibits 68A through 68E. Based on a defense objection, the detective was not permitted to describe each exhibit as he testified. (15RT 2171.) The marked exhibits, however, can be described as follows:

- People's Exhibit 68A is the drawing of a firearm that appears to be a Tech Nine semi-automatic that is being fired and with shell casing being ejected. To the left of the Tech Nine is what appears to be the barrel of a shotgun. (Cf. 15RT 2171-2172 [exhibit identified by detective].)
- People's Exhibit 68B is the list of 22 monikers. The top of the page is entitled "lil NIGGAS." Next to the list of monikers is a box with five monikers of people who were considered the next generation—i.e., "NXT GEN." A legend at the bottom

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(...continued)
Evidence Code section 352. (8RT 802, 822-823, 826-827, 1464-1465; see 4CT 839.)

right reads as follows: a star designates "all the niggaz locked up"; a handgun designates "disciplinary action"; a "$" designates "niggaz with lique potential"; and a house designates "home welcoming." (Cf. 15RT 2172-2173 [exhibit identified by detective].)

- People's Exhibit 68C is a drawing of a Black male holding what appears to be a semi-automatic firearm similar to a Glock pistol. The top of the page is entitled "Nut LOCO." (Cf. 15RT 2171-2172 [exhibit identified by detective].)
- People's Exhibit 68D is the caricature drawing of a muscled Black male. The face is similar to the drawing of the Black male in the previous exhibit. There is also the drawing of a car with what appears to be IROC rims. At the top of the page is written "Nut and" and over the car are the words "THE MONSTER BEEFY." The male figure is standing in front of a fence at a street corner with a street sign that reads: "55th" and "Lime." (Cf. 15RT 2173 [exhibit identified by detective].)
- People's Exhibit 68E is the drawing of the chest of a figure and the right forearm and hand. The hand is holding a semi-automatic firearm (possible a Tech Nine) that is being fired with shell casings being ejected. On the forearm is written "YMO." (Cf. 15RT 2174 [exhibit identified by detective].)

Barnes testified that he was shown the blue writing tablet during an interview on June 18, 1998. (14RT 1960.) During that interview, a copy of one of the pages, the drawing entitled "Nut and the Monster Beefy" (marked as Peo. Exh. 68D) was shown to Barnes. Barnes described what was on the page and signed the copy of the drawing. That signed copy was marked as People's Exhibit 34A. (14RT 1955-1956.) Barnes testified that the drawing of the male figure represented appellant Pops whose moniker

was "Nut." Barnes further identified the car in the drawing as appellant Pops's Camaro with the IROC rims. (14RT 1957.)

Another copy of a page identified and signed by Barnes was the drawing of the forearm shooting a gun (marked as Peo. Exh. 68E). (14RT 1961.) That exhibit page was marked as People's Exhibit 34B. Brown testified that the letters on the forearm—"Y M O"—stood for "Young Mafia Organization." This was an organization to which Barnes, both appellants, and Harris belonged. (14RT 1962.) It was stipulated that appellant Pops had "Y M O" tattooed on both his left and right forearms. (14RT 1962-1963.)

Finally, Barnes was shown the list of monikers (marked as Peo. Exh. 68B). The copy of the page signed by Barnes during the interview was marked as People's Exhibit 34C. Barnes testified that the name "Nut" in position number one was appellant Pops. The name "Scrap" in position number two was Harris, appellant Pops's brother. The third name, "Bird," was appellant Wilson. Barnes identified his own nickname, "Smerf," on the list in position number 18. (14RT 1958-1960.) While Barnes did not know if all the names on the list were members of the YMO, he did confirm that appellant, Harris and he were members. (14RT 1983-1985.) A star was placed next to Barnes's name. (The legend on the page indicated that a star represented people who were incarcerated.) Barnes confirmed that he was incarcerated in juvenile hall in early March 1998. (14RT 1960.)

Barnes did not know who produced the material he reviewed. (14RT 1958.) The drawings of the Tech Nine gun (Peo. Exh. 68A) and appellant Pops holding a Glock pistol (Peo. Exh. 68C) were not utilized during Barnes's testimony.

The record was clarified that People's Exhibits 34A-34C were enlargements of the copies shown to, and signed by, Barnes during the June 18, 1998 interview. The copies that bore Barnes's original signature were

marked as People's Exhibits 34D, 34C, and 34E. (14RT 1914.) The pages also corresponded to People's Exhibits 68B-68D, which were not signed by Barnes. The court determined that only the smaller-sized pages with Barnes's original signature (Exhibits 34D-34E) and the original pages (Exhibits 68B-68D) would be available to the jury during deliberations, since Exhibits 34A-34C were enlarged duplicates of Exhibits 34D-34E. (29RT 4808-4809-4311; see also 28RT 4476-4478 [defense objection to "duplicate" exhibits].)[95]

B. The Documents Were Adequately Authenticated

Generally, a "writing" must be authenticated; that is, it must be shown to be what the proponent of the evidence claims it to be. (Evid. Code, §§ 1400, 1401; *Jazayeri v. Mao* (2009) 174 Cal.App.4th 301, 321; *People v. Garcia* (1988) 201 Cal.App.3d 324, 328-329.) Under Evidence Code section 403, authentication is a preliminary fact that is first determined by the trial court and that is then subject to redetermination by the jury. (Evid. Code, § 403, subds. (a)(3), (c)(1); *People v. Fonville* (1973) 35 Cal.App.3d 693, 708-709.) The trial court decides whether the evidence is sufficient to permit the jury to find the preliminary fact true by a preponderance of the evidence, even if the trial judge would personally disagree. (*People v. Marshall* (1996) 13 Cal.4th 799, 832-833.) A trial court's decision as to the existence of a preliminary fact is reviewed under the abuse of discretion standard. (*People v. Lucas* (1995) 12 Cal.4th 415, 466; see *People v. Guerra* (2006) 37 Cal.4th 1067, 1113 ["The abuse of discretion standard of review applies to any ruling by a trial court on the admissibility of evidence.

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[95] People's Exhibits 34F and 34G were copies of People's Exhibits 39A and 39B (two photographs of the El Camino) that bore Barnes's original signature. (14RT 1914.)

[Citation.]"], overruled on other grounds in *People v. Rundle* (2008) 43 Cal.4th 76, 151.)

"Circumstantial evidence, content and location are all valid means of authentication [citations]." (*People v. Gibson* (2001) 90 Cal.App.4th 371, 383; accord, *People v. Olguin* (1994) 31 Cal.App.4th 1355, 1373.) For instance, in *People v. Olguin, supra*, at pages 1372-1373, the Court of Appeal found handwritten rap lyrics were sufficiently authenticated based on their content and location. The lyrics were found in the defendant's room, and their content mentioned the defendant's gang, his occupation, and a probable nickname. Similarly, in *People v. Gibson, supra*, at pages 382-383, the Court of Appeal found two manuscripts were sufficiently authenticated by content, location, and circumstantial evidence. The two manuscripts were found in the defendant's home and hotel room, they described a prostitution enterprise, which was shown by other evidence, and there was reference to one of the defendant's aliases as being the author.

Here, the pages in question from the blue writing table were authenticated by their location, content, and other circumstantial evidence. Tanesha Martin had previously lived in the apartment with appellant Wilson. She confirmed that the apartment was appellant Wilson's residence. She further confirmed that appellant Wilson's nickname was "Bird," which was the third name on the list. (8RT 786-787.) The name "Bird" also appeared on another page in the tablet. (8RT 794-795.) Martin further testified that appellant Pops and appellant Wilson were close friends, and she had seen Pops visit the apartment on several occasions. (8RT 788-790.) Martin identified the figure depicted in the "Nut Loco" drawing as appellant Pops. (8RT 792.) She agreed that the figure in the "Nut and the Monster Beefy" drawing was similar to appellant Pops and his Camaro. (8RT 793-794.) Martin also identified appellant Pops's brother (Harris) as

"Scrap" (8RT 795), the second name on the list and a person who was present at the apartment when the search warrant was executed.

Barnes's testimony at trial further authenticated the material for the jury. He personally knew appellants and Harris, and could identify their monikers on the list. Moreover, Barnes's own moniker "Smerf" was on this list. (14RT 1958-1960.) He, appellants, and Harris were all members of the Young Mafia Organization. (14RT 1962, 1983-1985.) Barnes was able to identify appellant Pops as the subject in the "Nut and the Monster Beefy" drawing with his Camaro. (14RT 1955-1957.) Barnes knew the meaning of the "Y M O" letters on the forearm of the other drawing. (14RT 1962.) These same letters were tattooed on appellant Pops's forearms. Based on this evidence, the pages from the blue writing tablet were authenticated.

C. The Trial Court Acted Within Its Discretion to Find the Pages Were Not Hearsay

Hearsay is "evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated." (Evid. Code, § 1200, subd. (a).) For purposes of the hearsay rule, a "[s]tatement" is defined as an "oral or written verbal expression" or "nonverbal conduct of a person intended . . . as a substitute for oral or written verbal expression." (Evid. Code, § 225; *People v. Lewis* (2008) 43 Cal.4th 415, 497-498 (*Lewis*).) Hearsay is not admissible unless it qualifies under some exception to the hearsay rule. (Evid. Code., § 1200, subd. (b); *Lewis, supra*, at pp. 497-498.)

> "'If a fact in controversy is whether certain words were spoken or written and not whether the words were true, evidence that these words were spoken or written is admissible as nonhearsay evidence.'" (*People v. Fields* (1998) 61 Cal.App.4th 1063, 1068–1069, quoting 1 Jefferson, Cal. Evidence Benchbook (3d ed. 1997) Hearsay and Nonhearsay Evidence, § 1.45, p. 31; see *Jazayeri v. Mao* [(2009] 174 Cal.App.4th [301]

> 316 ["Documents not offered for the truth of the matter asserted are, by definition, not hearsay."]; 1 Witkin, Cal. Evidence (4th ed. 2000) Hearsay, § 31, p. 714 [where "'the very fact in controversy is whether certain things were said or done . . . the words or acts are admissible not as hearsay[,] but as original evidence'"]; Fed. Rules Evid. 801(c), Advisory Committee Note ["If the significance of an offered statement lies solely in the fact that it was made, no issue is raised as to the truth of anything asserted, and the statement is not hearsay."].) Written or spoken words offered as original evidence rather than for their truth are generally referred to as "operative facts." (*Jazayeri v. Mao, supra*, 174 Cal.App.4th at p. 316; *People v. Fields, supra*, 61 Cal.App.4th at p. 1069.)

(*People v. Smith* (2010) 179 Cal.App.4th 986, 1003.)

In *Lewis, supra*, a case relied upon by both appellants (Pops AOB 149-150; Wilson AOB 220-222), the defendant was on trial for committing robberies and murders, some with a sawed-off shotgun. Drawings found in an apartment the defendant shared with codefendants depicted a cartoon caricature of a cat with money bags, a sawed-off shotgun, the name Bopete (defendant's moniker), the initials WSF (in reference to a gang), the number 211 (the Penal Code section for robbery), and other items. (*Lewis, supra*, 43 Cal.4th at pp. 432, 496.) The drawings were hearsay because they were offered for the truth of the assertion that defendant committed robberies with a sawed-off shotgun; hence, the court found that the drawings were inadmissible unless they fell within an exception to the hearsay rule. (*Id.* at p. 498.)

They were not, however, admissible as an admission by the defendant. (*Lewis, supra*, 43 Cal.4th at p. 498; Evid. Code, § 1220.) Notwithstanding that defendant's gang moniker was on the drawings and that they were in his apartment, this Court concluded that this was insufficient evidence defendant drew them, especially given the prosecutor's theory that a codefendant drew them. Nor were the drawings admissible as adoptive admissions under Evidence Code section 1221. (*Lewis, supra*, 43 Cal.4th

at p. 498.) There was no evidence that the defendant, by words or conduct, manifested or adopted a belief in their truth, and his "mere possession" of the drawings was insufficient to establish their admissibility as an adoptive admission. "Without such evidence of words or conduct, there was no way for the jury to determine whether the drawings simply represented the artist's fantasy, or whether they were an assertion of fact. As such, the drawings were hearsay and were inadmissible against defendant." (*Id.* at p. 499.)

Based on the Court's holding in *Lewis*, respondent agrees that the material could not be considered as an adopted admission by either appellant. No evidence was adduced that either appellant was responsible for the material or that they "adopted a belief in their truth." As such, the material was admissible only if it was offered for a nonhearsay purpose and relevant to a material issue.

Here, the trial court concluded that the documents were admissible as nonhearsay to show that appellants had a relationship, that appellant Pops had a connection to Wilson's apartment (where the unexpended nine-millimeter cartridge was found that had been worked through and expended from the same nine-millimeter firearm used in the murders), and to corroborate Barnes's testimony relating to his relationships with appellants and Harris. (8RT 1464; 14RT 1897-1907.) On appeal, the "review focuses on whether the documents supported the nonhearsay purposes identified by the court and whether those purposes were relevant to an actual issue in dispute. (See *People v. Bunyard* (1988) 45 Cal.3d 1189, 1204, quoting *People v. Armendariz* (1984) 37 Cal.3d 573, 585.)" (*People v. Smith, supra*, 179 Cal.App.4th at p. 1004.)

In the case at bar, the documents were clearly probative as to Barnes's testimony that he had a friendship and associated with appellants and Harris. His relationships with these men corroborated Barnes's testimony

as to the burning of the El Camino at appellants' behest. Barnes would not have been enlisted to help undertake such an important task had he not been trusted by appellants and Harris. The list with the monikers and the drawing of the forearm with the "YMO" tattoo, further helped established Barnes's knowledge of appellants' relationship. This evidence too constituted circumstantial evidence of Barnes's personal knowledge that they were all members of the Young Mafia Organization or "Y M O."

Moreover, the documents, coupled with Barnes's explanations based on his personal knowledge, were circumstantial evidence connecting appellant Pops to appellant Wilson's apartment. That evidence was important since the unexpended nine-millimeter cartridge that had been ejected from the same weapon appellant Pops was accused of using at the carwash was found under the couch cushion in the apartment. The drawings and list were not offered for the matter asserted as to appellants' guilt, but merely as "operative facts" which supported other evidence establishing such material issues as appellants' relationship between each other, and the relationships between appellants, Barnes, and Harris. In other words, the evidence was nonhearsay because it was offered to show pertinent connections between the people involved in the murders and actions after-the-fact.

Without considering the material for the truth of the matter stated therein, it was relevant that the list bearing appellant Pops's moniker and drawings bearing his likeness and tattoos were found at the residence. The jury could infer that these items would not have been so located unless appellant Pops had some connection to the apartment and appellant Wilson. (See, e.g., *People v. Williams* (1992) 3 Cal.App.4th 1535, 1538-1540, 1542-1543 [documents offered for nonhearsay found at apartment were circumstantial evidence of defendant's connection to residence]; *People v. Goodall* (1982) 131 Cal.App.3d 129, 139-140, 143 [copy of unsigned lease

and rent receipt bearing defendant's name properly introduced for nonhearsay purpose to show connection to apartment]; see also *People v. Rushing* (1989) 209 Cal.App.3d 618, 622.) The trial court thus did not abuse its discretion in admitting the evidence for nonhearsay purposes.

Appellants' claims that the admission of the material violated their confrontation rights (Pops AOB 158-165; Wilson AOB 226-229) lack merit. In *Crawford*, the United States Supreme Court held that testimonial hearsay evidence is admissible only when the proponent establishes unavailability and a prior opportunity for cross-examination. (*Crawford, supra*, 541 U.S. at p. 68.) As this Court has explained, however, "the confrontation clause is concerned solely with hearsay statements that are testimonial, in that they are out-of-court analogs, in purpose and form, of the testimony given by witnesses at trial." (*People v. Cage* (2007) 40 Cal.4th 965, 984.) Thus, "the statement must have been given and taken *primarily for the purpose ascribed to testimony*—to establish or prove some past fact for possible use in a criminal trial. . . . [T]he primary purpose for which a statement was given and taken is to be determined 'objectively,' considering all the circumstances that might reasonably bear on the intent of the participants in the conversation." (*Ibid*, fn. omitted; italics added.) A statement is not testimonial unless the out-of-court statement was made with some degree of formality or solemnity *and* its primary purpose pertains in some fashion to a criminal prosecution. (*People v. Lopez* (2012) 55 Cal.4th 569, 581-582; *People v. Holmes* (2012) 212 Cal.App.4th 431, 438 ["It is now settled in California that a statement is not testimonial unless both criteria are met"].) Here, it is without question that whoever prepared the list and drawings in the writing tablet did not do so for the purpose ascribed to testimony. The drawings in question were clearly an

homage to appellant Pops. As such, *Crawford*'s concerns about confrontation are not present in this case.[96]

The holding *People v. Thomas, supra,* 53 Cal.4th 771 at p. 803 is instructive here. In *Thomas*, the defendant contended that the trial court erred in admitting drawings of a crime scene, which were used to illustrate the testimony of three eyewitnesses. (*Id.* at p. 803.) The defendant argued that "because the drawings demonstrated the artist's interpretation of what the scene looked like, they constituted hearsay that was inadmissible under state law." (*Ibid.*) He also claimed the admission violated the confrontation clause under *Crawford.* (*Ibid.*) This Court stated:

> To the contrary, because the drawings were admitted solely to illustrate the witnesses' testimony, and not for the truth of the matters portrayed, they did not constitute inadmissible hearsay. [Citation.] Furthermore, the confrontation clause "does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted." [Citations.]

(*Ibid.*)

Appellants' assertions that the prosecutor's use of the evidence during his argument to the jury effectively turned it into hearsay (Pops AOB 154, 162-166; Wilson AOB 212-213, 228-229) is also meritless. Here, appellants attempt to make hay out of two passing comments by the prosecutor during argument. The first comment occurred when the prosecutor mentioned that appellant Pops was proud of the rims he removed from Dunn's El Camino. (27RT 4460.) The prosecutor recalled Barnes's testimony that after appellant Pops put the IROC rims on his Camaro, Barnes complemented Pops noting the rims were "tight" and they

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[96] Moreover, the high court in *Crawford* expressly stated that the confrontation clause "does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted." (*Crawford, supra*, 541 U.S. at p. 59, fn. 9; *People v. Cage, supra,* 40 Cal.4th 965 at p. 975, fn. 6.)

bumped firsts. (27RT 4460-4461, see, e.g., 14RT 1952-1953; Supp. II CT 112-113.) The prosecutor then also mentioned the drawing of appellant Pops "making a muscle pose with the Camaro behind him and the IROC rims on it. [¶] He was proud of it. [¶] He was proud of it." The defense objected, and noted in front of the jury that the evidence was not admitted for that purpose. The court too noted in front of the jury that it had admitted the drawings "for certain limited purposes which did not include that."[97] The prosecutor then corrected himself and told the jury, "The drawings show a relationship between Mr. Wilson and Mr. Pops and we'll get into that later on." (27RT 4461.) Even assuming the prosecutor's passing statement was inopportune, he corrected himself and informed the jury of the evidence's limited purpose. The jury would not have been confused.

Appellants' second complaint about the prosecutor's argument, to which no defense objection was offered at trial, occurred while the prosecutor was discussing all of the other "connecting evidence" in addition to compelling eyewitness identifications. (28RT 4506.) Among other evidence discussed by the prosecutor, he mentioned the following: a nine-millimeter semi-automatic gun was used (by appellant Pops) to kill Dunn; Dunn's El Camino was taken from the carwash; the El Camino ended up a short distance from the barbecue party attended by appellants; appellant Pops's girlfriend drove Barnes and Harris to the alleyway without needing

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[97] The court also observed that the prosecutor had "referred to a bunch of evidence." The court asked the prosecutor if he was "referring to the drawings in that regard . . . or the other evidence?" When the prosecutor stated he was referencing "[E]verthing together," the court made its admonishment that the drawing was admitted for a limited purpose. (27RT 4461.)

directions; the IROC rims had been removed from the El Camino; and the IROC rims ended up on appellant Pops's Camaro. (28RT 4506-4508.)

The prosecutor then pointed out that the unexpended nine-millimeter round was found in appellant Wilson's apartment. This round had been worked through and expended from the same nine-millimeter firearm used (by appellant Pops) at the carwash. The prosecutor observed, "So that clearly indicates a connection between Mr. Wilson's apartment and the crime scene." (28RT 4508.) The prosecutor then mentioned the "connections" between appellant Wilson and appellant Pops. The prosecutor noted that the drawings found at appellant Wilson's apartment depicted the same "Y M O" tattoo that appellant Pops had on his forearms and the firearm depicted in that drawing resembled the nine-millimeter Tech Nine from which the unexpended round found under the couch cushion had been ejected. (28RT 4509.) The prosecutor also mentioned the list from the blue writing tablet, which further showed a clear connection between appellants ("Nut" and "Bird"), Harris ("Scrap"), and Barnes ("Smerf"). (28RT 4509-4510.) This was indeed the purpose for which the evidence was introduced—i.e., to provide circumstantial evidence of connections between appellant Pops and appellant Wilson, his apartment, Harris, and Barnes. Read in context, there was nothing objectionable (and no objection was made) about the prosecutor's use of the material during this segment of the argument.

D. Appellant Pops's Related Claim that the Trial Court Should Have Given a Sua Sponte Limiting Instruction About the Evidence is Forfeited

In a related claim, appellant Pops contends that because the prosecution "misuse[d]" the drawings during argument the trial court was required to give a sua sponte limiting instruction on the use of the evidence. In order to get around the forfeiture of this claim, appellant Pops asserts

that the purported misuse was so extraordinary that his failure to request a limiting instruction should be forgiven. (Pops AOB 169-174 [Arg. IV]; see also Pops AOB 162-164.) Appellant Pops's forfeiture of the claim cannot be excused.

The trial court on at least two occasions specifically stated that it would give the jury a limiting instruction as to the use of the several pages from the blue writing tablet. (8RT 827-829; 12RT 1464.) The defense never submitted such an instruction. "Trial courts generally have no duty to instruct on the limited admissibility of evidence in the absence of a request. [Citation.]" (*People v. Lang* (1989) 49 Cal.3d 991, 1020; *People v. Grant* (2003) 113 Cal.App.4th 579, 591; Evid. Code, § 355.) Appellant Pops's claim is therefore forfeited.

In an attempt to skirt the forfeiture rule, appellant Pops cites to *People v. Rogers* (2006) 39 Cal.4th 826, 854. That decision recognized such a duty might arise sua sponte for the "occasional extraordinary case," but this is not such a case. *Rogers* explained an appropriate case involves evidence of past offenses that is "a dominant part of the evidence against the accused" and is "both highly prejudicial and minimally relevant to any legitimate purpose." (*Rogers, supra*, 39 Cal.4th at p. 854; *People v. Bunyard* (1988) 45 Cal.3d 1189, 1225-1226.) Neither set of conditions apply here.

The evidence did not relate to prior offenses unrelated to the instant case, nor was the evidence a dominant part of the People's case. Moreover, as discussed in the preceding section, the prosecutor's made only two fleet comments to which appellants attach error. The one passing instance where the prosecutor arguably misstated the purpose of the evidence was objected to by the defense in front of the jury. After the court noted the limited scope of the evidence's admissibility, the prosecutor clarified and correctly stated the proper use of the evidence to the jury. The other instance in

which the evidence was discussed fell squarely within the court's ruling. As the evidence did not create an "extraordinary case," there is simply no basis to excuse the forfeiture.

