In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA, **Plaintiff and Respondent,** **v.** **EDUARDO DAVID VARGAS,** **Defendant-Appellant.**	**CAPITAL CASE** Case No. S101247

Orange County Superior Court Case No. 99CF0831
The Honorable Francisco P. Briseno, Judge

RESPONDENT'S BRIEF

KAMALA D. HARRIS
Attorney General of California
DANE R. GILLETTE
Chief Assistant Attorney General
JULIE L. GARLAND
Senior Assistant Attorney General
HOLLY D. WILKENS
Supervising Deputy Attorney General
KRISTEN KINNAIRD CHENELIA
Deputy Attorney General
State Bar No. 225152
110 West A Street, Suite 1100
San Diego, CA 92101
P.O. Box 85266
San Diego, CA 92186-5266
Telephone: (619) 525-4232
Fax: (619) 645-2271
Email: Kristen.Chenelia@doj.ca.gov
Attorneys for Plaintiff and Respondent

TABLE OF CONTENTS

Page

TABLE OF CONTENTS
(continued)

Page

TABLE OF CONTENTS
(continued)

Page

TABLE OF AUTHORITIES

Page

CASES

STATUTES

CONSTITUTIONAL PROVISIONS

OTHER AUTHORITIES

STATEMENT OF THE CASE

On March 10, 2000, the Orange County District Attorney filed an information[1] charging Appellant Eduardo David Vargas (Vargas), in count 1, with the murder of Jesse Muro Jr. (Pen. Code, §187, subd. (a)). A special circumstance was alleged that the murder was committed during the commission or attempted commission of the crime of robbery in violation of Penal Code sections 211 and 212.5. (Pen. Code, § 190.2, subd. (a)(17)(A).) The information also charged Vargas with six counts of second degree robbery (counts 2, 3, 4, 8, 10 & 11; Pen. Code, §§ 211, 212.5, subd. (c), & 213, subd. (a)(2)), one count of possessing a firearm while on probation (count 5; Pen. Code, § 12021, subd. (d)), two counts of street terrorism (counts 7 & 12; Pen. Code, § 186.22, subd. (a)), and one count of attempted second degree robbery (count 9; Pen. Code, §§ 664, 211, 212.5, subd. (c), & 213, subd. (a)(2)). It was alleged that counts 1, 2, 3, 4, 8, 9, 10, and 11, were serious felonies within the meaning of Penal Code section 1192.7, subdivision (c)(19). (1 CT 41-46.)

It was further alleged as to counts 1 and 2 that Vargas personally discharged a firearm causing death (Pen. Code, § 12022.53, subd. (d)), and that a principal, having committed a felony for the benefit of, and at the direction of, and in association with a criminal street gang, with the specific intent to promote, and further and assist in any criminal conduct by gang members, vicariously discharged a firearm causing great bodily injury (Pen. Code, § 12022.53, subds. (d) & (e)(1)). It was also alleged as to counts 1, 2, 3, 4, 8, 9, 10, and 11, that a principal, having committed a felony for the benefit of, and at the direction of, and in association with a criminal street

---

[1] The information also charged co-defendants Matthew Miller and Eloy Gonzalez. (1 CT 41-46.) On August 25, 2000, Vargas's case was severed from both co-defendants. (1 CT 308.)

gang, with the specific intent to promote, and further and assist in any criminal conduct by gang members, vicariously used a firearm in the commission and attempted commission of the crimes charged. (Pen. Code, § 12022.53, subds. (b) & (e)(1)). It was further alleged counts 1, 2, 3, 4, 5, 8, 9, 10, and 11, were committed for the benefit of, at the direction of, and in association with a criminal street gang. (Pen. Code, § 186.22, subd. (b)(1).) (1 CT 41-46.)

On March 21, 2000, Vargas pled not guilty to all counts. (1 CT 50.)

The jury was sworn on January 18, 2001. (2 CT 597.) On February 9, 2001, the jury found Vargas guilty on all counts as charged and found the special circumstance allegation and enhancement allegations were true. (3 CT 785-813, 849-854.)

On February 20, 2001, the penalty phase began. (3 CT 862.) The jury began their penalty phase deliberations on February 22, 2001, at 3:48 p.m. (3 CT 872.) On February 23, 2001, the jury returned a verdict of death. (3 CT 909, 911.)

On October 4, 2001, the trial court denied Vargas's motion to modify the verdict pursuant to Penal Code section 190.4, subdivision (e). (4 CT 1267-1271.) The trial court sentenced Vargas to death for the murder of Jesse Muro Jr., and to 27 years-to-life in state prison for the remaining counts. (4 CT 1270-1274.)

STATEMENT OF FACTS

On March 30, 1999, and April 1, 1999, Appellant Eduardo Vargas and two fellow Southside Santa Ana gang members, Matthew Miller and Eloy Gonzalez, committed a series of armed robberies. In the course of the last of these robberies, Vargas shot Jesse Muro Jr. twice in the back of the head, mortally wounding him.

A. Guilt Phase

1. Prosecution's Case

March 30, 1999

The John Baek and Kim Hong Robberies

On Tuesday, March 30, 1999, at about 2:40 p.m., John Baek and Kim Hong were meeting at 2629 West 17th Street in Santa Ana to discuss the potential remodel of the vacant property. (4 RT 1093, 1095, 1100, 1190, 1192, 1198-1200.) Vargas and Miller entered the building. (4 RT 1096, 1190, 1111-1114; 7 RT 1735-1736.) Vargas approached Baek and Hong. (4 RT 1096, 1098.) Baek asked Vargas if he could help him. (4 RT 1145.) Vargas pointed a black gun at Baek and Hong and told them to give him everything they had.[2] (4 RT 1098, 1101, 1103-1104, 1106, 1190, 1193.) Baek put up his hands and replied, "You can have anything you want." (4 RT 1106.) Vargas took Baek's wallet and pager. (4 RT 1106.) Meanwhile, Hong followed Baek's lead and also put his hands up. (4 RT 1191.) Miller approached Hong and took his cellular phone and checkbook. (4 RT 1106-1107, 1191-1192.) Vargas and Miller left. (4 RT 1109.) Baek waited a few minutes before retrieving his cellular phone from his car and reporting the robberies to the police. (4 RT 1100, 1109, 1197-1205.)

---

[2] Hong told officers he would be unable to identify either robber. (4 RT 1200.) On April 8, 1999, Baek identified Vargas as the gunman in a photographic line-up. (4 RT 1111-1114; 7 RT 1735-1736.) In another photographic line-up, Baek pointed to Miller and one other individual and said either of them could have been the other robber. (4 RT 1114-1115; 7 RT 1736.) Baek also identified Vargas as the gunman in a live line-up at the Orange County jail. (4 RT 1115, 1119, 1177-1178; 9 RT 2210.) He then identified Miller in court on October 30, 2000, as the gunman. (4 RT 1137; 6 RT 1612.)

Baek described the gunman to officers as a white male about five feet ten inches, 150 pounds, with short black hair and a light complexion, and wearing medium to dark clothing.[3] (4 RT 1121, 1200.) He described the other individual as a white male, five feet nine inches, 180 pounds, with medium length dark hair, and also wearing medium to dark clothing. (4 RT 1122, 1200.)

About 20 minutes later, shortly before 3:00 p.m. and about three miles away from the location of the Baek and Kim robberies, Vargas, Miller, and Eloy Gonzalez entered Worldnet Pagers located at 16475 Harbor Boulevard in Fountain Valley.[4] (4 RT 1212-1213; 7 RT 1730-1731.) Perly Abdulnour, the owner of Worldnet Pagers was familiar with Eloy Gonzalez who had been a customer for over three years. (4 RT 1213.) Eloy Gonzalez provided Abdulnour a Visa credit card belonging to Baek to pay his pager bill. (4 RT 1213-1214, 1218.) At 2:59 p.m., Abdulnour charged $27 to the Visa credit card that had been in Baek's wallet. (4 RT 1107-1108; 9 RT 2209-2210.)

Eloy Gonzalez and Miller also opened two new accounts, and purchased two new pagers and a prepaid card under the name of Carlos Juan Rodriguez. (4 RT 1219-1222.) At 3:07 p.m., their purchase of $329.99 was made with Baek's Mastercard that was also in his wallet when it was stolen. (4 RT 1107, 1109, 1120, 1122.) While they were there, Eloy Gonzalez and Miller tried to sell Abdulnour a used pager and a used cellular phone. (4 RT 1225.) Vargas was looking around the store while

---

[3] The Probation Officer's Report indicates Vargas is Hispanic, five feet 11 inches, 175 pounds, and has brown hair and brown eyes. (4 CT 1203.)

[4] On April 12, 1999, Perly Abdulnour identified Eloy Gonzalez, Miller and Vargas in photographic line-ups. (4 RT 1227-1228, 1239, 1246; 7 RT 1737, 1740.) He also identified Vargas at trial. (4 RT 1247-1248.)

Eloy Gonzalez and Miller made their transactions with Abdulnour. (4 RT 1232.)

The Leavon Hill Robbery and Cornelius Wilson Attempted Robbery

On March 30, 1999, at about 11:30 p.m., Leavon Hill was outside of his home at 2317 South Laura Linda Lane in Santa Ana with his stepson, Cornelius Wilson, jumpstarting his truck battery. (4 RT 1254; 5 RT 1358.) Three males walked north on Laura Linda Lane from West Warner Avenue towards Hill and Wilson. (4 RT 1257-1258, 1312.) Hill said to them, "It is kind of late for you guys to be out here walking." (4 RT 1259, 1312.) Vargas removed a black automatic gun from his waist, pointed it at Hill, and demanded his money.[5] (4 RT 1259-1260, 1268, 1312.) Hill gave him his wallet. (4 RT 1261, 1312-1313.) Hill started backing up his driveway and then ran inside and called the police. (4 RT 1261, 1313.)

Meanwhile, Miller had approached Wilson.[6] (4 RT 1313.) As soon as Wilson saw Hill run inside, he ran toward Warner Avenue. (4 RT 1313.) Miller chased Wilson, yelling, "Stop or I will kill you." (4 RT 1316.) Wilson ran across Warner Avenue and flagged down a police car. (4 RT 1316-1317.) Miller took off. (4 RT 1317.)

Hill remembered seeing someone rifling through his truck before he ran inside. (4 RT 1269, 1290; 5 RT 1351, 1374, 1377.) Hill's stereo cassette had been removed and was sitting on the seat of his truck. (4 RT

---

[5] On April 13, 1999, Hill identified Vargas in a photographic line-up. (4 RT 1266-1267, 1272-1273; 5 RT 1368.) He also identified Vargas at trial. (4 RT 1272-1273.)

[6] On April 13, 1999, Wilson identified Miller in a photographic line-up. (4 RT 1319; 5 RT 1367.) He also identified Miller at trial. (4 RT 1318.) Hill was unable to identify Miller in a photographic line-up, but did identify him at trial. (4 RT 1266, 1272.)

1270.) Eloy Gonzalez's fingerprints were located on the stereo cassette.[7] (4 RT 1308; 5 RT 1386.)

Santa Ana Police Officer Peter Bollinger jointly interviewed Hill and Wilson. (5 RT 1340-1343.) They said there were three individuals with two guns; a small black handgun and a black .22 caliber. (5 RT 1343-1344, 1346.) They described the first male in his 20s, five feet seven inches, 160 pounds, with a light mustache, and wearing a black baseball hat and brown leather jacket. (5 RT 1347-1348.) The second male was also in his 20s, about six feet tall, skinny, and wearing a black baseball hat and black jacket. (5 RT 1349.) The third male was about five feet four inches and wearing a black hat and black jacket. (5 RT 1350.)

Detective William Barrett later interviewed Hill and Wilson separately about the incident. (5 RT 1366.) Hill said the male that pulled out a black automatic was Hispanic. (5 RT 1364.) Hill said the second male put a chrome revolver to his waist, demanded and took his wallet, and also told Hill to stop when he ran back to the house. (5 RT 1365.) He also believed the male that went into his truck was Hispanic. (5 RT 1377.) Wilson remembered only one small chrome handgun. (5 RT 1365-1366, 1371.) He said the "smaller guy" chased him. (5 RT 1365.)

April 1, 1999

On the evening of Thursday, April 1, 1999, Laura Espinoza picked up Amor Gonzales in Anaheim. (7 RT 1785; 8 RT 1930.) Espinoza was driving a Nissan Maxima that she said her cousin had borrowed from a friend. (7 RT 1785; 8 RT 1934-1935.) Espinoza and Amor Gonzales arrived at the Westminster Mall at about 6:45 p.m., smoked

---

[7] Hill was not able to identify Eloy Gonzalez, but testified he had never given him permission to be inside of his truck. (4 RT 1299.) Wilson identified Eloy Gonzalez and one other individual in a photographic line-up as the third person present. (5 RT 1367-1368.)

methamphetamine and marijuana on the way there and in the parking lot, and walked around the mall for 45 minutes. (7 RT 1785, 1843-1844; 8 RT 1930-1931, 1979-1983.)

After leaving the mall, Espinoza received a page from Vargas's number, called back and Eloy Gonzalez answered. (7 RT 1786; 8 RT 1931, 1984.) Eloy Gonzalez wanted Espinoza to pick up another girlfriend and the six of them could all "hang out." (8 RT 1985.) At the time, Espinoza was dating Miller, although she knew him as "Anthony." (7 RT 1821, 1841; 8 RT 1963-1964.) Espinoza and Amor Gonzales drove to Vargas's apartment at 2111 West 17th Street in Santa Ana, and picked up Vargas, Miller, and Eloy Gonzalez. (6 RT 1627; 7 RT 1786-1787, 1789; 8 RT 1934.) From there they stopped by Jack-In-The-Box, and then went to the home of Amor Gonzales's cousin Amy which was located near Warner Avenue and Cedar Street, but she was not available. (7 RT 1789, 1853; 8 RT 1935.)

Espinoza then drove to her apartment complex on the northwest corner of East Main Street and South Elk Lane to get a jacket and compact discs. (7 RT 1790; 8 RT 1929, 1935.) Espinoza parked the car in the Santa Ana Zoo parking lot on the northeast corner of Main Street and Elk Lane, facing south toward Main Street. (7 RT 1791-1792; 8 RT 1936-1937.) Espinoza crossed Elk Lane and went to her apartment. (7 RT 1793; 8 RT 1939.) She remained there for about five to ten minutes, noticing at one point that her clock indicated it was 8:43 p.m. (8 RT 1939.)

After Espinoza left, Miller and Vargas stood outside of the car. (7 RT 1793.) Amor Gonzales and Eloy Gonzalez got into the back seat of the car and smoked methamphetamine. (7 RT 1793-1794.) Miller and Vargas left the car and walked across Main Street. (7 RT 1795-1796.)

The Simon Cruz Robbery

Simon Cruz lived at the Park Place Apartments located at 16282 Main Street in Tustin, across the street from the Santa Ana Zoo parking lot. (5 RT 1388-1389.) At about 8:40 p.m., Cruz was in the apartment complex when a man pointed a black gun to the back of Cruz's head and said in Spanish, "Don't turn around or I will shoot you." (5 RT 1389-1390, 1393-1395, 1406, 1415.) The gunman told Cruz to remove his watch and took Cruz's wallet out of his pocket. (5 RT 1396.) Inside his wallet was between $120 and $150. (5 RT 1403.) Before Cruz could hand over his watch, a second man arrived and said in Spanish, "Let's go." (5 RT 1396, 1406.) Cruz turned around and headed in the direction of the robbers. (5 RT 1399.) The gunman pointed the gun at Cruz and said, "Go back or I will shoot you." (5 RT 1399.) Cruz gave general descriptions of his assailants as two Hispanic males, and said the gunman was wearing a red bandana and a red Pendleton shirt, i.e., long-sleeved, button down with checkered pattern. (5 RT 1404-1405, 1418-1420, 1431-1432.)

Miller and Vargas returned to the car a few minutes later and one of them had a wallet in their hand. (7 RT 1795-1796; 8 RT 2078.) Amor Gonzales remained in the car and Eloy Gonzalez got out of the back seat and stood by Miller and Vargas. (7 RT 1796.)

The Robbery of Matthew Stukkie and the Murder And Robbery of Jesse Muro Jr.

Sometime after 8:00 p.m., 17-year-old Matthew Stukkie (Matthew) and 17-year-old Jesse Muro Jr. (Jesse) were walking from Matthew's home on Lyon Street and Warren Street to their friend Pete's house on Main Street and Williams Street. (5 RT 1471-1473.) As they headed east on Main Street, Matthew quickly looked to his left and saw a group of suspicious "shaved head guys" standing near a car in the parking lot with the door open. (5 RT 1474, 1476-1477, 1479.) Two males were standing

by a fire hydrant, and then a few feet away three to four people were by a parked car with its door open. (5 RT 1500.) Matthew noticed that one of the males by the car was tall, skinny, Hispanic, and had a shaved head. (5 RT 1498-1499.) Another male was Hispanic, stocky, and wearing a red Pendleton shirt. (5 RT 1508-1509, 1511.) Matthew told Jesse not to look at them because he thought they were gang members, and they kept walking. (5 RT 1479-1481; 8 RT 2072.) Vargas, Miller and Eloy Gonzalez saw Matthew and Jesse, and left the car and crossed Main Street in their direction. (7 RT 1798-1799.) As they crossed, one of them said "snatcho" or some sort of put-down directed at Matthew and Jesse. (7 RT 1801; 9 RT 2191, 2208.)

Matthew had noticed two people approaching, and then a third person joined those two people.[8] (5 RT 1483; 8 RT 2072.) The male in the Pendleton shirt was one of the individuals that approached Matthew and Jesse. (5 RT 1510.) As Matthew was walking, someone came up from behind him and put a black revolver to the back of his head and said, "Give me your money and don't look at my face or I will shoot you." (5 RT 1481-1482, 1488.) Matthew told them he did not have any money, and gave them his bracelet and pager. (5 RT 1482-1485.) From behind him, Matthew heard a gunshot,[9] and then heard Jesse let out a high pitched

---

[8] Santiago Martinez was driving on Main Street when he noticed four people "struggling" on one side of the street and a fifth person on the other side of the street. (5 RT 1436-1439, 1450.) After he drove by, Martinez noticed the fifth person crossing the street. (5 RT 1441-1442.) Martinez said Jesse looked like one of the people involved in the struggle. (5 RT 1444.) He said it appeared that one person was struggling with a second person, and a third person was struggling with a fourth person. (5 RT 1444.) Matthew testified he did not struggle or fight with his assailants, and he did not hear any sounds of struggling from Jesse. (5 RT 1493.)

[9] Alexei Sandoval was in his apartment watching television when he heard two gunshots about three seconds apart. (6 RT 1559-1561.)

scream. (5 RT 1486, 1489.) The gunman kept the gun to Matthew's head as he laid him on the ground and said something to the effect of, "Keep your head down" or "Don't look back or we'll shoot you." (5 RT 1486, 1489.) Matthew remained on the ground for a minute and then got up to check on Jesse. (5 RT 1492.)

Jesse was lying on the ground about 15 to 20 feet from where Matthew had been forced to the ground. (5 RT 1493.) At 8:54 p.m., Matthew flagged down Tustin Police Officer Robert Wright who was responding to the scene. (5 RT 1460-1461.) Jesse was on the ground between the main gate and west driveway of the Park Place Apartment Complex with a pool of blood flowing from his head. (5 RT 1463.) Jesse was breathing but not responsive. (5 RT 1469.) Jesse had no weapons on him. (5 RT 1469.) Officer Wright accompanied Jesse and the paramedics to the hospital. (5 RT 1469.)

Jesse died from two gunshot wounds to the back of his head. (6 RT 1571.) Forensic pathologist Dr. Anthony Juguilon was unable to determine which gunshot wound was inflicted first. (6 RT 1578.) Gunshot wound "A" entered behind and below Jesse's left ear, passed behind the left jawbone and nose, entered the right bony eye socket, collapsed the right eye and exited over the right eyebrow. (6 RT 1572.) The presence of soot, searing of the skin, and stippling indicated the gun was fired within six inches of Jesse's head. (6 RT 1573-1574, 1580.) The gunshot was also fired at a slightly upward angle. (6 RT 1577.) Dr. Juguilon opined this gunshot wound was potentially lethal and would expect it to cause Jesse to go down and scream in pain. (6 RT 1578-1579, 1584.) Gunshot wound "B" entered above and behind Jesse's right ear, passed through the skull and brain tissue, and exited over the right frontal area of the head. (6 RT 1575-1576.) The absence of soot or stippling indicated the wound was inflicted from at least 24 inches away. (6 RT 1576, 1584.) Gunshot wound

"B" had a more extreme upward angle. (6 RT 1577.) Dr. Juguilon opined that gunshot wound "B" was lethal and would have also caused Jesse to go down. (6 RT 1578-1579.)

Meanwhile, after Vargas, Miller and Eloy Gonzalez had crossed the street toward Jesse and Matthew; Amor Gonzales relieved herself between two parked cars, and then returned to the car. (7 RT 1799.) Espinoza also returned to the car, placed an extra jacket in the trunk, and got into the driver's seat. (7 RT 1799; 8 RT 1940.) Amor Gonzales heard two quick gunshots, one after the other, and a scream. (7 RT 1799, 1802, 1906-1907.) Miller and Eloy Gonzalez came running across the street, got in the back seat, and said, "Let's go; let's go; start the car." (7 RT 1802-1803; 8 RT 1942, 1946.) Miller and Eloy Gonzalez had "serious faces" and "were kind of pumped up." (7 RT 1803; 8 RT 1943.)

As Espinoza was pulling out of the parking lot, Miller sounded upset and said that he had "seen [Jesse's] brains come out of his head" and that they could not leave without Vargas. (8 RT 1946.) Espinoza drove north on Elk Lane and made a U-turn, then headed west on Chestnut Avenue and north on South Lyon Street. (8 RT 1947.) She turned right and drove through the Saddleback Lodge parking lot to Elk Lane. (8 RT 1948.) Espinoza flashed her headlights at Vargas who was on the east side of Elk Lane next to the fence running along the Santa Ana Zoo. (7 RT 1803; 8 RT 1948, 2009.) Vargas crossed the street and got into the back seat with Miller and Eloy Gonzalez. (7 RT 1806-1807, 1875; 8 RT 1949, 2009.)

Miller and Eloy Gonzalez seemed upset with Vargas. (7 RT 1808; 8 RT 1949.) Miller told Vargas that "he should kick his ass for this." (8 RT 1949.) Both Miller and Eloy Gonzalez were yelling at Vargas telling him, "He is going to regret it for the rest of his life" and that he was going to get "taxed" or his "ass kicked" for what he did. (8 RT 1950-1951.) They were also hitting the back of the seats and yelling at Vargas, "Fucking Peewee."

(7 RT 1807.) Espinoza testified that Vargas said he shot Jesse because he was "getting up" or "coming up," and that Vargas said that Jesse "was like going to fight back" or "he was going to - - he came back at him." (8 RT 1951-1952, 2036-2038.) Espinoza drove to Vargas's house. (7 RT 1808; 8 RT 1952-1953.) Vargas said he did not want to go home, but wanted "to go party" and "kick it." (8 RT 1953, 2020.) They dropped Vargas off at his house, and then they went to the Motel 6 in Stanton where they drank beer and "got high." (7 RT 1808-1809, 1816, 1883; 8 RT 1954, 1962-1963.)

On April 2, 1999, at about 12:40 a.m., Deputy Christopher Cejka of the Orange County Sheriff's Department was patrolling the parking lot of the Motel 6 on Katella Avenue in Stanton, an area known for narcotics and stolen vehicles. (6 RT 1588-1589.) Deputy Cejka's attention was drawn to a gray Nissan Maxima with Espinoza, Amor Gonzales and Miller inside, and Eloy Gonzalez standing outside the car. (6 RT 1588-1590.) Eloy Gonzalez told Deputy Cejka they were staying at the motel and were getting ready to go get something to eat. (6 RT 1590.) Deputy Cejka asked Eloy Gonzalez about a nearby beer bottle and he said he and Miller were drinking beer earlier. (6 RT 1590-1591.)

Eloy Gonzalez had about $950 in cash on him and Matthew's bracelet in his pocket. (6 RT 1591; 7 RT 1774; 8 RT 2073.) Espinoza told the deputy that the Maxima belonged to her brother, but it was later returned to its rightful owner Louise Edwards.[10] (6 RT 1591, 1600-1601.) Amor Gonzales gave a false name and had marijuana in her purse. (6 RT 1590, 1603; 7 RT 1828-1830.) Miller had marijuana in his pocket and a key to room 133. (6 RT 1596, 1621-1622.) Underneath the front passenger seat

---

[10] Amor Gonzales confirmed at trial that the Maxima was stolen. (7 RT 1834.)

was Cruz's wallet and a pair of cotton gloves. (5 RT 1403; 6 RT 1593-1594, 1607.) Miller and Espinoza were placed in the back of one patrol car, and Eloy Gonzalez and Amor Gonzales were placed in the back of another until Tustin police officers came and picked them up. (6 RT 1595, 1620-1621.) Inside room 133 was a driver's license belonging to Vargas. (6 RT 1624.) There was also a phone book that belonged to Amor Gonzales with gang style writing on it and "Laura 4-1-99" written on the back. (6 RT 1624-1625; 7 RT 1835-1838.) Her phonebook did not mention Vargas in the April 1, 1999 entry. (7 RT 1835-1838.)

Amor Gonzales was initially interviewed the morning of April 2, 1999. (7 RT 1817; 8 RT 2074.) She identified Vargas, Miller and Eloy Gonzalez and then directed officers to where Vargas lived. (7 RT 1899; 8 RT 2074.) Amor Gonzales was interviewed a second time on May 9, 2000, and entered into an agreement where she pled guilty to two robberies and would be released after testifying truthfully. (7 RT 1817, 1885, 1891.)

Espinoza was also interviewed the morning of April 2, 1999, and showed officers where Vargas lived. (8 RT 1959, 2039, 2074, 2078-2079.) Espinoza was interviewed a second time on April 4, 2000. (8 RT 1960.) She then pled guilty to two robberies in exchange for her truthful testimony and time served. (8 RT 2021, 2027, 2031.)

At about 8:30 a.m., on April 2, 1999, officers arrested Vargas at his home. (6 RT 1667, 1671.) Vargas was lying on the pull-out couch in the living room. (6 RT 1668-1669.) Just inside the front door, under a chair cushion, was a gun. (6 RT 1669-1670.) Vargas was on probation at the time and one of the terms of his probation was not to possess a firearm. (9 RT 2211.)

The two casings and bullet recovered from the scene of Jesse's murder were fired by the gun found in Vargas's home. (5 RT 1469-1470, 1521-1522; 6 RT 1655-1660, 1676, 1686.) The gun was a .380 caliber

Lorcin semi-automatic pistol fed by a magazine with its safety missing. (6 RT 1676, 1678.) Forensic specialist Laurie Crutchfield opined that one gunshot was fired from a distance of contact to three inches, and the other shot was fired from 48 inches or farther. (6 RT 1689-1690, 1703.)

No blood was located on the clothing Miller and Eloy Gonzalez were wearing at the time of their arrest. (6 RT 1629-1630, 1638-1638, 1663-1664.) Vargas's palm print was located on the trunk of a Nissan Sentra parked on Main Street a few feet away from where Jesse was killed. (5 RT 1524, 1529, 1533; 6 RT 1613; 7 RT 1914, 1916-1917.) Jesse's wallet was found on the east side of Elk Lane across the street from the south driveway of the Saddleback Inn in some bushes next to the fence.[11] (6 RT 1550-1552, 1556, 1558-1559; 8 RT 2069.)

Gang Evidence

Neither Matthew nor Jesse was affiliated with a gang. (5 RT 1494.) Both Amor Gonzales and Espinoza testified that Eloy Gonzalez was a Southside gang member. (7 RT 1840; 8 RT 1965.) Amor Gonzales did not think Vargas was a gang member because he never told her he was from a gang. (7 RT 1840.) Espinoza gave the opinion that Vargas was not a gang member. (8 RT 1966.)

Officer Jeff Blair of the Tustin Police Department's Gang Unit testified as an expert on criminal street gangs. (8 RT 2079.) His job description had exposed him to gang members on a daily basis since 1989. (8 RT 2079-2080.) In 1991, Officer Blair began investigating gang cases, and in 1996, he was transferred into the gang investigations unit. (8 RT

---

[11] Vargas was on the east side of Elk Lane running along side the fence before crossing the street and getting into the car with his cohorts following the robbery-murder of Jesse. (7 RT 1803, 1806-1807, 1875; 8 RT 1848, 1949, 2009.)

2080.) As a gang investigator he was responsible for investigating all crimes involving gang members, and his job entailed that he play a proactive role in contacting gang members and gathering intelligence. (8 RT 2081.) Officer Blair was also a member of numerous law enforcement organizations that discuss current gang activities and trends, and was responsible for training other officers on the subject of gangs. (8 RT 2081-2082.)

Officer Blair explained that traditionally in Orange County gangs are broken down by race, Hispanic gangs being the most predominant. (8 RT 2083.) In Orange County, the concept of "respect" is the most important and primary motivating factor behind gang membership. (8 RT 2084-2085.) Gangs are driven by the need to obtain and retain respect which they gauge through fear and accomplish by committing acts of violence. (8 RT 2085.) A gang member gains respect within his gang by committing crimes on behalf of the gang commonly referred to as "putting in work." (8 RT 2086.) The greater the crime, the greater the respect earned by the individual gang member within the gang, and the more respect earned by the gang as a whole. (8 RT 2086.) Guns are particularly important to gangs because it allows them to accomplish their goal of creating fear and earning respect by committing acts of violence. (8 RT 2086.)

"Ratting" refers to telling on someone or cooperating with the police. (8 RT 2086-2087.) Such cooperation will label someone as a "rat" and will reflect negatively on the individual and their gang as a whole. (8 RT 2087.) Furthermore, it subjects the individual or someone close to them to retribution for disrespecting the gang member or gang. (8 RT 2087.) Such "payback" is expected to exceed the level of disrespect given. (8 RT 2087-2088.)

"Turf" is an area that a gang identifies as their territory. (8 RT 2088.) It is common for gangs to derive their names after an area or street

associated with their turf. (8 RT 2088.) Traditionally, gangs were pretty much confined to their turf. (8 RT 2089.) However, as gang members are being relocated for a variety of reasons, splinter gangs are popping up and gang members are becoming more dispersed throughout the county. (8 RT 2089.)

Most gang members join when they are teenagers. (8 RT 2132.) The most traditional way to join a gang is to get "jumped" into the gang where the prospective member is beat up or fights with established gang members. (8 RT 2089.) This ritual is important because it shows the person will fight for the gang even against overwhelming odds. (8 RT 2090.) Individuals may also join by committing crimes on behalf of the gang or having family members who are already members of the gang. (8 RT 2091-2092.)

The concept of "backup" or reinforcement is a core foundation of gang membership. (8 RT 2090.) When a fellow gang member commits a crime, gets into a fight, or does anything for that matter, his fellow gang members are expected to back him up no matter the circumstances, or else be targeted by his own gang. (8 RT 2090.) When they join a gang, the older gang members teach the newer gang members about the gang lifestyle and what is expected of them. (8 RT 2131.) In particular, they are taught the importance of backing up each other and that committing crimes enhances their status. (8 RT 2132.)

A gang member "claims" their gang by essentially admitting their membership in the gang. (8 RT 2091.) There is a trend developing in which gang members are no longer claiming their gangs and admitting membership because a jury may hear about it at a later date. (8 RT 2091.) Gang members refer to each other by their "monikers" or nicknames. (8 RT 2092.) Graffiti is an important form of communication for gangs and is often referred to as the "newspaper of the streets." (8 RT 2092.) It is commonly used to mark territory, challenge their rivals, and identify gang

members or pay tribute by posting a roster. (8 RT 2092-2093.) A roster is a list of people that belong to a gang and would not include a non-member because that person has not necessarily ascribed to the lifestyle and could reflect poorly on the gang. (8 RT 2096-2097.) It is also common for gang members to write graffiti and doodle on their personal property. (8 RT 2093.)

Tattoos are common among gang members but there is a growing trend for gang members to get more generic "gang-inspired" tattoos so it is more difficult to identify them with a specific gang. (8 RT 2094.) One common tattoo is the "smile now, cry later drama faces" that reflect the gang mentality to live for the day and worry about the consequences later. (8 RT 2094.) Another tattoo is three dots in the shape of a triangle meaning "mi vida loca" or "my crazy life." (8 RT 2094.) Some more regional tattoos representative of Orange County are "OC," a star, "714," and "sur" for "surenos" which means they are from Southern California. (8 RT 2094-2095.)

Officer Blair testified that the Southside of Santa Ana Gang (hereafter Southside) originated in the south end of Santa Ana, and in April 1999, the gang had between 20 and 40 members. (8 RT 2097.) Their territory or turf is bordered by West Edinger Avenue (north), South Raitt Street (east), West Warner Avenue (south), and South Fairview Street (west). (8 RT 2147.) Southside has the nickname the "187 Click" or "187 Clik," which is based on the fact 187 is the Penal Code section for murder and they fancy themselves as being murderers. (8 RT 2098-2099.) Southside commits crimes such as robbery, murder, and witness intimidation. (8 RT 2099.)

Officer Blair was of the opinion that Vargas, Miller and Eloy Gonzalez were all active members of the Southside gang when the crimes were committed. (8 RT 2129.) His opinion was largely based on the following evidence: Miller has the moniker "Wicked." (8 RT 2100.) On

or about June 9, 1999, while in custody at the Orange County Jail, Miller wrote a letter to Alex Hernandez in state prison asking about his "homies" in prison, using generic gang terms such as "dog," and signed it "Wicked." (8 RT 2100-2101.) Miller's home had graffiti such as "Mr. Wicked, Orange County" that embraced his moniker, "Santana" which is Santa Ana combined into one word, and "pay-back."[12] (8 RT 2102-2103.) Outside of Miller's home written in graffiti was "B.SOD1DE" and "Scrappy," "Wicked," and "PXWee," with "187" written underneath. (8 RT 2107-2108.) This was a "roster" indicating Scrappy, Wicked and Peewee were members of the Southside 187s. (8 RT 2107-2108.) The names would not have been posted if they were not members because it was essentially a challenge to the gang controlling the area, and in fact, the graffiti was later crossed out by another gang, the Krazy Proud Criminals. (8 RT 2108-2109.)

Eloy Gonzalez has the moniker "Scrappy." (8 RT 2104.) At his home was graffiti "Scrappy" and "Stalker" with "187's" underneath it which is a roster for Southside, meaning Scrappy and Stalker are members.[13] (8 RT 2104.) In the same location was his last name in graffiti.

---

[12] On April 8, 1999, officers executed a search warrant where Miller was living, a residence on Durant Street in Santa Ana belonging to his girlfriend Erica Guerra. (6 RT 1707-1708, 1712.) Outside of the residence on an air conditioning unit was graffiti of "nicknames of people and the numbers 187 underneath the names." (6 RT 1708.) Outside there was also graffiti on a metal pipe, "BXH." (6 RT 1709-1710.) Inside the apartment police found a blue folder, a piece of paper, and a day planner. (6 RT 1710-1712.)

[13] On April 8, 1999, officers executed a search warrant at Eloy Gonzalez's home at 1605 West Raymar Street in Santa Ana. (7 RT 1743.) A wallet was found in the kitchen area. (7 RT 1743-1744.) In the backyard was a table that had written on it "Gonzalez," and in another area "Scrappy" and "Stalkerer" with "V 187's" underneath. (7 RT 1746.)

(8 RT 2104.) A phone book recovered from the motel room had written on the front "BSSR" for "Barrio Southside Rifa" meaning the Southside gang rules, and underneath was written the name Scrappy. (8 RT 2105.) Also inside the book was written "BX SO" meaning Barrio Southside. (8 RT 2106.)

Eloy Gonzalez had gang-related incidents and contacts with authorities beginning in 1993 when he was arrested for tagging graffiti on a parking sign. (8 RT 2162-2163.) In 1994 Eloy Gonzalez was the target of a gang-related shooting. (8 RT 2163-2164.) In August 1994 he was arrested and listed as a member of the Highland Street gang. (8 RT 2165.) And, in November 1994 he was contacted during a robbery investigation in the presence of two Southside gang members. (8 RT 2165-2166.) In December 1994 Eloy Gonzalez was arrested while driving with a loaded and concealed handgun and admitted he "kicked it" with Southside, and his two passengers admitted to being Southside gang members. (8 RT 2169.) In 1997 he was in a traffic accident and used a false name. (9 RT 2171-2172.) He later pled guilty that year to a felony and admitted a gang allegation. (9 RT 2172.)

Vargas has the moniker "Peewee." (8 RT 2110.) His presence on the roster outside of Miller's home is indicative of his membership in the Southside gang. (8 RT 2110.) Vargas has two tattoos, a star on his arm representing Orange County, and three dots on his hand to represent "mi vida loca" or "my crazy life." (8 RT 2122.)

In addition, there were an abundance of writings and drawings in Vargas's home indicative of gang mentality and culture, and in particular the Southside gang.[14] (8 RT 2111.) For instance a picture of the man

---

[14] At the time officers arrested Vargas inside his home, there was a copy of the February 24, 1999 issue of the Orange County Register covered (continued...)

(...continued)
in "doodling" next to Vargas. (7 RT 1753-1755.) The writing and sketches included: "SA," "Orange County Sureno," a marijuana cigarette, "Sur," "OC," "X3," and "Southsider Rifa." (7 RT 1755-1757.) Officers also recovered a Nike shoebox on a bookshelf in the living room that was covered in writing: "The Los Malditos, Aqui, no Mas," "Santa Ana," Orange County," "XIII," "714 Boys," "Mr. Wicked," and "El Jefe." (7 RT 1757-1758.) Inside of the box was written "Mr. Peewee, Mr. Wicked" and below that "El Jefe, El Jefe, Wicked." (7 RT 1758.)

On April 8, 1999, officers returned to Vargas's apartment and conducted a more thorough search. (7 RT 1758.) On a bookcase in the living room was a three-ring binder notebook with "Eddie Vargas" written on the inside cover containing numerous papers. (7 RT 1760.) There was a drawing of a man wearing a beanie and sunglasses holding a six-shooter revolver pointed at the viewer with "brown Pride Mexican" written on the bottom of it and "Peewee" written across the front of the trigger guard and knuckles. (7 RT 1761-1762.) There were two other similar drawings of a man holding a gun, one had written on it "Peewee" and the other "X3" and "Sureno." (7 RT 1763, 1765-1766.) There was also a drawing of the cat in the hat with marijuana leaves and a joint coming out of its mouth, and written on the picture was "Sur," "Sur X3," "Mr. Creeper," and "Peewee." (7 RT 1765.) Other papers in the binder had written on them "Life with Lalo," "Bitch ain't shit, but hos and tricks," and "Southside." (7 RT 1762-1763.)

Also on the bookshelf was an eight and a half by 11 inch notebook binder that had written inside "Santa Ana Criminals," "Mr. Wicked," "Mr. Stalker" and "Mr. Hustler," and contained various papers. (7 RT 1770-1771, 1774.) One piece of scrap paper had written on it "Peewee," "Scrappy," and "SXXS" with "Southside" written above the S's. (7 RT 1771.) There was an envelope addressed to "Eduardo Vargas" which had written on it "Southside, Peewee, Southside, Bario," "Scrappy," and drawings of guns and numbers on the back. (7 RT 1772.) Another paper had written on it "SSSA," "OC," and had a star. (7 RT 1772.) A folding clipboard had written on it "Orange County" by "DS." (7 RT 1772-1773.) A piece of graph paper had written on it "Big Bad Sur" and "13." (7 RT 1773.) There was a drawing of "the smile now cry later theatrical masks" that had written on it "cry never." (7 RT 1773.) There was also a drawing of a male with a large moustache wearing a beanie reaching into a window and holding a gun that had written on it "West Side." (7 RT 1773-1774.)

In a nightstand next to the pull-out couch bed was a little black phone book with "Eddie Vargas's Phone Numbers" written on the front and

(continued...)

dressed up as a gang member or "cholo" with "brown pride mexicano" and "X3" is representative of the fact the Southern California gangs are controlled by the Mexican Mafia in the prison system. (8 RT 2112-2113.) Also, the picture of the man highlighting the gun that has written on the trigger guard "Peewee" is consistent with the gang mentality acknowledging the importance of guns in their culture. (8 RT 2114-2115.) Other drawings from Vargas's home also glorified guns and violence and were filled with gang references and embodied the overall fatalistic view on life that gang members have. (8 RT 2115-2116, 2119-2120, 2123.) In addition to the pictures, other items from Vargas's home such as the shoebox and papers were covered with common gang jargon particular to Orange County and Santa Ana. (8 RT 2121-2123.) Most notably was a newspaper dated February 24, 1999, that had written on it a Southside roster with the names Scrappy, Speedy and Peewee, and "Southside Rifa," in addition to numerous Orange County gang references. (8 RT 2124-2125.)

Vargas wrote three letters to Miller while in custody in June and July 1999. (8 RT 2126-2127.) In the letters Vargas used common gang terminology such as "dog," "truchas" which means to "watch your back," and the number "13." (8 RT 2127-2128.) He also talks about Eloy Gonzalez and signed one of the letters "Peewee." (8 RT 2128-2129.)

Officer Blair was not aware of any prior gang-related contacts Vargas had with the authorities. In August 1994 Vargas ran away from home for three days and his mother told officers his nickname was Peewee. (9 RT

(...continued)
"SA" and "LS" written on the inside. (7 RT 1768-1769.) In a storage closet outside the sliding glass door was a brown cassette case with "Peewee's Tapes" written on it. (7 RT 1767-1768.) There was also a file card cabinet with "Sur" and "SA" written on the handles. (7 RT 1770.)

2174.) In April 1995 Vargas was "hit up" by two men while riding his bike. (9 RT 2175.) When Vargas told them he did not claim a gang they punched him twice in the face and took his bike. (9 RT 2175.) In June 1997 Vargas was the victim of an assault with a beer bottle over a female by her former spouse. (9 RT 2176-2177.) Also, in December 1997 Vargas was pulled over for an expired vehicle registration and had in his trunk less than once ounce of marijuana and a billy club that he later pled guilty to and was placed on informal probation. (9 RT 2178-2179.)

Officer Blair explained that when gang members commit crimes with other gang members they do so to benefit the gang either financially or to gain notoriety through respect and fear. (8 RT 2129-2130.) Furthermore, they commit crimes with fellow gang members because they know they can count on each other for backup. (8 RT 2130; 9 RT 2189.) Crimes do not have to be committed against other gang members to benefit the gang because the fear manifested in the community translates into notoriety and respect for the gang. (8 RT 2130.) In addition, gang members commonly brag about their crimes, which also enhances the status of the gang. (8 RT 2131.)

Officer Blair was of the opinion the Santa Ana robberies in this case were committed for the benefit of and in association with the Southside gang. (8 RT 2132-2133.) He also opined that the robbery of Cruz was committed in association with, for the benefit of and would promote the Southside gang. (8 RT 2133.) And furthermore, those individuals committing the crime would know the crimes would benefit their gang. (8 RT 2133.) In addition, Officer Blair was of the opinion that the robbery and murder of Jesse benefitted the Southside gang financially by supplying the means for the gang members to support their way of life drinking, doing drugs, and renting motel rooms. (8 RT 2134.) It also enhanced the gang's reputation by being feared as killers. (8 RT 2134.)

2. Defense

Vargas's mother, Nilda Quintana testified that Vargas was the youngest of five children. (9 RT 2302, 2327.) Vargas has the nickname "Lalo." (9 RT 2325.) When the family moved to California in 1987 Vargas started going by the nickname "Eddie." (9 RT 2309-2310, 2326.) In elementary school he got the nickname "Peewee," but she had never heard him called that outside of elementary school. (9 RT 2326, 2343.) Vargas had been friends with Miller since 1987. (9 RT 2309.) Vargas is also friends with Eloy Gonzalez, but Quintana did not like him because he was a bad influence. (9 RT 2310.) Vargas was unemployed at the time and lived in the apartment on 2111 West 17th Street with Quintana and his grandmother. (9 RT 2304, 2340.)

Quintana testified that Vargas attended his grandmother's birthday party on March 30, 1999, between 7:00 and 9:00 p.m. (9 RT 2306-2307.) That evening Quintana went to bed about 10:30 p.m. and Vargas was in the living room. (9 RT 2308.) Hugo Vargas, Vargas's brother, and Nylda Anaya, Vargas's sister, both testified that they attended a birthday party for their grandmother on March 30, 1999, at the apartment where Vargas lived with his mother and grandmother. (9 RT 2272, 2277-2278.) Vargas was present at the party when they were there between 6:00 and 9:00 p.m. (9 RT 2274-2275, 2277-2279.) Both of his siblings were aware of his nicknames "Eddie" and "Lalo," but had never heard him called "Peewee." (9 RT 2275, 2279.)

Quintana said she came home from work on April 1, 1999, at about 3:30 p.m., and Vargas was there with Miller and Eloy Gonzalez. (9 RT 2309-2310.) She went to her room to watch a video, and when she emerged between 7:00 and 7:30 p.m., Vargas was there but his friends had left. (9 RT 2311.) She remembered hearing the phone ring two or three times at about 7:00 p.m. (9 RT 2341.) Quintana made herself a sandwich

and returned to her bedroom about 15 minutes later, leaving the door open. (9 RT 2312-2313.) Quintana heard the front door open at about 8:30 p.m. and assumed it was Vargas leaving. (9 RT 2315.) She then heard him re-enter the front door with his key about 15 minutes later. (9 RT 2315-2316.) Quintana went into the kitchen at about 10:00 and then joined Vargas on the patio for about 20 minutes before going to bed. (9 RT 2316-2318.) At about 4:30 a.m., Quintana went into the living room and saw Vargas brushing his tennis shoes. (9 RT 2319.) Vargas told her, "I am cleaning my shoes. I have an appointment at noon at Target." (9 RT 2319.) Quintana went back to bed, and said Vargas was asleep when she left for work at 7:00 a.m. (9 RT 2319-2321.) She later learned Vargas was taken into custody, but did not recall telling Sergeant Tarpley that she did not know where Vargas was on April 1, 1999, between 8:30 and 9:00 p.m. (9 RT 2324, 2329.)

Mireida Hermosa, Vargas's girlfriend met Vargas at Carl's Jr. on Sunday, March 28, 1999. (9 RT 2352.) Hermosa said she spoke with Vargas on the phone each evening that week beginning Monday, March 29th through Thursday, April 1st. (9 RT 2354.) Hermosa said on the evening of April 1, 1999, she spoke with Vargas on the phone beginning at about 7:00 or 7:30 p.m. for approximately one hour. (9 RT 2356.) Hermosa ate dinner and then spoke with Vargas a second time about 20 to 30 minutes later for about one hour. (9 RT 2357.) One hour or so after their second conversation ended, Hermosa and Vargas had a third conversation that lasted until possibly 3:00 to 3:30 a.m. (9 RT 2358-2359.) Hermosa said Vargas sounded like he was drinking and that she first noticed his speech was slurred during their second conversation. (9 RT 2359.) Hermosa never knew Vargas as "Peewee." (9 RT 2361.)

Guadalupe Tinoco lived across the hall from Vargas. (10 RT 2446-2447.) She testified that on April 1, 1999, she came home from work

between 5:30 and 5:45 p.m. and saw Vargas. (10 RT 2448.) Later that evening Tinoco saw Vargas on his patio at about 9:00 or 9:30 p.m. when she was doing her laundry.[15] (10 RT 2449-2451, 2459-2460.) Tinoco said Eloy Gonzalez's wife and children lived in the apartment complex and Eloy Gonzalez lived with them off and on, and he was a Southside gang member. (10 RT 2447, 2461.) Tinoco said she did not want to be involved with this case because she was only doing her laundry and was not getting paid for her time off of work to testify. (10 RT 2455-2456.)

Robert Phillips lived and worked at the Park Place apartment complex. (10 RT 2535.) On April 1, 1999, at about 5:30 p.m. or so, he noticed a group of Hispanic males by the front gate of the complex. (10 RT 2535-2536.) One individual was wearing a buttoned down red flannel shirt and a red bandana on his head. (10 RT 2537-2538.) He also had a long frizzy ponytail and a "long nose." (10 RT 2539, 2541.) Phillips went to the apartment office and told the manager, Nannie Marshall, there were people loitering. (10 RT 2542-2543, 2571.)

Marshall lived at the apartment complex and worked as the apartment manager. (10 RT 2551.) On April 1, 1999, Marshall closed the office and went to her apartment at about 6:00 p.m. (10 RT 2551-2552.) From there, she was pulling out of the driveway on the way to the store when three men were standing in the driveway and blocking her from leaving. (10 RT 2553.) One individual was dark skinned, about 25 years old, five feet ten inches, stocky, and muscular. (10 RT 2555-2556.) He also had a pony tail and thick mustache, and was wearing a plaid shirt and a red bandana. (10

---

[15] Private Investigator David Carpenter was present when the defense initially interviewed Tinoco. (10 RT 2599.) Tinoco was cooperative but expressed concern because she was afraid of Eloy Gonzalez and any gang connection. (10 RT 2599.) Tinoco initially said she saw Vargas twice that night at 5:30 p.m. and 9:45 p.m. (10 RT 2602.)

RT 2554, 2556.) One of the other individuals was bald, and the third person was wearing a blue jacket. (10 RT 2558.) Marshall returned to the complex about 30 minutes later, just as it was getting dark, and did not see these individuals. (10 RT 2558, 2567-2568.)

Marshall testified that about 15 minutes after she returned to her apartment Simon Cruz and his wife knocked on her door. (10 RT 2559.) Cruz told Marshall, with his wife translating, that he had been robbed and the assailant had a gun and had put a red bandana across his face. (10 RT 2560.) About 10 to 15 minutes into their conversation, Marshall heard two gunshots very close together. (10 RT 2561.)

Officer Charles Celano interviewed Santiago Martinez after the shooting outside the Park Place apartment complex. (9 RT 2291.) Martinez said that as he was driving by he saw a Hispanic male, about five feet five inches, 140 pounds, wearing a large gray jacket, white t-shirt, and unknown colored pants standing on the sidewalk on the north side of Main Street looking to the south side of the street. (9 RT 2291.) On the south side of Main Street he saw four individuals, including Jesse and Matthew, and a Hispanic male with a shaved head that was about five feet five inches pulling Jesse by the back of his neck westbound about 10 feet. (9 RT 2291-2292.) When Martinez looked in his rearview mirror he saw the man on the north side of the street running across the street towards the "pegando" which is Spanish for "hitting" or possibly "fighting." (9 RT 2295-2296.) Martinez said the heights were approximations and he was not paying a great amount of detail to the incident because he was concerned for his family and wanted to get out of there. (9 RT 2294, 2298-2299.)