E. Any Error Was Not Prejudicial

Finally, while the several pages from the writing tablet were admissible for the reasons stated, appellants would have been found guilty of the murder charges with or without the material. As appellant Pops notes, the challenged evidence was cumulative (or illustrative) of Barnes's testimony. (Pops AOB 156-157.) But, for that very reason, the evidence was also not prejudicial. Barnes clearly had friendship-connections to appellants and Harris. He was an accessory after the fact by assisting in the burning of Dunn's El Camino. His properly admitted testimony, more than any drawings or list, was a strong blow against appellants. Moreover, given the eyewitness testimony, appellant Pops's possession of Dunn's IROC rims, and the unexpended nine-millimeter round extruded from one of the murder weapons found at appellant Wilson's apartment, any error in the admission of the drawings and list was harmless. (*Watson, supra*, 46 Cal.2d at p. 836.) Appellants' claims should be rejected.

VI. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION ALLOWING THE ADMISSION OF A PHOTOGRAPH SHOWING HERNANDEZ'S LEG WOUND

Appellant Pops contends the trial court abused its discretion by allowing the prosecution to introduce one of the two photographs showing Hernandez's leg wound (Peo. Exh. 73B). (Pops AOB 267-273 [Arg. XII].) No abuse of discretion occurred here as the photograph was relevant and not overly prejudicial.

The one photograph the defense did not object to (Peo. Exh. 73A) shows Hernandez lying on a hospital gurney, covered by a clean white

sheet up to her neck. Her head is slightly turned away from the camera, and an oxygen mask covers her nose and mouth. A patch of a reddened area on her right hip, with possibly some torn skin, can be seen in the bottom right side of the photograph.

The other photograph (Peo. Exh. 73B) was objected to on the ground it was more prejudicial than probative (Evid. Code, § 352). (12RT 1467-1468.) That photograph depicts the victim's right leg from her hip to shin area. Just above her right knee is a fairly large open wound caused by the shotgun blast. Also visible is what looks like some muscle tissue. The wound appears to have been cleaned, and there is a relatively small amount of blood, most of which is on the gauze bandages lying to the victim's side. The prosecutor explained that the photograph was relevant to prove the crime was a willful, deliberate and premeditated attempted murder. It was also necessary to prove the allegations of great bodily injury and that a firearm used by appellant Pops proximately caused great bodily injury. (12RT 1466-1468.)[98] The defense offered to stipulate that great bodily injury occurred. (12RT 1470.) The court ruled that the photograph could be shown to the jury. (12RT 1471.)

> This [C]ourt is often asked to rule on the propriety of the admission of allegedly gruesome photographs. [Citations.] At base, the applicable rule is simply one of relevance, and the trial court has broad discretion in determining such relevance. [Citation.] "[M]urder is seldom pretty, and pictures, testimony and physical evidence in such a case are always unpleasant" [citations], and we rely on our trial courts to ensure that relevant, otherwise admissible evidence is not more prejudicial than probative [citation]. A trial court's decision to admit photographs under Evidence Code section 352 will be upheld on appeal unless the prejudicial effect of such photographs clearly

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[98] There was an indication that the photograph would corroborate testimony of a medical doctor who would describe the extent of the wound and the treatment performed. (12RT 1469-1470.)

> outweighs their probative value. [Citation.] Finally, prosecutors, it must be remembered, are not obliged to prove their case with evidence solely from live witnesses; the jury is entitled to see details of the victims' bodies to determine if the evidence supports the prosecution's theory of the case. [Citation.]

(*People v. Gurule* (2002) 28 Cal.4th 557, 624.)

Appellant Pops cites, inter alia, to *People v. Marsh* (1985) 175 Cal.App.3d 987, 997, that "[t]he unnecessary admission of gruesome or inflammatory photographs can deprive a defendant of a fair trial and require reversal of a judgment." (Pops AOB 271.) In *Marsh*, seven autopsy photographs in a child abuse murder case, which the trial court described as "'certainly shocking'" and the prosecutor admitted were "'terribly gruesome and terribly upsetting,'" were admitted into evidence. (*Marsh, supra*, at p. 997.) The photographs included images of the interior of the child's skull with blood clots, a scalp that had been peeled back, and the open ribcage exposing the bowels. (*Id.* at pp. 996-997.) Even though the *Marsh* court concluded that it was error to admit the photographs, it did not find that their admission was a miscarriage of justice. (*Id.* at p. 998.) The appellate court further noted that admission might still have been appropriate if "it [had been] necessary . . . to prove malice . . . or to justify aggravation of the crime and penalty. . . ." (*Ibid.*)

In the case bar, by contrast, proof of malice aforethought and great bodily injury were necessary for the prosecution's case. (See, e.g., 4CT 1090; 5CT 1218, 1227-1229.) The photograph not objected to (Peo. Exh. 73A) of the victim's upper thigh and hip area, although reddened by some blood, does not by any stretch of the imagination reflect the perpetrator's intent in the attack or even necessarily an infliction of great bodily injury. The challenged photograph, however, was probative of the issues of intent and great bodily injury. This is especially true in this case since the victim

did not testify and the jury could not assess her injuries by seeing Hernandez in person. The photograph was highly relevant to show the manner in which the victim was attacked and the severity of her injuries. (See *People v. Ramirez* (2006) 39 Cal.4th 398, 453, citing *People v. Heard* 2003) 31 Cal.4th 946, 973, *People v. Crittende, supra,* 9 Cal.4th 83 at pp. 132-133.)

The photograph shows only a portion of the victim's leg, there is relatively little blood and, although the single gunshot wound is unpleasant to look at, it cannot be characterized as gruesome or shocking. (See *People v. Mendoza* (2000) 24 Cal.4th 130, 171 [defense objection to photograph of victim's charred body would not have succeeded where Court of Appeal reviewed photograph and concluded it was "not unduly gruesome or inflammatory"].) Moreover, any undue prejudice is certainly outweighed when the single photograph is considered in the context of the case as a whole, where other victims were brutally murdered by gunshots to their heads. Fortunately, Hernandez survived her wounds. The photograph would have had little emotional impact on the jury. The trial court did not abuse its discretion, and appellant Pops's claim should be rejected. Appellant Pops's suggestion that the People should have accepted the defense's proposed stipulation that the wound amounted to great bodily injury or that the prosecution's refusal manifested an intent to "further prejudice the jury" (Pops AOB 268, 270, 272) is meritless. The prosecution had the burden of establishing that an attempted murder and great bodily injury occurred, and in meeting that burden, the prosecution was not required to "accept antiseptic stipulations in lieu of photographic evidence." (*People v. Pride* (1992) 3 Cal.4th 195, 243; see also *People v. Steele* (2002) 27 Cal.4th 1230, 1243 [prosecution entitled to prove its case].)

Further, Hernandez's daughter Tamanika positively identified appellant Pops as the shooter. She had previously seen him in her apartment, and he had a very distinctive hairstyle. Tamanika again saw Pops after the shooting driving in his Camaro. That appellant Pops was targeting Salter (who stayed at the apartment) and/or Davis (whom Pops encountered at the apartment the previous day), tended to show a motive. Additionally, appellant Pops's attempt to dissuade Tamanika from testifying shows a consciousness of guilt. As such, any error was harmless. (*Watson, supra*, 46 Cal.2d at p. 836.)

VII. EVIDENCE OF THE UNCHARGED ARSON OF GANT'S CAR BY APPELLANT POPS WAS PROPERLY ADMITTED AS TO MOTIVE AND THE IDENTITY OF THE SAME PERPETRATOR OF THE HERNANDEZ SHOOTING

Appellant Pops contends that the trial court abused its discretion by admitting evidence of the arson of Gant's car. He further asserts that the alleged error denied him due process and a fair trial. (Pops AOB 213-227 [Arg. VIII].) The claim lacks merit. The trial court did not abuse its discretion as the evidence was relevant to motive in the Hernandez shooting and the identity of the shooter.

A. Applicable Law

"To be relevant, an uncharged offense must tend logically, naturally and by reasonable inference to prove the issue(s) on which it is offered." (*People v. Robbins* (1988) 45 Cal.3d 867, 879.) Evidence that a defendant committed crimes other than those for which he is on trial is admissible when it is logically, naturally, and by reasonable inference relevant to prove some fact at issue, such as motive or identity. (*People v. Fuiava, supra,* 53 Cal.4th 622 at p. 667; *People v. Davis* (2009) 46 Cal.4th 539, 602; *People*

v. Lindberg (2008) 45 Cal.4th 1, 23 [identity]; *People v. Daniels* (1991) 52 Cal.3d 815, 856; Evid. Code, § 1101, subd. (b).)

The trial court has discretion to admit such evidence after weighing different factors:

> The trial judge has the discretion to admit such evidence after weighing the probative value against the prejudicial effect. [Citation.] When reviewing the admission of evidence of other offenses, a court must consider: (1) the materiality of the fact to be proved or disproved, (2) the probative value of the other crime evidence to prove or disprove the fact, and (3) the existence of any rule or policy requiring exclusion even if the evidence is relevant. [Citation.]

(*Fuiava, supra*, 53 Cal.4th at p. 667; *People v. Kelly* (2007) 42 Cal.4th 763, 783; *People v. Daniels, supra*, 52 Cal.3d at p. 856.) A trial court's rulings on relevance and admission or exclusion of evidence under Evidence Code sections 1101 and 352 are reviewed for abuse of discretion. (*Fuiava, supra*, 53 Cal.4th at p. 667-668; *Davis, supra*, 46 Cal.4th at p. 602), and shall not be disturbed on appeal absent a showing that such discretion was exercised "'in an arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice.'" (*People v. Rodrigues, supra*, 8 Cal.4th at pp. 1124-1125).

Generally speaking, a great degree of similarity between the charged and uncharged conduct is required to show identity. (*People v. Ewoldt* (1994) 7 Cal.4th 380, 403.) The least degree of similarity is generally required to establish intent or motive. (*Ibid.*) Where, however, uncharged conduct is offered on disputed issues, such as identity or motive, the requirement for a distinctive modus operandi does not apply when the same perpetrator and intended victim are involved. (*People v. Kovacich* (2011) 201 Cal.App.4th 863, 893; see also *People v. Linkenauger* (1995) 32 Cal.App.4th 1603, 1613; accord, *People v. Zack* (1986) 184 Cal.App.3d 409, 415.)

B. The Hearing

1. Keith Salter's Testimony

At the Evidence Code section 402 hearing conducted by the trial court, Keith Salter testified that in the early morning hours of February 6, 1998, he was sleeping in the bedroom of Jane Hernandez's apartment on Linden Avenue with her daughter Tamanika. Salter had a gun with him in the bedroom. Around 2:00 a.m., Salter was awakened by gunfire. (8RT 840-841, 845, 866-867, 880.) He heard two gunshots. (8RT 861.) He got out of bed and moved toward the living room. When he heard Jane calling for Tamanika, he saw that Jane had been shot and was lying on the floor. (8RT 846-847, 860-861, 867-868, 876-878.)

In February 1998, Salter lived at an apartment on Linden Avenue, located a block away from Hernandez's apartment. He shared the apartment with his mother. His cousin, Patreiner Gant, also lived in the same apartment complex. (8RT 847-848.) Gant owned a Camaro, and Salter sometimes drove with her. (8RT 848.) He claimed not to know why someone would shoot Hernandez or later burn Gant's car a few days later. (8RT 859-862, 864.) Salter denied that he was a member of a Crip gang or used the moniker "No-Good." (8RT 856.)[99]

Salter denied he "knew" appellant Pops, but acknowledged he had "seen" Pops "around Long Beach" "once or twice" before the shooting. (8RT 850-851.) Salter "probably" saw appellant Pops "once" after the shooting. (8RT 852, 857.) He denied that he told Tamanika that appellant Pops had shot her mother. (8RT 851.) Salter also denied that he told Gant that appellant Pops had burned her car. (8RT 859.)

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[99] At trial, Reggie Davis, Salter's friend, testified that Salter's moniker was "Baby No Good." (17RT 2482-2483.) Salter also admitted at trial that he was a member of the Nutty Block Crips. (16RT 2418.)

Salter had a cousin named Lawrence Thomas who went by the nickname "Whop." (8RT 854.) Salter had spoken to Thomas after appellant Pops was arrested, but denied that Thomas spoke to him about the Hernandez shooting. (8RT 854-855.) Thomas was incarcerated in the county jail in October 1998. (8RT 855.) Salter claimed that he did not know that Thomas and appellant Pops had been convicted together of robbery in 1991. (8RT 865.)

Several weeks after the shooting, Salter left town and went to Washington State. He remained there for about a month and a half, returning only after appellant Pops had been arrested. (8RT 873-874.)

Salter's answers to the prosecutor's questions during the hearing were evasive. (See, e.g., 8RT 851-853.) Salter admitted lying during an interview with the prosecutor and Detective Reynolds. (8RT 881.)

2. Patreiner Gant's Testimony

Gant and Salter were cousins. (8RT 882-883.) She lived in an apartment on Linden Avenue. (8RT 883.) Salter told Gant about the shooting at Hernandez's apartment. He did not say who he thought committed the shooting, or that he was having problems with anyone. (8RT 891.)

Gant had known appellant Pops for quite a while, possibly several years. He was a member of the Nutty Block gang. (8RT 892.) Appellant Pops visited Gant's cousin "Whop" on occasion at the apartment complex. (8RT 911-912.) On February 10, 1998, Gant was driving her Camaro with Salter as a passenger. (8RT 887.) As they drove through the Carmelitos housing project, she and Salter saw appellant Pops's friend, Terrance. Terrance was waving at someone who was sitting across the street under a nearby overpass. When Gant and Salter looked to where the man was waiving, they saw appellant Pops. (8RT 887-889, 913.) As they drove home, Gant and Salter discussed what occurred and wondered why

Terrance was pointing out the car to "Papa Nut" (i.e., appellant Pops). (8RT 890.)

The next day, in the early morning of February 11, Gant was awakened by a loud "boom" sound. (8RT 883.) She looked outside her window that faced Harding Street, and saw two men running away. The men turned left on a street two blocks away. Gant's Camaro was parked on the street. A patrol car and fire truck arrived and, when Gant went outside, she found that her car had been set on fire. (8RT 883-885, 894-897.) One of the men she saw running away was tall and had French hair braids. The other man was short. The taller man looked familiar to Gant. (8RT 885, 898.) Gant identified appellant Pops as the taller man with the braids. (8RT 886-887.)

Gant spoke with an arson investigator. (8RT 899.) She told the investigator that "Aswad"—appellant Pops—burned her car. (8RT 899-900.) Gant also told the investigator that appellant Pops burned her car because her cousin Salter was riding in her car the previous day. Gant did not recall if she told the investigator that appellant Pops shot Hernandez by mistake because he meant to shoot Salter. (8RT 900-901.) Gant had heard "on the street" that appellant Pops had shot Hernandez. (8RT 914.) Gant had not told police officers that she saw appellant Pops running away from the car because she was concerned for the safety of her children since appellant Pops knew where she lived. (8RT 908-910.)

Salter and Gant discussed the car arson. (8RT 891-892.) He expressed surprise that someone had burned Gant's car. At some point later, Gant saw appellant Pops driving alone in his Camaro on Atlantic Avenue. (8RT 890-891.)

3. The Trial Court's Ruling

The trial court allowed the prosecution to present evidence of the uncharged arson. It noted that there had been no previous interaction

between Hernandez or Tamanika and appellants. The court found that the uncharged conduct placed the Hernandez shooting in context. The court observed, "Mr. Salter does appear to be the constant between the two very close in time and distance incidents. And I think it has considerable probative value." (8RT 929.) The court also noted that Salter had a gun with him on the night of the Hernandez shooting, which tended to "indicate he's afraid of somebody." (8RT 929-930.) The court further found that any prejudice was minimal since the uncharged conduct was a crime against property and not violence directed at a person. (8RT 929.)

C. No Abuse of Discretion Occurred

Despite Salter's testimony to the contrary, there was circumstantial evidence that suggested appellant Pops had gone to the Hernandez apartment to shoot Salter. Hernandez and her daughter had no prior connection to appellant Pops. Salter had a gun in his possession, indicating, as the trial court noted, that Salter was in fear of someone. After the shooting and arson incidents, Salter fled to a different state. He did not return until after appellant Pops's arrest. This suggests there were problems between Salter and appellant Pops. There was also a close proximity in time and distance between the Hernandez shooting and the burning of Gant's car. The arson of the car occurred shortly after appellant Pops saw Salter in the Camaro with Gant. The car was parked in front of the apartment complex where Salter lived, and only one block from Hernandez's apartment. Appellant Pops also knew Salter's cousin. As was revealed later at trial, appellant Pops planned to have Thomas talk to Salter to dissuade Tamanika from testifying.

Given these links, the evidence of the uncharged conduct was relevant to the identity of the shooter, whom Tamanika identified as appellant Pops. Salter was the one person, other than appellant Pops, connected to both incidents. Since the evidence suggested that Salter was the intended target

the night of the shooting, the arson a few days later logically tended to show a motive—i.e., that there were problems between the two men. The arson evidence was thus relevant to issues at trial.

The "undue prejudice" referred to in Evidence Code section 352 "is not synonymous with 'damaging,' but refers instead to evidence that '"uniquely tends to evoke an emotional bias against defendant"' without regard to its relevance on material issues." (*People v. Kipp* (2001) 26 Cal.4th 1100, 1121.) The court properly found that the evidence was not unduly prejudicial. As the court noted, the arson was a property crime, and would not have evoked an emotional response from the jury. The arson was certainly not more inflammatory than the charged offense of attempted murder. Finally, any error in admitting the evidence was harmless under *Watson, supra*, 46 Cal.2d 818. (See *People v. Malone* (1988) 47 Cal.3d 1, 22 [erroneous admission of prior misconduct harmless under *Watson*].) Evidence of appellant Pops's guilt in the attempted murder was established by Tamanika's eyewitness testimony. She saw her mother shot from a very short distance away. She was able to identify appellant Pops by his distinctive hair braids. (16RT 2365, 2369-2377, 2384, 2395-2399, 2406-2407; 18RT 2775-2777, 2786.) Reggie Davis also saw appellant Pops at the apartment earlier in the day before the shooting. (17RT 2481, 2516-2517.) As far as any impact on the other charges, as previously discussed, the evidence was overwhelming.[100]

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[100] Appellant Pops has forfeited his due process claim by failing to object to the evidence on that ground. In general, a decision made under the ordinary rules of evidence does not implicate constitutional rights. (*People v. Dement* (2011) 53 Cal.4th 1, 52; *People v. Partida* (2005) 37 Cal.4th 428, 439 [erroneous admission of other crimes evidence "results in a due process violation only if it makes the trial fundamentally unfair"].) As appellant Pops did not make a constitutional argument below, and he has not established error under state law, he has not preserved a due process (continued...)

VIII. GANT'S MULTIPLE HEARSAY TESTIMONY WAS PROPERLY ADMITTED

Appellant Pops contends the trial court erred in admitting Patreiner Gant's testimony regarding what Reggie Davis told her Pops had said about the carwash murders. Appellant Pops claims the erroneous admission of this evidence violated his due process rights. (Pops AOB 228-239 [Arg. IX].) The claim lacks merit because the testimony was properly admitted under the exceptions to the hearsay rule.

A. Background

During Davis's trial testimony, the prosecutor asked if he had ever talked to appellant Pops about the carwash murders. Davis answered, "No. Never." (17RT 2486.) At side bar, the defense complained that they had not received any discovery on this subject. (17RT 2487-2488.) The prosecutor explained that when Gant entered the courtroom that morning, "for the first time ever she whispered . . . that Davis was told by Mr. Pops how the carwash murders went down." (17RT 2489.) Gant had not provided the prosecutor with any further details. (17RT 2491.)

Out of the jury's presence, the court conducted a hearing at which Gant and Davis testified, to determine what the witnesses would say on the matter. Gant testified that when she came into the courtroom, she told the prosecutor that appellant Pops had told Davis about the carwash killings. (17RT 2494-2495.) This was the first time Gant mentioned this information to anyone. (17RT 2498-2499.) Davis told Gant that appellant Pops said he "laid them [the victims] down." (17RT 2496-2498.)

(...continued)
claim on appeal. (*People v. Thornton* (2007) 41 Cal.4th 391, 443-444; *People v. Partida, supra*, 37 Cal.4th at pp. 435-439.)

Appellant Pops told Davis that he went to the carwash to rob the men but they did not give up the money so he shot them. Davis explained, "He laid them down one by one." (17RT 2498.) Davis mentioned it to Gant about one month after the murders. (17RT 2496.) Davis said that appellant Pops was "stupid" to tell others about the shootings because Pops was "going to mess around and tell the wrong person." (17RT 2497.)

According to Gant, Davis again mentioned it to her the previous day when the prosecutor indicated he was going to have Davis testify at trial. (17RT 2495-2496.) While outside the courtroom, after Davis was notified that he would be called to the stand, Davis said he "didn't know nothing about the shooting of Jamie (sic) Hernandez because he wasn't there." (17RT 2499.) Regarding the carwash murders, Davis said that if the defense attorney asked him questions, "it will be bad for his client." (17RT 2499-2500.) Davis again mentioned that appellant Pops had "told him about the carwash murders." (17RT 2498-2499.)

Davis testified and denied appellant Pops had told him that he went to carwash to commit a robbery, but they were not giving the money up, and laid them out. (17RT 2506-2507.)

Defense counsel objected to the proposed testimony coming before the jury because Gant's testimony had not met a threshold of reliability. The court disagreed. (17RT 2504, 2508-2509.) Gant then testified before the jury that Davis had twice mentioned to her that appellant Pops had admitted committing the carwash murders. Davis first told Gant about appellant Pops's admission approximately a month after the murders. Davis said that appellant Pops admitted going to the carwash to commit a robbery but the men would not give him money, so he shot them. (17RT 2524-2525, 2539-2540.) Davis again mentioned appellant Pops's statement to Gant on June 14, 1999—the day the prosecutor told Davis he would have to testify. Davis was upset and stated that the defense would not like what

he had to say. (17RT 2526-2527, 2534-2538.) Davis denied making such statements to Gant or that appellant Pops had made the statements to him. (17RT 2509-2510.)

After Davis and Gant testified before the jury, defense counsel argued that *California v. Green* (1970) 399 U.S. 149, held that prior inconsistent statements could be used for the purpose of judging credibility and for the truth. Defense counsel asserted, however, that since Davis denied making statement, Gant's testimony to the contrary violated appellant Pops's Sixth Amendment right to confrontation. (17RT 2521-2522.)

B. Legal Analysis

The hearsay rule provides that "evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated" is inadmissible, except as provided by law. (Evid. Code, § 1200.) Multiple hearsay is admissible if each statement satisfies an exception to the hearsay rule. (Evid. Code, § 1201.)

The exceptions to the hearsay rule relevant in this case include Evidence Code section 1220, under which "[e]vidence of a statement is not made inadmissible by the hearsay rule when offered against the declarant in an action to which he is a party," and Evidence Code section 1235, which provides that "[e]vidence of a statement made by a witness is not made inadmissible by the hearsay rule if the statement is inconsistent with his testimony at the hearing and is offered in compliance with Section 770."[101]

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[101] Evidence Code section 770 provides: "Unless the interests of justice otherwise require, extrinsic evidence of a statement made by a witness that is inconsistent with any part of his testimony at the hearing shall be excluded unless:

"(a) The witness was so examined while testifying as to give him an opportunity to explain or to deny the statement; or

"(b) The witness has not been excused from giving further testimony in the action."