Marlon Aguirre owned the Nissan Sentra that was parked near the murder. (10 RT 2439.) Aguirre explained that he lived about two blocks away from the Park Place apartments and would park his car on the street in the general area wherever he could find a spot. (10 RT 2441-2443.)

Aguirre washed his car once or twice a month but not regularly. (10 RT 2440.)

Officers collected clothing items from Vargas's home, including black pants, a white t-shirt, a black jacket, a blue jacket, and a pair of blue jeans with "real OG" for "original gangster" written on the back. (9 RT 2281-2282, 2284-2286.) Matthew was unable to identify any of the clothing items as being worn by the robbers. (9 RT 2283.)

Amor Gonzales kept a journal in March 1999. (10 RT 2525-2526.) Under the March 29, 1999 entry, she wrote "Laura and Lalo came over around 2:00 a.m." (10 RT 2528.) Amor Gonzales said "Lalo" referred to Vargas, and she could have been referring to them coming over at 2:00 a.m. on either March 29th or March 30th. (10 RT 2527, 2529.)

Michelle Stevens, a forensic alcohol analyst, testified that a blood sample was obtained from Vargas on April 2, 1999, at 11:50 a.m. that indicated he had a BAC of .045 percent. (9 RT 2250-2251, 2254-2258.) Assuming Vargas did not consume further alcohol and his body burned off the alcohol at .015 percent each hour, he would have an expected BAC of .26 to .27 at 9:00 p.m. the previous evening. (9 RT 2260-2262.) His BAC would be between .22 to .23 at midnight, and .17 to .18 at 3:30 a.m. (9 RT 2262.) Some mental and physical impairment would be expected at all three BAC levels, but the actual level of impairment would depend on Vargas's tolerance and the activity at hand. (9 RT 2263-2264.)

Private Investigator Carpenter testified it was 0.5 miles driving distance from the location of the Baek and Hong robberies to Vargas's home, and had a travel time of 45 to 60 seconds. (10 RT 2594-2595.) He also calculated the driving distance from the Baek and Hong robberies to Vargas's home and then to Worldnet Pagers was 4.6 miles. He estimated it would take about 12 minutes to drive to Vargas's home, remain inside the

home for about two minutes, and then drive to Worldnet Pagers. (10 RT 2595-2598.)

Lawrence Baggett, a ballistics and explosives consultant, testified the Lorcin is an inexpensive .380 caliber handgun. (9 RT 2227, 2235-2236.) He opined that gunshot wound "A" was fired within three inches of Jesse's head, and gunshot wound "B" could have been fired from a distance of 24 inches or greater. (9 RT 2232-2235.)

Donald Rubright, Vargas's former defense attorney, was present on October 27, 1999, when Baek participated in a live line-up at the jail. (10 RT 2425-2427.) Vargas was in position number three. (10 RT 2429.) During the line-up, Baek said, "Maybe number three." (10 RT 2429.) Baek was told not to make any comments and to record any information on the paper provided. (10 RT 2430.) Baek handed the paper to the sheriff's deputy and said "Maybe." (10 RT 2431-2432.) On the piece of paper Baek wrote "Maybe number three-younger?" (10 RT 2433.) It was stipulated that the paper filled out by Baek was lost. (10 RT 2591-2592.) Rubright later heard Baek ask the detectives, "Did I pick the right guy?" (10 RT 2434.)

Dr. Scott Fraser testified as an expert on the research and studies conducted in the field of witness memory and recognition. (10 RT 2464-2469.) He explained that he could not render an opinion on the accuracy of the identifications made by the witnesses in this case. (10 RT 2485.)

Dr. Fraser said that research has shown the presence of weapons reduces the accuracy of witness observation by distracting the observer from a person's face and inducing stress by increasing their heart rate and respiration. (10 RT 2469-2472.) However, some arousal above normal enhances accuracy. (10 RT 2487.) For instance, when there is a gradual onset with a gun where the assailant speaks with the victim before

displaying the gun, research would anticipate a more accurate recall than if the assailant suddenly pulled out the gun. (10 RT 2491.)

Studies have shown less accurate recall when identifying members of another race. (10 RT 2473-2475.) People are also poor observers of colors of clothing with the exception of lights, darks and distinctive patterns. (10 RT 2495.) In addition, witnesses tend to be unreliable with respect to heights and weights unless recalling an extreme or when they compare the person on a level plane. (10 RT 2496.) Also, a person's direct vision is more accurate than their peripheral vision. (10 RT 2499.)

Dr. Fraser explained that research has shown the perception of distinctive cues, such as odd or unusual features (for example, scars, tattoos, facial abnormalities, haircut, limp, stutter, etc.) is the most accurate part of human memory. (10 RT 2475-2476.) Since distinctive cues are what individuals detect first and foremost, they are the best indicators of whether a recognition choice is correct or incorrect. (10 RT 2477.) Discrepancies between identification and distinctive cues may indicate low reliability. (10 RT 2477.)

Dr. Fraser also testified that memories are constantly shifting and when an individual perceives information they adjudge credible, it may be fused with the original memory and become part of the original observation. (10 RT 2479-2480.) That is, post event information such as pictures observed in the newspaper could carryover influence into later identification without the observer ever being aware. (10 RT 2481-2483.)

3. Rebuttal

Sergeant Tarpley testified that he spoke with Quintana on April 2, 1999, during the daytime hours, and asked her about Vargas's whereabouts the prior evening between 8:30 and 9:00 p.m. (10 RT 2603, 2605-2606.) Quintana said she could not account for Vargas's whereabouts during that time because he had been in and out of the house throughout the evening.

(10 RT 2604.) She also told Sergeant Tarpley that she had seen Vargas with Miller and Eloy Gonzalez that night. (10 RT 2604.)

B. Penalty Phase

1. Prosecution Case-in-Aggravation

Leticia Orosco, Jesse's cousin and godmother, testified that she had a very close relationship with Jesse and thought of him as her brother. (12 RT 2902, 2907.) Jesse was very special to the family. (12 RT 2902.) Orosco described Jesse as a very lovable person, a "sweetheart," and "a big teddy bear." (12 RT 2905-2906.) Jesse had a special bond with Orosco's children and he loved animals. (12 RT 2902.) Jesse also loved to play Dominos, go to the beach, and go out to the desert and ride his quad. (12 RT 2906.)

Jesse was two weeks shy of turning 18 years old, and they held a party for him even though he wasn't there. (12 RT 2902.) Orosco recalled the phone call she received that night from Jesse's father that Jesse had been killed, and having to tell her mother. (12 RT 2903-2904.) Orosco said she and her entire family have been affected by Jesse's death. (12 RT 2904-2905.) It is particularly difficult over the holidays and when the family is together as they are reminded that all they have left of him are pictures and memories. (12 RT 2907.)

Gloria Cervantes, Jesse's cousin, described him as "fun loving, a big kid." (12 RT 2908, 2910.) Cervantes said Jesse loved to play baseball and to play with her children. (12 RT 2910-2911.) She recalled the evening she found out about his death and the awful feeling of not being able to prepare for it. (12 RT 2909-2910.) Cervantes said she thinks about Jesse's death on a daily basis, more so during Easter. (12 RT 2910-2911.) What she misses the most about Jesse is the way he was with people and children. (12 RT 2911.)

Arturo Jimenez, Jesse's cousin, was ten years older than Jesse and the two were very close, like brothers. (12 RT 2912-2914.) Jimenez, along with Jesse's father and another cousin, coached Jesse's baseball team. (12 RT 2913.) Jimenez took Jesse to karate classes and to the desert to hike and ride dirt bikes. (12 RT 2913.) They also saw movies together and went out to eat. (12 RT 2914.) Jesse was a terrific kid, sweet, tender, always positive and upbeat, and inspiring. (12 RT 2917-2918.) He never saw Jesse fight or argue. (12 RT 2918.) Jesse was able to form a special bond with animals and he played like a child. (12 RT 2918.) "He was just an awesome young man." (12 RT 2918.) Since Jesse's death, images of things he did with Jesse and the way he died flash through Jimenez's head all the time. (12 RT 2917.) Holidays and family get-togethers are not the same because it has become hard to celebrate and have a good time. (12 RT 2918-2919.)

Jesse Muro Sr., Jesse's father, described Jesse as "my baby ... my shining star. . . I had a lot of hopes for him . . . he meant everything in my life." (12 RT 2923.) Jesse was well respected and well mannered. (12 RT 2926.) He was a very gentle person and "everybody loved him." (12 RT 2930.) He loved baseball and other sports, fishing, and visiting his grandfather in Mexico. (12 RT 2927.) He also enjoyed watching movies, was happy eating pizza, and spaghetti was his favorite meal. (12 RT 2926-2927.)

Muro Sr. recalled being home when a Tustin police officer knocked on his door and directed him to go to the hospital where he learned of Jesse's death and had to identify him. (12 RT 2924-2925.) He said he "felt really bad like something went out on me." (12 RT 2924.) Ever since, Muro Sr. and his wife stop and pray at Jesse's grave nearly everyday to tell him, "I just come to pray for you son. Because I know your spirit will last." (12 RT 2925.) Muro Sr. said the hardest thing is coping with his

death and having to pass by where he was murdered every day. (12 RT 2930.)

2. Defense Case-in-Mitigation

Nilda Quintana, Vargas's mother, said Vargas was the product of an unexpected pregnancy. (12 RT 3080.) Quintana described Vargas as a normal happy boy. (12 RT 3081.) Vargas's father was more lenient with Vargas and spoiled him. (12 RT 3081.) Vargas suffered a few injuries early in his life: an overgrown testicle that required the removal of liquid; at age one year and eight months he was hospitalized for a month with pneumonia; and at age three his finger was nearly severed. (12 RT 3084-3085.)

Quintana and Vargas's father disagreed on religion, which was one of the reasons they divorced. (12 RT 3082-3084.) Quintana came to the United States with four of her children, moved to Santa Ana, and started working full time. (12 RT 3086-3087.) Vargas had good grades in Elementary school and fairly good grades in Junior High School. (12 RT 3088-3090.) In High School Vargas started getting into trouble because he was smoking marijuana and his grades were "flaky." (12 RT 3090-3091.) Vargas moved to a couple of high schools and then dropped out. (12 RT 3090-3091.) He later went to a continuation school. (12 RT 3092.) His grades improved but he did not graduate. (12 RT 3092.)

In the early 1990s, Vargas attended church-related activities but later decided he did not want to go anymore. (12 RT 3093.) Quintana married Jesus Quintana, who is currently incarcerated. (12 RT 3094.) Jesus Quintana got along well with Vargas. (12 RT 3094.) In 1994, Quintana asked Vargas about the way he dressed and Vargas said it was normal and how everyone was dressing. (12 RT 3102.) Vargas was always good with children and the elderly, but his attitude toward Quintana changed. (12 RT 3098.) In 1995, Quintana bought a one-way ticket to Mexico for Vargas so

he could live with his father and get out of Santa Ana. (12 RT 3098-3099.) Vargas refused to go and ran away from home for three days. (12 RT 3098-3099.) A few years later, the family travelled to Mexico but Vargas refused to go because he knew they wanted him to stay in Mexico with his father. (12 RT 3096-3098.)

Quintana, her husband, Vargas, and Hugo Vargas lived in a mobile home on Second Street until 1996. (12 RT 3094-3095.) Vargas then moved in with his sister, and in 1997 moved in with Quintana and her mother. (12 RT 3094-3095, 3100.) Vargas had a number of jobs and helped pay the rent. (12 RT 3101-3102.) Vargas befriended Eloy Gonzalez in late 1998 and Quintana noticed he started drinking. (12 RT 3102-3103.) Quintana would see Vargas with Miller and Eloy Gonzalez about two to three times a week. (12 RT 3104, 3106.) Quintana did not mind Miller, but did not approve of Eloy Gonzalez because he had the "gang aspect even in his walk and his talk." (12 RT 3104.)

Cesar Vargas, Vargas's older brother, testified that the family lived in Mexico until their parents were divorced in 1987. (12 RT 2935, 2939.) Vargas was the youngest of five children and his father's favorite. (12 RT 2936.) Their father was a strict disciplinarian with the older children; Vargas was not subject to the same physical discipline. (12 RT 2936-2938.) While living in Mexico their mother stayed at home with the children. (12 RT 2938.) After the divorce, their mother moved to Santa Ana with the four youngest children and began working full time. (12 RT 2939-2940, 2946.) Cesar Vargas finished high school a year later and then joined the army. (12 RT 2940.) He was honorably discharged and moved home in May 1990 and worked part time and went to school before moving out a few years later. (12 RT 2941-2942.) During this time Cesar Vargas did not observe any major difficulties with Vargas, "just regular kid stuff, discipline stuff." (12 RT 2942-2943.) Cesar Vargas said his contact with

Vargas between 1996 and 1999 was very limited, mostly to family gatherings. (12 RT 2944.) He described Vargas as "respectful," and said, Vargas "had a good relationship with other people. When he was asked to do something, he would do it, and pretty much all the time." (12 RT 2946.)

Hugo Vargas, Vargas's older brother testified that when the family lived in Mexico Vargas was the favorite because he was the youngest, six years younger than his other siblings. (12 RT 2951-2951.) Their parents were divorced in 1987 and the majority of the family moved to Santa Ana. (12 RT 2952-2954.) It took Hugo Vargas and Vargas about one year to become fluent in English. (12 RT 2954.) Hugo Vargas graduated from high school in 1991 and moved out of the family home. (12 RT 2954-2955.) He would see Vargas about once a week when he was visiting their mother. (12 RT 2955.)

Hugo Vargas said that when Vargas was about 13 to 15 years old he had a change in attitude and started disrespecting their mother by not listening to her. (12 RT 2955-2956.) Hugo Vargas thought this behavior of Vargas was normal for his age. (12 RT 2959.) He also noticed when Vargas was about 18 or 19 years old he started wearing baggy clothing. (12 RT 2956.) Vargas assured him that "this is the way people are dressing. It is just a style." (12 RT 2957.) On cross-examination, Hugo Vargas acknowledged that Vargas dressed like a gang member and shaved his head when he was 14 years old. (12 RT 2966-2968.)

Hugo Vargas never saw Vargas disrespect any adults, and said he was very respectful to his grandmother's generation. (12 RT 2958-2959.) Vargas would babysit his sister's children next door, and was very good with them and other children in the neighborhood. (12 RT 2959.) He said Vargas had been close friends with Miller since a few years after moving to the United States. (12 RT 2960.) Hugo Vargas believed that after Vargas

met Eloy Gonzalez, he noticed Vargas becoming short tempered with their mother and drinking a lot. (12 RT 2962-2963.)

Nylda Anya, Vargas's older sister, said when they lived in Mexico Vargas had friends and got good grades. (12 RT 3009-3011.) He was always treated special because he was the baby of the family and got more things that he wanted such as toys. (12 RT 3010-3011, 3013.) Their father never physically disciplined Vargas, only yelled at him. (12 RT 3012.) After moving to Santa Ana, Vargas befriended Miller who was about two years older. (12 RT 3014-3015.) She described Vargas as a nice boy who got good grades and never noticed anything out of the ordinary. (12 RT 3014-3015.)

Anya lived in the family home until 1991 when she was married and had a child. (12 RT 3014.) She would still see Vargas daily until she moved to Washington State in 1994 for about a year. (12 RT 3016-3017.) When Anya returned to Santa Ana in 1996,Vargas moved in with her family and lived with them for about a year until his mother and grandmother moved into the apartment next door. (12 RT 3017-3019.) Anya noticed at this point Vargas had shaved his head and started wearing baggy clothes. (12 RT 3019.) He also started smoking cigarettes and drinking. (12 RT 3020.) In 1996, Anya spoke with Vargas about his appearance, friends and drinking. (12 RT 3031-3033.) Vargas responded that he was not going to change and was making his own choices. (12 RT 3031-3033.)

In 1997, the family went to Mexico to visit their father. (12 RT 3021.) Vargas refused to join them because he knew they wanted him to remain in Mexico with his father because they felt he needed the discipline and guidance. (12 RT 3021-3023.) Between 1997 and 1999, Vargas did not have a steady job, and spent his time drinking and hanging out with his friends. (12 RT 3024.) In 1998, Vargas started hanging out with Eloy

Gonzalez. (12 RT 3025.) Anya did not like Eloy Gonzalez because he also dressed in baggy clothes, had a shaved head, he spent his time hanging out with friends rather than taking care of his family, and he did not like children. (12 RT 3026-3027.)

Anya said that since Vargas had been incarcerated he was "more open toward the Lord," "talks about god," and was "sorrowful for what he did." (12 RT 3030.) She said Vargas had expressed sorrow since his conviction and also sometime before April 2000. (12 RT 3031.)

Chris Miller, Matthew Miller's father, said the family met Vargas in 1988 when he lived across the street. (12 RT 3055-3056.) Matthew Miller and Vargas became best friends and Vargas was at the Miller household often. (12 RT 3057.) Chris Miller's impression was that Vargas had no male figure and Vargas's mother was always busy. (12 RT 3058.) He described Vargas as a very courteous and helpful young man. (12 RT 3059.) Around 1997, Vargas worked on a few jobs for Chris Miller's painting company and did "fine." (12 RT 3058-3059.)

At some point Chris Miller noticed a change in Vargas's appearance in his hair and the way he dressed. (12 RT 3062.) Matthew Miller dressed the same way. (12 RT 3063.) Chris Miller expressed concern with the way they dressed because it could leave a negative first impression. (12 RT 3063.) Matthew Miller replied that everyone dressed that way. (12 RT 3063-3064.)

In 1997 the Miller family moved to Portola Hills and Chris Miller did not see Vargas as frequently. (12 RT 3059-3060.) Matthew Miller moved with his family to Portola Hills and then moved in with his girlfriend in October 1998. (12 RT 3059-3061.) The last time Chris Miller had seen Vargas was Christmastime 1998. (12 RT 3061-3062.) He noticed that his son and Vargas seemed to have a "harder edge" to them, were more serious, and "not so happy-go-lucky." (12 RT 3064.)

Mark Kent was Vargas's youth pastor between about 1991 and 1994, and would see Vargas every other week. (12 RT 3072-3073.) Kent described Vargas as a regular kid, peaceful, respectful, good natured, had no trouble with authority, and got along with other kids. (12 RT 3074.) The last time Kent had seen Vargas was in 1995 when he spoke with him for about five minutes. (12 RT 3074-3075.) Kent noticed Vargas had changed his appearance by shaving his head and wearing baggy gang member style clothing. (12 RT 3074-3075.)

Private Investigator David Carpenter was appointed to Vargas's case in January 2000 and had visited him in custody between 15 and 20 times. (12 RT 3150-3151.) Prior to Vargas's conviction, about mid-2000, Vargas expressed remorse a couple of times, once during Eloy Gonzalez's trial. (12 RT 3152.) On February 15, 2001, unsolicited, Vargas told Carpenter he wanted to speak with the Muro family off the record. (12 RT 3155.) Vargas said he wanted to tell the family he was sorry they lost a family member and felt badly for what they were going through. (12 RT 3156.) Vargas also said, "I hope that some day they can find it in their heart to forgive me." (12 RT 3156.) Carpenter said Vargas could not finish the rest of his sentence because he started to cry, so Carpenter suggested that Vargas write a letter to the Muro family. (12 RT 3156.) The next day Carpenter returned to the jail and Vargas gave him a letter. (12 RT 3157.)

Forensic toxicologist Ines Colison testified that Vargas's blood sample taken on April 2, 1999 at 11:50 a.m., tested positive for 33 nanograms per milliliter of methamphetamine. (12 RT 3037, 3040, 3043-3044.) She described this as a "low concentration" of methamphetamine with the cutoff being 25 nanograms per milliliter. (12 RT 3044.) Colison explained that methamphetamine has a half life of seven to 15 hours, and she had no way of determining when the methamphetamine was ingested. (12 RT 3045-3046.)

Dr. Ted Greenzang, a forensic psychiatrist, was of the opinion that Vargas was an at-risk youth that was unusually susceptible to the gang lifestyle. (12 RT 2993.) Overall, Vargas tended to be more passive and somewhat of a follower with self-esteem issues and some impulsivity. (12 RT 2992.)

Dr. Greenzang explained that research shows certain risk factors make youths more susceptible to joining gangs. (12 RT 2980.) For instance, Vargas resided in a low socioeconomic area where gangs and illicit drugs were present at an early age. (12 RT 2982.) He was also the product of an unplanned pregnancy, and a broken family at the age of nine with little to no contact with his father. (12 RT 2982-2983.) Vargas's siblings were all much older, leaving Vargas behind to essentially fend for himself without much supervision or structure in a new culture. (12 RT 2984.) His siblings were also at a different developmental phase in their lives at the time of the move and managed to culturate and be reasonably successful. (12 RT 2988.)

Dr. Greenzang opined that Vargas had low self-esteem on account of his lack of a role model, assimilation to a new culture, and initial insecurity in bonding with peers. (12 RT 2987, 3145.) Vargas was also at risk by his exposure to peers that utilized drugs and were involved in gangs and illegal activities. (12 RT 2986.) Whereas Vargas's older siblings had a more established identity, they would not have been subjected to the same negative peer group influence. (12 RT 2989.) Generally, gang members get self-esteem through their affiliation and allegiance in their peer group. (12 RT 3145.)

Dr. Greenzang described Vargas as an underachiever, one with reasonably sound intelligence but deteriorating academic performance partly due to poor expectations from himself and within the family. (12 RT 2984-2985.) His poor academic performance was also likely associated

with the fact Vargas was using marijuana daily by tenth grade. (12 RT 2991.)

Dr. Greenzang was unaware of any prior violent or sadistic behavior of Vargas. (12 RT 2989-2990.) However, people in gangs show increased violence during their time in gangs, and this tendency may have existed prior to membership. (12 RT 3131.) In addition, there is a tremendous association between alcohol consumption and violence. (12 RT 2992.) Dr. Greenzang found it significant that during the three months leading to Jesse's murder, Vargas was out of work, drinking heavily, and using marijuana and some cocaine and methamphetamine on a daily basis. (12 RT 2992.) The use of drugs can bring about some paranoia, irritability, and impaired judgment. (12 RT 2993.)

ARGUMENT

I. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING VARGAS'S MOTION TO SUPPRESS EVIDENCE

Vargas contends the trial court abused its discretion when it denied his motion to suppress evidence seized from his residence because the search was not a valid probation search. (AOB 94-107.) Specifically, Vargas claims there is insufficient evidence he knowingly, freely, and voluntarily consented to his Fourth Amendment waiver as a term of his probation because the probation officer did not furnish him with his probation conditions in written form and there was no direct evidence he waived these rights at his change of plea hearing. (AOB 102.) To the contrary, there is substantial evidence from which the trial court found Vargas voluntarily entered into his plea agreement with knowledge of his probation conditions. In addition, the probation search was proper under the good faith exception and was conducted with Vargas's express consent. Accordingly, the trial court did not abuse its discretion in finding the officers conducted a valid probation search of Vargas's residence.

A. Motion to Suppress Evidence

On October 31, 2000, Vargas filed a motion to suppress evidence pursuant to Penal Code section 1538.5 alleging in part that the search was invalid because it exceeded the scope of his probation conditions. (1 CT 379-390.) The prosecution filed an opposition. (2 CT 432-460.) On November 21, 2000, the trial court held a hearing on Vargas's motion to suppress. (1 RT 68-211.)

Detective Michael Lamoureux testified that on the morning of April 2, 1999, Detective Tarpley provided him a faxed copy of court orders indicating that Vargas was currently on probation and subject to a search and seizure condition. (1 RT 92-93.) Laura Espinoza had shown Detective Donnie Kennedy where Vargas was residing and Detective Tarpley confirmed this was still his residence through a records check. (1 RT 95.) Shortly thereafter, the officers went to Vargas's residence to conduct a probation search. (1 RT 94.)

Detective Lamoureux arrived at Vargas's door and noticed it was slightly ajar, approximately a quarter to half an inch open. (1 CT 88.) He knocked on the door and announced they were with the Tustin Police Department and there to conduct a probation search. (1 RT 87-88.) As he knocked, the door opened about halfway. (1 RT 88, 98.) He saw Vargas lying on a fold-out bed in the living room on his stomach, face-down with his hands covered by a blanket. (1 RT 89.) Vargas appeared to be sleeping, but Detective Lamoureux was not sure since he could not see Vargas's face. (1 RT 90-91.) Detective Lamoureux again announced they were with the Tustin Police Department to conduct a probation search and noticed Vargas begin to stir and move his right hand. (1 RT 89.) Detective Lamoureux waited between 20 and 30 seconds from the time he originally knocked, then entered the apartment and climbed onto Vargas's back and secured his hands because Vargas was suspected of being in possession of a

firearm. (1 RT 88, 90.) He again told Vargas they were with the Tustin Police Department. (1 RT 90.)

Detective Donnie Kennedy also testified that on April 2, 1999, at 8:29 a.m., he and other officers conducted a probation search at Vargas's residence, 2111 West 17th Street, apartment number C2. (1 RT 71-72.) Detective Lamoureux knocked on the front door and identified himself and the other officers present as Tustin Police Officers. (1 RT 72.) He then waited approximately 30 seconds and entered the apartment. (1 RT 72.) Detective Kennedy entered a few seconds later and saw Vargas lying face-down on a sofa bed, being restrained by Detective Lamoureux and Detective Hayward. (1 RT 73.)

Detective Kennedy told Vargas he was under arrest and placed handcuffs on him. (1 RT 84.) He asked Vargas if he was on probation and Vargas replied, "Yes, I am." (1 RT 84.) Detective Kennedy then asked Vargas if he was on search and seizure and Vargas responded, "Yes, I am." (1 RT 85.) Next, he asked Vargas if all of the items in the living room area belonged to him. (1 RT 85.) Vargas said, "Yes, they do," and indicated that he considered the living room and the items in the living room as belonging to him. (1 RT 85.)

It was stipulated by the parties that the trial court could consider the following evidence in deciding any Fourth Amendment issue: (1) Detective Tarpley's Preliminary Hearing testimony; (2) there was no arrest or search warrant in this case; (3) Vargas's apartment measured 1821 square feet; and (4) a two-page excerpt from the police report for the limited purpose of determining what evidence was found and where it was located (People's exh. 1). (1 RT 68-69.) The People also submitted certified court documents initially attached to their opposition (see People's exh. 2; 1 CT 439A-459). (1 RT 109-110.)

Vargas argued the search and seizure condition of his probation was defective because he never signed the Disposition/Minute Order (1 CT 458) acknowledging he had received and was aware of the search and seizure conditions of his probation. (1 RT 117.) The trial court disagreed and relying on the clerk's minutes (1 CT 442-457), found that the judge accepting Vargas's plea determined that Vargas knew what he was pleading to and the consequences of his plea. (1 RT 117-118.) Further, as the trial court noted, before Vargas's plea was accepted, the judge went

> . . . through the conditions of probation, specifically spelling out the search and seizure condition. And there is no objection by either counsel or [Vargas] . . . so there is no question in this court's mind that [Vargas] was aware of and agreed to voluntarily because of the disposition reached in that case to accept the search and seizure condition.

(1 RT 118.)

The trial court noted that California recognizes probation searches by police officers as a valid exception to the warrant rule. (1 RT 119-120.) It also found the officers complied with knock-and-notice requirements by knocking and announcing their presence, and then waiting an appreciable amount of time before entry. (1 RT 120.) The trial court recognized that a "good knock" on a door that is ajar is going to push the door open. (1 RT 120.) Once the officers saw Vargas, a suspect in a murder committed by gun, made a subsequent announcement, and Vargas moved his right hand, the officers were entitled to enter without further notice because of reasonable fear for their safety. (1 RT 120-121.)

B. The Trial Court did Not Abuse it's Discretion in Denying Vargas's Motion to Suppress Evidence Because the Officers Conducted a Valid Probation Search

"In ruling on a motion to suppress, the trial court is charged with (1) finding the historical facts; (2) selecting the applicable rule of law; and (3)

applying the latter to the former to determine whether or not the rule of law as applied to the established facts has been violated." (*People v. Parson* (2008) 44 Cal. 4th 332, 345; *People v. Ayala* (2000) 24 Cal.4th 243, 279.) On appeal, this Court reviews "the trial court's resolution of the first inquiry, which involves questions of fact, under the deferential substantial-evidence standard, but subject the second and third inquiries to independent review." (*People v. Parson, supra*, 44 Cal.4th at p. 345.)

> When considering a trial court's denial of a suppression motion, 'we view the record in the light most favorable to the trial court's ruling, deferring to those express or implied findings of fact supported by substantial evidence.' [Citations.]

(*People v. Davis* (2005) 36 Cal.4th 510, 528-529.) A superior court's ruling on a motion to suppress may be sustained if the ruling is correct on any theory of the law applicable to the case, even if the ruling was made for an incorrect reason. (See e.g., *People v. Smithey* (1999) 20 Cal.4th 936, 972.)

> Pursuant to California Constitution, article I, section 28, subdivision (d), [the court] review[s] challenges to the admissibility of evidence obtained by police searches and seizures under [f]ederal [c]onstitutional standards. [Citations.]

(*People v. Woods* (1999) 21 Cal.4th 668, 674.) The Fourth Amendment guarantees "[t]he right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures" and provides that "no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." (U.S. Const., Amend. IV.)

"A search conducted without a warrant is unreasonable per se under the Fourth Amendment unless it falls within one of the 'specifically established and well-delineated exceptions.'" (*People v. Woods, supra*, 21 Cal.4th at p. 674, quoting *Katz v. United States* (1967) 389 U.S. 347, 357 [88 S.Ct. 507, 19 L.Ed.2d 576].) "It is 'well settled that one of the

specifically established exceptions to the requirements of both a warrant and probable cause is a search that is conducted pursuant to consent.'" (*Woods, supra*, at p. 674, quoting *Schneckloth v. Bustamonte* (1973) 412 U.S. 218, 219 [93 S.Ct. 2041, 36 L.Ed.2d 854].)

"In California, probationers may validly consent in advance to warrantless searches in exchange for the opportunity to avoid service of a state prison term." (*People v. Woods, supra*, 21 Cal.4th at pp. 674-675 citing *People v. Bravo* (1987) 43 Cal.3d 600, 608 and accord, *Zap v. United States* (1946) 328 U.S. 624, 628-629 [66 S.Ct. 1277, 1279-1280, 90 L.Ed. 1477], vacated (1947) 330 U.S. 800 [67 S.Ct. 857, 91 L.Ed. 1259].)

> [W]hen [a] defendant in order to obtain probation specifically [agrees] to permit at any time a warrantless search of his person, car and house, he voluntarily [waives] whatever claim of privacy he might otherwise have had.

(*People v. Reyes* (1998) 19 Cal.4th 743, 749, quoting *People v. Bravo, supra,* 43 Cal.3d at p. 607; see *United States v. Knights* (2001) 534 U.S. 112, 119-120 [122 S.Ct. 587, 151 L.Ed.2d 497] [even a warrantless search of a California probationer's residence does not violate the Fourth Amendment]; *Griffin v. Wisconsin* (1987) 483 U.S. 868, 874 [107 S.Ct. 3164, 97 L.Ed.2d 709] [probationers do not enjoy "the absolute liberty to which every citizen is entitled, but only . . . conditional liberty"].)

Vargas's claim that he did not waive his Fourth Amendment rights as a condition of probation is meritless because he personally and specifically agreed to this condition at the sentencing hearing. Pursuant to a plea agreement, on April 2, 1998, Vargas was present in court and pled guilty to misdemeanor possession of a deadly weapon (count 1; Pen. Code, § 12020, subd. (a)) and possession of less than 28.5 grams of marijuana (Health & Safe. Code, § 11357, subd. (b)). (2 CT 442-443, 453-454.) Vargas signed a written waiver of his constitutional rights under the advice of counsel, was advised orally by the trial court of these rights, and the trial court found

Vargas understood, and knowingly and intelligently waived his rights. (2 CT 442-443, 453-455.) In accordance with the change-of-plea, the District Attorney submitted a sentence recommendation of informal probation that listed the terms and conditions to include "submit to search or seizure." (2 CT 456.)

Imposition of sentence was suspended on both counts and Vargas was placed on informal probation for three years. (2 CT 443.) According to the clerk's minutes, the trial court advised Vargas on the record of the terms of his probation, including:

> Defendant ordered to submit your person and property including any residence, premises, container, or vehicle under your control to search or seizure at anytime of the day or night by a police or probation officer with or without a warrant or probable cause.

(2 CT 443.) Consistent with the trial court's oral announcement at the hearing, the Disposition/Minute Order contains the same probation terms, including that Vargas submit to search and seizure of his person and property. (2 CT 458.) Furthermore, during the search, Detective Kennedy asked Vargas if he was on probation and Vargas replied, "Yes, I am." (1 RT 84.) Vargas then affirmed his personal knowledge and understanding of his probation terms and conditions when Detective Kennedy then asked Vargas if he was on search and seizure and Vargas responded, "Yes, I am." (1 RT 85.)

The above cited evidence was sufficient to establish Vargas had knowledge of his Fourth Amendment waiver as a term of his probation and voluntarily waived this right as a condition of his plea agreement. Not only was the condition orally pronounced by the trial court in Vargas's presence, but it was also included in the Clerk's Disposition/Minute Order. In addition, Vargas informed the officers he was on probation and subject to search and seizure at the time of his arrest. Accordingly, there was

substantial evidence from which the trial court reasonably found Vargas had knowledge of the search and seizure term of his probation and knowingly and voluntarily waived it at his change of plea hearing.

Penal Code section 1203.12 provides the probation officer or court "shall furnish to each person who has been released on probation . . . a written statement of the terms and conditions of his probation. . . ." Vargas's argument, however, is not premised on his not receiving notice of his terms and conditions of probation, but rather on his not signing the summary probation order. (AOB 102.) He relies on *People v. Freytes* (1976) 60 Cal.App.3d 958 in support of his claim he did not validly consent to the search and seizure term. (AOB 101.)

In *Freytes*, the defendant was placed on probation with a search and seizure condition. (*People v. Freytes, supra*, 60 Cal.App.3d at p. 960.) The defendant's probation was later revoked and then restored with six conditions that did not include consent to warrantless searches. (*Id.* at pp. 960-961.) Officers went to the defendant's residence and advised him they were going to search pursuant to his probation, and defendant unlocked the door for them. (*Id.* at p. 960.) The defendant was later charged with drug offenses following a warrantless search as a condition of probation. (*Ibid.*) The *Freytes* Court issued a peremptory writ of mandate and found the warrantless search illegal because the search condition no longer existed since the probation order containing that condition was revoked and not restored in the second probation order. (*Id.* at pp. 962-963.)

The *Freytes* Court also considered whether the defendant was provided written notice of the terms of his probation when it was initially imposed. (*People v. Freytes, supra*, 60 Cal.App.3d at pp. 961-962.) The Court found that statements made by the judge implied that a written statement was provided to the defendant, but did "not include any direction of the judge that the record shows that a copy of the section 1203.12

statement was received by petitioner . . . ." (*People v. Freytes, supra*, 60 Cal.App.3d at p. 962.) Nonetheless, the *Freytes* Court found that even if a written statement was not received, the defendant unquestionably consented to the search term because they "were read to him by the judge and discussed in open court. He stated he understood them and agreed to abide by them." (*Ibid.*) Finally, any violation was statutory, not constitutional, and under the circumstances any failure to provide a written statement was not prejudicial. (*Ibid.*)

Similarly, here, the trial court informed Vargas specifically of the search condition of his probation in court while represented by counsel. (2 CT 442.) Vargas did not object to any terms of his probation. (2 CT 444; see *People v. Welch* (1993) 5 Cal.4th 228, 234-235 [failure to object to probation conditions at the sentencing hearing waives the claim on appeal].) Any concern that he was unaware of his search condition was put to rest when Vargas informed the officers as much at the time of his arrest. (1 RT 84-85.) Thus, any failure to provide a written statement of his conditions was harmless. (*People v. Freytes, supra*, 60 Cal.App.3d at p. 962.)

In any event, for the sake of argument, even if Vargas's search condition was invalid, the search was lawful because the officers acted under the good faith exception to the exclusionary rule established in *United States v. Leon* (1984) 468 U.S. 897, 906 [104 S.Ct. 3405, 82 L.Ed.2d 677]. Before going to Vargas's residence, the detectives were provided faxed copies of court orders indicating that Vargas was on probation and subject to a search and seizure condition. (1 RT 92-93.) Thus, if the probation condition was invalid then the officers were misinformed by the court documents indicating Vargas had a search condition. (See generally *Herring v. United States* (2009) 555 U.S. 135 [129 S.Ct. 695, 172 L.Ed 2d 496].) The detectives were not acting in

disregard of the Fourth Amendment but were acting in good faith reliance on official records, even if the records were defective or otherwise mistaken. (*Id.* at pp. 142-144.)

In addition, the probation search was also valid because Vargas provided consent to the officers. It is irrelevant whether the underlying search condition was valid because Vargas directly told the officers that he was on probation and subject to a search condition. (1 RT 84-85.) The officers were reasonable in relying on Vargas's statement that he had such a condition when conducting the search. There was no indication to the officers that Vargas was incapable of truthfully relaying his probation terms to the officers. Thus, the officers could reasonably believe Vargas "was aware of his legal circumstances and would not make a statement against his interest unless it was true. Indeed, it has long been recognized that statements made against one's interests, for that very fact, are reliable. (See Evid. Code, § 1230--declaration against interest constitutes exception to the hearsay rule.) (In re Jeremy G. (1998) 65 Cal.App. 4th 553, 556 [officers reasonably relied on statements made by minor in the presence of his mother that he was "searchable" for "weapons," when in fact it was later determined that the juvenile was not under such a search condition, and juvenile court thus erred in granting the suppression motion after officers searched the apartment where a minor lived and found weapons and narcotics].)

Since the officers were reasonable in relying on Vargas's statement and entitled to conduct the search, the trial court did not abuse its discretion in denying Vargas's motion to suppress evidence.

C. An Erroneous Denial of the Motion to Suppress was Harmless Beyond a Reasonable Doubt

Assuming for the sake of argument that the trial court erroneously denied Vargas's motion to suppress the evidence, any possible error was harmless beyond a reasonable doubt in light of the overwhelming evidence, irrespective of the gun and gang evidence collected, establishing Vargas's guilt. "Admission of unlawfully seized evidence is not reversible error per se, but rather is subject to harmless error analysis." (*People v. Kraft* (2000) 23 Cal.4th 978, 1036, citing *People v. Rich* (1988) 45 Cal.3d 1036, 1080 [applying *Chapman v. California* (1967) 386 U.S. 18, 24 [87 S.Ct. 824, 17 L.Ed.2d 705] harmless beyond a reasonable doubt standard].) Vargas would still have been convicted of all charges even assuming the trial court had suppressed the gun and gang evidence collected from his home on April 2, 1999, at the time of his probation search.

For instance, Vargas's possession of the murder weapon was not the only evidence tying him to Jesse's Murder and related charges. The testimony of Espinoza and Amor Gonzales, and the presence of Vargas's palm print, placed him at the scene of the murder. (5 RT 1524, 1529, 1533; 6 RT 1613; 7 RT 1798-1799, 1801-1803, 1906-1907, 1914, 1916-1917; 8 RT 1940-1943, 1946; 9 RT 2191, 2208.) Espinoza and Amor Gonzales also testified to picking up Vargas after Jesse was killed in the same location where Jesse's stolen wallet was recovered. (6 RT 1550-1552, 1556, 1558-1559; 7 RT 1803, 1806-1807, 1875; 8 RT 1948-1949, 2009, 2069.) And, they testified to statements by Miller and Eloy Gonzalez in the car expressing their displeasure with Vargas's conduct. (7 RT 1803, 1807-1808; 8 RT 1943, 1946, 1949-1951.) In addition, Espinoza testified to statements Vargas made in the car admitting to killing Jesse. (8 RT 1951-1952, 2036-2038.)

Moreover, even if the gang-related evidence collected during Vargas's probation search was suppressed, a jury would still have found his guilt beyond a reasonable doubt. During the probation search, officers collected a copy of the Orange County register, a shoebox, and a few other papers with gang "doodling" on them. (See 7 RT 1753-1758.) However, officers returned with a search warrant six days later and conducted a more thorough search of Vargas's residence. (7 RT 1758.) Again, officers recovered an abundance of gang-related graffiti and doodling that included Vargas's moniker, references to Southside and his fellow gang members, and the Mexican Mafia. (7 RT 1760-1774.) In addition to the gang-related evidence recovered from Vargas's home, the public roster, Vargas's tattoos, jail correspondence, and expert opinion testimony on the matter established beyond a reasonable doubt the substantive gang charges and enhancements. (8 RT 2094, 2107-2110, 2122, 2126-2134.)

In light of the overwhelming evidence presented at trial, including witness testimony, Vargas's palm print, location of stolen property, and the abundance of gang evidence, any error in admitting the challenged evidence was harmless beyond a reasonable doubt. (*People v. Kraft, supra*, 23 Cal.4th at p. 1036.)

II. THERE WAS SUFFICIENT EVIDENCE TO SUPPORT VARGAS'S CONVICTIONS FOR ACTIVE PARTICIPATION IN A CRIMINAL STREET GANG (PENAL CODE, § 186.22, SUBDIVISION (A))

Vargas contends that there was insufficient evidence to support his conviction for active participation in a criminal street gang because the evidence did not show he was an active participant, rather than merely associated with gang members.[16] (AOB 108-121.) He also asks this Court

---

[16] Vargas references the street terrorism conviction in count 11. (AOB 108.) The amended felony complaint filed on December 10, 1999, charged Vargas with street terrorism on or about March 30, 1999 (count 8) (continued...)

to reconsider its ruling in *People v. Castenada* (2000) 23 Cal.4th 743, upholding the constitutionality of Penal Code section 186.22, subdivision (a). (AOB 116-121.) Vargas's contention that insufficient evidence supports his convictions is without merit as there is substantial evidence Vargas was a Southside gang member that committed crimes with other Southside gang members. Also, this Court should not disturb its holding in *Castenada* because it correctly found that Penal Code section 186.22, subdivision (a) meets the necessary due process requirement of fair notice and does not encourage arbitrary enforcement.

A. There is Substantial Evidence Vargas Actively Participated in a Criminal Street Gang

When a defendant challenges the sufficiency of the evidence,

> '[t]he court must review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence—that is, evidence which is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.' [Citation.]

(*People v. Clark* (2011) 52 Cal.4th 856, 942-943, quoting *People v. Davis* (1995) 10 Cal.4th 463, 509; *People v. Johnson* (1980) 26 Cal.3d 557, 578.)

A reviewing court must "presume in support of the judgment the existence of every fact the jury could reasonably infer from the evidence." (*People v. Smith* (2005) 37 Cal.4th 733, 739, quoting *People v. Ochoa* (1999) 6 Cal.4th 1199, 1206.) The question is, after drawing all inferences

---

(...continued)
and street terrorism on or about April 1, 1999 (count 11). (1 CT 15-18.) The information subsequently filed on March 10, 2000, charged Vargas with street terrorism on or about March 30, 1999 (count 7) and street terrorism on or about April 1, 1999 (count 12). (1 CT 41-46.) Vargas was found guilty of both street terrorism charges alleged in the information (counts 7 & 12). (3 CT 800, 813.)

in favor of the judgment, could any rational trier of fact have found Vargas guilty beyond a reasonable doubt. (*Jackson v. Virginia* (1979) 443 U.S. 307, 318-319 [99 S.Ct. 2781, 61 L.Ed.2d 560].) Before a judgment of conviction can be set aside for insufficiency of the evidence to support the trier of fact's verdict, it must clearly appear that upon no hypothesis whatever is there sufficient evidence to support it. (*People v. Bolin* (1998) 18 Cal.4th 297, 331; *People v. Redmond* (1969) 71 Cal.2d 745, 755.) In a case where findings of the trial court are based upon circumstantial evidence, the reviewing court "must decide whether the circumstances reasonably justify the findings of the trier of fact. . . ." (*People v. Proctor* (1992) 4 Cal.4th 499, 528-529.) If the reviewing court finds "that the circumstances also might reasonably be reconciled with a contrary finding [it] would not warrant reversal of the judgment." (*Id.* at p. 529; accord, *People v. Cain* (1995) 10 Cal.4th 1, 39; see *People v. Ceja* (1993) 4 Cal.4th 1134, 1138 [a review of circumstantial evidence uses the same standard as sufficiency of the evidence].)

Although the reviewing court must ensure the evidence is reasonable, credible, and of solid value, 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 on which that determination depends. (*People v. Ochoa, supra*, 6 Cal.4th at p. 1206; *People v. Jones* (1990) 51 Cal.3d 294, 314.) Thus, if the verdict is supported by substantial evidence, the reviewing court must give due deference to the trier of fact and not substitute its evaluation of a witness's credibility for that of the fact finder. (*Ochoa, supra*, 6 Cal.4th at p. 1206.)

Vargas was charged and convicted in counts 7 and 12 of the substantive offense of active participation in a criminal street gang (Penal Code, § 186.22, subd. (a)), also known as street terrorism. (1 CT 43-44; 3 CT 800, 813.) Penal Code section 186.22, subdivision (a) provides:

> Any person who actively participates in any criminal street gang with knowledge that its members engage in or have engaged in a pattern of criminal gang activity, and who willfully promotes, furthers, or assists in any felonious criminal conduct by members of that gang, shall be punished by imprisonment in a county jail for a period not to exceed one year, or by imprisonment in the state prison for 16 months, or two or three years.

There are three elements to the substantive street terrorism offense: (1) active participation in a criminal street gang; (2) knowledge the gang's members have engaged in a pattern of criminal gang activity; and (3) willfully promoting, furthering, or assisting in any felonious criminal conduct by members of the gang. (*People v. Albillar* (2010) 51 Cal.4th 47, 56; see also *People v. Lamas* (2007) 42 Cal.4th 516, 523; *People v. Castenada, supra,* 23 Cal.4th at p. 747.)

To prove active participation, the prosecutor had to show that Vargas actively participated in the Southside gang with knowledge that Southside members engage in or had engaged in a pattern of criminal gang activity, and that Vargas willfully promoted, furthered, or assisted in any felonious criminal conduct by members of Southside. (Penal Code, § 186.22, subd. (a).) "The gravamen of the substantive offense set forth in section 186.22(a) is active participation in a criminal street gang." (*People v. Albillar, supra,* 51 Cal.4th at p. 55.) The participation must be more than "nominal or passive." (*People v. Castenada, supra*, 23 Cal.4th at p. 747.) Penal Code section 186.22, subdivision (a) does not require proof the defendant participated in a gang-related offense; rather, it only requires evidence the defendant was an active member of a gang and participated in some manner in an offense committed by a member of the gang. (*People v. Albillar, supra,* 51 Cal.4th at p. 55.)

Vargas argues there is insufficient evidence supporting his conviction because he had no documented history of gang membership (AOB 112-

113), no personal knowledge exclusive to a gang member (AOB 113-114), no specific tattoos linking him to a specific gang (AOB 114), and claims the graffiti just shows he was a "wannabe" gang member (AOB 114-116). None of these factors are necessary for the substantive offense of active gang participation. Indeed, there was substantial evidence supporting the jury's determination that Vargas's participation in Southside was more than nominal or passive, and that he did more than merely associate with gang members or aspire to be a Southside gang member. The evidence showed Vargas was a member of the Southside gang and committed crimes with Southside gang members Eloy Gonzalez and Miller.

Vargas's mother testified that he had been friends with Miller since 1987, and was also friends with Eloy Gonzalez. (9 RT 2309-2310.) Officer Blair was of the opinion that Vargas, Miller and Eloy Gonzalez were all active members of the Southside gang when the crimes were committed. (8 RT 2129.)

Eloy Gonzalez's membership in the Southside gang was well publicized and known by numerous witnesses. (7 RT 1840; 8 RT 1965; 10 RT 2461.) His moniker was "Scrappy." (8 RT 2104.) Eloy Gonzalez had gang-related incidents and contacts with authorities beginning in 1993 when he was arrested for tagging graffiti on a parking sign. (8 RT 2162-2163.) In the year 1994 alone he was the target of a gang-related shooting, arrested and contacted on multiple occasions in the presence of other Southside gang members, and admitted he "kicked it" with Southside. (8 RT 2163-2169.) In 1997, he pled guilty to a felony and admitted a gang allegation. (9 RT 2171-2172.) In addition, there was the graffiti, particularly the "rosters" listing Eloy Gonzalez as a member of Southside in his home and on the phone book recovered in the motel room. (8 RT 2104-2106.)

There was also substantial evidence that Miller was a member of Southside and had the moniker "Wicked." (8 RT 2100.) He used this moniker in his correspondence with other inmates. (8 RT 2100-2101.) His residence also contained graffiti embracing his moniker and Southside. (8 RT 2102-2103.) A particularly significant item of graffiti was the roster outside Miller's residence that listed Scrappy, Wicked and Peewee as members of the Southside 187s. (8 RT 2107-2108.) This public posting was a challenge to the gang controlling the area, and interpreted as much when it was later crossed out by the Krazy Proud Criminals. (8 RT 2108-2109.)

There was substantial evidence Vargas was a member of the Southside gang and had the moniker "Peewee." (8 RT 2110.) Particularly significant is the presence of Vargas's moniker on the roster outside of Miller's home as indicative of his membership in the Southside gang. (8 RT 2110.) Officer Blair explained the importance of graffiti as a means to mark a gang's territory, challenge their rivals, and identify and pay tribute to gang members by posting rosters. (8 RT 2092-2093.) Officer Blair described graffiti as the newspaper of the streets and an important means of communication in the gang underworld. (8 RT 2092.) The content of their graffiti is scrutinized by their own gang and other gangs. For this reason, a roster is not going to include persons that are not gang members. (8 RT 2096-2097.) Gang members are required to undergo an initiation process to join, and identifying a non-member could reflect poorly on the gang because that individual may not live-up to the gang lifestyle. (8 RT 2096-2097.) Here, the graffiti roster posted outside of Miller's residence was a public announcement of Vargas, Miller's and Eloy Gonzalez's gang membership in Southside. (8 RT 2107-2108.) Not only did it broadcast their membership to the neighborhood, but effectively acted as a challenge as apparent by a rival gang later crossing it out. (8 RT 2108-2109.)