In the present case, Gant's multiple hearsay testimony was properly admitted because both appellant Pops's statement and Davis's statement were admissible under exceptions to the hearsay rule. First, appellant Pops's statements to Davis regarding his participation in the carwash murders were admissible under Evidence Code section 1220, as a party admission. Second, Davis's statements to Gant were admissible under Evidence Code section 1235, as prior inconsistent statements. Davis, who testified at trial and was subject to cross-examination, claimed that he had never talked to either Gant or appellant Pops about the shootings. The prosecution was thus entitled to impeach Davis with Gant's contrary testimony. (See *People v. Zapien, supra*, 4 Cal.4th at pp. 951-952, 956 [multiple hearsay testimony is admissible if each hearsay level satisfies an exception to the hearsay rule, and the witness's "credibility, although challenged, [is] for the jury to determine"]; accord, *People v. Barnes* (1986) 42 Cal.3d 284, 303-304, 306.)

Appellant Pops nonetheless avers that the admission of Gant's hearsay testimony was in violation of the holding in *California v. Green, supra*, because Davis steadfastly denied making the statements and did not feign recollection. Appellant Pops also asserts that the statements should have been excluded by the trial court because they were "highly unreliable." (Pops AOB 232-238.) The same arguments, however, were considered and rejected by this Court in *Zapien*. In that case, a minor, Inez, testified and denied that the defendant (her uncle) had come to her house on the day of the murder with blood on his hands and clothes. Inez also denied having told her older sister Juanita this information and that the defendant also admitted killing the victim. Juanita testified and denied that Inez made such statements to her. She further denied that she told her friend Perez about Inez's statements. Perez, however, testified that Juanita had told her about Inez's statements concerning the defendant. (*Zapien, supra*, 4

Cal.4th at p. 950.) An investigator from the district attorney's office also testified about Perez's out-of-court statement to him. (*Id.* at p. 951.)

As did the defendant in *Zapien*, appellant Pops relies on the following sentence from the decision in *California v. Green, supra*, 399 U.S. at page 158: "If the witness admits the prior statement is his, or if there is other evidence to show the statement is his, the danger of faulty reproduction is negligible and the jury can be confident that it has before it two conflicting statements by the same witness." (*Zapien, supra*, 4 Cal.4th at p. 956.) This Court concluded that Perez's testimony—like Gant's here—"constitutes sufficient evidence to support a finding by the jury that the disputed statement was made." (*Ibid.*)

This Court also rejected the assertion that the multiple-hearsay statement should have been excluded because Perez was an unreliable witness. This Court reasoned that because all of the witnesses testified and were subject to cross-examination, it is for the jury to determine the witness's credibility. (*Zapien, supra*, 4 Cal.4th at pp. 956-957.) The trustworthiness of the prior inconsistent statement is thus not at issue. No preliminary trustworthiness determination by the trial court is required. In *Crawford, supra*, the United States Supreme Court citing *Green* with approval stated the following:

> [W]e reiterate that, when the declarant appears for cross-examination at trial, the Confrontation Clause places no constraints at all on the use of his prior testimonial statements. [Citation.] It is therefore irrelevant that the reliability of some out-of-court statements "'cannot be replicated, even if the declarant testifies to the same matters in court.'" [Citations.] The Clause does not bar admission of a statement so long as the declarant is present at trial to defend or explain it.

(*Crawford v. Washington, supra*, 541 U.S. at p. 59, fn. 9.)

Here, there was no error in admitting multiple-hearsay statements as both Davis and Gant testified and were subject to cross-examination. It

was for the jury (who was made unmistakably aware of Gant's late revelations and inconsistencies in her testimony) to judge the credibility of the witnesses. Appellant Pops's claim must therefore be rejected.[102]

IX. SUFFICIENT EVIDENCE SUPPORTED THE ROBBERY CONVICTION IN COUNT 5 AT THE CONCLUSION OF THE PROSECUTION'S CASE-IN-CHIEF

Appellant Wilson contends that the trial court erred in not granting his acquittal motion (§ 1118.1) at the close of the prosecution's case as to count 5 (the robbery of Hurd) because the evidence was insubstantial to prove that property was specifically taken from Hurd. (Wilson AOB 202-204 [Arg. V].) The claim lacks merit because there was strong circumstantial evidence that a robbery at the business occurred. As a co-owner of the business, Hurd had constructive possession of the property at the business.

A trial court should deny a motion for acquittal under section 1118.1[103] when there is any substantial evidence, including all reasonable inferences to be drawn from the evidence, to support the offense charged. (*People v. Mendoza* (2000) 24 Cal.4th 130, 175.) The Court examines

> "'the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence—evidence that is reasonable, credible and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.' [Citations.] We presume in support of the

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[102] Even if error occurred, it was harmless given the eyewitness identifications and other evidence connecting appellants to the murders. (See Statement of Facts and Arg. I, *ante*.)

[103] Section 1118.1 provides, in pertinent part: "In a case tried before a jury, the court on motion of the defendant . . . , at the close of the evidence on either side and before the case is submitted to the jury for decision, shall order the entry of a judgment of acquittal of one or more of the offenses charged in the accusatory pleading if the evidence then before the court is insufficient to sustain a conviction of such offense or offenses on appeal. . . ."

> judgment the existence of every fact the trier could reasonably deduce from the evidence. [Citation.] [¶] The same standard of review applies to cases in which the prosecution relies primarily on circumstantial evidence and to special circumstance allegations. [Citation.] '[I]f the circumstances reasonably justify the jury's findings, the judgment may not be reversed simply because the circumstances might also reasonably be reconciled with a contrary finding.' [Citation.] We do not reweigh evidence or reevaluate a witness's credibility. [Citation.]" [Citations.]

(*People v. Nelson* (2011) 51 Cal.4th 198, 210.)

Where a motion is made under section 1118.1 at the close of the prosecution's case-in-chief, "'the sufficiency of the evidence is tested as it stood at that point' in the trial [citation]—in other words, based on the prosecution's case alone, and without considering the evidence subsequently adduced during the presentation of the defense case. . . ." (*People v. Watkins* (2012) 55 Cal.4th 999, 1019; see also *In re Anthony J.* (2004) 117 Cal.App.4th 718, 727 [review limited to the evidence that was introduced at the time the motion was made].)[104]

After the close of the prosecution's case-in-chief, the defense made a general motion for acquittal on all counts. (19RT 3092; 20RT 3118, 3129-3130 [motion deferred without prejudice to appellants]; see generally 20RT 3174-3196 [court grants motion as to count 10, and denies motion as to other counts]; 4CT 992.) During the discussions about the jury instructions, appellant Wilson's counsel reasserted the 1118.1 motion as to the robbery counts, including Hurd. (25RT 4261-4268, 4302-4303 [granting motion as to the greater charges in counts 7 and 8, but instructing as to the lesser attempted murder; consideration of count 5 deferred]; 26RT

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[104] "[T]he trial court applies the same standard as an appellate court reviewing the sufficiency of the evidence." (*People v. Harris* (2008) 43 Cal.4th 1269, 1286.)

4330-4346.) In ultimately denying the motion for acquittal as to count 5, the court noted Williams's testimony that there was a large quantity of marijuana—about one pound—at the shop. The court observed that photographs of the evidence taken from the carwash suggested that appellants took some of the marijuana, but left a very small amount behind. The court held that the jury "could find a robbery as to the people connected with the business based on the narcotics." (26RT 4342, 4346; 4CT 992.)[105]

Williams testified that he and Hurd were co-owners of the business located on Sportsman Drive. (13RT 1710.) Although car washing constituted some measure of the business conducted there, it seems that a substantial portion of the business was devoted to the selling of marijuana. (12RT 1623, 1626 [Bowie observed "a lot of people in and out" of the carwash]; 13RT 1709-1710 [Williams and the other men smoked marijuana and then began selling to customers of the carwash].) The rent for the building was paid from the marijuana sale proceeds. (13RT 1756.) Williams testified that marijuana was present at the business on a daily basis. (13RT 1740.) It was stored in various places around the shop, including at times inside a soda vending machine. (13RT 1736-1737.) The men who frequented the shop, both the workers and customers, tended to carried large sums of money. (13RT 1741-1742.)

When appellants entered the shop on the morning of January 25, 1998, brandishing their guns, they demanded to know where the money and "shit" were kept. (12RT 1517.) A reasonable inference from this statement was that they were there to steal marijuana (i.e., the "shit") and the money

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[105] "Robbery is the felonious taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear." (§ 211.)

made from the sales. The evidence unquestionably shows that appellants ransacked the shop. The victims' pockets had been searched, and there were empty boxes scattered on the floor. (See Peo. Exh. 2A-2F; Peo. Exh. 4D; Peo. Exh. 5A-5I; 12RT 1530-1531.) It appears that no money was found by the police after the shootings either inside the building or on the victims. Additionally, the amount of marijuana pictured in the exhibits appears to be far less than what Williams indicated was present at the shop before the shootings. (13RT 1737-1739, 1742-1743, 1848; Peo. Exhs. 7A, 7B, 8A, 8B; Def. Exhs. A2, A4.) Where a victim was last seen in the company of the defendant, and the victim's property was not found on the victim or at the scene, this Court has found sufficient evidence of robbery. (*People v. Nelson, supra,* 51 Cal.4th 198 at pp. 211-212 [missing car keys sufficient evidence to support robbery-murder special circumstance finding]; *People v. Maury* (2003) 30 Cal.4th 342, 402 [missing cash sufficient evidence to support robbery-murder special circumstance finding].) Accordingly, there was strong circumstantial evidence that appellant Wilson, at the very least, stole property from the business.[106] "Circumstantial evidence is as sufficient to convict as direct evidence." (*People v. Reed* (1952) 38 Cal.2d 423, 431.) The trial court therefore properly denied the section 1118.1 motion as to count 5.

> A person who owns property or who exercises direct physical control over it has possession of it, but neither ownership nor physical possession is required to establish the element of possession for the purposes of the robbery statute. [Citations.] "[T]he theory of constructive possession has been used to expand the concept of possession to include employees and others as robbery victims."

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[106] Although not relevant in the context of the section 1118.1 motion, it was later learned during the prosecution's rebuttal case that money and jewelry were stolen from Hurd. (25RT 4112-4113.)

(*People v. Scott* (2009) 45 Cal.4th 743, 749-750. In *Scott*, this Court held "all on-duty employees have constructive possession of the employer's property during a robbery," explaining that "those who commit robberies are likely to regard all employees as potential sources of resistance, and their use of threats and force against those employees is not likely to turn on fine distinctions regarding a particular employee's actual or implied authority. . . ." (*Id.* at p. 755.)[107] Here, as a co-owner of the business, Hurd was likely an even stronger source of resistance than a mere employee.

Appellant Wilson avers that while Hurd was a co-owner of the carwash business, there was no evidence that he was involved in the marijuana distribution enterprise conducted there. He thus asserts that Hurd "did not have a special relationship with the owner of any marijuana whereby Hurd had authority or responsibility to protect the marijuana." (Wilson AOB 203.) It is doubtful appellant Wilson is correct that only Williams and Hoard were involved in the marijuana selling scheme conducted at the carwash. Although he was never directly asked if Hurd sold marijuana, Williams's testimony tended to suggest that everyone who worked at the shop sold and smoked marijuana. Moreover, Hurd and Williams were lifelong friends who owned the Wheels N' Stuff carwash together. (13RT 1710-1711.) The rent for the building was paid from the marijuana sales proceeds. Additionally, Hurd and Williams had previously been arrested together for possession of marijuana for sale. (13RT 1747-

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[107] As this Court has previously stated: "'"Robbery is an offense against the person; thus a store employee may be the victim of a robbery even though he is not its owner and not at the moment in immediate control of the stolen property." [Citation.]'" (*People v. Nguyen* (2000) 24 Cal.4th 756, 761.) The Court pointed out that robbery convictions had been upheld upon a finding of constructive possession of an employer's property by security guards, janitors, a store truck driver, and others who do not even have the responsibility of handling the property which was stolen. (*Ibid.*)

1748, 1799-1800.) Thus, circumstantial evidence connected Hurd to the marijuana stolen during the carwash robberies.

In any event, the attempt to parse out the various services rendered or merchandises sold at the same shop to assign authority over, or responsibility for, is unpersuasive. As Hurd was on duty and an obvious "potential sources of resistance," appellants' guilt does not turn on any actual or implied authority over the property stolen. (*Scott, supra*, 45 Cal.4th at p. 755.) "[B]usiness employees—whatever their function—have sufficient representative capacity to their employer so as to be in possession of property stolen from the business owner." (*People v. Jones* (2000) 82 Cal.App.4th 485, 491, cited with approval in *Scott, supra*, at pp. 746, 751-752.) The evidence was sufficient to establish that Hurd had constructive possession of all property at the business at the time appellants committed the robberies. Appellant Wilson's claim should be rejected.

Finally, even if the evidence is lacking, this Court may reduce the conviction to the lesser included offense of attempted robbery, which is certainly supported by the evidence. An appellate court that finds insufficient evidence supports the conviction for a greater offense may modify the judgment of conviction to reflect a conviction for a lesser included offense. (*People v. Bailey* (2012) 54 Cal.4th 740, 748; *People v. Reed* (2006) 38 Cal.4th 1224, 1227; § 1181, subd. 6; § 1260.) An attempt to commit robbery is a lesser included offense of the crime of robbery. (*People v. Crary* (1968) 265 Cal.App.2d 534, 540.) Based on the evidence here, there can be no doubt that appellants went to the Wheels N's Stuff carwash to commit robbery. Therefore, if the evidence is lacking as to an actual robbery against Hurd, it would be appropriate to reduce the offense to an attempt.

X. THERE IS SUFFICIENT EVIDENCE OF APPELLANT POPS'S CONVICTION FOR ATTEMPTED MURDER

Appellant Pops contends that the evidence is insufficient to sustain his conviction for the attempted murder of Hernandez. He asserts that Tamanika's identification of him as the shooter was so unreliable that it failed to constitute substantial evidence of guilt. (Pops AOB 240-260 [Arg. X].) This claim should be rejected. Tamanika's identification of appellant Pops as the shooter, coupled with the circumstantial evidence of Pops's link to Salter, his presence at the apartment prior to the shooting, and evidence of his consciousness of guilt, constituted sufficient evidence. Everything appellant Pops argues now, his defense counsel argued to the jury. This Court should decline appellant Pops's invitation reweigh the evidence and displace the jury as the finder of fact.

A. Standard of Review and Applicable Law

"In reviewing a sufficiency of evidence claim, the reviewing court's role is a limited one." (*People v. Smith* (2005) 37 Cal.4th 733, 738.) This Court should uphold a defendant's conviction unless "upon no hypothesis whatever" was there sufficient substantial evidence to support it. (*People v. Cravens* (2012) 53 Cal.4th 500, 508.)

> In assessing a claim of insufficiency of evidence, the reviewing court's task is to review the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence—that is, evidence that is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. (*People v. Johnson* (1980) 26 Cal.3d 557, 578.) The federal standard of review is to the same effect: Under principles of federal due process, review for sufficiency of evidence entails not the determination whether the reviewing court itself believes the evidence at trial establishes guilt beyond a reasonable doubt, but, instead, whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a

reasonable doubt. (*Jackson v. Virginia* (1979) 443 U.S. 307, 317-320.)

(*People v. Rodriguez* (1999) 20 Cal.4th 1, 11.)

This Court

> neither reweigh[s] the evidence nor reevaluate[s] the credibility of witnesses. [Citation.] We presume in support of the judgment the existence of every fact the jury reasonably could deduce from the evidence. [Citation.] If the circumstances reasonably justify the findings made by the trier of fact, reversal of the judgment is not warranted simply because the circumstances might also reasonably be reconciled with a contrary finding. [Citation.]

(*People v. Jennings* (2010) 50 Cal.4th 616, 638-639.)

In *People v. Allen* (1985) 165 Cal.App.3d 616, the court set out the standards governing review of a challenge to the sufficiency of eyewitness testimony supporting a conviction:

> It is well settled that, absent physical impossibility or inherent improbability, the testimony of a single eyewitness is sufficient to support a criminal conviction. [Citation.] "'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. [Citations.] 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 facts upon which a determination depends. [Citation.]'" [Citations.] Further, a jury is entitled to reject some portions of a witness' testimony while accepting others. [Citation.] Weaknesses and inconsistencies in eyewitness testimony are matters solely for the jury to evaluate.

(*Id.* at p. 623; *People v. Elliott* (2012) 53 Cal.4th 535, 585.)

B. There Is Substantial Evidence that Appellant Pops Shot Jane Hernandez

Tamanika identified appellant Pops as the shooter, and she was certain of her identification. When she heard the first gunshot, Tamanika went to the living room and looked around the corner into the kitchen. There was sufficient light that she could see that her mother had been shot and was lying on the kitchen floor. (16RT 2364-2365, 2393.) Tamanika could see two men in the doorway. (16RT 2365-2366, 2386, 2394-2395.) Detective Reynolds determined that the distance from the wall behind where Tamanika crouched and the back door where the shooter stood, was approximately eight feet. (20RT 3125; Peo. Exh. 72B.) She had a sufficient opportunity to view the event, and was able to identify the type of gun—a .12 gauge shotgun—used by the shooter. (16RT 2365.) The shooter, according to Tamanika, had a distinctive braid hairstyle and was tall. (16RT 2366-2368, 2386, 2406-2407.) Although Tamanika could not see the men's faces, she could clearly identify the braids of the taller man holding the gun. (16RT 2395-2396.)

After the shooting, Tamanika described the shooter's braided ponytail hairstyle to a neighbor. (16RT 2381.) That neighbor said she had seen the man at Tamanika's apartment before the shooting. The neighbor described the man as tall, having a dark complexion, and long hair in a ponytail. (16RT 2381-2383.) Tamanika then recalled that she too had previously seen the same man—appellant Pops—in her apartment a week or two before her mother was shot. (16RT 2384-2385.) Reggie Davis too saw appellant Pops at the Hernandez apartment on the afternoon before the shooting. (17RT 2480-2481.)

A couple of days after the shooting, Tamanika was visiting Salter's apartment. While she was outside walking with her daughter, she saw appellant Pops drive by in his Camaro. Tamanika was frightened upon

seeing the man who had shot her mother, and went back inside the apartment. (16RT 2375-2377, 2397.) Nineteen days after the shooting, Tamanika selected appellant Pops's photograph from a six-pack lineup, and noted that she had seen him driving in his Camaro. (16RT 2369-2371, 2375, 2384, 2387, 2397-2399; 18RT 2775-2777, 2786; Peo. Exh. 78.) Tamanika identified appellant Pops in court at trial. She was positive of her identification. (16RT 2375.) There was nothing physically impossible or inherently improbable about Tamanika's identification testimony.

Appellant Pops asserts that the only source of Tamanika's identification of the shooter came from the unidentified neighbor with whom she discussed the shooting. (Pops AOB 250-252.) Appellant Pops, however, misinterprets Tamanika's testimony about the neighbor. This evidence can reasonably be interpreted that the neighbor's comments merely helped Tamanika recall that she had previously seen appellant Pops in her apartment. In short, talking through her description of the shooter with the neighbor, jogged her memory about her prior contact. She then recognized appellant Pops driving by Salter's apartment. The inferences drawn from the record in a light most favorable to the judgment show that Tamanika saw appellant Pops's distinctive hairstyle, body shape, and height. After talking to her neighbor, Tamanika realized she previously had contact with appellant Pops when he was in her apartment. Her identification was not based on a secondhand source, but by personal contact with, and observations of, appellant Pops. Any weaknesses in Tamanika's testimony were solely a matter for the jury to evaluate and judge. (*People v. Allen, supra*, 165 Cal.App.3d at p. 623; see also *People v. Maury, supra* 30 Cal.4th at p. 403 ["it is the exclusive province of the . . . jury to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends"].)

Further supporting the attempted murder conviction was appellant Pops's apparent dispute with Salter. As discussed in previous arguments, Salter was the common dominator in the Hernandez shooting and the burning of Gant's car. He was at the apartment on the night of the shooting, and was seen by appellant Pops driving with Gant before her car was burned. The evidence circumstantially suggested motive and identification. Moreover, appellant Pops showed a consciousness of guilt by planning to have Salter's cousin intervene and dissuade Tamanika from testifying. (18RT 2791, 2799; Supp. II 1CT 115 [Peo. Exh. 85B (transcript)], 116 (Peo. Exh. 86B (transcript)].) Based on this record there was sufficient evidence to uphold the attempted murder conviction. Appellant Pops's argument should be rejected.

XI. A SUA SPONTE INSTRUCTION ON NON-PREMEDITATED EXPRESS MALICE SECOND DEGREE MURDER WAS NOT WARRANTED BY THE EVIDENCE IN THIS CASE

Appellant Wilson contends that the trial court erred in failing to sua sponte instruct the jury as to non-premeditated express malice second degree murder. He further asserts that by failing to instruct the jury on this lesser form of homicide, the court failed to provide the jury with the option of convicting him of a non-capital offense as required by *Beck v. Alabama* (1980) 447 U.S. 625. (Wilson AOB 127-198 [Arg. III].) This claim has no merit whatsoever as there was absolutely no evidence to support a second degree murder instruction.

> "It is the 'court's duty to instruct the jury not only on the crime with which the defendant is charged, but also on any lesser offense that is both included in the offense charged and shown by the evidence to have been committed.' [Citation.]" (*People v. Gutierrez* (2009) 45 Cal.4th 789, 826; see *Beck v. Alabama*[, *supra*,] 447 U.S. [at p.] 637.) "Conversely, even on request, the court 'has no duty to instruct on any lesser offense unless there is substantial evidence to support such instruction'

> [Citation.]" ([*People v.*] *Cole* (2004) 33 Cal.4th [1158,] 1215.) Substantial evidence "is not merely ' any evidence . . . no matter how weak' [citation], but rather '"evidence from which a jury composed of reasonable [persons] could . . . conclude []"' [] that the lesser offense, but not the greater, was committed. [Citations.]" (*People v. Cruz* (2008) 44 Cal.4th 636, 664.) " 'On appeal, we review independently the question whether the court failed to instruct on a lesser included offense.' [Citation.]" (*People v. Avila* (2009) 46 Cal.4th 680, 705.)

(*People v. Castaneda* (2011) 51 Cal.4th 1292, 1327-1328.)