Vargas also publicly subscribed to the gang lifestyle by his gang-inspired tattoos. Vargas had a tattoo on his arm of three dots in the shape of a triangle that means "mi vida loca" or "my crazy life." (8 RT 2094, 2122.) This is a common gang tattoo because it is reflective of the gang membership mindset of being a "crazy guy" and living a "crazy life." (8 RT 2094.) Vargas also has a star tattooed on his arm, which is a gang inspired tattoo that means he is from Orange County. (8 RT 2094-2095, 2122.) Officer Blair explained that gang members are no longer getting more gang specific tattoos in order to make it harder for law enforcement to identify their membership in a specific gang. (8 RT 2094.)

Any further doubt as to Vargas's gang allegiance could be put to rest by the graffiti riddled throughout his belongings. The writings and drawings in Vargas's home are indicative of gang mentality and culture, and in particular the Southside gang. (8 RT 2111.) For instance, a picture of the man dressed up as a gang member or "cholo" with "brown pride mexicano" and "X3" is representative of the fact the Southern California gangs are controlled by the Mexican Mafia in the prison system. (8 RT 2112-2113.) Also, the picture of the man highlighting the gun that has written on the trigger guard "Peewee" is consistent with the gang mentality acknowledging the importance of guns in their culture. (8 RT 2114-2115.) Other drawings from Vargas's home glorified guns and violence and were filled with gang references and embodied the overall fatalistic view on life that gang members have. (8 RT 2115-2116, 2119-2120, 2123.) Furthermore, Vargas injected himself into these gang inspired drawings by including his moniker and Southside gang references in them. (7 RT 1752-1758, 1761-1766, 1773-1774.) It stands to reason that Vargas envisioned himself as an active member of the Southside gang as recently as February 24, 1999, when he included himself on a Southside roster. (7 RT 1753-1755; 8 RT 2124-2125.)

The Southside membership of Vargas, Miller, and Gonzalez is also apparent through jail correspondence. Vargas wrote three letters to Miller while in custody in June and July 1999. (8 RT 2126-2127.) In the letters Vargas uses common gang terminology such as "dog," "truchas" which means to "watch your back," and the number 13. (8 RT 2127-2128.) He also talks about Eloy Gonzalez and signed one of the letters "Peewee." (8 RT 2128-2129.)

There was substantial evidence that Eloy Gonzalez was a seasoned Southside gang member that committed crimes with fellow gang members Vargas and Miller. The evidence showed all three were present at Worldnet Pagers when Baek's stolen credit cards were being used. (4 RT 1213-1214, 1218-1222, 1225, 1227-1228, 1232, 1239, 1246-1248; 7 RT 1730-1731, 1737, 1740; 9 RT 2209-2210.) They were also all present and involved in the robbery of Hill and attempted robbery of Wilson. (4 RT 1266-1267, 1272-1273, 1308, 1318-1319; 5 RT 1367-1368, 1386.) In addition, all three were present when Matthew was robbed and Jesse was robbed and killed. (7 RT 1798-1799, 1802-1803; 8 RT 1942-1943, 1946, 1949-1952, 2036-2038.) Officer Blair explained that gang members commit crimes with other gang members because they know they can count on each other for backup. (8 RT 2130; 9 RT 2189.) This concept of backup is the core foundation of gang membership and ingrained in the newer gang members by their elders. (8 RT 2090, 2131-2132.) Thus the fact Eloy Gonzalez, a seasoned gang member, was committing numerous crimes with Miller and Vargas supports the conclusion that all three of them were active Southside gang members.

There is substantial evidence from which the jury reasonably found Vargas actively participated in a criminal street gang. Vargas's possessions demonstrate that he knew Southside was a criminal enterprise under the umbrella of the Mexican Mafia. He also knew the gang engaged in

criminal conduct. In fact, the evidence shows that Vargas himself was an active member of the Southside gang, along with Miller and Eloy Gonzalez. The three of them committed felonies together, and Vargas's participation assisted in the criminal conduct of his fellow gang members. Therefore, he committed the substantive offense of street terrorism.

There was also substantial evidence that the proceeds of the crimes being committed benefited the Southside gang. Officer Blair explained that gang members committed crimes to instill fear into the community which translates to respect and allows them to continue committing crimes unimpeded. (8 RT 2129-2130, 2134.) They also commit crimes for financial gain and so they can continue their lifestyle and support themselves. (8 RT 2129-2130, 2134.) In this case, at the very least, proceeds from the robberies were used to purchase and maintain their pagers. (4 RT 1213, 1218-1222.) Officer Blair was also of the opinion the proceeds were used to support their way of life to purchase alcohol, drugs, and rent hotel rooms. (8 RT 2134.)

In sum, there is substantial evidence from which the jury found beyond a reasonable doubt that on both March 30, 1999, and April 1, 1999, Vargas actively participated in the Southside criminal street gang as a member. And furthermore, he committed a series of felonies with other Southside members, Miller and Eloy Gonzalez. Accordingly, his street terrorism convictions should be affirmed.

B. This Court's Opinion in *Castenada* Should Not be Disturbed

Vargas also asks this Court to reconsider its holding in *People v. Castenada, supra,* 23 Cal.4th 743, and find Penal Code section 186.22, subdivision (a) violates due process because it does not provide notice as to what conduct is prohibited, and encourages arbitrary and capricious enforcement. (AOB 116-121.) This Court's opinion in *Castenada* is a

sound ruling that demonstrates Penal Code section 186.22, subdivision (a) comports with due process requirements. Vargas has not advanced any new argument undermining the reasoning and conclusion of *Castenada.*

In *Castenada*, the defendant challenged on appeal the sufficiency of the evidence supporting his conviction for active participation in a criminal street gang. *(People v. Castenada, supra*, 23 Cal.4th at p. 746.) This Court construed "actively participates in any criminal street gang" to mean "involvement with a criminal street gang that is more than nominal or passive." (*Id.* at p. 747.)

This Court also explained in *Castenada* that in *Scales v. United States* (1961) 367 U.S. 203 [81 S.Ct. 146, 96 L.Ed.2d 782], the United States Supreme Court held the Smith Act satisfied "the due process requirement of personal guilt by requiring proof of a defendant's active membership in a subversive organization with knowledge of and an intent to further its goals." (*Scales, supra*, 43 Cal.4th at p. 749.) In enacting Penal Code section 186.22, subdivision (a), the Legislature was fully cognizant of the guilty knowledge and intent requirements the high court had articulated in *Scales* because Penal Code section 186.22, subdivision (a) is patterned after *Scales* by expressly requiring that a

> defendant not only 'actively participates' in a criminal street gang[], but also that the defendant does so with knowledge that [the gang's] members engage in or have engaged in a pattern of criminal gang activity, and that the defendant 'willfully promotes, furthers, or assists in any felonious criminal conduct by members of that gang.'

(*People v. Castenada, supra*, 23 Cal.4th at p. 749.)

This Court further concluded in *Castenada* that there was no due process violation because

> a person liable under section 186.22(a) must aid and abet a separate felony offense committed by gang members. In that way, as the bill's proponents stressed, section 186.22(a) 'goes

> beyond the active membership test in Scales,' which allowed the criminal conviction of anyone holding active membership in a subversive organization, without requiring that the member aid and abet any particular criminal offense committed by other members.

(*Castenada, supra*, 23 Cal.4th at p. 750.) Thus, this Court aptly concluded Penal Code section 186.22, subdivision (a), exceeded the requirements of "'the active membership test in Scales.'" (*Ibid.*)

The *Castenada* opinion recognizes that "the underpinning of the vagueness doctrine" is the due process concept of "fair warning." (*People v. Castenada, supra,* 23 Cal.4th at p. 751.) The rule of fair warning consists of the due process concepts of preventing arbitrary law enforcement and providing adequate notice to potential offenders. (*Ibid.*) This Court correctly found the statute's plainly worded requirements made it reasonably clear what conduct was prohibited, and did not encourage discriminatory law enforcement. (*Id.* at p. 752.)

This Court most recently reaffirmed the *Castenada* holding in *People v. Albillar* (2010) 51 Cal.4th at pages 55 through 59. Vargas has advanced no new argument that calls into question the validity of the *Castenada* holding. Therefore, Vargas's invitation to depart from *Castenada* in order to find that he had been convicted under an unconstitutional statute, should be rejected. Vargas's conviction for active participation in a criminal street gang should be affirmed.

III. THERE WAS SUFFICIENT EVIDENCE TO SUPPORT VARGAS'S CONVICTION FOR THE ROBBERY OF SIMON CRUZ (COUNT 4)

Vargas argues there is insufficient evidence that he was one of the perpetrators, or otherwise, involved in the robbery of Simon Cruz (count 4). (AOB 122-126.) To the contrary, there was substantial evidence from which the jury reasonably found Vargas robbed Cruz.

As respondent set forth in Argument II, a judgment for conviction will not be reversed for insufficient evidence if there is substantial evidence – that is, evidence which is reasonable, credible, and of solid value – from which the jury could find the defendant guilty beyond a reasonable doubt. (*People v. Johnson, supra*, 26 Cal.3d at p. 578; *Jackson v. Virginia, supra*, 443 U.S. at pp. 318-319.) The reviewing court presumes in support of the judgment every fact and credibility determination reasonably inferred from the evidence. (*People v. Bloyd* (1987) 43 Cal.3d 333, 346-347; *People v. Ochoa, supra,* 6 Cal.4th at p. 1206.) This standard of review is applicable regardless of whether the prosecution relies primarily on direct or on circumstantial evidence. (*People v. Lenart* (2004) 32 Cal.4th 1107, 1125.)

Vargas does not contest that Cruz was robbed, only that there was insufficient evidence identifying him as one of the perpetrators. (AOB 123.) Amor Gonzales testified that after Espinoza parked the car and went to her apartment, Miller and Vargas stood outside of the car. (7 RT 1793.) Amor Gonzales and Eloy Gonzalez got into the back seat of the car and smoked methamphetamine. (7 RT 1793-1794.) Miller and Vargas left the car and walked across Main Street. (7 RT 1795-1796.) When Miller and Vargas returned to the car a few minutes later, one of them had a wallet in their hand. (7 RT 1795-1796; 8 RT 2078.) Cruz's wallet was later recovered from the car Espinoza was driving that evening and in which Vargas was a passenger. (5 RT 1403; 6 RT 1593-1594.)

Meanwhile, during the same period of time in which Amor Gonzales testified that Vargas and Miller had crossed the street in the direction of the Park Place apartment complex where they had retrieved a wallet, Cruz was robbed. At about 8:40 p.m., Cruz was in the apartment complex when a man pointed a black gun to the back of Cruz's head and said in Spanish, "Don't turn around or I will shoot you." (5 RT 1389-1390, 1393-1395, 1406, 1415.) The gunman told Cruz to remove his watch and took Cruz's

wallet out of his pocket. (5 RT 1396.) Inside his wallet was between $120 and $150. (5 RT 1403.) Before Cruz could hand over his watch, a second man arrived and said in Spanish, "Let's go." (5 RT 1396, 1406.) Cruz turned around and headed in the direction of the robbers. (5 RT 1399.) The gunman pointed the gun at Cruz and said, "Go back or I will shoot you." (5 RT 1399.) Cruz gave general descriptions of his assailants as two Hispanic males, and said the gunman was wearing a red bandana and a red Pendleton shirt. (5 RT 1404-1405, 1418-1420.)

There is substantial evidence supporting Vargas's conviction for the robbery of Cruz. The jury could reasonably find from Amor Gonzales's testimony, the circumstances of the robbery as described by Cruz, and location of Cruz's wallet that Vargas was one of the perpetrators. Therefore, Vargas's robbery conviction in count 4 should be affirmed.

IV. THERE WAS SUFFICIENT EVIDENCE TO SUPPORT THE JURY'S FINDINGS IN COUNTS 1 AND 2 THAT VARGAS PERSONALLY DISCHARGED A FIREARM (PENAL CODE, § 12022.53, (D))

Vargas argues there is insufficient evidence identifying him as the shooter, and consequently, to support the allegations in counts 1 and 2 that he personally discharged a firearm (Pen. Code, § 12022.53, subd. (d)). (AOB 127-133.) This is not so. There is substantial evidence from which the jury reasonably found Vargas was the shooter.

As respondent set forth in Argument II, a judgment for conviction will not be reversed for insufficient evidence if there is substantial evidence – that is, evidence which is reasonable, credible, and of solid value – from which the jury could find the defendant guilty beyond a reasonable doubt. (*People v. Johnson, supra*, 26 Cal.3d at p. 578; *Jackson v. Virginia, supra*, 443 U.S. at pp. 318-319.) The reviewing court presumes in support of the judgment every fact and credibility determination reasonably inferred from the evidence. (*People v. Bloyd, supra*, 43 Cal.3d at pp. 346-347; *People v.*

Ochoa, supra, 6 Cal.4th at p. 1206.) This standard of review is applicable regardless of whether the prosecution relies primarily on direct or on circumstantial evidence (*People v. Lenart, supra*, 32 Cal.4th at p. 1125), and applies to enhancements as well as convictions (*People v. Wilson* (2008) 44 Cal.4th 758, 806).

At the close of the prosecution's case-in-chief, the trial court granted the prosecution's motion to amend the information to include an allegation under Penal Code section 12022.53, subdivision (d), that Vargas personally discharged the firearm as to the homicide and robbery of Jesse (counts 1 & 2). (9 RT 2216-2217.)

Former section 12022.53, subdivision (d), provided in relevant part,

> Notwithstanding any other provision of law, any person who, in the commission of a felony specified in subdivision (a) . . . personally and intentionally discharges a firearm and proximately causes great bodily injury . . . or death, to any person other than an accomplice, shall be punished by an additional and consecutive term of imprisonment in the state prison for 25 years to life.
>
> Applied to a defendant/shooter, this enhancement is arguably unambiguous: a defendant who is convicted of a specified felony and is found to have intentionally and personally discharged a firearm proximately causing great bodily injury or death when committing that felony, is subject to section 12022.53, subdivision (d).

(*People v. Garcia* (2002) 28 Cal.4th 1166, 1173.)

Here, there is substantial evidence that Vargas personally and intentionally fired the gun and shot Jesse twice in the back of the head, killing him. Amor Gonzales testified that Vargas, Miller and Eloy Gonzalez saw Matthew and Jesse and crossed Main Street in their direction. (7 RT 1798-1799.) As they crossed the street, one of them said "snatcho" or some sort of put-down directed at Matthew and Jesse. (7 RT 1801; 9 RT

2191, 2208.) Matthew recalled being approached by two people initially, and then a third joined them. (5 RT 1483; 8 RT 2072.)

After the gunshots, Miller and Eloy Gonzalez ran back to the car and told Espinoza to start the car and go. (7 RT 1802-1803; 8 RT 1942, 1946.) Miller and Eloy Gonzalez had "serious faces" and "were kind of pumped up." (7 RT 1803; 8 RT 1943.) Espinoza drove around and located Vargas on the east side of Elk Lane next to the fence running along the Santa Ana Zoo where Jesse's wallet was recovered. (6 RT 1550-1552, 1556, 1558-1559; 7 RT 1803; 8 RT 1848, 2009, 2069.) Vargas crossed the street and got into the back seat with Miller and Eloy Gonzalez. (7 RT 1806-1807, 1875; 8 RT 1949, 2009.)

Amor Gonzalez testified Miller and Eloy Gonzalez seemed upset with Vargas. (7 RT 1808; 8 RT 1849.) Miller told Vargas that "he should kick his ass for this." (8 RT 1949.) Both Miller and Eloy Gonzalez were yelling at Vargas telling him, "He is going to regret it for the rest of his life" and that he was going to get "taxed" or his "ass kicked" for what he did. (8 RT 1950-1951.) They were also hitting the back of the seats and yelling at Vargas, "Fucking Peewee." (7 RT 1807.) Espinoza testified that Vargas said he shot Jesse because he was "getting up" or "coming up," and that Vargas said that Jesse "was like going to fight back" or "he was going to - - he came back at him." (8 RT 1951-1952, 2036-2038.) Thereafter, Espinoza drove Vargas home. (7 RT 1808-1809; 8 RT 1953-1954.) The next morning officers arrested Vargas who was in possession of the gun used to kill Jesse. (5 RT 1469-1470, 1521-1522; 6 RT 1655-1660, 1669-1670, 1676, 1686.) Vargas's palm print was located on the trunk of a car parked a few feet from where Jesse was killed. (5 RT 1524, 1529, 1533; 6 RT 1613; 7 RT 1914, 1916-1917.)

The jury could reasonably find from the above cited evidence that Vargas personally fired the gun that killed Jesse. Amor Gonzales's and

Espinoza's testimony, along with Vargas's palm print placed him at the scene of the shooting. Their testimony also established that Miller and Eloy Gonzalez were upset with Vargas for shooting Jesse, and that Vargas tried to explain why he shot Jesse. In addition, Vargas's presence at the location where Jesse's wallet was discarded and his possession of the gun used to shoot Jesse further support the inference that Vargas fired the fatal shot.

Vargas contends there is insufficient evidence to support the personal gun use enhancements because Matthew did not identify him as the shooter, Espinoza and Amor Gonzales's testimony was unreliable, and the presence of his fingerprints did not necessarily place him there at the time of the shooting. (AOB 129-132.) The above facts and theories raised by Vargas were presented to the jury and clearly rejected. Vargas is essentially asking this Court to improperly substitute its evaluations of the credibility of witnesses for that of the trier of fact. (*People v. Koontz* (2002) 27 Cal.4th 1041, 1078.) There is substantial evidence to support the jury's findings and they should be affirmed.

V. THE COURT PROPERLY DENIED VARGAS'S MOTION TO SEVER THE NON-CAPITAL CHARGES

Vargas contends the trial court committed reversible error and denied him due process and his right to be free from cruel and unusual punishment when it denied his motion to sever the capital charges relating to the murder and robbery of Jesse, the robbery of Matthew, and possessing a firearm while on probation (counts 1, 2, 3 & 5) from the remaining charges. (AOB 134-153.) Vargas argues the underlying evidence of the charges was not cross-admissible, the gang evidence and capital charges were prejudicial, joinder was used to bolster factually weak arguments, and as a result, he was denied due process. (AOB 140-153.) To the contrary, the trial court did not abuse its discretion when it denied the severance motion because

the evidence was cross-admissible, it was not unduly prejudicial, and it was not used to merely bolster other charges. Finally, even assuming the charges should have been severed, any error was harmless.

Vargas filed a motion to sever the charges relating to the crimes committed against Jesse and Matthew from his remaining charges because they were not distinct enough to be cross-admissible on the sole contested issue of identity, the evidence was unduly prejudicial, and joinder was being used to bolster the strength of various charges. (2 CT 391-408.) The prosecution filed an opposition arguing the evidence was cross-admissible to show common plan or scheme, identity, that Jesse was killed in the course of a robbery, and the crimes were committed in furtherance of a criminal street gang. (2 CT 421-429.) Also, there was not a substantial likelihood of prejudice and all of the allegations were supported by strong cases. (2 CT 428.) The parties submitted on their filings and the trial court denied Vargas's motion to sever. (1 RT 267.)

Pursuant to Penal Code section 954, an accusatory pleading may charge two or more different offenses so long as at least one of two conditions is met: The offenses are (1) "connected together in their commission," or (2) "of the same class." (*People v. Soper* (2009) 45 Cal.4th 759, 771.) Article I, section 30, subdivision (a) of the California Constitution provides: "This Constitution shall not be construed by the courts to prohibit the joining of criminal cases as prescribed by the Legislature . . . ." Joint trial has long been prescribed, and broadly allowed, by the Legislature's enactment of section 954. (*Soper*, at p. 772; *Alcala v. Superior Court* (2008) 43 Cal.4th 1205, 1218.) Thus, "the law prefers consolidation of charges." (*People v. Manriquez* (2005) 37 Cal.4th 547, 574, quoting *People v. Ochoa* (1998) 19 Cal.4th 353, 409 (hereafter *Ochoa I.*) Where the offenses charged are of the same class, joinder is proper

under Penal Code section 954. (*People v. Kraft, supra*, 23 Cal.4th at p. 1030; *People v. Bradford* (1997) 15 Cal.4th 1229, 1315.)

Consolidated charges are beneficial to the state, namely, conservation of judicial resources and public funds. These considerations often weigh strongly against severance of properly joined charges. (*People v. Soper, supra,* 45 Cal.4th at p. 774; *People v. Bean* (1988) 46 Cal.3d 919, 939-940.) Although the assessment of whether severance is appropriate is necessarily dependent upon the particular circumstances of each individual case, this Court has developed certain criteria which provide guidance in ruling upon and reviewing a motion to sever trial. (*Soper*, at p. 774; *Frank v. Superior Court* (1989) 48 Cal.3d 632, 639.)

The first thing to be considered is cross-admissibility of the evidence in hypothetical separate trials. (*Alcala, supra*, 43 Cal.4th at p. 1220.) If the evidence underlying the charges in question would not be cross-admissible, that determination alone does not establish prejudice or an abuse of discretion by the trial court in declining to sever properly joined charges. (*People v. Soper, supra*, 45 Cal.4th at p. 775; *Alcala, supra*, 43 Cal.4th at p. 1221.)

Then, the reviewing court needs to consider "whether the benefits of joinder were sufficiently substantial to outweigh the possible 'spill-over' effect of the 'other-crimes' evidence on the jury in its consideration of the evidence of defendant's guilt of each set of offenses." (*Soper, supra*, 45 Cal.4th at p. 775, quoting *People v. Bean, supra*, 46 Cal.3d at p. 938.) In making this evaluation, three additional factors are considered: (1) whether certain of the charges are unusually likely to inflame the jury against the defendant; (2) whether a "weak" case has been joined with a "strong" case, or with another "weak" case, so that the "spillover" effect of aggregate evidence on several charges might well alter the outcome of some or all of the charges; and (3) whether any one of the charges carries the death

penalty or joinder of them turns the matter into a capital case. (*Soper, supra,* 45 Cal.4th at p. 775; *People v. Arias* (1996) 13 Cal.4th 92, 127; see also *Alcala, supra*, 43 Cal.4th at pp. 1220-1221.) Thus, the potential for prejudice to the defendant from a joint trial is balanced against the countervailing benefits to the state with the recognition that in light of the countervailing benefits of a single trial of properly joined charges,

> '[t]he state's interest in joinder gives the court broader discretion in ruling on a motion for severance [of properly joined charges] than it has in ruling on admissibility of evidence' [of uncharged offenses in a separate trial]. [Citations.]

(*Alcala,* at p. 1221.)

Joinder may be appropriate even though the evidence is not cross-admissible and only one of the charges would be capital absent joinder. (*People v. Musselwhite* (1998) 17 Cal.4th 1216, 1244-1246.) Even where the People present capital charges, joinder is proper so long as evidence of each charge is so strong that consolidation is unlikely to affect the verdict. (*Arias*, at p. 130, fn. 11; *People v. Lucky* (1988) 45 Cal.3d 259, 277-278; *People v. Ochoa* (2001) 26 Cal.4th 398, 423 (hereafter *Ochoa II.*)

A trial court's denial of a severance motion for abuse of discretion is based on the facts as they appeared at the time the court ruled on the motion. (*People v. Avila* (2006) 38 Cal.4th 491, 575; *People v. Hardy* (1992) 2 Cal.4th 86, 167.) If the court's joinder ruling was proper at the time it was made, a reviewing court may reverse a judgment only on a showing that joinder "resulted in 'gross unfairness' amounting to a denial of due process." (*People v. Mendoza* (2000) 24 Cal.4th 130, 162.)

To establish error in a trial court's ruling declining to sever properly joined charges, a defendant must make a clear showing of prejudice to establish that the trial court abused its discretion. (*People v. Soper, supra*, 45 Cal.4th at p. 774; *Alcala, supra*, Cal.4th at p. 1220.) In other words, whether the denial fell "'outside the bounds of reason.'" (*Ochoa II, supra*,

26 Cal.4th 398, 423, *Ochoa I, supra*, 19 Cal.4th at p. 408, quoting *People v. DeSantis* (1992) 2 Cal.4th 1198, 1226.) Even if the court abused its discretion in refusing to sever, reversal is unwarranted unless, to a reasonable probability, defendant would have received a more favorable result in a separate trial. (*People v. Avila, supra*, 38 Cal.4th at p. 575; *People v. Coffman* (2004) 34 Cal.4th 1, 41.) In the context of properly joined offenses, a party seeking severance must make a stronger showing of potential prejudice than would be necessary to exclude other-crimes evidence in a severed trial. (*Soper,* at p. 774; *Alcala, supra*, 43 Cal.4th at p. 1222, fn. 11; *People v. Arias, supra*, 13 Cal.4th at p. 127.)

The trial court did not abuse its discretion when it denied Vargas's severance motion. Vargas does not contest that the charges were properly joined at the outset, only that the trial court should have exercised its discretion to sever the jointly charged offenses on account of potential prejudice. This is no doubt because all of the counts alleged "assaultive" crimes against the person and involved common elements, and thus joinder was permissible in the first instance under the threshold requirements for joinder under Penal Code section 954. (See *People v. Sapp* (2003) 31 Cal.4th 240, 257; *People v. Gutierrez* (2002) 28 Cal.4th 1083, 1120.) Vargas's claim of reversible error fails because he cannot show the benefits of the properly joined charges were outweighed by potential prejudice. (*People v. Myles* (2012) 53 Cal.4th 1181, 1201; quoting *People v. Bean, supra,* 46 Cal.3d at p. 938.)

Contrary to Vargas's argument, the evidence surrounding the crimes committed against Jesse and Matthew was cross-admissible with the remaining charges. This case represented a series of armed robberies committed over two days involving the same three individuals, Vargas, Miller and Eloy Gonzalez, all of whom were members of the same criminal street gang and committed the crimes in furtherance of their gang.

Vargas argues that the one critical issue in dispute at trial was the identities of the robbers and murderer, and the common features of the crimes were not distinct enough to support an inference of identity. (AOB 144-145.) He names the only common features of the robberies as the use of a firearm, the perpetrators were male, and the crimes were committed in the same geographical and temporal area. (AOB 144.) He also cites numerous cases addressing the cross admissibility of evidence under Evidence Code section 1101, subdivision (b). (AOB 140-147.) But Vargas fails to include the abundance of evidence supporting the inference that he committed each of the robberies. While the commission of an armed robbery with a firearm may not be original in itself, the surrounding circumstances of the robberies show Vargas committed each one with the assistance of his cohorts Miller and Eloy Gonzalez.

"For identity to be established, the offenses must share common features that are so distinctive as to support an inference that the same person committed them." (*People v. Scott* (2011) 52 Cal.4th 452, 472-473; *People v. Foster* (2010) 50 Cal.4th 1301, 1328; *People v. Ewoldt* (1994) 7 Cal.4th 380, 403.) "The inference of identity need not depend on one or more unique or nearly unique common features; features of substantial but lesser distinctiveness may yield a distinctive combination when considered together." (*People v. Scott, supra*, 52 Cal.4th at p. 473; *People v. Lynch* (2010) 50 Cal.4th 693, 736.)

Baek identified Vargas and Miller as his assailants. (4 RT 1111-1115, 1137; 6 RT 1612; 7 RT 1735-1736.) Shortly after Baek and Hong were robbed and a few miles away, Vargas, Miller and Eloy Gonzalez were at Worldnet Pagers using Baek's stolen credit cards and trying to sell their stolen property. (4 RT 1107-1109, 1212-1214, 1218-1222, 1225, 1227-1228, 1232, 1239, 1246-1248; 7 RT 1737, 1740; 9 RT 2209-2210.)

Similarly, Hill identified Vargas and Miller as two of the three individuals who robbed him. (4 RT 1266-1267, 1272-1273; 5 RT 1368.) Wilson identified Miller and Eloy Gonzalez as two of the three robbers. (4 RT 1318-1319; 5 RT 1367-1368.) Eloy Gonzalez's presence at the scene was further confirmed by his fingerprints that were located on Hill's stereo cassette that had been removed and placed on the seat of his truck. (4 RT 1308; 5 RT 1386.)

Vargas's identification as one of the individuals that robbed Cruz was supported by Amor Gonzales's testimony that she and Eloy Gonzalez remained at the car while Vargas and Miller crossed the street and then returned with a wallet. (7 RT 1795-1796.) Cruz's stolen wallet was later recovered in the car they were passengers in. (5 RT 1396, 1403; 6 RT 1593-1594, 1607; 7 RT 1795-1796; 8 RT 2078.)

Finally, Amor Gonzales testified that Vargas, Miller, and Eloy Gonzalez saw Jesse and Matthew walking on the other side of the street and made a derogatory comment as they crossed the street in their direction. (7 RT 1798-1799, 1801; 9 RT 2191, 2208.) Following two gunshots and a scream, Miller and Eloy Gonzalez returned to the car and were upset with Vargas. (7 RT 1799, 1802-1803, 1807-1808, 1906-1907; 8 RT 1942-1943, 1946, 1949-1951.) They located Vargas where Jesse's wallet was later recovered. (6 RT 1550-1552, 1556, 1558-1559; 7 RT 1803; 8 RT 1848, 2009, 2069.) Vargas said he shot Jesse because he was "getting up." (8 RT 1951-1952, 2036-2038.) Vargas was later found in possession of the gun that killed Jesse. (5 RT 1469-1470, 1521-1522; 6 RT 1655-1660, 1676, 1686.) Eloy Gonzalez had Matthew's stolen bracelet in his pocket. (6 RT 1591; 7 RT 1774; 8 RT 2073.)

In addition to evidence linking Vargas, Miller and Eloy Gonzalez to each robbery, there were several other similarities to take into account. Each one involved Vargas approaching the victim, pulling a black handgun

gun on them, and demanding their money. (4 RT 1101, 1103-1104, 1259-1260, 1268, 1312-1314; 5 RT 1393-1395, 1415, 1481-1482, 1488; 9 RT 2236.) In addition, two of the robberies took place on March 30, 1999, in Santa Ana. (4 RT 1093, 1095, 1254.) The remaining crimes took place on April 1, 1999, at the Park Place apartment complex in Tustin within a matter of minutes. (5 RT 1388-1389, 1472-1473.) Furthermore, there was substantial evidence that Vargas, Miller and Eloy Gonzalez were all members of the Southside criminal street gang and committed the crimes in furtherance of their gang. (See Arg. II.)

Considered in the aggregate, there was substantial evidence pertaining to each separate robbery and the murder implicating Vargas and more specifically, identifying him as a perpetrator. Furthermore, the interconnectivity of the crimes, particularly in light of the fact they involved the same three individuals, rendered the evidence cross-admissible in separate trials. (See *People v. Vines* (2011) 51 Cal.4th 830, 854-858 [common features of armed robberies sufficed to demonstrate the defendant's identity as a perpetrator rendering evidence cross-admissible in separate trials].)

Also, the gang evidence was cross admissible as to all counts because it was relevant to prove the substantive charges of street terrorism (counts 7 & 12) and the gang enhancements on the remaining charges. Enhancements, by definition, are inherently connected to the underlying offense. (*People v. Hernandez* (2004) 33 Cal.4th 1040, 1048–1049.) Such cross-admissibility dispels any inference of prejudice from joinder. (*People v. Marshall* (1997) 15 Cal.4th 1, 28.)

Because evidence of the charged offenses would have been cross-admissible in separate trials, then "'any inference of prejudice is dispelled.'" (*People v. Mayfield* (1997) 14 Cal.4th 668, 721; see also *People v. Gray* (2005) 37 Cal.4th 168, 222; *People v. Carter, supra*, 36

Cal.4th at p. 1154.) "For that reason alone, no abuse of discretion would have occurred in denying severance" (*People v. Maury* (2003) 30 Cal.4th 342, 393). And where that reason alone suffices, there is no need to analyze additional factors. (*People v. Bradford, supra*, 15 Cal.4th at p. 1317; see also *People v. Gray, supra*, 37 Cal.4th at p. 222 ["Having concluded evidence of the crimes was cross-admissible, we need not address defendant's other contentions concerning the trial court's denial of his severance motion for he could not have been prejudiced by the court's denial."].)

Moreover, even if the evidence was not cross-admissible, the four-part test is stated in the conjunctive, and pursuant to Penal Code section 954.1, any lack of cross-admissibility is not, by itself, sufficient to show prejudice and bar joinder. (Pen. Code, § 954.1; *People v. Stitely* (2005) 35 Cal.4th 514, 533 ["[A]ny lack of cross-admissibility is not, by itself, sufficient to show prejudice and bar joinder."]; *People v. Manriquez, supra*, 37 Cal.4th at p. 573.) Indeed, "[c]ross-admissibility suffices to negate prejudice, but it is not essential for that purpose." (*People v. Carter, supra*, 36 Cal.4th at p. 1154; see also *People v. Mendoza, supra*, 24 Cal.4th at p. 161 ["'Although cross-admissibility ordinarily dispels any inference of prejudice [citation], the absence of cross-admissibility does not by itself demonstrate prejudice.' [Citation.]"].)

> [T]o establish prejudice defendant must show more than the absence of cross-admissibility of evidence. He must show also, for example, that evidence of guilt was significantly weaker as to one group of offenses, or that one group of offenses was significantly more inflammatory than the other.

(*People v. Mayfield, supra*, 14 Cal.4th at p. 721.)

Vargas also argues severance was necessary because the gang evidence and murder charges were particularly inflammatory. (AOB 147-150.) As stated above, the gang evidence was admissible to prove the

substantive gang charge of street terrorism, and was cross-admissible as to both groups of offenses to support the gang allegation pursuant to Penal Code section 186.22, subdivision (b), that the offenses were committed – as the jury subsequently found – for the benefit of a street gang. Therefore, Vargas has failed to demonstrate how severance had any bearing on the alleged inflammatory nature of the gang evidence because it was not relevant to a distinct offense, but applied to all charges.

While the murder of Jesse was more inflammatory than the other charged offenses because it involved shooting someone in the back of the head and was the only alleged murder, all of the underlying robberies involved the same general conduct of threatening the victim with a gun and demanding their property. In particular, in the Cruz, Matthew and Jesse robberies, the robber approached their victim from behind with a gun. In this respect, all of the underlying charges were similarly egregious. (*People v. Elliott* (2012) 53 Cal.4th 535, 553.)

Vargas also claims severance was proper because the evidence supporting some counts was stronger than that of others. (AOB 150-151.) Specifically, he claims to have been convicted of the Cruz robbery, street terrorism, and the personal firearm use enhancements based solely on evidence relating to other counts such as the Baek, Kim, Wilson and Hill robberies. (AOB 151.) As shown in Arguments II through IV, *supra*, each charged offense was supported by substantial evidence and was strong, and, this was not "a situation where a weak case was joined with a strong one in order to produce a spillover effect that unfairly strengthened or bootstrapped the weak case." (*People v. Gutierrez, supra*, 28 Cal.4th at p. 1121.) "Even if the evidence in one case might be considered stronger than the other, "'[a] mere imbalance in the evidence ... will not indicate a risk of prejudicial 'spillover effect,' militating against the benefits of joinder and

warranting severance of properly joined charges.'" (*People v. Thomas* (2012) 53 Cal.4th 771, 799, quoting *Soper, supra*, 45 Cal.4th at p. 781.)

Vargas also argues severance was favorable because the killing and robbery of Jesse were capital charges. (AOB 151-152.) This Court considers "'whether one of the charges is a capital offense, or the joinder of the charges converts the matter into a capital case.'" (*People v. Thomas, supra,* 53 Cal.4th at p. 799, quoting *People v. Mendoza, supra,* 24 Cal.4th at p. 161.) As this Court explained in *Thomas*:

> [A]lthough joinder did not convert the matter into a capital case. . . . Our concern in such situations is whether joinder 'would tend to produce a conviction when one might not be obtainable on the evidence at separate trials. Clearly, joinder should never be a vehicle for bolstering either one or two weak cases against one defendant, particularly where conviction in both will give rise to a possible death sentence.'

(*Thomas, supra*, at pp. 799-800, quoting *Williams v. Superior Court* (1984) 36 Cal.3d 441, 454.)

Here, joinder did not elevate Vargas's murder charge to a capital offense. Also, the prosecution did not need evidence of other robberies to prove Jesse was killed in the commission of a robbery because Vargas took his wallet and Matthew was robbed at the same time. Moreover, since the evidence supporting Jesse's murder and all of the remaining charges was strong, there was no risk that joinder of the charges resulted in an otherwise unobtainable conviction. Accordingly, Vargas has not demonstrated prejudice.

In sum, Vargas has failed to "demonstrate that the denial of severance involved the abuse of discretion or caused gross unfairness" at his trial. (*People v. Stitely, supra*, 35 Cal.4th at p. 533.) There was no abuse of discretion, denial of due process, or other error in the court's ruling denying severance.

Even assuming there was error in denying the severance motion, it was clearly harmless and it is not reasonably probable it affected the outcome as the evidence of Vargas's guilt of both sets of offenses was overwhelming.

> Even if we were to assume for the sake of discussion that the trial court erred in denying defendant's motion to sever, the evidence linking defendant to each homicide was strong, and none was potentially inflammatory vis-a-vis the other; accordingly, any error would have been harmless, because it is not reasonably probable that defendant would have received a more favorable result as to any count even had he been tried separately as to each one.

(*People v. Manriquez, supra*, 37 Cal.4th at p. 576.)

There is overwhelming evidence supporting each of Vargas's convictions. He was repeatedly identified as the individual who robbed Baek and Hong. (4 RT 1111-1115, 1177-1178; 7 RT 1735-1736; 9 RT 2210.) He was also present when Eloy Gonzalez and Miller used the stolen bank cards to make purchases at Worldnet pagers and tried to sell the stolen pager and cellular phone. (4 RT 1107-1109, 1120, 1122, 1213-1214, 1218, 1225, 1227-1228, 1232, 1239, 1246-1248; 7 RT 1737, 1740; 9 RT 2209-2210.) Vargas was identified as the person that robbed Hill and attempted to rob Wilson later that evening. (4 RT 1259-1260, 1266-1268, 1272-1273, 1312; 5 RT 1368.) Miller was also identified as one of the robbers and Eloy Gonzalez's fingerprints were located on Hill's radio. (4 RT 1266, 1272, 1308, 1318-1319; 5 RT 1367-1368, 1386.)

Espinoza and Amor Gonzales testified that they were across the street from the Park Place apartment complex with Vargas, Miller and Eloy Gonzalez at the time of the Cruz robbery. (7 RT 1790-1792; 8 RT 1929, 1935-1937.) Amor Gonzales said Vargas and Miller crossed the street and returned a few minutes later with a wallet. (7 RT 1795-1796; 8 RT 2078.) Meanwhile, Cruz was robbed at the apartment complex at gunpoint and his

wallet was stolen. (5 RT 1389-1390, 1393-1396, 1403, 1406, 1415.) Cruz's wallet was later recovered from the car Espinoza was driving and Vargas was a passenger. (5 RT 1403; 6 RT 1593-1594, 1607.)

Amor Gonzales also testified that Vargas, Miller and Eloy Gonzalez saw Matthew and Jesse walking on the other side of Main Street, and exclaimed some sort of put down as they crossed the street in their direction. (7 RT 1798-1799, 1801; 9 RT 2191, 2208.) Matthew testified he and Jesse were approached and robbed by three individuals. (5 RT 1481-1483, 1488; 8 RT 2072.) The assailants stole Matthew's bracelet and pager, and shot Jesse twice in the back of the head. (5 RT 1482-1485; 6 RT 1571.) Eloy Gonzalez was later arrested with Matthew's bracelet in his pocket. (7 RT 1774; 8 RT 2073.)

Immediately after the shooting, Eloy Gonzalez and Miller ran back to the car, "pumped up" and eager to leave. (7 RT 1802-1803; 8 RT 1942-1943, 1946.) Miller was upset and said he had seen Jesse shot in the head. (8 RT 1946.) Espinoza drove around and finally located Vargas in the same place where Jesse's stolen wallet was later found, a few blocks from the murder. (6 RT 1550-1552, 1556-1559; 7 RT 1803; 8 RT 1848, 2009, 2069.) Miller and Eloy Gonzalez were extremely upset with Vargas when he got into the car, and were yelling at him and kicking the backs of the car seats. (7 RT 1807-1808; 8 RT 1949-1951.) Espinoza testified that Vargas told them he shot Jesse because he was "getting up" or "coming up," and that Vargas said that Jesse "was like going to fight back" or "he was going to - - he came back at him." (8 RT 1951-1952, 2036-2038.) Vargas's palm print was found at the scene of the murder and he was in possession of the gun used to kill Jesse. (5 RT 1469-1470, 1521-1522, 1524, 1529, 1533; 6 RT 1613, 1655-1660, 1676, 1686; 7 RT 1914, 1916-1917.)

In addition to the overwhelming evidence supporting each robbery, the murder, and being a felon in possession of a gun, there was also

substantial evidence Vargas was an active participant in the Southside criminal street gang. (See Arg. II.) Severance would not have inured to Vargas's benefit or had any impact on the jury's verdicts because of the substantial evidence supporting each conviction. Therefore, any possible error was harmless.

VI. THE TRIAL COURT HAD NO SUA SPONTE DUTY TO INSTRUCT THE JURY ON THE LESSER INCLUDED OFFENSE OF VOLUNTARY MANSLAUGHTER, SUDDEN QUARREL OR HEAT OF PASSION

Vargas contends the trial court erred by not instructing the jury sua sponte on the lesser included offense of voluntary manslaughter based upon a sudden quarrel or heat of passion. (AOB 154-162.) He reasons the testimony of Santiago Martinez describing a "street fight" warranted such an instruction. (AOB 157-159.) Vargas is incorrect. Martinez's testimony was insufficient to support a theory of voluntary manslaughter because there was no evidence of provocation. Moreover, any possible error was harmless.

The trial court instructed the jury on murder, first degree premeditated murder, first degree felony murder, second degree murder, and robbery-murder special circumstance. (CALJIC Nos. 8.10, 8.20, 8.21, 8.31, 8.81.17.) During jury instruction discussion, defense counsel agreed with the trial court that there were no theories for a manslaughter instruction. (9 RT 2397.) Vargas now argues the trial court should have also instructed on voluntary manslaughter heat of passion.

> We have held that a defendant has a constitutional right to have the jury determine every material issue presented by the evidence and that, whenever there is substantial evidence raising a question as to whether all of the elements of the charged offense are present, the failure to instruct on a lesser included offense, even in the absence of a request, constitutes a denial of that right. [Citation.] """Substantial evidence is evidence

> sufficient to 'deserve consideration by the jury,' that is, evidence that a reasonable jury could find persuasive.'"'"

(*People v. Benavides* (2005) 35 Cal.4th 69, 102, quoting *People v. Heard* (2003) 31 Cal.4th 946, 981.) On appeal, this Court independently reviews the question of whether the trial court failed to instruct on a lesser included offense. (*People v. Cole* (2004) 33 Cal.4th 1158, 1215.)

> Voluntary manslaughter is a lesser included offense of murder. [Citation.] One form of the offense is defined as the unlawful killing of a human being without malice aforethought 'upon a sudden quarrel or heat of passion.' (§ 192, subd. (a).)

(*People v. Cole, supra*, 33 Cal.4th at p. 1215.) "A heat of passion theory of manslaughter has both an objective and a subjective component." (*People v. Moye* (2009) 47 Cal.4th 537, 549.) "The defendant must actually, subjectively, kill under the heat of passion. [Citation.] But the circumstances giving rise to the heat of passion are also viewed objectively." (*Cole, supra*, 33 Cal.4th at p. 1215.)

"To satisfy the objective or reasonable person element of this form of voluntary manslaughter, the accused's heat of passion must be due to sufficient provocation." (*People v. Moye, supra*, 47 Cal.4th at p. 549, internal citations omitted.)

> The provocation which incites the defendant to homicidal conduct in the heat of passion must be caused by the victim [citation], or be conduct reasonably believed by the defendant to have been engaged in by the victim. [Citations.] The provocative conduct by the victim may be physical or verbal, but the conduct must be sufficiently provocative that it would cause an ordinary person of average disposition to act rashly or without due deliberation and reflection.

(*Id.* at pp. 549-550.) "To satisfy the subjective element of this form of voluntary manslaughter, the accused must be shown to have killed while under 'the actual influence of a strong passion' induced by such provocation." (*Id.* at p. 550, quoting *People v. Wickersham* (1982) 32

Cal.3d 307, 327.) "Accordingly, for voluntary manslaughter, 'provocation and heat of passion must be affirmatively demonstrated.'" (*People v. Gutierrez, supra,* 28 Cal.4th at p. 1143, italics in original.)

Santiago Martinez was driving on Main Street with his wife and child looking for parking when he noticed four people "struggling" on one side of the street and a fifth person on the other side of the street. (5 RT 1436-1439, 1450.) All four people in the struggle were standing. (5 RT 1441.) Martinez drove past the "struggle" and saw the fifth person crossing the street in his rear-view mirror. (5 RT 1441-1442.) Martinez drove to the 7-Eleven on the corner of Main Street and Williams Street and called the police. (5 RT 1442.) Martinez returned to the scene and said Jesse looked like one of the people involved in the "struggle." (5 RT 1444-1445.) He said it appeared that one person was struggling with a second person, and a third person was struggling with a fourth person. (5 RT 1444.) Martinez explained that it was dark and there were cars parked between him and the individuals. (5 RT 1444, 1452.) He could not see their faces, where each person was positioned, or provide any further description of what was happening besides "struggling." (5 RT 1444, 1543.)

Officer Celano interviewed Martinez after the shooting. (9 RT 2291.) Martinez described the fifth person crossing the street. (9 RT 2291, 2295-2296.) On the south side of Main Street he saw four individuals, including Jesse and Matthew, and a Hispanic male with a shaved head that was about five feet five inches pulling Jesse by the back of his neck westbound about 10 feet. (9 RT 2291-2292.) Martinez said the heights were approximations and he was not paying a great amount of detail to the incident because he was concerned for his family and wanted to get out of there. (9 RT 2294, 2298-2299.)

Vargas gleans from Martinez's testimony describing a "struggle" that he and Jesse were "probably" engaged in a "street fight" and during which,

"it is entirely possible," Vargas was provoked and killed Jesse in the heat of passion. (AOB 158-159.) Vargas's interpretation of the evidence is pure conjecture and speculative at best, and does not support an instruction on voluntary manslaughter because there is no evidence of provocation. (See *People v. Wilson* (1992) 3 Cal.4th 926, 941 ["Speculation is an insufficient basis upon which to require the giving of an instruction on a lesser offense."].)

A trial court is only required to instruct on lesser included offenses when there is sufficient evidence from which a reasonable jury could find persuasive to support the instruction. (*People v. Cole, supra*, 33 Cal.4th at p. 1215.) Martinez's brief observation of a struggle alone is not sufficient evidence from which a jury could find either the objective or subjective elements of heat of passion. First, there was absolutely no evidence of the circumstances leading up to the struggle Martinez perceived establishing conduct on behalf of Jesse that met the objective, reasonable person requirement. Nor was there any evidence that Vargas was in fact provoked by Jesse. The existence of a "struggle" without further details is not sufficient to establish a theory of heat of passion.

Vargas also argues the omitted instruction was prejudicial because had it been provided, he would not have been convicted of felony murder in light of the "struggle." And, he would have likely been convicted of voluntary manslaughter because the jury would not have been faced with the choice of murder or letting Vargas go free. (AOB 161.) These arguments lack merit.

None of Vargas's constitutional rights were implicated by the trial court's failure to instruct on voluntary manslaughter. (See *Beck v. Alabama* (1980) 447 U.S. 625, 637 [100 S.Ct. 2382, 65 L Ed.2d 392].) "Beck was not violated because no evidence warranted a voluntary manslaughter instruction. (See *Hopper v. Evans* (1982) 456 U.S. 605, 611 [72 L. Ed. 2d

367, 102 S. Ct. 2049].)" (*People v. Verdugo* (2010) 50 Cal.4th 263, 294-295.) In addition,

> the jury was instructed on the lesser included offense of second degree murder, which satisfied the due process requirement that an intermediate choice be given to the jury when supported by the evidence. (See *Schad v. Arizona* (1991) 501 U.S. 624, 646–648 [115 L.Ed.2d 555, 111 S.Ct. 2491].)

(*Id.* at p. 295.)

Moreover, it is not possible the jury would have returned a more favorable verdict had it been instructed on voluntary manslaughter heat of passion. "'Error in failing to instruct the jury on a lesser included offense is harmless when the jury necessarily decides the factual questions posed by the omitted instructions adversely to defendant under other properly given instructions.'" (*People v. Chatman* (2006) 38 Cal.4th 344, 392, quoting *People v. Lewis* (2001) 25 Cal.4th 610, 646; *People v. Elliot* (2005) 37 Cal.4th 453, 475.)

"Voluntary manslaughter is 'the unlawful killing of a human being without malice' 'upon a sudden quarrel or heat of passion.'" (§ 192, subd. (a); *People v. Thomas* (2012) 53 Cal.4th 771, 813.) The jury found Vargas guilty of first degree murder and a robbery special circumstance. If the jury found Vargas guilty of premeditated first degree murder, it necessarily concluded that Vargas's intent to kill was ". . . not under a sudden heat of passion or other condition precluding the idea of deliberation. . . ." (CALJIC No. 8.20; 2 CT 685.) Likewise, assuming the jury based its first degree murder verdict on felony murder robbery, this, along with the true finding of the robbery special circumstance, demonstrates the jury determined that Vargas killed Jesse "to carry out or advance the commission of the crime of robbery or to facilitate the escape therefrom or to avoid detection." (CALJIC No. 8.81.17; 2 CT 693.)

In *People v. Horning* (2004) 34 Cal.4th 871, for instance, the defendant was convicted of first degree felony murder and argued on appeal that the trial court erred in failing to instruct the jury on second degree murder as a lesser included offense. (*Id.* at pp. 904-905.) This Court held that any such error was harmless because the jury was instructed on the robbery-murder and burglary-murder special circumstances and found both special circumstances to be true. (*Id.* at p. 906.) In so doing, the jury "found that defendant killed the victim in the perpetration of robbery and burglary, which means it necessarily found the killing was first degree felony murder." (*Ibid.*)

Likewise, here, the jury's verdicts demonstrated that it necessarily found Vargas killed Jesse to advance the commission of the robbery, and possibly with premeditation. (See e.g., *People v. Koontz, supra*, 27 Cal.4th at pp. 1086-1087 [Failure to instruct on unreasonable self-defense harmless error because robbery special circumstance "signified the jury's unanimous conclusion that the killing occurred during the commission of a robbery and that defendant committed the murder in order to carry out or advance the commission of the crime of robbery."].) In doing so, the jury would have rejected Vargas's claim that he killed Jesse in the heat of passion because the jury found the killing was committed to further the robbery. Accordingly, it is not possible that the jury would have found Vargas killed Jesse out of provocation had it been instructed on heat of passion.