Appellants did not request, and the court did not give, an instruction on the theory of express malice second degree murder. This Court has previously noted that it has left undecided as a matter of California law whether second degree murder is a lesser included offense of felony murder. (See *People v. Taylor* (2010) 48 Cal.4th 574, 623.) The Court, however, has since cast doubt on such an inclusion by pointing out that malice is an element of second degree murder but not of first degree felony murder. (*People v. Castaneda, supra,* 51 Cal.4th at pp. 1328-1329.) As appellant Wilson recognizes, "the prosecutor only pursued a felony murder theory of first degree murder [and] the trial court instructed the jury only on this theory." (Wilson AOB 128.) As such, the trial court had no sua sponte duty to instruct on a crime that was not necessarily included, but rather a merely lesser related. (*People v. Carrera* (1989) 49 Cal.3d 291, 310, 261; *People v. Lam* (2010) 184 Cal.App.4th 580, 583; *People v. Butler* (1996) 43 Cal.App.4th 1224, 1246.)[108]

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[108] Contrary to appellant Wilson's assertion, the accusatory pleading did not charge first degree premeditated murder with a corresponding necessarily lesser included offense of second degree murder. (See Wilson AOB 131-132.) Rather, from the outset, appellants were put on notice that the prosecution was proceeding on a felony murder theory. The information and amended information charged appellants with murder as well as alleging the robbery- and burglary-murder special circumstances.

(continued...)

But, even if second degree express malice murder is a lesser included offense of felony murder, there was absolutely no evidence substantial or otherwise to warrant such an instruction. The evidence exclusively demonstrated that each of the murders occurred during the commission of robbery or burglary, a circumstance that in itself establishes the offenses as first degree murders under the felony-murder doctrine. (§ 189.) As detailed in the factual statement above, appellants arrived at the carwash and waited in their car next to the building. (13RT 1703-1706, 1733.) When Williams spoke to the men a short time later, both stated they were "looking for some sounds." Appellants gave no indication that they were there to purchase marijuana. (13RT 1713-1714, 1771-1772, 1812) As Bowie arrived at the carwash, he walked to the pay telephone next to appellants' car. (12RT 1511-1513, 1518-1520, 1523-1526, 1577-1578, 1632-1633.) Appellants immediately held Bowie at gunpoint and told him not to move or warn anyone. (12RT 1514-1520, 1528-1529, 1577-1580, 1632, 1636-1637, 1642, 1644-1645.) Dunn and Hurd arrived and entered the building. (12RT 1515-1516.) Appellants then got out of their car with their guns still trained on Bowie, and forced him into the building. (12RT 1516-1517, 1519-1520.)

Once inside the building, appellants immediately ordered everyone to get on the ground and not to move. Appellants demanded to know where the money and "shit" were kept. (12RT 1517, 1580-1581.) Bowie was lying on the floor next to Hurd. (12RT 1517-1518, 1581, 1675-1676.)

(...continued)
(2CT 386-392; 4CT 1033-1041.) No evidence that the homicides were anything but felony-murder was presented. Therefore, as to counts 1 through 9, appellants were on notice that the prosecution was proceeding solely on a felony-murder theory. (Cf. *People v. Carey* (2007) 41 Cal.4th 109, 132.)

Appellants rummaged around in the back of the building. Appellant Wilson searched the white Chevrolet Caprice that was parked inside the building. (12RT 1530-1532, 1568-1570, 1581; 13RT 1735; Peo. Exh. 2; Def. Exh. L.) Bowie heard what sounded like struggling or some type of commotion. (12RT 1672-1673.)

Bowie then fled the building. As he did so, he heard numerous gunshots. (12RT 1530, 1533, 1583-1584, 1584-1586, 1594, 1650, 1652.) Appellants had shot the four victims in the back of their heads, indicating that they were lying on the floor when the shots were fired. (14RT 1996, 1998, 2002-2003, 2006-2007, 2011-2013, 2078-2082, 2090-2092.)

Contrary to appellant Wilson's argument, no reasonable jury could have concluded from the above described evidence that he committed second degree murder instead of first degree felony murder. Appellants went into the building with their guns already drawn, ordered everyone to lie on the ground, and demanded to know where the money and "shit" (possibly meaning marijuana) were kept. It is quite clear that appellants entered the carwash building with an intent to commit robbery. Appellant Wilson's theory proposed for the first time on appeal, that he and appellant Pops went to the carwash to purchase marijuana and "got into an argument and shoving match with some men inside," is woven out of whole cloth of pure speculation. There is no evidence whatsoever to suggest this scenario. The trial court here satisfied its obligation to instruct on the general principles of law relevant to the issues raised by the evidence.

In addition, appellant Wilson's reliance on *Beck* is misplaced. As this Court explained in a case similar to this one:

> Nor, contrary to [appellant's] assertion, did the trial court's failure to instruct on second degree . . . murder implicate defendant's federal constitutional rights within the meaning of *Beck v. Alabama*[, *supra*,] 447 U.S. 625. Neither *Beck* nor any of the subsequent cases [appellant] cites requires instruction on a

> lesser included offense that substantial evidence does not support. (*People v. Wilson* [(2008)] 43 Cal.4th 1, 17.) Furthermore, and also contrary to [appellant's] argument, this is not a case in which the jury was impermissibly "forced into an all-or-nothing choice between capital murder and innocence." (See *Beck v. Alabama, supra*, at p. 629[].) Here, the trial court gave the jury the noncapital third option of convicting defendant of first degree felony murder but finding not true the special circumstance allegations that made him death eligible. (*People v. Horning* (2004) 34 Cal.4th 871, 906.)

(*People v. Taylor, supra*, 48 Cal.4th at p. 625.)

As this Court in *People v. Prince* (2007) 40 Cal.4th 1179, 1269, noted, unlike the situation in the *Beck* case, California does not

> prohibit the giving of lesser included offense instructions in capital cases. Nor under our state law can the absence of a lesser included offense instruction force the jury into a choice between acquittal and a murder conviction that necessarily would lead to the death penalty; even after finding true an alleged special circumstance, a California jury may elect to sentence the defendant to life in prison without the possibility of parole.[109]

(*Ibid.*; see also *People v. Valdez* (2004) 32 Cal.4th 73, 118 ["Because there was no substantial evidence supporting an instruction on second degree murder, the high court's decision in *Beck* is not implicated"]; *People v. Waidla* (2000) 22 Cal.4th 690, 736.) Under the facts of this case, appellant

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[109] "The law at issue in *Beck* prohibited giving lesser included offense instructions in capital cases while they remained available in noncapital cases. Additionally, the jury was instructed that if they found the defendant guilty, they were mandated to impose the death penalty. (*Beck, supra*, 447 U.S. at p. 639, fn. 15.) In such a case, the jury was left with only 'two options: to convict the defendant of the capital crime, in which case they were required to impose the death penalty, or to acquit.' (*Hopkins v. Reeves* (1998) 524 U.S. 88, 95.)" (*People v. Valdez, supra*, 32 Cal.4th at p. 118, fn. 23.)

Wilson offers no compelling reason for this Court to reconsider its prior interpretations of *Beck*. (See Wilson AOB 151-189.)

In any event, any error was harmless. A trial court's error in failing to instruct the jury sua sponte on a lesser included offense is reviewed for prejudice under the *Watson* harmless error standard. (*People v. Breverman* (1998) 19 Cal.4th 142, 165; *People v. Joiner* (2000) 84 Cal.App.4th 946, 972.) Given appellants' armed intrusion into the business, and their stated purpose immediately upon entering the building that they wanted the "money" and "shit," it is not reasonably probable that appellants would have received a more favorable result had the court instructed as to second degree murder. (*People v. Elliot* (2005) 37 Cal.4th 453, 475-476; *People v. Horning, supra,* 34 Cal.4th at p. 906.) In fact, the jury necessarily found the murders were committed during the commission of a robbery and burglary by finding the special circumstance allegations true. Thus, the jury adopted the prosecution's felony-murder theory, which was the only theory supported by the evidence. Appellant Wilson's claim must be rejected.

XII. THE TRIAL COURT DID NOT ERR IN FAILING TO INSTRUCT ON THEFT AS A LESSER INCLUDED OFFENSE OF THE DUNN ROBBERY

Appellant Wilson contends the trial court erred in failing to instruct the jury sua sponte on theft as a lesser included offense of the Dunn robbery because, he asserts, the evidence suggests his intent to steal Dunn's El Camino was formed after the murders were committed. (Wilson AOB 199-201 [Arg. IV].) The claim lacks merit because substantial evidence supports the finding that appellants went to the carwash with an intent to commit robbery.

> To be clear, "a conviction of *robbery* cannot be sustained in the absence of evidence that the defendant conceived his

> intent to steal either before committing the act of force against the victim, or during the commission of that act; if the intent arose only after the use of force against the victim, the taking will at most constitute a theft."

(*People v. Lindberg, supra,* 45 Cal.4th 1 at p. 28, quoting *People v. Morris* (1988) 46 Cal.3d 1, 19, italics in original.) In the case at bar, overwhelming evidence shows that appellants went to the carwash with an intent to commit robberies. They were armed and were waiting in their car for the right opportunity to enter the building. As they held Bowie at gunpoint, they saw Dunn drive his El Camino equipped with the special chrome plated IROC rims into the parking lot and park. Once Dunn and Hurd had entered the building, appellant got out of their car with their guns drawn. They entered the building, forced everyone to the ground, and demanded to know were the money and "shit" were kept. On this evidence, a jury could reasonably conclude that appellants had formed intents to commit robberies at the carwash before entering the building. This evidence also shows appellants intended to take anything of value from the victims.

Appellant Wilson argues that it was "reasonable to believe the El Camino was stolen to facilitate an escape after the assault," and thus he and appellant Pops did not have the requisite intent for a robbery. (Wilson AOB 200.) Appellant Wilson fails to explain, however, why he would take the El Camino to escape when *he drove* to the carwash in the dark-colored Honda with appellant Pops. Here, the escape happened shortly after the murders and there is no evidence appellants made any plans to take two cars to facilitate the escape. To the contrary, taking Dunn's distinctive El Camino with the chrome IROC rims would have increased the chance that they would be apprehended. The more reasonable inference is that prior to the murders, appellants had already noticed the IROC rims and intended to take them by force. This intent was obviously formed when appellants saw

the car had chrome rims as they waited outside before entering the building. This intent was confirmed by uncontroverted evidence that appellant Pops shortly thereafter switched the stolen rims onto his Camaro and had Dunn's vehicle burned. Based upon this evidence, the jury reasonably could have found that appellants harbored an intent to steal Dunn's property when they saw him arrive at the carwash in his El Camino. There is no substantial evidence that anything less than a robbery occurred, and the trial court property did not instruction on theft. (*People v. Castaneda, supra*, 51 Cal.4th at pp. 1327-1328.) Appellant Wilson's claim should be rejected.

XIII. THE TRIAL COURT PROPERLY INSTRUCTED WITH CALJIC NO. 2.06 REGARDING EFFORTS TO SUPPRESS EVIDENCE

Appellant Pops contends that the trial court erred by instructing with CALJIC No. 2.06 relating to consciousness of guilt. (Pops AOB 261-266 [Arg. XI].) The claim lacks merit. The instruction was warranted because the evidence in the form of words from appellant Pops's own mouth indicated he was having his friend dissuade a witness against him, thus suggesting a consciousness of guilt.

At trial, the prosecution introduced portions of two recorded conversations between appellant Pops and two different women on separate occasions. The first recording was made on April 2, 1998, of a conversation between appellant Pops and Rosette Hanna. (18RT 2789-2790, 2793.) Appellant Pops discussed information he had received from a friend he first identified as "my boy." Appellant Pops stated to Hanna, in part, the following:

> [H]e's been out there in the immediate area of all the motherfuckers, he's been over there everyday kicking it with them like just listening and talking and shit, he's like said it's a good sign cause he ain't see this one motherfucker . . . he said he looking for this other motherfucker that I allegedly suppose to had come in the house and shot the mother, the daughter said I

> shot her, but the boyfriend of the daughter is his cousin, right, so he's gonna go over there and talk to his cousin and get at his girlfriend and tell them, you know what I'm saying, all that court shit, so one more, I get that one more, then I walk, everything else is hearsay, I ain't gonna give a fuck about that bullshit, just one more, get that one more I'll be home.

(Supp. II 1CT 155 [Peo. Exh. 85B].) It can be discerned that the person taking action on appellant Pops's behalf was his friend Lawrence Thomas (aka Whop), who was also Salter's cousin. Thomas and appellant Pops had previously been arrested together on January 12, 1991, in the Los Angeles for robbery. (17RT 2578.)

The second conversation was recorded on April 10, 1998, between appellant Pops and Tiontalayia Williams at the county jail. (18RT 2796-2797.) Appellant Pops told Williams the following:

> Yea then I heard that um this one fool that suppose to be the witness on me, can't nobody find his ass you know what I'm saying so that's cool I hope can't nobody find his ass even . . . damn, that's cool then he said his cousin get back today so he gonna talk to his cousin about his girlfriend, the one that saying that I did that to her mom, they do that's I'm out of this mother fucker you know what I'm saying.

(Supp. II 1CT 116 [Peo. Exh. 86B].)

The trial court instructed the jury pursuant to CALJIC No. 2.06 as follows:

> If you find that defendant Pops attempted to suppress evidence against him in any manner, this attempt may be considered by you as a circumstance tending to show a consciousness of gilt. However, this is not sufficient by itself to prove guilt, and its weight and significance, if any, are for you to decide.

(5CT 1170; 29RT 4746.)

> "It is an elementary principle of law that before a jury can be instructed that it may draw a particular inference, evidence must appear in the record which, if believed by the jury, will

> support the suggested inference. [Citation.] . . . [I]n order for a jury to be instructed that it can infer a consciousness of guilt from suppression of adverse evidence by a defendant, there must be some evidence in the record which, if believed by the jury, will sufficiently support the suggested inference."

(*People v. Hart* (1999) 20 Cal.4th 546, 620, quoting *People v. Hannon* (1977) 19 Cal.3d 588, 597; *People v. Valdez, supra,* 32 Cal.4th 73 at p. 137.) Circumstantial evidence is sufficient to support the trial court's instruction pursuant to CALJIC No. 2.06. (*People v. Rodrigues, supra*, 8 Cal.4th at pp. 1139-1140.) Evidence of the attempt of third persons to suppress testimony is admissible against a defendant where the defendant has authorized the attempt of the third person to suppress testimony. (*People v. Williams* (1997) 16 Cal.4th 153, 200.) In order to justify the instruction, the prosecution need not "conclusively establish [ ]" that suppression of evidence occurred; there need only be "some evidence in the record" that would support the inference. (*People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 103.)

Here, the jury was entitled to interpret appellant Pops's comments that he had arranged to have Thomas speak with his cousin Salter to "get at his girlfriend," as an attempt to persuade Tamanika not to testify against Pops. The jury could further interpret appellant Pops's comment that "so one more, I get that one more, then I walk," to mean that he was actively working to dissuade other witnesses and if Tamanika did not testify he would not be prosecuted. The jury could logically have inferred from appellant Pops's manifest desire to prevent the true story from being told an awareness that the truth was incriminating—in other words, Pops's consciousness of his guilt. (See, e.g., *People v. Coffman and Marlow, supra*, 34 Cal.4th at p. 103 [giving of CALJIC No. 2.04 justified by evidence of communications between codefendants referring to a "fictitious

actual perpetrator" as "suggestive of an effort to persuade each other to testify falsely or to fabricate evidence"].)

Moreover, appellant Pops does not argue on appeal that the trial court erred in admitting the evidence of his recorded conversations with Hanna and Williams. Thus, regardless of CALJIC No. 2.06, the prosecutor was therefore entitled to argue based on that evidence that appellant Pops was attempting to dissuade a witness against him from testifying which, in turn, demonstrated a consciousness of guilt. In fact, the cautionary nature of CALJIC No. 2.06 benefitted appellant Pops by admonishing the jury to be circumspect about evidence that might otherwise be considered decisively inculpatory. (*People v. Thornton, supra*, 41 Cal.4th at p. 438.) As such, even if the trial court erred in giving the instruction, any error would have been harmless in that it is not reasonably probable that had the instruction not been given a different result would have ensued. (*Watson, supra*, 46 Cal.2d at p. 836.) CALJIC No. 2.06 informed the jury that even if it found that appellant attempted to suppress evidence, that evidence alone was insufficient to support a guilty verdict. This made it unlikely that such evidence formed the sole basis of the attempted murder verdict, which ultimately was supported by substantial evidence (see Arg. X, *ante*), or any other conviction. Appellant Pops's claim should be rejected.

XIV. THE STANDARD GUILT PHASE INSTRUCTIONS PROPERLY INFORMED THE JURY ABOUT THE PROSECUTION'S BURDEN OF PROOF

Despite his failure to object to or request clarifications in the trial court, appellant Wilson contends that the five standard guilt phase instructions impermissibly reduced the prosecution's burden of proof. (Wilson AOB 294-304 [Arg. IX].) The Court should reject the claim as it has done so in many other similar cases.

The trial court's guilt phase instructions included the following six CALJIC standard instructions: (1) No. 2.01 (sufficiency of circumstantial evidence) (5CT 1169; 29RT 4744-4746); (2) No. 2.21.2 (willfully false witnesses) (5CT 1179; 29RT 4752-4753); (3) No. 2.22 (weighing conflicting testimony) (5CT 1180; 29RT 4753); (4) No. 2.27 (sufficiency of one witness's testimony) (5CT 1183; 29RT 4755); (5) No. 2.51 (motive) (5CT 1184; 29RT 4755); and (6) No. 8.83 (sufficiency of circumstantial evidence for special circumstances) (5CT 1210; 29RT 4777-4779).[110]

Appellant Wilson did not object or request any modifications to any of these instructions in the trial court. (25RT 4273 [No. 2.01], 4277-4278 [Nos. 2.21.2, 2.22, 2.27], 4281 [No. 2.51 requested by appellant Wilson], 4293 [No. 8.83].) As a result, he forfeited this issue on appeal. (*People v. Virgil* (2011) 51 Cal.4th 1210, 1260 [defendant forfeited claim regarding CALJIC No. 2.51]; but see *People v. Stitely* (2005) 35 Cal.4th 514, 556 [section 1259 "seems to preserve" all challenges to circumstantial evidence instructions].)

On the merits, this Court has repeatedly rejected the same contentions appellant Wilson makes here. (E.g., *People v. Jones* (2013) 57 Cal.4th 899, 972-973 [same six instructions challenged here]; *People v. Whalen* (2013) 56 Cal.4th 1, 70 [same]; *People v. Watkins, supra*, 55 Cal.4th at pp. 1029-1030 [same]; *People v. Streeter* (2012) 54 Cal.4th 205, 253 [same]; *People v. Livingston* (2012) 53 Cal.4th 1145, 1164-1169 [same]; *Thomas, supra*, 53 Cal.4th at p. 812 [same]; *People v. Pearson* (2012) 53 Cal.4th 306, 326

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[110] The trial court gave several other instructions, including CALJIC Nos. 2.90, 8.71, and 8.80.1, addressing the prosecution's burden of proving beyond a reasonable doubt appellants' guilt and the truth of the special circumstances. (5CT 1191 [No. 2.90], 1205-1206 [No. 8.80.1]; 29RT 4760-4761 [No. 2.90], 4772-4774 [No. 8.80.1].) Appellant Wilson does not challenge these instructions.

[same]; *People v. Famalaro* (2011) 52 Cal.4th 1, 36 [same]; *People v. Lee* (2011) 51 Cal.4th 620, 647 [same]; *People v. Moore* (2011) 51 Cal.4th 386, 414-415 [same]; *People v. Tate* (2010) 49 Cal.4th 635, 698 [same]; *People v. Brasure* (2008) 42 Cal.4th 1037, 1058-1059 [same].) Appellant Wilson offers no cogent reason for this Court to reconsider or reject its prior decisions.

XV. APPELLANT POPS WAS NOT DENIED A FAIR TRIAL OR DUE PROCESS DUE TO HIS REFUSAL TO UTILIZE THE BARBER SERVICES OFFERED BY THE COUNTY JAIL

Appellant Pops contends that the trial court's refusal to allow him to receive a haircut from a deputy public defender instead of using the jail's barber services denied him a fair trial and due process. Appellant Pops likens his hair situation to forcing a defendant to wear jail clothing in front of a jury. (Pops AOB 319-323 [Gen. Arg. II].) The claim lacks merit.

Prior to the prospective jurors entering the courtroom for the first time at the beginning of trial, counsel for appellant Pops advised the court that Pops had not received a haircut. Defense counsel stated that arrangements had been made through the county jail for appellant Pops to receive a haircut. (9RT 959-960.) A Latino man, however, was sent to cut Pops's hair, and Pops refused the service. Defense counsel noted tensions between Blacks and Latinos in the county jail as the reason for appellant Pops's refusal. (9RT 960.) Defense counsel stated that she had purchased hair clippers and arranged for a Black deputy public defender to cut appellant Pops's hair. She argued that appellant Pops "has a constitutional right to a fair trial and part of that is to appear in a way that he feels is positive . . . ."

(9RT 358-359.)[111] Defense counsel described appellant Pops's hair having a "ponytail approximately three inches in length." (9RT 359.) The court declined to issue an order allowing for someone other than a county jail-authorized barber to cut appellant Pops's hair, and noted the following: "I have discussed it with the Sheriff's Department. I don't think it's appropriate to make exceptions like this and start bringing in Public Defenders to cut client's hair so I'm not going to make any order in that regard." (9RT 961.)

Appellant Pops compares not getting a haircut from a barber of his choosing to being forced to wear jail clothing in front of a jury because the jurors might speculate that he was in custody due to his uncut hair. This Court and the United States Supreme Court have long held that an accused may not be compelled, over objection, to stand trial before a jury while dressed in identifiable prison/jail clothing. (*Estelle v. Williams* (1976) 425 U.S. 501, 512–513; *People v. Taylor* (1982) 31 Cal.3d 488, 494, 495.) The rule entitling a defendant to be tried in ordinary clothing is designed to preserve the presumption of innocence. (*People v. Taylor, supra*, 31 Cal.3d at p. 494.) A defendant's appearance in jail clothing "is a constant reminder to the jury that the defendant is in custody, and tends to undercut the presumption of innocence by creating an unacceptable risk that the jury will impermissibly consider this factor." (*Ibid.*) Further, a "defendant may be handicapped in presenting his defense by embarrassment associated with his wearing jail garb," and imposition of jail clothing discriminates between those defendants who can afford to post bail and those who cannot. (*Id.* at p. 495.)

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[111] Defense counsel also raised violations of the Sixth and Fourteenth Amendments. (9RT 961.)

Here, in sharp contrast to *Taylor*, any error or prejudice is merely speculative. First of all, appellant Pops was not forced to attend trial without a haircut, as he refused the services of a qualified barber who presumably could have cut the hair of any Black inmate. In any event, contrary to appellant Pops's characterization of his appearance as "ungroomed" and "disheveled," the record reflects only that he had a "ponytail approximately three inches in length." (9RT 359.)[112] To show error, appellant Pops was required to make a record reflecting that the jury was likely to realize he was incarcerated based on his hairstyle. (See *People v. Sullivan* (2007) 151 Cal.App.4th 524, 549 [defendant must affirmatively demonstrate error]; cf. *People v. Anderson* (2001) 25 Cal.4th 543, 596 [no reversible error absent evidence that jury saw defendant in restraints]; *People v. Williams* (1995) 33 Cal.App.4th 467, 475-476 [no reversible error absent showing that jurors noticed defendant's wearing of "in-custody wristband" or knew wristband signified custody].) The mere fact that appellant Pops refused the services of a jail barber and proceeded to trial with a three-inch ponytail does not suffice to show he bore the mark of incarceration. He has not established a violation of his constitutional rights based on the length of his hair.[113] Appellant Pops's claim must be rejected.