VII. CALJIC NO. 2.51 IS NOT UNCONSTITUTIONAL AND DID NOT PERMIT THE JURY TO FIND GUILT BASED ON MOTIVE ALONE

Vargas claims the trial court erred by instructing the jury with CALJIC No. 2.51. He argues this instruction on motive permitted the jury to infer his guilt from evidence of motive alone in violation of his rights to due process, a fair jury trial, and a reliable verdict under the United States

and California constitutions. (AOB 163-167.) This claim is forfeited and meritless, and even assuming error, it was harmless.

Without objection, the trial court instructed the jury on motive with CALJIC No. 2.51, as follows:

> Motive is not an element of the crime charged and need not be shown. However, you may consider motive or lack of motive as a circumstance in this case. Presence of motive may tend to establish the defendant is guilty. Absence of motive may tend to show the defendant is not guilty.

(11 RT 2773; 2 CT 738.)

Vargas's claim is forfeited because he did not object to CALJIC No. 2.51, nor does it appear he requested a modification of this standard instruction. (See *People v. Hudson* (2006) 38 Cal.4th 1002, 1011-1012; *People v. Guiua* (1998) 18 Cal.4th 558, 570; *People v. Andrews* (1989) 49 Cal.3d 200, 218.) Even assuming this claim is not forfeited, it must be rejected because no instructional error occurred here. This Court has repeatedly addressed and rejected the argument that CALJIC No. 2.51 somehow shifts the burden of proof from the prosecution to the defense or somehow lessens the prosecution's burden of proof. (*People v. Livingston* (2012) 53 Cal.4th 1145, 1168; *People v. Tate* (2010) 49 Cal.4th 635, 699; *People v. Friend* (2009) 47 Cal.4th 1, 53; *People v. Cleveland* (2004) 32 Cal.4th 704, 750; *People v. Snow* (2003) 30 Cal.4th 43.) As this Court stated in *Snow*:

> If the challenged instruction somehow suggested that motive alone was sufficient to establish guilt, defendant's point might have merit. But in fact the instruction tells the jury that motive is not an element of the crime charged (murder) and need not be shown, which leaves little conceptual room for the idea that motive could establish all the elements of murder.

(*People v. Snow, supra*, 30 Cal.4th at pp. 97-98.)

Moreover, the correctness of a jury instruction is determined from the entire charge of the court, not from the consideration of parts of an instruction or from a single instruction. (*People v. Wilson* (1992) 3 Cal.4th 926, 943.) Here, then, the relevant language of the motive instruction must be considered in conjunction with the "reasonable doubt" standard set forth in CALJIC No. 2.90. (11 RT 2787; 2 CT 681.) A "reasonable juror in the present case would understand that the language of CALJIC No. 2.51 that motive may tend to establish guilt while lack of motive may tend to establish innocence, cannot be considered a standard of proof instruction apart from the reasonable doubt standard set forth clearly in CALJIC No. 2.90." (*People v. Estep* (1996) 42 Cal.App.4th 733, 739.) Accordingly, CALJIC No. 2.51, as given in the present case, did not lighten the prosecution's burden of proof or shift the burden to appellant to prove his innocence. (*Id.* at pp. 738-739; *People v. Wade* (1995) 39 Cal.App.4th 1487, 1496-1497.) Finally, given the overwhelming evidence of Vargas's guilt and the instructions above, and even assuming any error, it was harmless as it is not reasonably probable Vargas would have obtained a more favorable outcome had the jury not been instructed with CALJIC No. 2.51. (See *People v. Breverman* (1998) 19 Cal.4th 142, 177-178.)

VIII. THE JURY WAS NOT REQUIRED TO AGREE UNANIMOUSLY ON A SPECIFIC THEORY OF FIRST DEGREE MURDER AND VARGAS'S CONTRARY CONTENTION IS FORFEITED

Vargas contends that the trial court erred in failing to require the jurors to unanimously agree on a theory of first degree murder, either felony murder or murder with premeditation and deliberation. (AOB 168-180.) He contends that the error mandates reversal of the judgment because it denied him his constitutional rights to have all elements of the charged crime proved beyond a reasonable doubt, due process, and to a fair and reliable determination that he committed a capital offense. (AOB 168.)

Vargas's claim is without merit. First, this claim of instructional error, including its constitutional components, has been forfeited because Vargas failed to assert the claim in the trial court. (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1189-1192.) Moreover, as Vargas acknowledges, this Court has repeatedly rejected contentions identical to his, and has frequently held that jurors need not unanimously agree on a theory of first degree murder as either felony murder or murder with premeditation and deliberation. (*People v. Tate, supra*, 49 Cal.4th at p. 697; *People v. Friend, supra,* 47 Cal.4th at p. 54; *People v. Benavides* (2005) 35 Cal.4th 69, 100-101; *People v. Lewis* (2001) 25 Cal.4th 610, 654; *People v. Riel* (2000) 22 Cal.4th 1153, 1200.) This rule of law passes Federal Constitutional muster. (*Schad v. Arizona* (1991) 501 U.S. 624 [111 S.Ct. 2491, 115 L.Ed.2d 555].)

Vargas recognizes that in *Schad v. Arizona, supra*, 501 U.S. 624, the United States Supreme Court held that the Federal Constitution does not entitle a defendant to a unanimity instruction on different theories of first degree murder. (AOB 172; *Schad v. Arizona, supra*, at pp. 630-645 (plur. opn. of Souter, J.); *id.* at pp. 648-652 (conc. opn. of Scalia, J.).)

Schad, contrary to Vargas's analysis, also supports a rejection of his contention that his due process rights were violated when the trial court failed to require unanimity on each element of the murder charge. (AOB 172-173.) In *Schad*, the High Court held that federal due process did not require the jury to agree on one of two alternative statutory theories of first degree murder, i.e., premeditated murder and felony murder. Although the majority agreed that due process imposes some limits on the degree to which different states of mind may be considered merely alternative means of committing a single offense, the Court did not agree on the application or extent of such limits. (*Schad v. Arizona, supra*, 501 U.S. at pp. 632, 651, 656.)

In writing for the plurality in *Schad*, Justice Souter explained there exists no single test for determining when two means are so disparate as to exemplify two inherently separate offenses. (*Schad v. Arizona, supra*, 501 U.S. at pp. 633-637, 643.) Along with history and widespread practice, the relevant mental states must be considered to determine whether they demonstrate comparable levels of culpability. In addressing the culpability level of premeditated murder and felony murder, Justice Souter concluded:

> Whether or not everyone would agree that the mental state that precipitates death in the course of robbery is the moral equivalent of premeditation, it is clear that such equivalence could reasonably be found, which is enough to rule out the argument that this moral disparity bars treating them as alternative means to satisfy the mental element of a single offense.

(*Schad v. Arizona, supra*, 501 U.S. at p. 644.) Thus, the plurality held that unanimous agreement as to the underlying theory of first degree murder was unwarranted. (*Id.* at p. 645.) Accordingly, unanimous agreement as to the underlying theory of murder in this case was not required. (See *People v. Morgan* (2007) 42 Cal.4th 593, 617; *People v. Nakahara* (2003) 30 Cal.4th 705, 712; *People v. Kipp* (2001) 26 Cal.4th 1100, 1132.)

Vargas relies on language in *People v. Dillon* (1983) 34 Cal.3d 441 and *People v. Carpenter* (1997) 15 Cal.4th 312, and argues this Court has recognized felony murder and premeditated murder have different statutory elements. (AOB 172-176.) However, this Court has "clarified any confusion, holding that although the two forms of murder have different elements, only a single statutory offense of murder exists. Felony murder and premeditated murder are not distinct crimes, and need not be separately pleaded." (*People v. Nakahara, supra*, 30 Cal.4th at p. 712.)

This Court has consistently held that regardless of the theories of guilt on first degree murder or their numbers, unanimity as to the theory of murder is not required. This Court has applied the rule where the theories

of guilt were premised on malice murder and felony murder (see, e.g., *People v. McPeters* (1992) 2 Cal.4th 1148, 1185), multiple theories of felony murder (see, e.g., *People v. Lewis, supra*, 25 Cal.4th at p. 654), malice murder and multiple theories of felony murder (see, e.g., *People v. Seaton* (2001) 26 Cal.4th 598, 671), and aiding and abetting and direct culpability (see, e.g., *People v. Jenkins* (2000) 22 Cal.4th 900, 1024-1025).

Because this Court has repeatedly considered and rejected claims identical to Vargas's, and because Vargas offers no persuasive reason for this Court to reconsider its prior decisions, his argument fails.

IX. THE TRIAL COURT PROPERLY CONSIDERED A MODIFICATION OF VARGAS'S DEATH SENTENCE PURSUANT TO PENAL CODE SECTION 190.4, SUBDIVISION (E)

Vargas contends that the trial court's denial of the automatic motion to modify the death judgment under section 190.4, subdivision (e) should be vacated because the judge did not properly reweigh the evidence and failed to state its reasons for denying the motion in the clerk's minutes. (AOB 181-191.) Vargas's claims are without merit. The trial court properly considered a modification of Vargas's death sentence in accordance with Penal Code section 190.4, subdivision (e), and its reasons for denying the motion were memorialized in the clerk's transcript.

Vargas submitted a written motion to modify his death sentence to life without the possibility of parole under Penal Code section 190.4, subdivision (e), on the grounds that the aggravating factors were not so substantial in comparison to the mitigating factors to warrant a death sentence. (3 CT 951-957.) The People filed an opposition arguing death was warranted because the aggravating factors substantially outweighed the mitigating factors. (3 CT 1168-1171.)

At the hearing, defense counsel did not elaborate further on the motion, and submitted on the evidence before the court and status of the

applicable law. (14 RT 3430.) The People responded that the facts supported the verdict and recommendation of death, and submitted. (14 RT 3430.) The trial court discussed the evidence in aggravation and mitigation in detail (14 RT 3431-3441) before denying Vargas's motion to modify the verdict.

> Section 190.4, subdivision (e), requires that in ruling on an automatic application to modify a death verdict, 'the judge shall review the evidence, consider, take into account, and be guided by the aggravating and mitigating circumstances referred to in Section 190.3, and shall make a determination as to whether the jury's findings and verdicts that the aggravating circumstances outweigh the mitigating circumstances are contrary to law or the evidence presented. The judge shall state on the record the reasons for his findings.'

(*People v. Jackson* (2009) 45 Cal.4th 662, 695, quoting § 190.4, subd. (e).) "On appeal, we independently review the trial court's ruling after reviewing the record, but we do not determine the penalty de novo." (*People v. Steele* (2002) 27 Cal.4th 1230, 1267.)

Vargas reasons the trial court did not properly reweigh the evidence because it did not explain why the identified aggravating factors outweighed the mitigating factors. (AOB 187-188.) But the trial court's statements and conclusions in the record indicate otherwise.

First, the trial court's discussion with defense counsel and preliminary remarks show that it understood its obligation to reweigh the evidence of aggravating and mitigating factors and determine whether, in its independent judgment, the evidence supports a sentence of death rather than life imprisonment. (14 RT 3429-3431; see e.g., *People v. Smith* (2003) 30 Cal.4th 581, 640 [in this case, the court's preliminary remarks show that it understood this duty precisely.].)

Specifically, at the outset of the hearing, the trial court explained:

> In a ruling on a verdict modification application, this Court is required by section 190.4, subdivision (a) [sic] to make an

> independent determination whether an imposition of the death penalty is proper in light of the relevant evidence and applicable law. The court must independently determine whether the jury decision, in effect, is appropriate under all the circumstances and is adequately supported. That language came from [*People v.*] *Holt* [(1997)] 15 Cal.4th 619 at 702.
>
> This Court has reviewed the evidence presented and has considered, taken into account and will be guided by the aggravating and mitigating circumstances set out in Penal Code section 190.3.

(14 RT 3431.)

Furthermore, the trial court's comments, viewed in full context, showed that it understood its obligation to reweigh the evidence and executed its responsibilities accordingly.[17] The trial court addressed each

---

[17] The trial court's exact comments as to each factor is as follows:

> Factor (a), the circumstances of the crimes of which the defendant was convicted in the present proceedings and the existence of any special circumstance found to be true. The (a) factor includes all the crimes for which the defendant was convicted in the present proceeding. And *People versus Mayfield,* which was another multi-count case when you have homicide with nonhomicides, that's at 14 Cal.4th 668.
>
> The robbery/murder of Mr. Muro was senseless. Mr. Vargas apparently did not want Mr. Muro to ever to be able to identify him. The money had already been taken from Mr. Muro and Mr. Stukkie. The money was obviously, based on the evidence before this Court, going to be used to purchase more dope, beer, and pay for the motel room for a party that night.
>
> One shot could have accomplished Mr. Vargas's goal, but he had to make sure by firing a second shot. And immediately preceding the double robbery which included the murder, Mr. Vargas was personally involved in the robbery of Simon Cruz.
>
> On March 30th, just two days earlier, Mr. Vargas and his buddies were involved in the robberies of John Baek, Hong

(continued...)

(...continued)

Kim, Leavon Hill, and the attempted robbery of Cornelius Wilson. A gun was involved in all of these crimes. (14 RT 3431-3432.)

Victim/witness is in there, too, but the victims - - impact testimony kind of - - that's part of (a) but it doesn't sway me. (14 RT 3432.)

I've heard a lot of it and I'm not so sure it sways juries either, but - - so I was looking at the hard evidence related to the crime. (14 RT 3432.)

The (b) factor, the presence or absence of criminal activity other than for the crimes for which he was tried in the present proceedings. As far as I know, Mr. Vargas has never been involved in any other criminal activity which attempted force or the use of force. (14 RT 3434.)

(C) factor, the presence or absence of any prior felony convictions. He has none. (14 RT 3434.)

Whether or not the offense was committed while the defendant was under the influence of extreme mental or emotional disturbance. I don't think that applies either - - or that does not apply. (14 RT 3434.)

(E) factor, whether or not the victim was a participant in the defendant's homicidal conduct or consented. Of course that's a nonfactor here. (14 RT 3434.)

(F), whether or not the offense was committed under circumstances which the defendant reasonably believed to be a moral justification, extenuation for his conduct. That's not appropriate. (14 RT 3434-3435.)

(G), whether or not the defendant acted under extreme duress or under the substantial domination of another person. I find that he was not, although I know, [defense counsel], you would argue. (14 RT 3435.)

[Eloy Gonzalez was the leader] [o]f that pack, yes. But the facts as we hear, he was upset by the shooting. He or - - and/or

(continued...)

(...continued)

the others chided your client for the shooting. And it looks like they left Mr. Vargas to go home and they went on to party with the girls. So it don't look like Gonzalez was - - told your client to do anything. Your client did what he wanted to do. (14 RT 3435.)

(H) factor, whether or not at the time of the offense the capacity of the defendant to appreciate the criminality of the conduct or to conform his conduct to the requirements of law was impaired as a result of mental defect or disease, or the effects of intoxication.

There was no credible evidence that the defendant was under the influence of alcohol or narcotics at the time of the offenses. It is most likely that he went home after the killing and drank. That's my finding, and I know we had expert testimony in that regard. (14 RT 3436.)

There's just no evidence to allow this Court to find that he was impaired to that extent that (h) talks about. Okay? So that's what my findings are. (14 RT 3437.)

(I), the age of the defendant at the time of the crime. He was relatively young. No serious criminal background.

Those, you know, tend to be mitigating when you put in a combination with the lack of background. But he certainly wasn't deprived with the years he spent with his mother. His mother certainly was and is hardworking. His brothers and sisters - - sister are good citizens with responsible jobs.

So, yeah, his age I think is mitigating. The lack of a criminal background in conjunction with age is mitigating, but he had choices to make and he made them. His brother, brothers and sister had choices and made - - they made different choices. So I'm giving that some mitigating evidence. (14 RT 3437.)

It's not only age. It's mitigating. You can't consider it as aggravating. (14 RT 3438.)

(continued...)

(...continued)

I suppose you could, but I'm not. I suppose that's one that's neutral. (14 RT 3438.)

(J), whether or not the defendant was an accomplice to the offense and his participation in the commission of the offense was relatively minor.

I don't believe that's applicable. I know there were two other individuals involved in almost all of these crimes, but the shooting was your client's idea. (14 RT 3438.)

(K), any other circumstance which extends the gravity of the crime, even though it is not a legal excuse to the crime, and any sympathetic or other aspect of the defendant's character or record that the defendant offers as a basis for a sentence less than death, whether or not related to the offense for which he is on trial.

And Mr. Vargas was at risk to become involved in gang activity because of his age, his socioeconomic status when his family first settled in Santa Ana, he had been. Based on the information to the jury, accepted by the court, he is kind to children and his grandmother and other elderly persons who lived in and about the neighborhood.

What else is there that's a (k) factor? We have a history of marijuana use, methamphetamine use and alcohol use, which has some impact on a person's ability, you know, if it's prolonged or chronic, ability to think rationally had they not been subjected to those abuses. I can consider that also, I suppose. (14 RT 3438-3439.)

I believe that your client has expressed remorse for what he did to the Muro family, and I'll include that in (k). Because if he testified about it, I don't know that he could effectively rebut that. (14 RT 3440-3441.)

The Court determines that the aggravating circumstances are so substantial in comparison to mitigating factors, and further finds that the jury's findings and verdicts, that the aggravating

(continued...)

prospective mitigating and aggravating factor, and heard any input from the parties. In aggravation, the trial court considered the series of armed robberies Vargas committed, and the murder of Muro. (14 RT 3431-3432.) In particular, it found the murder "senseless." (14 RT 3431.) It was also particularly egregious in light of the fact Muro had already been robbed, the shooting was to conceal Vargas's identity, the money was going to be used to buy dope, beer, and rent a motel room, and could have been accomplished without firing a second shot. (14 RT 3431-3432.)

In mitigation, Vargas had not been involved in any other criminal activity and did not have any prior felony convictions. (14 RT 3434.) The trial court considered Vargas's age in conjunction with his lack of a criminal background to be neutral. (14 RT 3437-3438.) It also considered Vargas's risk to succumbing to gang activity, that he is kind to children and elderly persons, his history of drug abuse, and expression of remorse to the Muro family. (14 RT 3438-3440.)

However, the trial court's comments throughout its rulings indicate it determined that these mitigating factors were substantially outweighed by the aggravating factors. For instance, the trial court pointed out that Vargas was raised in a home with a hardworking mother and siblings that made choices culminating in their becoming good citizens with responsible jobs. (14 RT 3437.) Also, Vargas's decision to kill Muro was his idea, his own decision. (14 RT 3435, 3438.)

(...continued)

> circumstances outweighed the mitigating circumstances, are not contrary to the law or the evidence presented.
>
> The automatic motion to modify the jury verdict is denied. The Court's reasons for these findings will be - - or shall be entered on the clerk's minutes. (14 RT 3441.)

The trial court explained the aggravating circumstances "are so substantial in comparison to mitigating factors" to support the judgment of death. (14 RT 3441.) The trial court's strong appraisal of the aggravating evidence surrounding the circumstances of the crimes is fully supported by the record, and contrasts with the minimal nature of the mitigating evidence presented by Vargas. The Court properly and independently weighed the evidence in answering the pertinent question of whether the weight of the evidence supported the jury's verdict. (See *People v. Cunningham* (2001) 25 Cal.4th 926, 1039; *People v. Mickey* (1991) 52 Cal.3d 612, 604-705.) The trial court thus complied with the statute and explained "the reasons why it concluded the aggravating circumstances exceeded the mitigating circumstances." (See *Bonillas, supra*, at p. 801; *People v. Rodriguez* (1986) 42 Cal.3d 730, 794.)

Furthermore, the trial court's reasons were adequately set forth in the clerk's minutes. Vargas contends the clerk's minutes did not adequately explain the trial court's reasons for denying the motion, but merely reiterated the factors in aggravation and mitigation. (AOB 189.) He is wrong. The trial court's ruling and the details of its findings are stated nearly verbatim in the clerk's minutes. (3 CT 1268-1269.)

Vargas analogizes this case to the circumstances in *People v. Sheldon* (1989) 48 Cal.3d 935, and requests that his death sentence be vacated and remanded for a proper hearing. (AOB 190.) Vargas's reliance on *Sheldon* is misplaced.

In *Sheldon*, "the trial court merely denied defendant's application for modification without stating any reason for his findings or his ruling. ('The motion to reduce the penalty is denied.')" (*People v. Sheldon, supra*, 48 Cal.3d at p. 962.) The People conceded the error but argued it was harmless. (*People v. Sheldon, supra*, 48 Cal.3d at p. 962.) This Court concluded in *Sheldon* that under similar circumstances, in *People v.*

Heishman (1988) 45 Cal.3d 147, the error was found harmless, but such an analysis was not applicable when the presiding judge is still alive and available for a remand. (*People v. Sheldon, supra*, 48 Cal.3d at pp. 962-963.) Since the presiding trial judge was available, this Court opted to remand the matter in *Sheldon.* (*Id.* at p. 963.)

Unlike in *Sheldon,* here, the trial court thoroughly analyzed each of the prospective mitigating and aggravating factors and articulated its findings on the record. It further explained that the aggravating factors outweighed those in mitigation, and the jury's findings and verdicts were not contrary to the law or evidence presented. The trial court's findings are memorialized nearly verbatim in the clerk's minutes in accordance with section 190.4, subdivision (e). (3 CT 1268-1269.) There was no error.

X. VARGAS IS NOT ENTITLED TO ANY RELIEF BASED ON THE ALLEGED VIOLATION OF THE VIENNA CONVENTION

Vargas asserts that he is entitled to "review and reconsideration" of his claim that his rights to consular notification under the Vienna Convention were violated, but asks this Court to defer any findings until the claim is presented in a writ of habeas corpus. (AOB 192-204.) It is neither necessary nor appropriate to delay resolution of Vargas's consular notification claim pending his anticipated pursuit of habeas relief.[18] (See

---

[18] Respondent does not concede that any subsequent claim in a habeas petition based on violating Vargas's right to consular notification will necessarily be properly before this Court. (See *In re Martinez* (2009) 46 Cal.4th 945, 950, 958 [applying procedural bar on habeas to Vienna Convention Consular Notification claim]; *In re Waltreus* (1965) 62 Cal.2d 218, 225.) Vargas is not entitled to supplement a record based claim on direct appeal by raising the claim on habeas when the absence of record on appeal is attributable to his failure to make a record with what he knew, or reasonably should have known, at the time the issue could have been, or was, litigated during his trial. (See *In re Seaton* (2004) 34 Cal.4th 193, 199-200.)

e.g., *People v. Waidla* (2000) 22 Cal.4th 690, 703, fn. 1 [inappropriate to consolidate pending habeas petition with a direct appeal]; In re Carpenter (1995) 9 Cal.4th 634, 646 [appellate jurisdiction is limited to the four corners of the record on appeal].) Nor has Vargas identified legal authority entitling him to relief.

The Vienna Convention on Consular Relations provides that when a national of one country is detained by authorities in another, the authorities must notify the consulate of his country without delay if the detainee requests notification.[19] Without deciding whether the Vienna Convention creates judicially enforceable rights, the United States Supreme Court held that suppression of a defendant's statement is not an appropriate remedy for a violation of the convention. (*Sanchez-Llamas v. Oregon* (2006) 548 U.S. 331, 342-364 [126 S.Ct. 2669, 2677-2690, 165 L.Ed.2d 557].) This Court has assumed for purposes of reviewing claims asserting a denial of consular notification rights that a defendant has individually enforceable rights under article 36 of the Vienna Convention.[20] (*In re Martinez* (2009) 46 Cal.4th 945, 957, fn. 3; *People v. Cook* (2006) 39 Cal.4th 566, 600.) It is incumbent upon a defendant to demonstrate prejudice from the failure of authorities to notify a defendant of his right to consular notification. Where a defendant shows what assistance the consulate claims it would have provided, it is incumbent upon that defendant to show that he did not obtain

---

[19] California law also requires that arresting officers advise known foreign nationals of their right to communicate with officials from the consulate of their country. (Pen. Code, § 834c.)

[20] On March 7, 2005, the United States withdrew from the Optional Protocol and the ICJ's jurisdiction over Vienna Convention disputes. (*Medellin v. Texas* (2008) 552 U.S. 491, 500 [128 S.Ct. 1346, 170 L.Ed.2d 190] [citing Letter from Condoleeza Rice, Secretary of State, to Kofi A. Annan, Secretary-General of the United Nations].)

that same assistance from other sources. (*People v. Mendoza* (2007) 42 Cal.4th 686, 711.)

Vargas filed a motion for new trial contending his federal rights to due process were violated under the Vienna Convention because he was never advised by law enforcement of his right as a Mexican national to communicate with an official from the Mexican Consulate. (3 CT 1093-1100; 1144-1157.) The People filed an opposition. (4 CT 1180-1186.)