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[112] During opening argument to the jury, the prosecutor noted that both appellants were "nice-looking young men." (27RT 4446.)

[113] It is more likely appellant Pops would have suffered prejudice had he cut his hair. Witnesses at trial testified to appellant Pops's unique braided hairstyle. As the prosecutor noted, he intended to comment on appellant Pops's attempt to change his appearance if he cut his hair. (9RT 961.)

XVI. THE PROSECUTOR DID NOT COMMIT MISCONDUCT REQUIRING REVERSAL

Appellant Pops contends that the prosecutor committed prejudicial misconduct by: (1) going beyond the limited scope for which the court permitted the introduction of the drawings and list of monikers seized from appellant Wilson's apartment; (2) having effectively "testified" while cross-examining two defense witnesses; and (3) vouching for the integrity of the live lineup process conducted at the county jail. (Pops AOB 198-212 [Arg. VII].) The claims lacks merit as no reversible misconduct occurred.

> Under the federal Constitution, a prosecutor commits reversible misconduct only if the conduct infects the trial with such "unfairness as to make the resulting conviction a denial of due process." [Citation.] By contrast, our state law requires reversal when a prosecutor uses "deceptive or reprehensible methods to persuade either the court or the jury" [citation] and "it is reasonably probable that a result more favorable to the defendant would have been reached without the misconduct" [citation].

(*People v. Davis, supra*, 46 Cal.4th at p. 612; *People v. Dement, supra,* 11) 53 Cal.4th 1 at p. 49; *People v. Blacksher* (2011) 52 Cal.4th 769, 828, fn. 35; *People v. Clark* (2011) 52 Cal.4th 856, 960.)

A. The Prosecutor's Comments During Argument About the Drawings and List of Monikers Did Not Constitute Reversible Misconduct

As discussed in Argument V, *ante*, the trial court properly admitted several drawings and a list of monikers seized during the search of appellant Wilson's apartment. The court, however, limited the use of the evidence to show appellant Pops's connection to the apartment, his association with appellant Wilson, and a connection between Barnes, Harris and appellants. (14RT 1464, 1897-1907.) Appellant Pops contends the prosecutor committed misconduct by exceeding that limitation during argument to the jury.

Appellant Pops complains about two references the prosecutor made to the material during his argument. The first time occurred when the prosecutor mentioned that appellant Pops was proud of the rims he removed from Dunn's El Camino. (27RT 4460.) The prosecutor recalled Barnes's testimony that after appellant Pops put the rims on his Camaro, Barnes complemented Pops noting the rims were "tight" and they pumped firsts. (27RT 4460-4461, see, e.g., 14RT 1952-1953; Supp. II CT 112-113.) The prosecutor then mentioned the drawing of appellant Pops "making a muscle pose with the Camaro behind him and the IROC rims on it. [¶] He was proud of it. [¶] He was proud of it." The defense objected and, in front of the jury, noted that the evidence was not admitted for that purpose. The court observed that the prosecutor had "referred to a bunch of evidence," and asked the prosecutor if he was "referring to the drawings in that regard . . . or the other evidence?" When the prosecutor stated he was referencing "everthing together," the court responded in front of the jury that it had admitted the drawings "for certain limited purposes which did not include that." At this point, the prosecutor immediately corrected himself and told the jury, "The drawings show a relationship between Mr. Wilson and Mr. Pops and we'll get into that later on." (27RT 4461.)

Although defense counsel objected that the prosecutor's argument was outside the limitation set by the court, counsel did not object on misconduct grounds and request the jury be admonished as to the limited use of the evidence. As such, appellant has forfeited any claim of misconduct by the prosecutor in this regard. (*People v. Elliott, supra*, 53 Cal.4th at p. 554; *People v. Clark, supra*, 52 Cal.4th at p. 960; *People v. Dykes* (2009) 46 Cal.4th 731, 774-775; *People v. Coddington* (2000) 23 Cal.4th 529, 595.)

Assuming the claim is preserved for appeal, no reversible misconduct occurred. Of course, it is misconduct for a prosecutor, during argument, to

invite or encourage the jury to do what the law prohibits. (*People v. Whalen, supra*, 56 Cal.4th at p. 77, citing *People v. Love* (1961) 56 Cal.2d 720, 730 [a prosecutor may not use evidence offered for a limited purpose to argue inferences for which the evidence is inadmissible].) But here, after the court noted that the evidence was limited and could not be used for a purpose to show appellant Pops was proud of the rims, the prosecutor immediately corrected himself and informed the jury of the evidence's limited purpose. Accordingly, the jury would not have understood the prosecutor's brief comment as an invitation to use the evidence for any purpose other than to "show a relationship between Mr. Wilson and Mr. Pops[.]" No prejudicial error can be demonstrated based on this instance.

Appellant Pops's second complaint about the prosecutor's argument occurred while the prosecutor was discussing all of the other "connecting evidence" in addition to compelling eyewitness identifications. (28RT 4506.) Among other evidence discussed by the prosecutor, he mentioned the following: a nine-millimeter semi-automatic gun was used (by appellant Pops) to kill Dunn; Dunn's El Camino was taken from the carwash; the El Camino ended up a short distance from the barbecue party attended by appellants; appellant Pops's girlfriend drove Barnes and Harris to the alleyway without needing directions; the IROC rims had been removed from the El Camino; and the IROC rims ended up on appellant Pops's Camaro. (28RT 4506-4508.)

The prosecutor then pointed out that the unexpended nine-millimeter round that had been worked through one of the murder weapons was found in appellant Wilson's apartment. The prosecutor observed, "So that clearly indicates a *connection* between Mr. Wilson's apartment and the crime scene." (28RT 4508, italics added.) The prosecutor then noted the "connections" between appellant Wilson and appellant Pops. He explained the connections were found in the drawings that depicted the same "YMO"

tattoo that appellant Pops had on his forearms and a firearm that resembled the nine-millimeter Tech Nine from which the unexpended round found under the couch cushion had been ejected. (28RT 4509.) The prosecutor also mentioned the "gang list"[114] from the blue writing tablet, which also showed a clear connection between appellants ("Nut" and "Bird"), Harris ("Scrap"), and Barnes ("Smerf"). (28RT 4509-4510.)

This time, the defense did not make any objection or request an admonition. Any claim of misconduct is therefore forfeited. (*People v. Elliott, supra*, 53 Cal.4th at p. 554) But, no misconduct can be shown here since the prosecutor discussed the evidence in the context of the nonhearsay purpose for which it was introduced—i.e., to provide circumstantial evidence of connections between appellant Pops and appellant Wilson, his apartment, Harris, and Barnes.[115] Read in context, there was nothing objectionable about the prosecutor's use of the material during this segment of the argument.

B. The Prosecutor Did Not "Testify" or Improperly Vouch While Cross-Examining Two Defense Witnesses and No Reversible Misconduct Occurred

Appellant Pops next asserts that the prosecutor committed misconduct by essentially testifying when he made gratuitous comments while cross-

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[114] Referring to the list of names as a "gang list" was a reasonable inference from the evidence as Barnes testified that they all belonged to the "Young *Mafia* Organization." The list also referenced classic indicia of gang membership, such as members who were incarcerated, "disciplinary action," and the next generation of members with the "lil'" prefix before their monikers. (Peo. Exh. 68B.)

[115] During the prosecutor's rebuttal argument, he again discussed this evidence without any objection from the defense. The prosecutor properly noted that the evidence showed a relationship between appellants and corroborated Barnes's testimony. (29RT 4690-4691.) This argument fell squarely within the court's limitation on the use of the evidence, and reinforced its proper use by the jury.

examining defense witnesses Black and Klingenbeck. He also characterizes the comment during Klingenbeck's cross-examination as improper vouching. (Pops AOB 203-210.) During the defense case, appellant Pops called Kevin Black, a project engineer for a company that manufactured IROC rims, to testify about the production of the rims and their different styles. (See 22RT 3450-3456; Statement of Facts, *ante*, Guilt Phase II E.) On cross-examination, the prosecutor questioned Black about such things as the origin of the term "three-bar" to describe such rims (22RT 3457), his knowledge of how to attach IROC rims to an El Camino (22RT 3458-3459), and the discoloration and peeling chrome on one of the rims from Dunn's car marked at People's Exhibit 44C (22RT 3459-3461). The prosecutor also questioned Black about the differences between an IROC rim shown in a photograph (Def. Exh. N) and one of the rims taken from appellant Pops's car that had belonged to Dunn (Peo. Exh. 44C). (22RT 3461-3463.) Black testified he could not determine which company manufactured the rim shown in the photograph. The prosecutor asked if Black's company had manufactured Exhibit 44C—the rim from Dunn's car. Black testified the rim was not manufactured by his company. (22RT 3463.) The following then occurred:

> Q. [Prosecutor] Your company didn't make them?
>
> A. We did not manufacture this wheel.
>
> Q. I understand. You can take your seat, sir. [¶] I mean, in that case, since you didn't manufacture them, I guess our jurors can look at the two pictures and see the differences. [¶] I apologize, sir, I thought that your company actually manufactured - -
>
> Mr. Mizel: Your Honor, I would object making statements in front of the jury, it is improper, your Honor. [¶] May we approach the bench?

> The Court: No, disregard Mr. Monaghan's gratuitous comments, ladies and gentlemen. You just decide the case on the evidence.

(22RT 3464.)

"An argumentative question is a speech to the jury masquerading as a question. The questioner is not seeking to elicit relevant testimony. Often it is apparent that the questioner does not even expect an answer. The question may, indeed, be unanswerable." (*People v. Chatman, supra,* at p. 384.)

Assuming the prosecutor's comment was inappropriate and appellant Pops's claim is preserved here even though a specific objection on misconduct grounds was not made, there was no prejudice. By sustaining defense counsel's objection and admonishing the jury to disregard the comment, the court effectively kept the cross-examination under control, and eliminated any prejudice that might otherwise have flowed from such a comment. (See *People v. Pinholster* (1992) 1 Cal.4th 865, 943; see also *People v. Mayfield* (1997) 14 Cal.4th 668, 755.) When the trial court has given an admonition to disregard the prosecutor's improper statement, it is presumed the jury followed it. (*People v. Osband* (1996) 13 Cal.4th 622, 718.) An improvident comment by a prosecutor is rarely of such a nature that it cannot be cured by a proper admonition. (*People v. Pitts* (1990) 223 Cal.App.3d 606, 692; *People v. Allen* (1978) 77 Cal.App.3d 924, 935.) The prosecutor's comment, though gratuitous, was de minimis and no prejudice can be demonstrated.

The next witness called by appellant Pops was Deputy Public Defender Jeanmarie Klingenbeck to testify about her purported observations during the live lineup, where she allegedly saw Brown look over at Williams's comment card. (22RT 3467-3474.) During her cross-examination, Klingenbeck gave vague answers and almost immediately

became defensive and quarrelsome with the prosecutor. Klingenbeck had little or no recollection of when and how she informed appellant Pops's attorneys about her observations. (See 22RT 3474-3486.) When questioned about why she did not come forward and reveal her information to the court at the preliminary hearing, Klingenbeck replied that it "would not have made a difference." (22RT 3486-3487.) Klingenbeck did not believe she had an affirmative duty as an attorney to come forward with the information any earlier than she did. (22RT 3487.) The following colloquy then occurred:

> Q. [Prosecutor] [¶] As an attorney - - as an attorney didn't you feel you had an obligation to notify the District Attorney's Office, the Sheriff's Department, the Compton Police Department, the Municipal Court judge, that you saw misconduct involving a case where the People were seeking the death penalty?
>
> A. As I have already answered, no, I did not.
>
> And maybe you could answer to me whether or not you would have dismissed the case had you known that.
>
> I doubt that you would have.
>
> Q. If you stood up that night, if you really saw what you said you saw, actions would have been taken that night, I can promise you that because I was there.
>
> Mr. Mizel: Excuse, I object, your Honor. May we approach the bench?
>
> The Court: No, no. [¶] Just because she asked the question doesn't make it relevant. It's stricken, ladies and gentlemen. Disregard it.
>
> Mr. Monaghan: I just don't want the jury to think that - -
>
> Ms. Jones: Objection.
>
> The Court: No more speeches.

Mr. Monaghan: Would the court then admonish the witness not to ask me questions so I am not put in that position –

The Court: Mr. Monaghan, if the witness asks you questions, just ignore them and ask your next question and go on.

Mr. Mizel: Your Honor, may we approach the bench?

The Court: No, no, no.

(22RT 3488-3489.) The prosecutor then continued questioning the witness. (22RT 3489-3513.)[116]

During a recess, outside the presence of the jury, defense counsel moved for a mistrial complaining to the court about the comments made by the prosecutor during Black's and Klingenbeck's testimony. Defense counsel believed that "there's a pattern of misconduct that has been established by Mr. Monaghan continuously making statements such as he has made this morning on at least two occasions in front of the jury. And these amount to misconduct." (22RT 3513-3514.) Defense counsel further stated that he did not believe that the court's admonishments to the jury were "at all strong enough." (22RT 3514.) The prosecutor expressed his frustration that the witness was not directly answering his questions and asking questions herself. He observed that the witness was "deliberately being difficult at times." (22RT 3514-3515.) Defense counsel complained that the prosecutor was not following the proper rules of court. (22RT 3515-3516.)

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[116] At one point, Klingenbeck became somewhat combative with the judge after he sustained a defense objection and the witness continued speaking and attempted to blurt out an answer. Klingenbeck told the judge, "I was just going to answer the previous question." The court admonished the witness (who was an attorney), "When I sustain an objection—you know what I mean by that, don't you? [¶] When I sustain the objection you don't answer and he asks a new question, please." (22RT 3498.)

The court denied the motion for a mistrial, and commented:

> Mr. Monaghan, I sympathize with your frustration with some of the witnesses, but you are an experienced enough prosecutor that you can deal with it within the rules without making gratuitous comments. [¶] Am I getting across?

(22RT 3516.) When the prosecutor then requested that the court instruct "the witnesses to answer the questions yes or no," the court made the following comments and observations:

> Mr. Monaghan, that is what you do. You don't make gratuitous comments. You ask the court to ask the witness to respond, especially when it is an attorney, the attorney should know how to respond and so forth. [¶] I am telling you, that Mr. Mizel is right on that point, that there are well established rules of court and conduct that all attorneys on both sides should follow. I think you know those rules. And I think you can do as well within them as well as you can outside of them.
>
> But I have to observe, Mr. Mizel, that there is nothing approaching or even hinting at a due process violation that Mr. Monaghan has done.
>
> In fact, I would suspect if you would talk to the jurors, that he is not helping himself when he does that, when the court admonishes them to disregard it. But it is petty conduct. It doesn't rise to the kind of prejudice that would warrant a [mis]trial or equal a due process violation. But I do share your concern. [¶] I'm telling Mr. Monaghan now to stay within the rules. You are an experienced attorney. You can handle yourself well within the rules. And I don't think you need to make gratuitous comments. [¶] As I say, there is a way to deal with it. Ask the court to deal with the witnesses and I'll deal with them. If that doesn't work, then I would understand the need for gratuitous comments in your mind, not legally. [¶] But as I say, this is a molehill, let's not make a mountain out of it.

(22RT 3517-3518.)

Prior to making the objectionable comment, the prosecutor's line of questioning that apparently agitated Klingenbeck was undoubted proper.[117] Clearly, the prosecutor should not have taken the bait dangled by Klingenbeck. As before, however, although the prosecutor's comment to the witness was arguably improper, there was no prejudice. The court admonished the jury to disregard the comment, and reprimanded the prosecutor in front of jury. As the court observed, what occurred was for more damaging to the prosecution and the defense. Moreover, because the comment was de minimis, no prejudice arose. (*People v. Collins* (2010) 49 Cal.4th 175, 208, citing *People v. Osband, supra*, 13 Cal.4th at pp. 695, 718.)

Appellant Pops relies on *People v. Bolton* (1979) 23 Cal.3d 208. (Pops AOB 208-209.) In *Bolton*, the defendant, who was charged with assault with a deadly weapon, asserted at trial that he had acted in self-defense, and impeached the victim's testimony by showing that the victim had a criminal record. (*Id.* at pp. 211-212 & fn. 1.) During closing argument, the prosecutor stated that it was unfair that he could not do "the same thing" to the defendant, and suggested that the defendant might be "just as bad a guy as" the victim. (*Id.* at p. 212, fn. 1.) The judge sustained

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[117] There is "nothing inherently improper about cross-examining a defense witness as to h[er] failure to come forward at an earlier date. In fact, the information discovered during this type of questioning may well aid the trier of fact in its effort to determine whether the testimony is an accurate reflection of the truth or a recent fabrication. [¶] Although a citizen ordinarily has no legal obligation to offer exculpatory information to law enforcement officials, there are many situations where the natural response of a person would be to come forward in order to avoid a mistaken prosecution. . . . In that situation a witness's silence may be akin to a 'prior inconsistent statement,' and therefore, has probative value. [Citation.]" (*People v. Ratliff* (1987) 189 Cal.App.3d 696, 701; see also *People v. Tauber* (1996) 49 Cal.App.4th 518, 524-525; *People v. Santos* (1990) 222 Cal.App.3d 723, 736-737.)

objections to these remarks, admonished the jury to disregard them, and directed the prosecutor to limit his argument to the evidence. (*Ibid.*) This Court held, "There is no doubt that the prosecutor's statement constituted improper argument, for he was attempting to smuggle in by inference claims that could not be argued openly and legally." (*Id.* at p. 212.) Ultimately, this Court found that the prosecutor's argument was not prejudicial in light of the evidence at trial. (*Id.* at p. 216, fn. 5.)

Here, unlike in *Bolton*, there was no similar attempt to "smuggle in by inference" evidence that could not be admitted. The prosecutor's comment occurred while the witness was being questioned about why she did not immediately report the alleged improper activity. The jury would not have interpreted the comment as the prosecutor testifying that "the eyewitnesses did not misbehave" or that he "would have personally prevented it from happening." (Pops AOB 210.) Rather, the import of the questioning suggested that the deputies running the lineup would have interceded had Klingenbeck said anything. Thus, this was not, as appellant Pops suggests, akin to "vouching for the integrity of the lineup process" or the credibility of the eyewitness. It would have come as no surprise to the jury that the prosecutor believed Klingenbeck had fabricated her testimony to assist her friend and fellow deputy public defender. In fact, the point the prosecutor attempted to make was later testified to by Deputy Gilbert who ran the lineup. He testified that the witnesses would have been watched during the process, and any misbehavior would have been swiftly dealt with had it been reported at the time. (25RT 4177-4178, 4182-4188, 4213-4214, 4193-4195, 4224-4225.)

Moreover, in view of the overwhelming evidenced of appellants' guilt, any errors by the prosecutor were certainly harmless. (*People v. Collins, supra*, 49 Cal.4th at p. 208; *People v. Hardy* (1992) 2 Cal.4th 86, 172-173.) Appellant Pops's claims should be rejected.

XVII. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY LIMITING THE NUMBER OF CUMULATIVE PHOTOGRAPHS OF APPELLANT POPS AT AGE 10 AND EXCLUDING THE USE OF A REPETITIOUS AND HEARSAY-LADEN "CRITICAL LIFE EVENTS CHART" BY THE "URBAN SOCIAL GEOGRAPHER" EXPERT

Appellant Pops contends that the trial court erred in two respects as to the presentation of penalty phase mitigation evidence. He first contends that it was error for the court to limit him to one photograph of him at age 10 instead of two photographs. Second, he contends it was error to exclude Dr. Johnson's use of a "critical life events" chart which referenced points from appellant Pops's difficult upbringing. (Pops AOB 331-342 [Penalty Arg. I].) These assertions lack merit. The trial court acted well within its discretion to exclude a cumulative photograph. The expert's chart of repetitious hearsay was properly excluded because it was cumulative of other testimony, would not have assisted the jury, and its intended purpose fell outside the purview of Dr. Johnson's work.

A. Limiting Appellant Pops to One Photograph of Him at Age 10

During the presentation of the appellant Pops's mitigation evidence, his sister Naisha Harris identified four photographs of Pops at various stages in his life: (1) appellant Pops with friends at a neighbor's house, (2) Pops with Naisha and younger brother Aziz, (3) another of the three children together, and (4) Pops with his wife Angela. (31RT 5182-5183; Def. Exh. KKK.)

Out of the jury's presence during a recess, the prosecutor objected to two additional enlarged photographs of appellant Pops. (31RT 5184.) Defense counsel explained that the enlarged photographs, identified as Defense Exhibits JJJ and III, were taken when appellant Pops was approximately 10 years old. In explaining their purported relevance, defense counsel stated that the photographs "amplifie[d] that my client was

an evolving human being and this is how he appeared when he was ten years old when some of the incidents occurred that have been testified about." (31RT 5184-5185.) He further offered that the photographs showed appellant Pops was once "little in stature and vulnerable," and not "always a big, strong strapping young man of six feet two. . . ." (31RT 5185.)

The court stated that it understood defense counsel's point, but found that two photographs of appellant Pops at age 10 were cumulative. Exercising its discretion under Evidence Code section 352, the court directed defense counsel to pick one of the two photographs. Defense counsel chose Defense Exhibit JJJ. (31RT 5185-5187.) Naisha identified that photograph as a school picture taken of appellant Pops. (31RT 5205-5206.) Thereafter, that enlarged photograph (Def. Exh. JJJ) and the four other photographs (Def. Exh. KKK) were admitted into evidence. (34RT 5794-5795.)

> A capital defendant has a constitutional right to present all relevant mitigating evidence at the penalty phase. (*Skipper v. South Carolina* (1986) 476 U.S. 1, 4.) But "the United States Supreme Court never has suggested that this right precludes the state from applying ordinary rules of evidence to determine whether such evidence is admissible." (*People v. Smithey* (1999) 20 Cal.4th 936, 995.)

(*People v. Watson* (2008) 43 Cal.4th 652, 692-693.) "Evidence Code section 352 permits the exclusion of evidence on the ground that it is cumulative. A trial court's exclusion of evidence on this ground will not be reversed on appeal unless the court abused its discretion." (*People v. Brown* (2003) 31 Cal.4th 518, 576, citing *People v. Williams, supra*, 16 Cal.4th at p. 213.)

Since both photographs of appellant Pops were taken when he was around the age of 10, showing the jury more than one of them would be cumulative. Appellant has not shown that one photograph showed

something different than the other. The court thus did not act arbitrarily or capriciously when it limited the defense to one of the two photographs. Moreover, any error was most certainly harmless because "it is not reasonably possible defendant would have obtained a different verdict but for the error." (*People v. Brown, supra*, 31 Cal.4th at p. 576; citing *People v. Ervin* (2000) 22 Cal.4th 48, 103 [state law error at the penalty phase tested by the 'reasonable possibility' test]; *People v. Brown* [(1988)] 46 Cal.3d [432,] 448 [same].) The jurors could readily understand the defense's point that appellant Pops was "an evolving human being" without the second photograph. Unfortunately, based on the evidence of the horrific murders, appellant Pops had evolved into a monster. One additional similar photograph would have made no difference in the verdict.

B. Excluding the "Critical Life Events" Chart

The court conducted an extensive hearing pursuant to Evidence Code section 402, where Dr. Johnson offered a preview of his anticipated testimony.[118] (33RT 5412-5454, 5457-5505; see, e.g., Statement of Facts,

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[118] Prior to Dr. Johnson appearing in court, the prosecution noted that it had received only the expert's resume and some charts, but no other discovery concerning the witness's proposed testimony. (31RT 5019, 5029-5030, 5038.) Defense counsel indicated that the doctor "gives kind of a historical economic sociological perspective of South Central Los Angeles, Lynwood and Compton," and how the effect these "depressed areas" have "upon people growing up in these areas." (31RT 5020, 5026-5029.) The court complained of an "increasing problem . . . of [the] defense getting experts and apparently having them not write reports." In such situations, the court explained, an Evidence Code section 402 hearing was necessary. (31RT 5022-5023, 5064-5067.) The court requested that the defense provide some transcripts of Dr. Johnson's prior testimony so that the court could see what was done in prior proceedings, and such transcripts might fill the gap in discovery. (31RT 5031-5032.) A few days later, the court had read a transcript of Dr. Johnson's prior testimony in

(continued...)

ante, Penalty Phase III B at pp. 105-110.) The defense sought to have Dr. Johnson use a chart he had prepared entitled "Critical Life Events" during his testimony which purportedly chronicled traumatic events in appellant Pops's live that corresponded to the factors that the doctor believed deemed were predicators of violence in young Black men. (33RT 5451-5454, 5464-5465, 5479-5480.)

The information used to prepare the chart was provided to the doctor by the defense, and included interviews with appellant Pops's family, a letter from Mr. Mizel describing the circumstances of the stepfather's shooting, and school records. (33RT 5471-5472, 5487-5479.) Dr. Johnson did not conduct any interviews himself. (33RT 5472, 5477, 5484.) He was not trained in either psychiatry or psychology. (33RT 5464.) The events listed on the chart contained mostly information that had previously been testified to by other witnesses, but it also referenced other matters to which no one had testified. (33RT 5524.)[119]

In considering whether the doctor could use the chart, the court noted that pursuant to *People v. Carpenter* (1997) 15 Cal.4th 312, 403, it had discretion under Evidence Code section 352 to weigh the prejudicial effects

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(...continued)
another case and noted, "[H]e's giving an anti-death penalty message under the guise of educating the jury about employment, race and things of that nature." (32RT 5259.)

[119] In regard to the shooting of appellant Pops's stepfather, Dr. Johnson wrote on the chart: "November 7, 1978, Mr. Pops witnessed the brutal fatal shooting of his stepfather by the L.A.P.D, his stepfather was shot 13 times, handcuffed and left in the street, 11406 South Towne Avenue, for several hours." The doctor did not include information that the family had barricaded themselves inside the house out of fear of the stepfather and that he was wielding an axe before being shot. (33RT 5487-5479.) The only information to suggest that appellant Pops actually witnessed the shooting came from the defense's interviews with family members. (33RT 5481.)

of the hearsay evidence against its probative value. (33RT 5523-5524.) The court ruled that Dr. Johnson could testify generally regarding the factors that affect development and were predictors of violence. The court likened Dr. Johnson's testimony to expert testimony about eyewitness identification or battered woman syndrome; the expert discusses relevant factors, but then the jury uses the evidence from the trial to form their own opinions. (33RT 5525-5526.) The court observed that the chart did not add anything to Dr. Johnson's testimony beyond what he could say generally about his research and studies. (33RT 5526-5527, 5529-5530.) Letting the doctor discuss specific life events, noted the court, would, in effect, allow him to argue the defense's case. (33RT 5527.)

As set forth in the Statement of Facts, *ante*, Dr. Johnson did testify extensively about various studies and how certain life events are predictors of violence. Dr. Johnson further testified that based on his review of interviews with appellant Pops's family and data from published sources, "the probability and the likelihood of [Pops] engaging in criminal activity was high." (34RT 5642.) After the prosecution finished its cross-examination of the doctor, defense counsel again attempted to get permission to use the chart. (34RT 5685-5686.) The court denied the request and observed that "all the chart does is highlight what[is] already in front of the jury and so it's cumulative." (34RT 5687.) The court further observed that the chart was being offered for a purpose outside of the purview of the doctor's work. On cross-examination, the doctor had indicated that his testimony was not based on an individual's life events. Rather, the doctor was isolating factors that showed higher incidents of violence and lack of opportunity generally. (34RT 5687-5688; see 34RT 5684 [when asked about whether interviewing inmates on death row would be of value to determine why they ended up there, Dr. Johnson replied: "It

could be of value, if that's what you're interested in. That's not my point in my work"].)

The defense, however, was permitted to state hypothetical life events—that exactly tracked appellant Pops's life—and ask the doctor whether those events were examples of precursors to violence. Dr. Johnson agreed that the hypothetical life events were precursors to violence. (34RT 5688, 5692-5694.)

Trial courts have broad discretion under Evidence Code section 352 to limit or exclude cumulative expert testimony. (See *People v. Carpenter, supra*, 15 Cal.4th at p. 403; *People v. Stoll* (1989) 49 Cal.3d 1136, 1159, fn. 20.) Rulings under Evidence Code section 352 come within the trial court's discretion and will not be overturned absent an abuse of that discretion. (E.g., *People v. Kipp, supra*, 26 Cal.4th at p. 1121; *People v. Minifie* (1996) 13 Cal.4th 1055, 1070; *People v. Rodrigues, supra*, 8 Cal.4th at pp. 1124-1125.) Here, the Critical Life Events chart was indeed cumulative. The best evidence of appellant Pops's life events came directly from his family members who too experienced or witnessed the events. As the trial court noted, the jurors were more than capable of applying Dr. Johnson's testimony to the facts of the case they personally heard. Additionally, Dr. Johnson testified on cross-examination that interviewing individuals like appellant Pops to determine why they committed lethal violence was not part of his work. He thus could not then turn around and use appellant Pops's specific life events to explain why he resorted to lethal violence.

Appellant Pops's suggestion that the Eighth Amendment and *Lockett v. Ohio* (1978) 438 U.S. 586, compelled the court to admit the Critical Life Events chart is unpersuasive. (Pops AOB 337-338, 341-342.) *Lockett* decried a statute that prevented the sentencer from considering "aspects of the defendant's character and record" and "circumstances of the offense

proffered in mitigation." (*Id.* at p. 605 (plur. opn. of Burger, C. J.).) Here, absolutely nothing *prevented* the jury from considering appellant Pops's critical life events in relation to Dr. Johnson's testimony. They heard extensive testimony about the events from family members. Moreover, Dr. Johnson was permitted under the guise of hypothetical questions to hit home the point that appellant Pops's life events were the sort of things that research showed were factors in leading to violence.

Appellant Pops asserts that the error "limited the impact of [his] mitigation presentation." (Pops AOB 340.) But, as previously noted, the ordinary rules of evidence are still applied to determine whether evidence is admissible. (*People v. Watson, supra*, 43 Cal.4th at pp. 692-693.) Because the information on the chart was before the jury in the form of testimony and hypothetical questions, any error must be considered harmless. The mere fact that the chart would have served to reemphasize appellant Pops's life events does not suggest in the slightest that it was reasonably possible he would have obtained a different verdict but for the alleged error.[120] (*People v. Ervin, supra*, 22 Cal.4th at p. 103.) Appellant Pops's claims should be rejected.

XVIII. A BURGLARY-MURDER SPECIAL CIRCUMSTANCE Allegation Finding Was Properly Included on Each of the Four Verdict Forms Relating to the Four Murders

Observing that only one burglary occurred at the Wheels N' Stuff Carwash, appellant Pops contends that the trial court prejudicially erred by including duplicative burglary-murder special circumstance findings on each of the four murder verdict forms in counts 1 through 4. He believes

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[120] There was nothing that precluded the defense from using such a chart during its closing argument to the jury.

that the duplicative special circumstance allegations artificially inflated his conduct that was based on a single course of conduct. (Pops AOB 343-348 [Penalty Arg. II].) The claim lacks merit as previously explained by this Court in similar cases.

Appellant Pops's reliance on the plurality opinion in *People v. Harris* (1984) 36 Cal.3d 36, 64-67—which suggested that a finding of multiple special circumstances arising out of the same course of conduct violates section 654—is misplaced. This Court has rejected the general reasoning of *Harris*. (*People v. Pinholster, supra*, 1 Cal.4th at p. 970, citing *People v. Melton* (1988) 44 Cal.3d 713, 766.) In *People v. Andrews* (1989) 49 Cal.3d 200, this Court rejected the argument in the context of multiple robbery-murder special circumstances: "It is of no significance that each murder occurred in the course of the same robbery . . . . When a defendant entertains a single principal objective during an indivisible course of conduct, he may nonetheless be punished for multiple convictions if during the course of that conduct he committed crimes of violence against different victims." (*Id.* at p. 225.) This Court then applied the same reasoning in the context of multiple burglary-murder special circumstances alleged in connection with a multiple murder case. (*People v. Pinholster, supra*, 1 Cal.4th at p. 970; see also *People v. Champion, supra*, 9 Cal.4th at p. 935.) Accordingly, appellant Pops's claim should be rejected here.[121]

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[121] Appellant Pops asks this Court to reconsider its prior holdings. He offers, however, no cogent reason to do so. That the burglary was committed during one course of conduct is of no consequence since the law permits multiple punishment when, as here, multiple victims are involved. Moreover, as the trial court observed, no jurors would be confused by duplicative special circumstance allegations because they were fully aware that only one burglary occurred. (29RT 4669-4670.)

XIX. THE COURT PROPERLY REFUSED FOUR PROPOSED DEFENSE PENALTY INSTRUCTIONS

Appellant Pops contends that the court erred in refusing four proposed defense penalty instructions. (Pops AOB 349-361 [Penalty Arg. III].) As this Court has found these instructions were properly refused in other cases, the claims should be rejected here.

A. One Mitigating Factor

Appellant Pops requested that the jury be instructed as follows: "One mitigating circumstance may be sufficient for you to return a verdict of life imprisonment without possibility of parole." (35RT 5823; 6CT 1406.) This Court has

> rejected the claim that a trial court is required to instruct the jury that one mitigating factor could outweigh multiple aggravating factors, explaining that "the standard jury instructions . . . 'are adequate to inform the jurors of their sentencing responsibilities in compliance with federal and state constitutional standards.' [Citations.]" (*People v. Kelly, supra*, 42 Cal.4th at p. 799; see also [*People v.*] *Lewis* [(2009)] 46 Cal.4th [1255,] 1316 [same].) As in our prior cases, the other standard instructions that were given—including CALJIC No. 8.88, which instructed the jury that a mitigating factor may be "any fact, condition, or event" and that jurors could assign to each factor any moral or sympathetic value they deem appropriate—"amply covered the point." (*Cook, supra*, 40 Cal.4th at p. 1364.) Moreover, a "trial court may properly refuse as argumentative an instruction that one mitigating factor may be sufficient for the jury to return a verdict of life imprisonment without possibility of parole." (*People v. Guerra*[, *supra*,] 37 Cal.4th [at p.] 1150.)

(*People v. Jones* (2012) 54 Cal.4th 1, 79-80 (*Jones*).)

People v. Sanders (1995) 11 Cal.4th 475, does not assist appellant Pops's argument. In *Sanders*, this Court expressed approval of an instruction advising the jury, in part, that one mitigating factor may be sufficient to determine that life without the possibility of parole is the appropriate punishment. This Court found the instruction, as a whole,

reduced the risk that the jury would misapprehend "the nature of the penalty determination process or the scope of their discretion to determine through the weighing process whether death or life imprisonment without possibility of parole was the appropriate punishment." (*Id.* at p. 557.) But, as this Court later observed:

> We neither imposed nor contemplated, however, an obligation to instruct the jury that a single mitigating factor could outweigh all other aggravating factors. To the contrary and as noted above, we have repeatedly held that the standard jury instructions, specifically CALJIC No. 8.88, adequately instruct the penalty phase jurors as to the nature and scope of their determination. (See also *People v. Smith* (2005) 35 Cal.4th 334, 371; *People v. Taylor* (2001) 26 Cal.4th 1155, 1181.) We decline to revisit these decisions.

(*Jones, supra*, 54 Cal.4th at p. 80.) The jury was properly instructed here with CALJIC No. 8.88. (35RT 5963-5966; 6CT 1395-1396.) Appellant Pops's claim should be rejected too.

B. Multiple Special Circumstances Considered as One

Next, appellants sought to have the jury instructed:

> At the guilt phase of this trial four separate burglary special circumstances were alleged and found true. However, for the purposes of determining the penalty to be imposed, these multiple special circumstances findings should be considered as one. [¶] Similarly, four separate robbery special circumstances were alleged and found true. Again, for the purposes of determining the penalty to be imposed, these multiple special circumstances findings should be considered as one.

(35RT 5827-5828; 6CT 1411.) The trial court properly refused this instruction because it misstated the law. (*People v. Monterroso* (2004) 34 Cal.4th 743, 789, citing *People v. Millwee* (1998) 18 Cal.4th 96, 165, fn. 35; accord, *Spann v. State* (Fla. 2003) 857 So.2d 845, 856-857.) As this Court previously explained, "a sentencer may legitimately conclude that a death-eligible murderer is more culpable, and hence more deserving of death, if

he not only robbed the victim but also committed an additional and separate felonious act, burglary, to facilitate the robbery and murder. [Citations.] It does not matter whether the burglary is residential or commercial." (*People v. Monterroso, supra*, 34 Cal.4th at p. 789.) The claim should be rejected here too.

C. Ignore Evidence of Other Criminal Activity

Appellant Pops sought to have the jury instructed as follows: "You must not consider as aggravation any evidence of criminal behavior by a defendant which did not involve the use or attempted use of force or violence or which did not involve the express or implied threat to use force or violence." (35RT 5828-5830; 6CT 1410.)[122] The court properly refused this instruction because its subject was covered in the properly given CALJIC No. 8.87.

In *People v. Boyd* (1985) 38 Cal.3d 762, 776, this Court held that section 190.3 "expressly excludes evidence of criminal activity, except for felony convictions, which activity 'did not involve the use or attempted use of force or violence or which did not involve the express or implied threat to use force or violence.'" (*People v. Pinholster, supra*, 1 Cal.4th at p. 960.) "Consistent with *Boyd*, CALJIC No. 8.87 contains the following admonition: 'A juror may not consider any evidence of any other criminal [act [s] [activity]] as an aggravating circumstance.' (CALJIC No. 8.87 (5th ed. 1988).)" (Cf. *People v. Prieto* (2003) 30 Cal.4th 226, 266.) This exact version of CALJIC No. 8.87 was given by the trial court here. (35RT 5960-5962; see 6CT 1389, 1391.) Jurors are presumed to understand and follow the court's instructions. (*People v. Holt* (1997) 15 Cal.4th 619, 662;

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[122] This proposed instruction was submitted by appellant Wilson, but his defense counsel agreed that it was covered by CALJIC No. 8.87. Defense counsel for appellant Pops nevertheless requested it be given. (35RT 5828.)

People v. Delgado (1993) 5 Cal.4th 312, 331.) As such, no error occurred here and the claim should be rejected.

D. Lingering Doubt

Appellant Pops requested that the jury be instructed that it could consider, as a mitigating factor, any lingering doubt it had concerning the question of appellant's guilt. The court refused the instruction, noting that the law was clear that courts were not required to give such an instruction and its subject was covered by section 190.3, subdivision (k). (35RT 5822; 6CT 1405.[123])

This Court consistently has rejected this claim. (*Jones, supra*, 54 Cal.4th at p. 84 [citing numerous cases].) "Although it is proper for the jury to consider lingering doubt, there is no requirement, under federal or state law, that the jury specifically be instructed that it may do so, even if such an instruction is requested by the defendant." (*Ibid.*, citing *People v. Gray* (2005) 37 Cal.4th 168, 231-232; *People v. Slaughter* (2002) 27 Cal.4th 1187, 1219; *People v. Sanchez* (1995) 12 Cal.4th 1, 77; see also *Abdul–Kabir v. Quarterman* (2007) 550 U.S. 233, 250-251 ["we have never held that capital defendants have an Eighth Amendment right to present 'residual doubt' evidence at sentencing"].) "Instructions to consider the circumstances of the crime (§ 190.3, factor (a)) and any other circumstance extenuating the gravity of the crime (*id.*, factor (k)), together with defense argument highlighting the question of lingering or residual doubt, suffice to properly put the question before the penalty jury. [Citation.]" (*People v.*

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[123] The proposed instruction read, in its entirety, as follows: "1. The adjudication of guilt is not infallible and any lingering doubts you entertain on the question of guilt may be considered by you in determining the appropriate penalty, including the possibility that at some time in the future, facts may come to light which have not yet been discovered. [¶] 2. It may be considered as a factor in mitigation if you have a lingering doubt as to the guilt of the defendant."

Demetrulias (2006) 39 Cal.4th 1, 42; see also *People v. Avila* (2006) 38 Cal.4th 491, 615; *People v. Brown, supra*, 31 Cal.4th at pp. 567-568; CALJIC No. 8.85.)[124] Appellant Pops's claim should be rejected.

XX. APPELLANTS' CHALLENGES TO CALIFORNIA'S DEATH PENALTY SCHEME ARE MERITLESS

Appellants contend their death sentences are unconstitutional for various reasons that this Court has previously rejected. (Pops AOB 362-380; Wilson AOB 305-321.) Appellants offer no cogent reason for this Court to reconsider or reject its prior decisions.

California's capital scheme, including sections 190.2 and 190.3, is not, as appellants contend (Pops AOB 363-364; Wilson AOB 305-306), overbroad and does not fail to adequately narrow the class of murderers eligible for the death penalty. (*People v. Whalen, supra*, 56 Cal.4th at p. 92; *People v. Homick* (2012) 55 Cal.4th 816, 903-904; *People v. McDowell* (2012) 54 Cal.4th 395, 443 (*McDowell*).)

Appellants' claim that the broad application of section 190.3, factor (a), violated his constitutional rights (Pops AOB 364-365; Wilson AOB 306-307), should be rejected. This Court "'repeatedly ha[s] held that consideration of the circumstances of the crime under section 190.3, factor (a) does not result in arbitrary or capricious imposition of the death penalty. [Citations.]'" (*People v. Brasure, supra*, 42 Cal.4th at p. 1066; see *Whalen, supra*, 56 Cal.4th at p. 90; *People v. Lightsey* (2012) 54 Cal.4th 668, 731; *McDowell, supra*, 54 Cal.4th at p. 443; *People v. Souza* (2012) 54 Cal.4th

[124] In the case at bar, given the overwhelming evidence of appellants' guilt, there is little possibility any jury had lingering doubt. Because of the state of the evidence, defense counsel instead focused their arguments to the jury on appellant Pops's problematic family background and the immense responsibility that comes from imposing death. (35RT 5881-5913.)

90, 141-142; *People v. Moore, supra*, 51 Cal.4th at p. 415 ["section 190.3, factor (a), under which the jury may consider the 'circumstances of the crime' as a factor in aggravation (or mitigation) of penalty," is not "so broad as to make imposition of a death sentence arbitrary and capricious"]; see also *Tuilaepa v. California* (1994) 512 U.S. 967, 976, 980 [section 190.3, factor (a) is not vague].)

California's capital scheme and related pattern jury instructions are not as appellants contend (Pops AOB 365-376; Wilson AOB 307-317) unconstitutional: (1) because findings are not premised on proof beyond a reasonable doubt (*People v. DeHoyos* (2013) 57 Cal.4th 79, 149-150; *Whalen, supra*, 56 Cal.4th at p. 90; *People v. Moore, supra*, 51 Cal.4th at p. 415); (2) because they do not inform the jury that some burden of proof is required or that the jury is not informed that no burden of proof exists (*Thomas, supra*, 53 Cal.4th at p. 836); (3) because they do not require the jury to achieve unanimity as to aggravating factors and prior criminality (*People v. Watkins, supra*, 55 Cal.4th at p. 1035); (4) because the instructions cause the penalty determination turn on an impermissibly vague and ambiguous standard (*People v. Elliott, supra*, 53 Cal.4th at p. 594; *Lewis, supra*, 43 Cal.4th at pp. 533-534); (5) because instructions failed to inform the jury regarding the central determination of whether death is the appropriate punishment (*People v. Williams* (2010) 49 Cal.4th 405, 471); (6) because the instructions failed to inform jurors that if they determined that mitigation outweighed aggravation, they were required to return a sentence of life without the possibility of parole (*People v. Page* (2008) 44 Cal.4th 1, 57; see also *Jones, supra*, 54 Cal.4th at pp. 78-79); (7) because the instructions do not inform the jury about the standard of proof and the lack of unanimity as to mitigating circumstances (*People v. Loy* (2011) 52 Cal.4th 46, 78; *People v. Jones* (2011) 51 Cal.4th 346, 381); and (8) because the instructions do not instruct the jury that the law favors life

and presumes life without parole to be the appropriate sentence (*People v. Homick, supra*, 55 Cal.4th at p. 904; *People v. Elliott, supra*, 53 Cal.4th at p. 594; see *Lewis, supra*, 43 Cal.4th at p. 534).

Nor does the United States Supreme Court's decisions from *Apprendi v. New Jersey* (2000) 530 U.S. 466, through *Cunningham v. California* (2007) 549 U.S. 270, render unconstitutional any aspect of California's capital scheme. (*Whalen, supra*, 56 Cal.4th 1, 91; *People v. Homick, supra*, 55 Cal.4th at p. 902.)

A jury does not, as appellants contend (Pops AOB 376; Wilson AOB 317-318), need to make its penalty phase findings in writing. (*People v. Pearson* (2013) 56 Cal.4th 393, 478; *People v. Williams* (2013) 56 Cal.4th 165, 202; *People v Moore, supra*, 51 Cal.4th at p. 415.)

CALJIC No. 8.85, with the various mitigating factors listed therein, is not, as appellants contend (Pops AOB 377-378; Wilson AOB 318-319), unconstitutional. The inclusion of terms like "extreme" and "substantial" does not act as barriers to the consideration of mitigation. (*Pearson, supra*, 56 Cal.4th at p. 478; *Williams, supra*, 56 Cal.4th at p. 201.) There is no constitutional requirement for the trial court to delete inapplicable sentencing factors from the instructions. (*Pearson, supra*, 56 Cal.4th at p. 478; *Williams, supra*, 56 Cal.4th at p. 201; *People v. Moore, supra*, 51 Cal.4th at p. 417; see *People v. Lightsey, supra*, 54 Cal.4th at p. 731.) The trial court is not constitutionally required to instruct the jury that certain sentencing factors can only be mitigating. (*People v. Elliott, supra*, 53 Cal.4th at p. 594; *People v. Taylor* (2009) 47 Cal.4th 850, 899; *People v. Brasure, supra*, 42 Cal.4th at p. 1069.)

Intercase proportionality review or disparate sentence review is not, as appellants contend (Pops AOB 378-379; Wilson AOB 319-320), constitutionally required. (*Pearson, supra*, 56 Cal.4th at p. 478 [neither review is required]; *People v. Eubanks* (2011) 53 Cal.4th 110, 154 [same];

see also *Pulley v. Harris* (1984) 465 U.S. at pp. 43-44 [California courts are not required to conduct intercase proportionality review].)

That California affords noncapital defendants certain procedural protections not afforded capital defendants during the penalty phase does not, as appellants contend (Pops AOB 379-380; Wilson AOB 320), deny capital defendants equal protection. (*Jones, supra*, 54 Cal.4th at p. 87; *People v. Bivert* (2011) 52 Cal.4th 96, 124.)

Finally, imposing the death penalty here does not, as appellants contend (Pops AOB 380; Wilson AOB 321), violate international law, international norms of human decency, or any other international standards. (*Williams, supra*, 56 Cal.4th at p. 201; *Whalen, supra*, 56 Cal.4th at p. 92.) International law does not prohibit imposing a death sentence that, as here, is "rendered in accordance with state and federal constitutional and statutory requirements." (*People v. Hillhouse* (2002) 27 Cal.4th 469, 511; accord, *People v. Nunez* (2013) 57 Cal.4th 1, 62; *People v. Tully* (2012) 54 Cal.4th 952, 1070.)

XXI. THERE WAS NO CUMULATIVE ERROR AS TO EITHER APPELLANT

Appellants contend their convictions and sentences should be reversed because of cumulative error. (Pops AOB 324-326, 381; Wilson AOB 322.) These contentions fail because there were no errors, appellants invited the claimed error or waived or forfeited their challenges to the claimed errors, or any errors were harmless. Whether considered individually or for their cumulative effect, the claimed errors did not affect the outcome of the trial. (*People v. Maciel* (2013) 57 Cal.4th 482, 554; *People v. DeHoyos, supra*, 57 Cal.4th at p. 155.) Appellants were entitled to a fair trial, not a perfect one. (*Lutwak v. United States* (1953) 344 U.S. 604, 619-620; *People v.*

Anzalone (2013) 56 Cal.4th 545, 556; *McDowell, supra*, 54 Cal.4th at p. 442.) They received a fair trial.

XXII. APPELLANT POPS FORFEITED HIS CLAIM RELATING TO THE IMPOSITION OF THE RESTITUTION FINE AMOUNT

As part of the sentence, the court ordered appellant Pops to pay the maximum restitution fine of $10,000. (40RT 6479; 7CT 1691.) Appellant Pops contends the court abused its discretion by imposing the maximum fine without considering his ability to pay. (Pops AOB 327-329.) Appellant Pops has forfeited this issue on appeal by failing to object to the fine below. "By 'failing to object on the basis of his [ability] to pay,' defendant forfeits both his claim of factual error and the dependent claim challenging 'the adequacy of the record on that point.' [Citations.]" (*People v. McCullough* (2013) 56 Cal.4th 589, 597.) In any event, no abuse of discretion occurred.

"In every case where a person is convicted of a crime, the court shall impose a separate and additional restitution fine, unless it finds compelling and extraordinary reasons for not doing so, and states those reasons on the record." (§ 1202.4, subd. (b).) Where the defendant is convicted of a felony, the fine shall be set, at the discretion of the trial court, at between $200 and $10,000, commensurate with the seriousness of the offense. (§ 1202.4, subd. (b)(1).) An appellant's inability to pay the fine is not a compelling and extraordinary reason not to impose the fine, but it shall be considered in setting the fine above the minimum of $200. (§ 1202.4, subds.(c) & (d).) Section 1202.4 presumes a defendant has the ability to pay the fine. (*People v. Romero* (1996) 43 Cal.App.4th 440, 448-449.) "A defendant shall bear the burden of demonstrating his or her inability to pay." (§ 1202.4, subd. (d).)

Here, while the court noted that the imposition of restitution fines were "academic in light of the sentence," the court impliedly considered not only appellant Pops's ability to pay, but also "the seriousness and gravity of the offense and the circumstances of its commission[.]" (§ 1202.4, subd. (d).) Appellant Pops's committed the most serious and grave of crimes, and the trial court did not abuse its discretion in imposing the maximum fine. It is presumed that the trial court properly performed its duty. (Evid. Code, § 664.) Based on the record, there was no abuse of discretion.

XXIII. NO JUROR MISCONDUCT OCCURRED AND THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING THE MOTIONS FOR NEW TRIAL

Appellants contend the trial court abused its discretion in denying their new trial motions based on juror misconduct. Specifically, appellants contend that: (1) Juror No. 9 committed misconduct by failing to disclose she had served as an alternate juror 15 or 16 years earlier on a murder case, which might have been a death penalty case; and (2) the court failed to conduct a sufficient evidentiary hearing as to other instances of alleged misconduct such as consideration of an unrelated news account, by Juror No. 6, vote trading by Juror No. 12, and consideration of inappropriate factors by two other jurors. (Pops AOB 275-318 [Gen. Arg. I]; Wilson AOB 235-293 [Args. VII & VIII].) The claims lack merit. As discussed below, no misconduct, prejudicial or otherwise, occurred. The trial court's handling of the matter provided a sufficient record for the court's rulings and for review.

A. Background

1. Defense Counsel's Contact With Jurors After Trial

After the jury rendered its verdicts and was discharged, appellant Pops's defense attorney, Miss Jones, began contacting individual jurors using telephone numbers from the confidential juror questionnaires.[125] (37RT 6059-6060; 39RT 6298-6299; Supp. IV 1CT 2.) On August 23, 1999, after receiving a complaint from a juror about counsel's actions, the court issued an order directing that all counsel have no further contact with the jurors in this case. The court also noted in its order that the confidential telephone numbers were for court's use only and not for counsel to contact the jurors. (6CT 1451; 37RT 6056.)

Thereafter, appellant Pops's defense counsel sought permission from the court to lift the no-contact order. (Supp. IV 1CT 1-6.) According to defense counsel, Juror No. 7 indicated that Juror No. 6 had been voting for life without the possibility of parole (LWOP) for appellant Pops. On Monday afternoon, August 2, 1999, when the jury returned from the weekend recess, she changed her vote to death. According to Miss Jones's declaration, the juror changed her vote due to the killing of 12 people in Atlanta, Georgia, on Thursday, July 29, 1999.[126] (Supp. IV 1CT 2-3.)

At a hearing held on October 8, 1999, the prosecutor argued against the court lifting its previous order and noted the problems inherent with up

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[125] The cover page of the 23-page questionnaire indicated that a juror's telephone number was "confidential" and would be used *by the court* for the purpose of contacting the juror.

[126] The motion and declaration filed by Miss Jones contains the actual names of the two jurors with whom she spoke. To respondent's knowledge, the jurors' names in this case remain confidential. As such, the Court should direct the parties to redact the jurors' names from any pleadings in the Clerk's Transcript.

to five attorneys and an untold number of investigators descending upon the jurors. The court agreed with the prosecutor's suggestion to call Juror No. 7 (I.D. No. 93285103) and Juror No. 6 (I.D. No. 980429219) to testify under oath. (37RT 6061-6066.) On October 22, 1999, the court conducted a hearing with the two jurors. (37RT 6077.)

2. Juror No. 7's Testimony

Juror No. 7 had previously spoken to Miss Jones about what had occurred with Juror No. 6 on the day the jurors reached their verdicts. (37RT 6100-6101.) When Juror No. 7 was notified that he needed to come to court, he spoke to Juror No. 1. (37RT 6124-6125.) He also spoke to a female juror whom he believed had been Juror No. 9. (37RT 6125.) While waiting in the jury room to be called into the courtroom for questioning, Juror No. 7 and Juror No. 6 spoke. Juror No. 7 told her that he did not know the specific reason why they were there, but a friend had told him there was something written about it in the Press Telegram newspaper. He believed the hearing involved them and the Atlanta shootings. (37RT 6125-6126.) Juror No. 6 responded something to the effect by asking, "Isn't this case ever going to go away, is it ever going to end?" (37RT 6126.) Juror No. 7 asked Juror No. 6 if she recalled the statement she made about the Atlanta shootings, and she said she did recall the statement. The two jurors also discussed what had been occurring in their lives since the last time they saw each other. Juror No. 6 mentioned that Mr. Mizel had called her. (37RT 6127.)

Prior to leaving the courthouse for the weekend before the verdicts were reached, the jury was split nine to three regarding appellant Wilson, and around 11 to one in regard to appellant Pops. (37RT 6102-6103, 6109-6110.) Juror No. 7 recalled that Juror No. 12 was one of the jurors voting for life. (37RT 6110-6110.) Juror No. 6 appeared unsure. (37RT 6111.)

No undue pressure was put on any juror to vote a certain way. The jurors respected each other's opinions. (37RT 6108-6109.)

On the afternoon of August 2, 1999, the jury returned to resume its deliberations. (37RT 6103.) Before any discussions began, the jurors took a poll to see where they stood. Each juror had a piece of paper on which they drew a line down the middle. On one side they wrote their individual verdict for appellant Pops and on the other side for appellant Wilson. The foreperson then tabulated the votes. The jury was unanimous for death as to both appellants. Some of the jurors had changed their minds over the weekend. (37RT 6103-6104, 6116-6117, 6122-6124.)

Some of the jurors asked the ones who had changed their minds what had influenced their decisions. (37RT 6104.) This discussion occurred because they wanted to make sure that the jurors who had changed their minds had not felt pressured by other jurors or changed their votes simply because they felt tired of being there. (37RT 3104-6105.) Each juror who had changed his or her mind was asked to explain the votes. (37RT 6105.) Juror No. 7 recalled that Juror No. 6 explained that she had seen the shooting in Atlanta, and thought "those guys did a horrible thing and they will probably get the death penalty." (37RT 6105.)[127] Juror No. 6 further explained that "honestly in her mind" appellants "deserved the death penalty." The Atlanta shootings made Juror No. 6 "take a closer look at the case [] she was on." (37RT 6106.) The prior week, although Juror No. 6 had voted for LWOP, she nevertheless indicated that she was wavering. (37RT 6106-6107.)

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[127] The killings were perpetrated by one man, Mark O. Barton, who later committed suicide. (See Special Exhs. A1-A6 [media coverage of Atlanta Shootings].)

Juror No. 7 believed that the jury's deliberations always focused on the various factors delineated in the jury instructions. In Juror No. 7's opinion, each juror followed the court's instructions and weighed the various factors. (37RT 6108.)

No discussion of the Atlanta shooting occurred until after the unanimous verdicts were reached. Juror No. 12 had already switched positions. (37RT 6111.) During the deliberations the prior week, Juror No. 12 indicated that he felt life imprisonment was severe enough punishment, but if the entire jury voted for the death penalty, he would not hold out and would agree to death. (37RT 6111-6112.) Juror No. 7 got "the impression" that Juror No. 12 would go along with the majority. (37RT 6112, 6117-6118.) The jurors made it "crystal clear" to each other that whatever verdict was reached, each juror "had to wake up in the morning and look in the mirror" and they were not to compromise their position "because you've got to live with it the rest of your life." (37RT 6118.) Juror No. 7 had no impression as to whether Juror No. 12 was exercising his independent judgment or just going along with the majority. Juror No. 12, however, was an active, verbal participant when the jurors were discussing the factors and evidence during the deliberations. (37RT 6119.) That juror spoke both in favor and against the death penalty during deliberations. (37RT 6119-6120.) He appeared to be actively analyzing the issues pro and con. (37RT 6120.)

At sidebar, Miss Jones stated that she believed that during her interview with Juror No. 7, he told her that Juror No. 12 changed his vote after Juror No. 6 talked about the Atlanta shooting. (37RT 6112-6113.) Juror No. 7 testified that he did not recall telling Miss Jones during their interview that Juror No. 12 changed his vote after hearing discussion about the Atlanta shooting. (37RT 6113.) Juror No. 7 recalled that the jury "came right in and took the vote and then they inquired as to why the

people had changed votes . . . and that's when [Juror No. 6] spoke about the Atlanta shooting." (37RT 6113, 6116-6117.)

When asked by Mr. Mizel to state the "precise wording that Juror No. 6 used when she described the Atlanta shootings," Juror No. 7 explained the following: "Honestly, I'm going to kind of - - me giving you my version of what I remember - - and it's not going to be verbatim exactly what she said because I couldn't remember exactly what her wording was at that point. I can remember what I perceived what she was saying and how I took it and how I remember it but I couldn't sit here and say she said and quote her directly. I couldn't remember what she said." (37RT 6113-6114.) Juror No. 7 recalled only that Juror No. 6 had said she saw the coverage about the Atlanta shootings during the weekend. Juror No. 7 did not know anything about the incident until it was mentioned in the jury room. (37RT 6120-6121.) Juror No. 6 said the Atlanta shootings were senseless and this caused her to think about the case on which she was sitting as a juror. The event caused her to look closer at this case, and she concluded the "right thing to do" was to vote for death. (37RT 6121.) Juror No. 6 never said she was making a comparison between the Atlanta shootings and this case. (37RT 6122.)

After the vote was taken and Juror No. 6 offered her explanation for her change of vote, she spoke in a calm tone of voice and was not excited. Her demeanor was the same as it had been throughout and had not changed from previous weeks. Juror No. 7 explained that Juror No. 6 was "a pretty nice person and she usually addresse[d] the rest of the jury with a smile." (37RT 6115.)

3. Juror No. 6's Testimony

Juror No. 6 had not seen anything in the newspaper about this particular hearing in which she and Juror No. 7 were to testify. (37RT 6152.) Prior to coming into the courtroom to testify, she spoke with Juror

No. 7. Juror No. 6 asked Juror No. 7 if he knew why they had been called to court. Juror No. 7 said he did not know, but mentioned that there had been something in the news about it. (37RT 6153.)

On the afternoon of August 2, 1999, the jury returned for deliberations after the weekend. (37RT 6138-6139.) Juror No. 6 recalled that a vote was taken first before any discussion occurred. She did not recall if it was a written vote. The votes were unanimous as to both appellants. (37RT 6140.) Juror No. 6 recalled that there was discussion about why some of the jurors had changed their votes over the weekend. Juror No. 6 recalled that she explained why she had changed her vote, but did not remember the substance of what she said. (37RT 6141.) Juror No. 6 did not remember mentioning the Atlanta shootings on the day the jury returned its verdicts. (37RT 6153.)

Juror No. 6 recalled that there was a discussion at some point about the Atlanta shootings, but she did not remember what day it occurred. (37RT 6141-6142.) The juror had heard about the shootings on the news, and she could not understand how someone could kill innocent people. Juror No. 6 did not think she had said anything about the Atlanta shootings as to how that incident affected the way she viewed this case. She recalled that the discussion was "just a general conversation" "not related to th[is] case." (37RT 6142.)

Juror No. 6 recalled that she learned about the Atlanta shootings from factual news reports on the internet. (37RT 6143-6144, 6156-6157.) She also saw some news reports on television as the events unfolded, but she did not recall what station she watched. (37RT 6157-6158.) Juror No. 6 believed she heard about the shootings on the Thursday (which would have been July 29, 1999) before the verdicts were reached on August 2. (37RT 6151.) She read a couple of pages of news about the incident. (37RT

6151.) Juror No. 6 also saw some coverage on television prior to the weekend. (37RT 6152.)

When asked by the court how the news impacted her emotionally, Juror No. 6 explained that she was a "very emotional person." She further explained, "[E]very time that something like that happens . . . I think about it and I guess I sometimes tend to dwell on it a little bit. . . . I think it's kind of sad that these things happen." (37RT 6144.) When Juror No. 6 returned on the afternoon of August 2, she was not still emotionally impacted by the news of the Atlanta shootings. (37RT 6144-6145.) Juror No. 6 did not remember ever saying to the other jurors that the Atlanta shootings had an impact on her deliberating process. (37RT 6144.)

During her deliberations with the other jurors, Juror No. 6 discussed the factors outlined in the instructions given by the court. (37RT 6144.)

4. Further Proceedings; Juror No. 12 Called to Testify

After extensive discussions with the attorneys concerning Juror No. 7's testimony (38RT 6194-6238), the court agreed to call Juror No. 12 to testify (39RT 6239-6240). Juror No. 12 testified at a hearing on December 3, 1999. (39RT 6266.) Juror No. 12 had not heard from any other juror or read anything in the newspaper about the reason he was called to court. (39RT 6275.)

Juror No. 12 recalled that the jury reached verdicts on Monday afternoon, August 2, 1999. (39RT 6267.) The jury deliberated the prior Friday. Juror No. 12 recalled that the jury was split nine to three in favor of the death penalty as to both appellants. (39RT 6267.) Juror No. 12 was one of the three. (39RT 6267-6268.) The juror recalled that when they returned on Monday afternoon, the jury took a vote right away without further deliberating. The jurors wanted to see if there were any changes in people's feelings from the previous week. (39RT 6268.) Juror No. 12

recalled that after the vote was taken, the jury was still split nine to three. (39RT 6268.)

He believed the jurors then deliberated further. Juror No. 12 said he would go along with the majority if the vote came down to 11 to one. Juror No. 12 did not recall when he made his statement about not being the one holdout juror. He could have made that statement on the Monday that the verdicts were reached. (39RT 6276.)

Juror No. 12 was influenced by the feelings expressed by the majority, and he did "think that the heinousness of the crime" warranted the death penalty. The jurors had "put up the pictures of the slain men." Juror No. 12 did not change his vote to just go along with the others. (39RT 6269.) Rather, Juror No. 12 explained that he listened very carefully to the reasons the jurors gave who had changed their minds. The juror believed that the jury had "rather scrupulously" evaluated the various witnesses. The jurors "did exchange view and considerations very well." Juror No. 12 did not know the numbers of the two other jurors who had changed their minds, but both were female. (39RT 6270.)

When the jury voted unanimously for death, the ballots were in written form. (39RT 6276.) Juror No. 12 did not recall any discussion after the unanimous verdicts were reached. He recalled, "I think we were pretty much all satisfied that . . . deliberated and weighed the factors and had followed the law and the instructions that we had been given." (39RT 6276-6277.)

Juror No. 12 did not recall what the two other jurors said when discussing their vote change. He recalled that "all three [were] influenced by the fact that the murders took place in what seemed to be cold blood and that there seemed to be premeditation and that the mitigating circumstances were not sufficient to outweigh the aggravating." The jurors did "quite a bit" of listing on the blackboard the factors in aggravation and mitigation,

and "tri[ed] to give weight to each particular circumstance." Ultimately, Juror No. 12 recalled that all the jurors "agreed that the aggravating certainly outweighed the mitigation." The factors in aggravation and mitigation considered by the jury were those listed in the jury instructions. (39RT 6271.)

When asked by the court if he recalled during the deliberations any of the jurors mentioning the Atlanta shootings that had taken place, Juror No. 12 responded: "No, I don't think I actually knew about that." (39RT 6278-6279.) It was not a topic discussed in his presence. (39RT 6279.)

5. The Court Sends Letters to Each of the Jurors Asking if They Were Willing to Be Interviewed by the Defense

After repeated requests by defense counsel to be permitted to interview the jurors directly, the court relented and agreed to send letters to each of the jurors asking if they would be willing to speak to the defense attorneys. (39RT 6280-6285, 6298-6304.) At a status conference held on January 14, 2000, the court noted that all but one of the jurors had responded to the court's inquiry letter. (39RT 6309-6310.) The court continued the matter to permit defense counsel time to interview the jurors who had responded positively to the request. (39RT 6319.)

a. Defense Counsel's Contact with Juror No. 9

During her interview with defense counsel Miss Jones and Mr. Brodie, Juror No. 9 (I.D. No. 975191735) mentioned that she had served as an alternate juror on either a death penalty case or non-death penalty murder case in which the defendant was a juvenile. This jury service possibly occurred 15 years before the trial in the instant case. Juror No. 9 did not reveal her prior service in either the juror questionnaire or during voir dire. The Jury Commissioner's records reflected that Juror No. 9's name appeared in the office's files for the relevant period of 1985-1987.

The office could not determine, however, whether Juror No. 9 was qualified as a juror, served on a jury, or was excused. (6CT 1517-1522, 1530-1538, 1540-1541, 1550.)

b. Defense Counsel's Contact with Juror No. 1

Miss Jones stated in a declaration that she and Mr. Brodie spoke with Juror No. 1 on March 1, 2000.[128] Juror No. 1 purportedly conveyed the following information to defense counsel: On the Friday before the verdicts, Jurors No. 6 and No. 12 were voting for life for both appellants. Juror No. 7 was voting life for appellant Wilson, and was vacillating between life and death for appellant Pops. The next Monday when the jury returned, they took a vote before any further deliberations occurred. The vote was unanimous for death as to both appellants. When asked why she had changed her votes, Juror No. 6 explained that the Atlanta shootings made her realize that she was feeling sympathy for appellants' families, and that she needed to put those feelings aside. (6CT 1562.)

Miss Jones further recounted that, according to Juror No. 1, Juror No. 12 had said that he was "comfortable" with voting for either death or life. Juror No. 10 purportedly said that in the country where he was born, "If you kill someone, then you are killed. If someone steals, then you cut off the hand." Juror No. 1 also purportedly told Miss Jones either Juror No. 10 or No. 11 rhetorically asked why should appellants "sit in jail while we pay for it." (6CT 1562.)

Miss Jones prepared a declaration for Juror No. 1's signature and faxed it to her. Later that day, Juror No. 1 called Miss Jones. The juror was upset that Miss Jones had called her place of employment and represented that she (Miss Jones) was a friend of Juror No. 1. The

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[128] This juror's name is also mentioned in an attachment to the pleading filed with Miss Jones's declaration. (6CT 1567-1568.)

coworker gave Miss Jones a contact telephone number for Juror No. 1 despite the fact this call was not an emergency situation. According to Miss Jones, she did not say that she was Juror No. 1's friend. Later, Miss Jones left messages at Juror No. 1's home telephone number on two different days, but the juror did not respond. Mr. Brodie also called Juror No. 1 and left a message. The next day, Juror No. 1 left a voicemail message that indicated she no longer wanted to be contacted regarding this case. (6CT 1563.) The juror did not sign and return the declaration prepared for her by Miss Jones. (6CT 1563-1564.)

6. Juror No. 9's Testimony

On March 24, 2000, Juror No. 9 testified that she did tell a couple of defense attorneys she had served on a prior death penalty case as an alternate juror. This occurred around 1984. She was not substituted in for one of the jurors and never deliberated. (39RT 6338.)

As for question 40-A of the juror questionnaire that asked about prior juror service, Juror No. 9 wrote that she served on a civil, personal injury jury in 1992. Juror No. 9 did not mention her earlier service because she "had just forgotten about it." (39RT 6339.)

Juror No. 9 did not recall when she first remembered her prior service from 1984. She noted, "It was not at the time that I filled out the jury questionnaire because it was lengthy. I was trying to get through it. I just didn't recall it at that time." Juror No. 9 speculated, "It could have been months into [the trial] or weeks into it and I can't really say when." (39RT 6342.) The questioning of other jurors during jury voir dire did not jog Juror No. 9's memory about her prior service as an alternate. (39RT 6343.)

7. The Trial Court's Findings of Fact and Rulings Denying the New Trial Motions

a. Jurors No. 10 and No. 11

The court found as to Jurors No. 10's and No. 11's alleged statements that there was no evidence "they were anything other than transitory comments in passing, provoking no discussion by other jurors." The court noted that appellants were represented by very skilled attorneys and the fact there had been no further discussion with Juror No. 1 or follow up with the other two jurors indicated these were passing comments. (39RT 6372.) The court had observed that the absence of any follow up by the attorneys "does speak very loudly." (39RT 6365-6366.) Based on these limited representations, the court determined that it would not "drag in this juror [No. 1] who is, obviously, very reluctant." (39RT 6372.)

b. Juror No. 9

During the discussion with the attorneys about Juror No. 9, appellant Wilson's counsel, Mr. Thomason, argued that the juror's failure to list her prior jury service "was a concealment of a very material fact." The court asked, "Are you really arguing this lady was lying to me today?" Defense counsel agreed that she was not lying, and clarified that his use of the word "concealment" was a "term of art," not made in the pejorative sense. The court then commented: "Well, I just want to know what you mean by it in your argument to me because I'll tell you, quite frankly, I don't think this lady intentionally concealed anything. I thought she was very credible." (39RT 6384.) The court further noted that the relevant question in the questionnaire was not entirely clear as to whether it also encompassed situations where a juror merely sat as an alternate. (39RT 6392-6393, 6395-6396.)

The court continued the matter so that it could conduct further research. (39RT 6395-6396.) On April 7, 2000, the court heard further argument from counsel. (40RT 6400-6434.) In denying the new trial motion, the court again noted it had found Juror No. 9 "credible," and "had honestly failed to give the answer. . . ." (40RT 6434.) The court noted a number of reasons for its finding, including that it was unclear whether Juror No. 9 sat as an alternate on a simple murder case (possibly involving a juvenile defendant) or a death penalty case. (40RT 6424, 6434-6435.) Even assuming Juror No. 9 did sit on a death penalty case, the court found it significant that she was an alternate juror because it would be "a lot easier to forget" since she did not actually render a verdict. Moreover, that jury service occurred 15 or 16 years before this trial. (40RT 6435.)

The court further found that Juror No. 9's "demeanor was such that nothing indicated to me that she was lying here." "I believe that she was honestly in the position where she just honestly forgot about it. Based on the questioning that took place, she certainly didn't conceal it. When it came up in the conversations with counsel, there was nothing - - nobody told her, you know, if some time during the course of trial you think of something you forgot on voir dire, bring it up." (40RT 6436.) Lastly, the court found that under the test articulated in the then-recent case of *In re Hamilton* (1999) 20 Cal.4th 273, the inadvertent omission of the juror's prior service as an alternate juror was not the kind of information that would have demonstrated actual bias on her part. (40RT 6437.)

c. Juror No. 6

In regard to Juror No. 6, the court rejected defense counsel's argument that the juror had violated her oath by "deliberating" over the weekend. The court observed that defense counsel was suggesting an impossible standard as there was no possible way to expect jurors not to think about a case while outside the jury room. (40RT 6438-6440.) Additionally, the

court observed that Juror No. 9 appeared to have been considering an improper basis for not voting for death as she was feeling sympathy for appellants' families, which was not a factor enumerated in the law. (40RT 6441-6442.)

B. The Law and Analysis

"A trial court has broad discretion in ruling on a motion for a new trial, and there is a strong presumption that it properly exercised that discretion." (*People v. Davis* (1995) 10 Cal.4th 463, 524; *People v. Cox* (1991) 53 Cal.3d 618, 694 ["'The determination of a motion for a new trial rests so completely within the court's discretion that its action will not be disturbed unless a manifest and unmistakable abuse of discretion clearly appears'"].) Where a party seeks a new trial based on jury misconduct, the trial court must first determine whether the evidence presented for its consideration is admissible, then consider whether the facts establish misconduct; if misconduct is found to have occurred, the court must determine whether the misconduct was prejudicial. (*People v. Duran* (1996) 50 Cal.App.4th 103, 112-113.) On appeal the trial court's determination on a motion for new trial is reviewed for abuse of discretion. (*Id.* at p. 113.)

1. Juror No. 9's Omission about Prior Jury Service as an Alternate Was Inadvertent and No Prejudicial Misconduct Occurred

As noted above, the trial court found Juror No. 9 to be credible and that she honestly forgot about her prior jury service as an alternate 15 or 16 years before trial. On review, this Court

> accept[s] the trial court's credibility determinations and findings on questions of historical fact if supported by substantial evidence. [Citations.] Whether prejudice arose from juror misconduct, however, is a mixed question of law and fact subject to an appellate court's independent determination. [Citations.]

(*People v. Nesler* (1997) 16 Cal.4th 561, 582.) This Court has "long recognized that, except when bias is apparent from the record, the trial judge is in the best position to assess the juror's state of mind during questioning." (*People v. Clark, supra*, 52 Cal.4th at p. 971.)

> There is serious question whether honest voir dire mistakes can ever form the basis for impeachment of a verdict. [Citations.]. . . . [¶] What is clear is that an honest mistake on voir dire cannot disturb a judgment in the absence of proof that the juror's wrong or incomplete answer hid the juror's actual bias. Moreover, the juror's good faith when answering voir dire questions is the most significant indicator that there was no bias. [Citations.]

(*In re Hamilton, supra*, 20 Cal.4th 273, 300.)

As this Court has confirmed, the decision to set aside a unanimous jury verdict may not be taken lightly and must be supported by a finding of a substantial likelihood of bias. (*In re Carpenter* (1995) 9 Cal.4th 634, 654.) The *Carpenter* Court further noted,

> the criminal justice system must not be rendered impotent in quest of an ever-elusive perfection. The system is fundamentally human, which is both a strength and a weakness. [Citation omitted]. Jurors are not automatons. They are imbued with human frailties as well as virtues. If the system is to function at all, we must tolerate a certain amount of imperfection short of actual bias. To demand theoretical perfection from every juror during the course of a trial is unrealistic.

(*Id.* at pp. 654-655; *People v. Danks* (2004) 32 Cal.4th 269, 304.) The high court agrees that it is not enough that the juror was "placed in a potentially compromising situation," for then "few trials would be constitutionally acceptable." (*Smith v. Phillips* (1982) 455 U.S. 209, 217.) Ultimately, a defendant is entitled to a juror who is "capable and willing to decide the case solely on the evidence" presented at trial. (*Ibid.*)

In defiance of the well-established deference owed to the trial court's credibility determinations, appellants repeatedly asks this Court to second-

guess the lower court's finding that Juror No. 9 was credible and to reach its own independent determination that the juror was dishonest and actually biased. (Pops AOB 308-313; Wilson AOB 251-262.) There is no reason, absent resorting to extreme speculation, to set aside the trial court's factual findings about Juror No. 9's credibility. Her prior service as an alternate juror occurred many years earlier—a decade and a half or more—before appellants' trial began. The juror's lack of memory was also understandable since she never deliberated and did not even know what verdict the jury had reached. Moreover, there was a conflict in the record, as it was not clear whether Juror No. 9 served as an alternate on a death penalty case or a murder trial involving a juvenile defendant. To the extent her prior service was not a death penalty case, the omission was even more unremarkable.

Appellants' suggestion that Juror No. 9 intentionally concealed her prior service is also contrary to the record. In filling out the juror questionnaire, the Juror No. 9 gave indications that she did not particularly want to be seated as a juror in this case. In response to question no. 70 which asked if the juror had "any specific problems at home or on the job that might cause you to be unable to concentrate on the case or might cause you to 'hurry' along your deliberations," Juror No. 9 responded in the affirmative and wrote: "I would be anxious to return to work for fear I may forget how to use our new computer system." (7CT 1735.) Further, the juror stated that she had been "jaded" by unfavorable reports of misconduct by police officers. She also personally had had contact with police officers who had not acted in a professional manner. (7CT 1853.) This was clearly not a juror who was hiding some bias in the hope of being placed on the jury in this case. Certainly, the fact that she was an alternate juror in a murder case 15 years before this trial did not suggest any type of bias against appellants and was hardly a significant factor during voir dire. And

the inadvertent omission of this prior jury service did not show any bias. (See, e.g., *Hamilton, supra*, 20 Cal.4th at pp. 299-301.)

A review of the juror's questionnaire also reflects that she gave considerable thought to her answers, and attempted to provide full and complete responses. In particular, she gave extensive answers to questions relating to her feelings about law enforcement (7CT 1848), causes of crime (7CT 1850), the need for the prosecution to prove the case beyond a reasonable doubt "provided that all evidence has been preserved" (7CT 1854), that childhood experience affected development (an issue developed at the penalty trial by the defense) (7CT 1857), that the circumstances dictated the appropriate punishment, and that life in prison could be a "just punishment" (7CT 1855-1859; see also 10RT 1156-1157 [voir dire]).

The trial court's conclusion that Juror No. 9 omission was not intentional concealment is therefore supported by the record and entitled to deference on appeal. These same factors that support the trial court's credibility findings, also supports the conclusion that any failure to disclose her prior jury service did not affect Juror No. 9's ability to perform her duty to evaluate the evidence objectively and perform her duty impartially. (*People v. San Nicolas* (2004) 34 Cal.4th 614, 646.) The trial court did not abuse its discretion in denying the motion for a new trial. (*People v. Clair* (1992) 2 Cal.4th 629, 667.)

2. The Trial Court Conducted a Sufficient Inquiry to Determine That No Other Juror Misconduct Occurred

Tacitly recognizing that the other assertions of juror misconduct raised below were insufficient to grant a new trial, appellants assert that the trial court's hearings on the matter were inadequate to resolve the question of whether there was jury misconduct, and the case must therefore be remanded for more hearings. (Pops AOB 275-301; Wilson AOB 265-293.)

This claim too lacks merit. The trial court did not abuse its discretion in denying appellants' requests for further fishing expeditions because the evidence upon which the claims of juror misconduct were based did not demonstrate a strong possibility that prejudicial misconduct had occurred.

Not every incident involving a juror's conduct requires or warrants further investigation. The decision whether and how to investigate allegations of juror misconduct rests within the trial court's sound discretion. (*People v. Engelman* (2002) 28 Cal.4th 436, 442.) A hearing is required only where the court possesses information which, if proven to be true, would constitute good cause to doubt the juror's ability to perform his or her duties. (*People v. Cleveland* (2001) 25 Cal.4th 466, 478; see also *People v. Brown, supra*, 31 Cal.4th at p. 582 [court acted within discretion in not holding hearing].) "[O]nly when the defense has come forward with evidence demonstrating a strong possibility that prejudicial misconduct has occurred" is an evidentiary hearing called for. (*People v. Hedgecock* (1990) 51 Cal.3d 395, 419.)

A trial court's inquiry should be as limited in scope and focus upon the conduct of the jurors, rather than upon the content of the deliberations. (*People v. Cleveland, supra*, 25 Cal.4th at p. 485.) Although the attorneys for the parties need not be allowed to question jurors, "the court may allow counsel to suggest areas of inquiry or specific questions to be posed by the court." (*Ibid.*) Finally, the reaction of the other jurors may help to dispel any inference that bias infected the deliberations. (*People v. Loker* (2008) 44 Cal.4th 691, 749.)

Here, as detailed above, the court, out of an abundance of caution, separately questioned under oath four jurors involved in the allegations of misconduct. The court allowed counsel to question Juror No. 7 at length, and asked various questions suggested by counsel of the other jurors. The court went even further and permitted defense counsel to interview all the

jurors who had indicated in response to the court's letter that they would be willing to talk with counsel. In the end, what was brought forth and considered by the trial court did not objectively raise the possibility of juror misconduct.

There was absolutely no evidence to suggest that Juror No. 6 engaged in some sort of comparative analysis of the two extremely different incidents. Rather, according to Juror No. 7, Juror No. 6 explained to her fellow jurors and later to the court, the Atlanta shootings caused her to "take a closer look" at this case. She had been allowing her feelings of sympathy for appellants' family to interfere with her deliberative process. (37RT 6106.) Sympathy for families of the killers is not a specific factor set forth in the law which a juror may consider. (See § 190.3, factors (a)-(k); 6CT 1385-1387 [CALJIC 8.85].) Juror No. 6 engaged in the normative weighing process of the factors as instructed by the court and concluded that "honestly in her mind" appellants "deserved the penalty." (37RT 6106 [Juror No. 7's testimony about Juror No. 6's statements].)

Juror No. 6, on the other hand, did not recall when the discussion of the Atlanta shooting occurred. She remembered it as "just a general conversation" "not related to th[is] case." (37RT 6142.) In fact, the shootings in Atlanta occurred on a Thursday, July 29, 1999, and it was quite conceivable that the "general conversation" about the incident occurred the next day. In any event, four days had passed from when the shootings occurred and the jury returned its unanimous verdicts. Juror No. 6 testified that she was not emotionally impacted by the shootings when she voted for death on Monday afternoon, August 2, 2000. (37RT 6144-6145.) Juror No. 7 described Juror No. 6's demeanor as calm, and noted that all the jurors had deliberated and followed the court's instructions. (37RT 6108, 6115.) The declaration submitted by Miss Jones regarding her interview with Juror No. 1 also supported the finding that no misconduct

occurred. Juror No. 1 confirmed that Juror No. 6 said she had set aside her feelings of sympathy for appellants' families, and impliedly then considered the proper factors set forth in the law. According to Juror No. 7, Juror No. 6 never indicated that she was comparing the case at bar with the Atlanta shootings. (37RT 6122.) Juror No. 12, who testified later, did not hear any mention of the Atlanta shootings in his presence. (39RT 6278-6279.)

While "[i]t is well settled that it is misconduct for a juror to read news[] accounts of a case on which [s]he is sitting" (*People v. Pinholster, supra*, 1 Cal.4th at p. 924), the news accounts about the Atlanta shootings had absolutely nothing to do with appellants' case. It is not misconduct for a prospective juror to even read a newspaper article about an unrelated capital case. (*People v. Hardy, supra*, 2 Cal.4th at p. 176.) Thus, judged objectively, the news reports about the Atlanta shootings were not the type of extraneous information that was inherently likely to bias the juror against appellants. (*People v. Williams* (2006) 40 Cal.4th 287, 333-334.) Nor is there any evidence that the nature of the information actually biased Juror No. 6 against appellants. The juror's subjective reasoning process in how, or even if, she considered this information in her deliberations is inadmissible. (Evid. Code, § 1150.)[129]

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[129] Evidence Code section 1150, subdivision (a), provides: "Upon inquiry as to the validity of a verdict, any otherwise admissible evidence may be received as to statements made, or conduct, conditions, or events occurring, either within or without the jury room, of such a character as is likely to have influenced the verdict improperly. No evidence is admissible to show the effect of such statement, conduct, condition, or event upon a juror either in influencing him to assent to or dissent from the verdict or concerning the mental processes by which it was determined." The statute thus makes a "distinction between proof of overt acts, objectively ascertainable, and proof of the subjective reasoning processes of the individual juror, which can be neither corroborated nor disproved. . . ."
(continued...)

Recently, in *In re Boyette* (2013) 56 Cal.4th 866, this Court determined that a juror's suggestion to undecided jurors that they watch a movie about prison life in order to convince them that death was proper penalty, did not amount to prejudicial misconduct. (*Id.* at pp. 890-898.) The situation here was even more attenuated because there was absolutely no evidence that Juror No. 6, or any other juror, utilized the extraneous information about the Atlanta shootings in reaching a decision. The record viewed as a whole shows that even if Juror No. 9 considered the Atlanta shootings, it was only in the context of causing her to take a closer look at the evidence in *this case* and to actually weigh the factors outlined in the court's instructions. There was no "substantial likelihood" that Juror No. 6 was actually biased against appellants due to the extraneous information.

As this Court has observed, the standard for reviewing alleged juror misconduct

> "is a pragmatic one, mindful of the 'day-to-day realities of courtroom life' [citation] and of society's strong competing interest in the stability of criminal verdicts [citations]. It is 'virtually impossible to shield jurors from every contact or influence that might theoretically affect their vote.' [Citation.] Moreover, the jury is a 'fundamentally human' institution; the unavoidable fact that jurors bring diverse backgrounds, philosophies, and personalities into the jury room is both the strength and the weakness of the institution. [Citation.] '[T]he criminal justice system must not be rendered impotent in quest of an ever-elusive perfection. . . . [Jurors] are imbued with human frailties as well as virtues. If the system is to function at all, we must tolerate a certain amount of imperfection short of actual bias.'"

(...continued)
(*People v. Hutchinson* (1969) 71 Cal.2d 342, 349.) "This limitation prevents one juror from upsetting a verdict of the whole jury by impugning his own or his fellow jurors' mental processes or reasons for assent or dissent." (*Id.* at p. 350; *People v. Ozene* (1972) 27 Cal.App.3d 905, 914.)

(*In re Boyette, supra*, 56 Cal.4th at p. 897.)

As to Juror No. 12, the trial court's implied finding that the juror had changed his vote based on proper deliberations is also supported by a sufficient record. Juror No. 12 testified under oath that although he said he would not be a holdout juror, his ultimate vote for death was based on the jury's deliberations. He specifically noted that "the heinousness of crime" warranted the death penalty. (39RT 6269.) He was also "influence by the fact that the murders took place in what seemed to be cold blood and that there seemed to be premeditation and that the mitigating circumstances were not sufficient to outweigh the aggravating [circumstances]." He viewed pictures of the slain men. (39RT 6269.) He described part of the jurors' deliberating process where they listed on the blackboard the various factors in aggravation and mitigation and "tri[ed] to give weight to each particular circumstance." (39RT 6271.) Juror No. 12 averred that he did not change his vote to just go along with the other jurors. (39RT 6269.) Juror No. 7 too confirmed that Juror No. 12 was an active participant when the jury discussed the factors and evidence. (37RT 6119-6120.)

Although Juror No. 12 believed the jury deliberated on August 2, before the unanimous verdicts were reached, it appears that his recollection in this regard was inaccurate. All of the other jurors who testified, and Juror No. 1's statement to Miss Jones (6CT 1562:14-15), confirmed that the jury reached unanimous verdicts before any further deliberations commenced on August 2. This evidence thus refutes the suggestion that Juror No. 12 was influenced to go along with the majority as he would not have known that the other holdout jurors had changed their minds. There is thus no evidence, beyond pure speculation, that Juror No. 12 did not independently deliberate and changed his vote to simply go along with the majority.

Appellants' suggestion that Juror No. 1's unsworn statements purportedly made to defense counsel required that the trial court haul in the juror for questioning lacks authority. (Wilson AOB 284-291; Pops AOB 295-296, 301.) Defense counsel's declaration was not probative evidence of misconduct. In *People v. Cox, supra*, 53 Cal.3d at page 697, for example, the defendant offered an investigator's affidavit recounting a juror's statement to him. This Court held the trial court "did not abuse its discretion in according little, if any, credence to assertions the declarant was unwilling to verify." This Court declined to find that a trial court abuses its discretion not to hold an evidentiary hearing in "situations in which the defendant merely seeks to place unsworn statements under oath by calling upon reluctant jurors to reiterate those statements from the witness stand." (*Id.* at p. 698.) As this Court explained:

> First, we find no constitutional, statutory, or decisional imperative supporting such an extension. A criminal defendant has neither a guaranty of posttrial access to jurors nor a right to question them about their guilt or penalty verdict . . . . [¶] Second, requiring testimony under such circumstances is tantamount to the type of "fishing expedition" condemned in [*People v. Hedgecock, supra*, 51 Cal.3d at p. 419]. Either a juror is willing to come forward and, at least on a preliminary basis, sign an affidavit or not. Unless the reticence results from impermissible interference by the court or prosecutor, the reasons therefor should not be subject to further inquiry."

(*People v. Cox, supra*, at pp. 698–699.)

As this Court further cautioned:

> "To grant this kind of power to the losing attorney would open the door to harassment of jurors and . . . ultimately damage the jury process and the administration of justice." [Citation.] In the civil context, we have also recognized that "permitting counsel for the losing party to interrogate unwilling trial jurors touches the integrity of our venerable jury process . . . . [O]nce aware that after sitting through a lengthy trial he himself may be placed on trial, only the most courageous prospective juror will not seek excuse from service." [Citations.] Although in

> *Hedgecock* we permitted a limited right to examination under specified circumstances, the justifiable concern for juror prerogatives cautions against an extension of that rule to the instant facts.

(*People v. Cox, supra*, 53 Cal.3d at p. 699.) Additionally, the Court noted, "jurors might well completely refuse to talk with defense counsel or investigators if they anticipated being called into court for subsequently declining to acknowledge their statements under oath." (*Ibid.*)

Likewise, under the facts here, the trial court's ruling was proper. Miss Jones's declaration about what Juror No. 1 allegedly told her was insufficient for further inquiry by the court and no abuse of discretion is shown. Moreover, the purported comment by one juror about what happens to murders in the country where he came from, and another juror's alleged comments about having to pay for appellants to sit in prison, were nothing more than transient comments. These statements necessarily involved the type of subjective reasoning processes rendered inadmissible under Evidence Code section 1150. (*People v. Cox, supra*, 53 Cal.3d at pp. 694-695 ["we are precluded from considering any matters concerning the jurors' ratiocinations"].)

Even if the comments were made, there is no showing, or suggestion from any juror, that these jurors did not engage in proper deliberations. It may well be that one of the jurors was originally from a country that executes all murderers. That does not mean that the juror applied some foreign law as opposed to the law given to the jury by the court. The juror's mental processes cannot be questioned (Evid. Code, § 1150), and the statement standing alone, as it must be viewed, means nothing in the context of the juror's individual deliberations. Likewise, a juror's comments that he did not want to pay for appellants to sit around in prison, does not suggest he based his verdicts on an improper factor. Considered in context, and not delving into the juror's mental process, it is more than

likely that if a juror made such a comment he nevertheless found that the aggravating circumstances in this case warranted death and appellants did not deserve the leniency of life. Again, however, what effect the alleged statement had on the juror would not be admissible to impeach the verdicts. (*Ibid.*) These subjective remarks were insignificant in the context of the entire deliberations and did not show the jurors decided the case based on extrajudicial evidence or the wrong law. The court's finding that these were passing comments of no consequence is supported by the evidence and reason.

In sum, the trial court's handling of the various claims of juror misconduct was sufficient for the court to resolve the factual issues presented by the new trial motions. As there was no strong probability of juror misconduct, prejudicial or otherwise, based on the allegations and evidence received, there was no basis for further inquiry by the court. Remand for additional evidentiary hearings is unnecessary. (*People v. Cox, supra*, 53 Cal.3d at pp. 694-699.) Appellants' claims should be rejected.

CONCLUSION

Accordingly, respondent respectfully requests that the judgment against appellants be affirmed.

Dated: February 25, 2014

Respectfully submitted,

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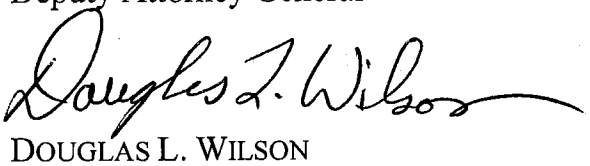

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CERTIFICATE OF COMPLIANCE

I certify that the attached RESPONDENT'S BRIEF uses a 13 point Times New Roman font and contains 84,851 words.

Dated: February 25, 2014

KAMALA D. HARRIS
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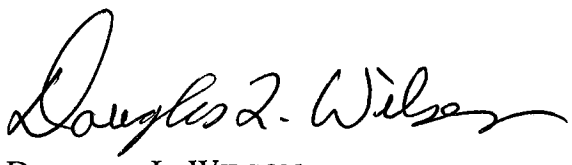

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DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **The People of the State of California v. Aswad Pops and Byron Wilson**

No.: **S087533**

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 February 26, 2014, I served the attached **CAPITAL CASE-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:

PLEASE SEE ATTACHED SERVICE LIST

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 February 26, 2014, at Los Angeles, California.

M. Louie
Declarant

Signature

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