At the hearing on Vargas's motion, it was stipulated that Vargas was a Mexican national and he was not advised of his right to speak with the Mexican Consulate at the time of his arrest. (13 RT 3277.) Vargas was arrested on April 2, 1999 at 8:30 a.m. (13 RT 3348-3349.)

Defense counsel called Dr. Ricardo Weinstein, a psychologist. (13 RT 3278.) Dr. Weinstein had been contacted by defense counsel and Sandra Babcock, an attorney working for the Mexican Consulate. (13 RT 3287-3288.) Dr. Weinstein reviewed documents relating to the penalty phase of Vargas's trial, including the testimony of Dr. Greenzang, the probation officer's report, and school records. (13 RT 3280.) He also interviewed Vargas and Vargas's mother. (13 RT 3280-3281.)

Dr. Weinstein explained that he identified numerous issues for mitigation that were not presented at the penalty phase. (13 RT 3288-3290.) Dr. Weinstein was also critical of Dr. Greenzang's performing an M.M.P.I. on Vargas because it is not a valid test for a person with Vargas's background and cultural upbringing. (13 RT 3292-3293.) Dr. Weinstein opined the M.M.P.I. test is invalid for Hispanic populations. (13 RT 3294.) He further stated that with additional time and resources, he expected to develop more mitigating factors. (13 RT 3296-3297.)

The defense also presented the testimony of attorney Sandra Babcock, Director of the Legal Assistance Program for Mexican Nationals Facing the Death Penalty. (13 RT 3302.) She explained her role is partly to assist

defense attorneys by recommending qualified experts. (13 RT 3304.) Babcock was contacted by the Mexican Consulate regarding Vargas's case. She then contacted Vargas's defense counsel and put him into contact with Dr. Weinstein. (13 RT 3306-3307.) She also contacted Dr. Richard Cervantes, a mitigation specialist with the approval of the Mexican Consulate. (13 RT 3309-3310.)

Miguel Isidro-Rodriguez, the Counselor of Mexico in Santa Ana with jurisdiction in Orange County, with authorization by the Government of Mexico signed a letter dated September 17, 2001, as the head of the Mexican Consulate in Santa Ana. (13 RT 3331-3332.) He confirmed for identification Vargas's birth certificate, passport, and letters indicating he had no criminal convictions in Mexico. (13 RT 3333-3334.)

In response, the People called Diane Booker, an immigration agent with the United States Immigration Naturalization Service. (13 RT 3335.) Booker saw Vargas on April 2, 1999, at 8:55 p.m., after he was booked into the county jail and then referred to I.N.S. for an interview. (13 RT 3336.) She explained that she was there to obtain information to determine his alienage in the United States. (13 RT 3336.) Booker made the determination that Vargas was a lawful, permanent resident in the United States. (13 RT 3337.) She also provided Vargas with a copy of the immigration rights form I862 that advised him he had the right to speak with an attorney, legal representative, as well as someone from his country citizenship consulate or embassy. (13 RT 3337-3339.) Had Vargas made a request to contact his Consulate, then Booker would have advised Vargas to do so himself or have his family do so on his behalf. (13 RT 3340.)

Defense counsel argued a violation of the Vienna Convention had been established because Vargas had never been advised of his right to communicate with an official from the consulate of his country. (13 RT 3349.) He pointed out that at most, Vargas was advised through Agent

Booker of his right to contact an attorney in regards to his immigration status, but was never informed of his right to seek assistance from his consulate in regards to his criminal status. (13 RT 3350.) Vargas further maintained that he had established prejudice on account of the expert testimony and other services that would have been at his disposal in assisting in his capital defense. (13 RT 3350-3351.)

The prosecution responded that assuming the Vienna Convention provided Vargas personally endorsable rights; he had failed to establish prejudice. That is, assuming there was a technical violation, it was not demonstrated that Vargas and his counsel would have availed him of the services offered by the consulate and more specifically, the experts Weinstein and Cervantes. (13 RT 3351-3352.) And, moreover, he had not shown that such notification would have impacted his decision to make statements to the officers in light of the fact he was apprised of his Miranda rights. (13 RT 3353-3354.)

Defense counsel replied that Vargas knew of the Vienna Convention, but was not apprised of the full range of services that would have been available to Vargas. (13 RT 3354.) Counsel added that had he been aware of Dr. Weinstein, counsel would have made every effort to have him appointed as a defense expert during the penalty phase. (13 RT 3354.) In particular, to establish the M.M.P.I. test provided to Vargas by Dr. Greenzang was culturally biased. (13 RT 3355-3357.)

The trial court found a technical violation of the notification requirement. The Court found the defense remedy of returning Vargas to the status immediately post arrest to be an unreasonable remedy because a denial of due process would entail a finding of prejudice before any remedy should be forthcoming. The Court cited to cases that aptly concluded that even if there were an enforceable right; there must be a showing of prejudice before there was any entitlement to relief. (13 RT 3358-3360.)

In assessing Vargas's claim of prejudice, the trial court observed it was speculative in terms of how being notified of his rights would have affected his defense:

> This is speculation: Let's assume that Tustin P.D. told Mr. Vargas that he had a right to talk to the Consulate or they would call the Consulate for him, what would have happened? Would they have said, 'Don't talk to the police'? Would Mr. Vargas have followed that advise [sic]? We don't know because he certainly hasn't told us.
>
> But he did, in essence, not talk to the police. He gave them a story, and that was it. Not very helpful to anybody. So we're right back where we were. Nothing happened, in essence, that would prejudice Mr. Vargas's right to a fair trial.
>
> And Dr. Weinstein had several opinions on what could have occurred during the penalty phase. You know, based upon I think his work on lots of other cases and his studies.
>
> I think he didn't say this, by the way, and I am not sure he meant to say it, although he may have to, to accept - - to accept that these things could have happened, the things he said could have happened during the penalty phase, we would have to assume that you are incompetent. Dr. Greenzang was incompetent. The psychologist was incompetent. That the M.M.P.I. for whatever that was worth was biased. And those assumptions are just not supported by the evidence that was before this jury, and certainly not noted by this Court's observations of the trial.
>
> There is a thing known as trial tactics. Now, what we can't do, we can't decide to do it one way, and if that don't [sic] work, raise the other issue on appeal or on a motion for new trial or on a writ of habeas corpus. We are flat out not allowed to do that.
>
> It is a rational choice. You know, I am assuming because I know - - I know how competent you are or have been in the past that you consulted mental health experts and went with what you thought was the best for your client during this trial.
>
> And we all know that you were aware of the Vienna Convention well before trial. Could have talked to the

> Consulate if you liked to, and I don't think it was incompetent not to.

(13 RT 3360-3362.)

The trial court found Vargas relied on speculation, and while there was a technical violation of the convention, there was no prejudice. (13 RT 3363.)

Vargas has failed to demonstrate prejudice from the delay in his becoming aware of his right to consult with representatives from the Mexican consulate. Accordingly, even assuming any right under the Vienna Convention, he is not entitled to any relief.

XI. THE STANDARD CALJIC NO. 8.85 INSTRUCTION DOES NOT VIOLATE A DEFENDANT'S EIGHTH AND FOURTEENTH AMENDMENT RIGHTS TO A RELIABLE SENTENCING DETERMINATION

Vargas asks this Court to reconsider its previous rulings upholding the constitutionality of CALJIC No. 8.85 and find its use violated his Eighth and Fourteenth Amendment rights to a reliable sentencing determination. (AOB 205-208.) Specifically, he claims the instruction's failure to identify which factors are mitigating versus aggravating presents the potential of disparate treatment and the application of different legal standards among different juries. (AOB 205-208.) Vargas has not presented an original argument on this matter warranting reconsideration of this Court's previous rulings.

As this Court recently held in *People v. Jones* (2012) 54 Cal.4th 1, "[t]he trial court was not required to instruct the jury as to which of the listed sentencing factors are aggravating, which are mitigating, and which could be either mitigating or aggravating, depending upon the jury's appraisal of the evidence." (*Id.* at p. 183; citing e.g., *People v. Manriquez, supra,* 37 Cal.4th at p. 590; see *People v. Hillhouse* (2002) 27 Cal.4th 469,

509 ["The aggravating or mitigating nature of the factors is self-evident within the context of each case."].)

Vargas reasons the administration of capital punishment will not be even handedly applied because juries may construe Penal Code section 190.3, subdivision (a) factors differently as mitigating and aggravating. His concerns have already been adequately addressed by this Court. That is, whether a factor is aggravating or mitigating will be self-evident. (*People v. Hillhouse, supra,* 27 Cal.4th at p. 509.) Those factors that are not apparent and dependent on the circumstances of each crime are subject to interpretation by both parties and should not be categorically defined by the instruction. (See *People v. Cox* (1991) 53 Cal.3d 618, 674-675 ["[E]ach side may have its own theory for assessing the same factor in its favor"].)

> Given the nature of the jury's normative function, neither the prosecution nor the defense should be arbitrarily constrained from urging the jury to find life or death more appropriate according to its respective interpretation of the facts. To require the trial court to attach one label or the other would lead to unproductive, insoluble debates and would unduly hamper a meaningful examination of the full range of relevant considerations. As we explained in *People v. Jackson* [(1980)] 28 Cal.3d [264,] 316, with respect to the 1977 death penalty law, 'the aggravating or mitigating nature of these various factors should be self-evident to any reasonable person within the context of each particular case.'

(*People v. Cox, supra*, 53 Cal.3d at p. 675.)

In light of the discretionary nature of the Penal Code section 190.3, subdivision (a) factors, it would do a disservice to categorically define them in CALJIC No. 8.85. As this Court has repeatedly held, "CALJIC No. 8.85 is both correct and adequate." (*People v. Valencia* (2008) 43 Cal.4th 268, 309.) Vargas has not presented any basis for this Court to conclude otherwise.

XII. CALIFORNIA'S DEATH PENALTY LAW DOES NOT VIOLATE THE FEDERAL CONSTITUTION OR INTERNATIONAL LAW

In a series of arguments that have been repeatedly rejected by this Court, Vargas contends California's death penalty scheme violates the Constitution and international law. He provides no basis for this Court revisiting the merits of the arguments he raises. They are all without merit and should be rejected.

A. Penal Code Section 190.2 is Not Impermissibly Broad

First, contrary to Vargas's assertion (AOB 211-212), "[s]ection 190.2, which sets forth the circumstances in which the penalty of death may be imposed, is not impermissibly broad in violation of the Eighth Amendment." (*People v. Farley, supra*, 46 Cal.4th at p. 1133.) This Court has repeatedly rejected the claim that California's death penalty statutes are unconstitutional because they fail to sufficiently narrow the class of persons eligible for the death penalty. (*People v. Virgil* (2011) 51 Cal.4th 1210, 1288; *People v. Verdugo* (2010) 50 Cal.4th 263, 304; *People v. Schmeck, supra*, 37 Cal.4th at p. 304; *People v. Wilson* (2005) 36 Cal.4th 309, 361-362; *People v. Panah, supra*, 35 Cal.4th at p. 499; *People v. Welch* (1999) 20 Cal.4th 701, 767; *People v. Arias* (1996) 13 Cal.4th 92, 187.) Vargas's claim fails because he gives no justification for this Court to depart from its prior rulings on this subject.

B. The Application of Penal Code Section 190.3 Factor (a) did Not Violate Vargas's Constitutional Rights

Equally unavailing is Vargas's claim that the application of Penal Code section 190.3 in the penalty phase results in the arbitrary and capricious imposition of the death penalty. (AOB 213-214.) Allowing a jury to find aggravation based on the "circumstances of the crime" under Penal Code section 190.3, factor (a), does not result in an arbitrary and capricious imposition of the death penalty. (*People v. Virgil, supra*, 51

Cal.4th at p. 1288.) As the United States Supreme Court noted in *Tuilaepa v. California* (1994) 512 U.S. 967 [114 S.Ct. 2630, 129 L.Ed.2d 750], "The circumstances of the crime are a traditional subject for consideration by the sentencer, and an instruction to consider the circumstances is neither vague nor otherwise improper under our Eighth Amendment jurisprudence." (*Id.* at p. 976.)

> Nor is section 190.3, factor (a) applied in an unconstitutionally arbitrary or capricious manner merely because prosecutors in different cases may argue that seemingly disparate circumstances, or circumstances present in almost any murder, are aggravating under factor (a).

(*People v. Carrington* (2009) 47 Cal.4th 145, 200.) Instead, "'each case is judged on its facts, each defendant on the particulars of his [or her] offense.'" (*Ibid.*, quoting *People v. Brown* (2004) 33 Cal.4th 382, 401, alteration in original.)

C. CALJIC No. 8.88 is Not Impermissibly Vague and Ambiguous for Using the Word "Substantial"

Vargas contends the phrase "so substantial" in the instruction to the jury that their determination of penalty depended on whether the jurors were "persuaded that the aggravating circumstances are so substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole" (CALJIC No. 8.88) was impermissibly vague and ambiguous in violation of his rights under the Eighth and Fourteenth Amendments to the Constitution. (AOB 214-215.) His contention is without merit. (*People v. Carrington, supra*, 47 Cal.4th at p. 199; *People v. Bramit* (2009) 46 Cal.4th 1221, 1249.)

D. The Use of Restrictive Adjectives in the Sentencing Factors Does Not Act as a Barrier to the Consideration of Mitigation Evidence

Vargas urges this Court to reconsider its earlier holdings and find the use of restrictive adjectives such as "extreme" and "substantial" in the list of potential mitigating factors act as barriers to the meaningful consideration of mitigation in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments. (AOB 215.) This argument has been consistently rejected by this Court. (*People v. Eubanks* (2011) 53 Cal.4th 110, 153; *People v. Brasure* (2008) 42 Cal.4th 1037, 1068; *People v. Avila, supra,* 38 Cal.4th at pp. 614-615; *People v. Schmeck, supra*, 37 Cal.4th at p. 305; *People v. Morrison, supra*, 34 Cal.4th at pp. 729–730.) Vargas has offered no basis to reconsider these rulings.

E. There is no Duty to Instruct the Jury that Statutory Mitigating Factors were Relevant Solely as Potential Mitigators

Vargas argues the trial court's failure to advise the jury that mitigating factors could only be considered mitigating violated state law and his constitutional rights. (AOB 215-217.) This Court has repeatedly found no error in this regard.

> The trial court was not constitutionally required to inform the jury that certain sentencing factors were relevant only in mitigation, and the statutory instruction to the jury to consider 'whether or not' certain mitigating factors were present did not impermissibly invite the jury to aggravate the sentence upon the basis of nonexistent or irrational aggravating factors.

(*People v. Morrison, supra*, 34 Cal. 4th at p. 730; see also *People v. Jurado* (2006) 38 Cal.4th 72, 143; *People v. Moon* (2005) 37 Cal.4th 1, 42.) Vargas offers no justification for this Court to reconsider its earlier rulings.

F. Vargas's Death Sentence Need Not Be Premised on Findings Made Beyond a Reasonable Doubt

Vargas contends the failure to assign a burden of proof in California's death penalty scheme should be revisited in light of the United States Supreme Court's decisions in *Apprendi v. New Jersey* (2000) 530 U.S. 466 [120 S.Ct. 2348, 147 L.Ed.2d 435]; *Ring v. Arizona* (2002) 536 U.S. 584 [122 S.Ct. 2428, 153 L.Ed.2d 556]; *Blakely v. Washington* (2004) 542 U.S. 296 [124 S.Ct. 2531, 159 L.Ed.2d 403]; and *Cunningham v. California* (2007) 549 U.S. 270 [127 S.Ct. 856, 166 L.Ed.2d 856]. (AOB 218-222.) However, this Court has determined on many occasions that Penal Code section 190.3 and the pattern instructions are not constitutionally defective because they fail to require the state to prove beyond a reasonable doubt that an aggravating factor exists, and that aggravating factors outweigh mitigating factors. This Court has also consistently rejected the claim that the pattern instructions are defective because they fail to mandate juror unanimity concerning aggravating factors. (See, e.g., *People v. Russell, supra,* 50 Cal.4th at pp. 1271-1272; *People v. Bramit, supra*, 46 Cal.4th at pp. 1249-1250; *People v. Burney* (2009) 47 Cal.4th 203, 267-268.)

> '[U]nder the California death penalty scheme, once the defendant has been convicted of first degree murder and one or more special circumstances has been found true beyond a reasonable doubt, death is no more than the prescribed statutory maximum for the offense; the only alternative is life imprisonment without the possibility of parole.' [Citation].

(*People v. Ward* (2005) 36 Cal.4th 186, 221-222, quoting *People v. Prieto* (2003) 30 Cal.4th 226, 263.) As this Court explained in *Prieto*, "in the penalty phase, the jury merely weighs the factors enumerated in section 190.3 and determines 'whether a defendant eligible for the death penalty should in fact receive that sentence.'" (*People v. Prieto, supra*, 30 Cal.4th at p. 263, quoting *Tuilaepa v. California, supra*, 512 U.S. at p. 972; accord

People v. Virgil, supra, 51 Cal.4th at pp. 1278-1279.) Vargas gives this Court no reason to reconsider its previous holdings.

G. The Jury is Not Required to Base any Death Sentence on Written Findings Regarding Aggravating Factors

Vargas asserts that the California death penalty law violates his federal due process and Eighth Amendment rights because it does not require that the jury base a death sentence on "written findings regarding aggravating factors." (AOB 222-225.) Contrary to his assertion, "[t]he law does not deprive defendant of meaningful appellate review and federal due process and Eighth Amendment rights by failing to require written or other specific findings by the jury on the aggravating factors it applies." (*People v. Dunkle* (2005) 36 Cal.4th 861, 939, overruled on another ground in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22; accord *People v. Foster, supra*, 50 Cal.4th at pp. 1365-1366; *People v. Gemache* (2010) 48 Cal.4th 347, 406.) Nor does the absence of such findings violate equal protection (*People v. Parson, supra*, 44 Cal.4th at p. 370) or a defendant's right to trial by jury (*People v. Avila* (2008) 46 Cal.4th 680, 724.) "Nothing in the [F]ederal [C]onstitution requires the penalty phase jury to make written findings of the factors it finds in aggravation and mitigation[.]" (*People v. Nelson* (2011) 51 Cal.4th 198, 225.) Vargas offers no justification for this Court to reconsider its earlier rulings.

H. The Jury is Not Required to Make Unanimous Findings as to the Aggravating Factors

Vargas urges this Court to reconsider its rulings and find his Federal Constitutional rights were violated because his death verdict was not premised on a unanimous jury finding that the aggravating circumstances outweighed the mitigating beyond a reasonable doubt. (AOB 225-227.) This Court has consistently rejected these claims. (*People v. Nelson, supra,* 51 Cal.4th at p. 225; *People v. Hoyos* (2007) 41 Cal.4th 87, 926; *People v.*

Russell, supra, 50 Cal.4th at pp. 1271-1272; *People v. Bramit, supra*, 46 Cal.4th at pp. 1249-1250; *People v. Burney, supra*, 47 Cal.4th at pp. 267-268.) There is no constitutional requirement that a capital jury reach unanimity on the presence of aggravating factors. (*People v. Martinez* (2009) 47 Cal.4th 399, 455; *People v. Burney, supra*, 47 Cal.4th at p. 268.) The Eighth and Fourteenth Amendments do not require the jury to unanimously find the existence of aggravating factors or that aggravating factors outweigh mitigating factors. (*People v. Nelson, supra*, 51 Cal.4th at p. 225; *People v. Hoyos, supra*, 41 Cal.4th at p. 926.) Nor does the failure to require jury unanimity as to aggravating factors violate Vargas's right to Equal Protection. (*People v. Cook* (2007) 40 Cal.4th 1334, 1367; *People v. Griffin* (2004) 33 Cal.4th 536, 598.) Vargas has offered no persuasive reason to reconsider this argument.

I. There is no Constitutionally Required Burden of Proof at the Penalty Phase

Vargas contends that some burden of proof is constitutionally required for a capital jury's finding that an aggravating factor exists, that the aggravating factor outweighs the mitigating factors, and that death is the appropriate sentence, or that life without parole is presumed to be the appropriate sentence. He further contends that if no burden of proof is required, the jury should have been so instructed. (AOB 227-228.) This Court has repeatedly held, "no burden of proof or burden of persuasion is required during the penalty determination." (*People v. Bennett, supra*, 45 Cal.4th at p. 631.) As this Court has explained:

> Because the determination of penalty is essentially moral and normative [citation], and therefore is different in kind from the determination of guilt, there is no burden of proof or burden of persuasion. [Citation.].

(*People v. Lenart, supra*, 32 Cal.4th at pp. 1136-1137, quoting *People v. Hayes* (1990) 52 Cal.3d 577, 643.) The penalty phase determination is "not

akin to 'the usual fact-finding process,' and therefore 'instructions associated with the usual fact-finding process–such as burden of proof–are not necessary.'" (*People v. Lenart, supra*, 32 Cal.4th at p. 1137, quoting *People v. Carpenter, supra*, 15 Cal.4th at pp. 417-418.)

Vargas argues that Evidence Code section 520, which imposes the burden of proof on the prosecution in a criminal case, creates a burden of proof requirement in penalty phase proceedings, citing *Hicks v. Oklahoma* (1980) 447 U.S. 343, 346 [100 S.Ct. 2227, 65 L.Ed.2d 175]. (AOB 227.) This Court has considered the applicability of Evidence Code section 520 to capital sentencing determinations, and rejected the contention that it creates a burden of proof. (*People v. Lenart, supra*, 32 Cal.4th at pp. 1136-1137.)

There is no constitutional requirement that a capital jury be instructed concerning a burden of proof. (*People v. Samuels* (2005) 36 Cal.4th 96, 137.) Conversely, there is no constitutional requirement to instruct that there is no burden of proof. Because the penalty determination process is normative, not factual, there is no burden of proof at the penalty phase. Therefore, no instruction on the burden of proof is required, as to either the presence or absence of any such burden. (*People v. Elliot, supra*, 37 Cal.4th at p. 488; *People v. Cornwell* (2005) 37 Cal.4th 50, 104, overruled on other grounds in *People v. Doolin, supra*, 45 Cal.4th at p. 421.) Vargas offers no justification for this Court to reconsider its earlier rulings.

J. California's Death Penalty Statute does Not Violate the International Covenant on Civil and Political Rights and Prevailing Civilized Norms

Vargas contends that the California Death Penalty Law violates the International Covenant on Civil and Political Rights. (AOB 228-230.) This Court has repeatedly rejected similar arguments and should do so again here. International law does not prohibit a sentence of death where,

as here, it was rendered in accordance with state and Federal Constitutional and statutory requirements. (*People v. Blacksher* (2011) 52 Cal.4th 769, 849 [rejecting claim "again"]; *People v. Gonzales* (2011) 52 Cal.4th 254, 334; *People v. Hamilton* (2009) 45 Cal.4th 863, 961; *People v. Alfaro* (2007) 41 Cal.4th 1277, 1322; accord *People v. Mungia* (2008) 44 Cal.4th 1101, 1143; *People v. Panah, supra*, 35 Cal.4th at p. 500; *People v. Ward, supra,* 36 Cal.4th at p. 222; *People v. Elliot, supra*, 37 Cal.4th at p. 488.) Vargas does not present any reason to revisit these holdings.

Vargas also contends that the use of the death penalty is contrary to prevailing civilized norms. (AOB 228-230.) International law does not require California to eliminate capital punishment. (*People v. Blacksher, supra,* 52 Cal.4th at p. 849; *People v. Martinez* (2010) 47 Cal.4th 911, 968; *People v. Doolin, supra*, 45 Cal.4th at p. 456.) Furthermore, California does not impose the death penalty as regular punishment in California for numerous offenses. (*Doolin, supra*, at pp. 456-457.) Instead,

> [t]he death penalty is available only for the crime of first degree murder, and only when a special circumstance is found true; furthermore, administration of the penalty is governed by constitutional and statutory provisions different from those applying to 'regular punishment' for felonies. (E.g., Cal. Const., art. VI, § 11; §§ 190.1-190.9, 1239, subd. (b).)

(*People v. Doolin, supra,* 45 Cal.4th at p. 456, quoting *People v. Demetrulias* (2006) 39 Cal.4th 1, 44.) Thus, California's death penalty law does not violate international law or the Federal Constitution.

K. Intercase Proportionality Review is Not Required

Vargas claims that the failure to conduct intercase proportionality review violates the Eighth Amendment. (AOB 230-231.) This Court has repeatedly rejected this contention and should do so again here. (*People v. Foster, supra,* 50 Cal.4th at p. 1368; *People v. Hoyas, supra,* 41 Cal.4th at p. 927; *People v. Cornwell, supra*, 37 Cal.4th at p. 105; *People v. Elliot,*

supra, 37 Cal.4th at p. 488; *People v. Smith* (2005) 35 Cal.4th 334, 374; *People v. Jones* (2003) 29 Cal.4th 1229, 1267.)

L. Pre-execution Delay does Not Violate the Eighth Amendment

In his final argument, Vargas urges this Court to revisit its earlier rulings and find a prolonged wait for execution violates the Eighth Amendment in light of the small proportion of persons sentenced to death in California that have actually been executed. (AOB 231-232.) This Court has consistently held "that delay inherent in the automatic appeal process is not a basis for concluding that either the death penalty itself, or the process leading to its execution, is cruel and unusual punishment." (*People v. Vines, supra*, 51 Cal.4th at p. 892, quoting *People v. Brown* (2004) 33 Cal.4th 382, 404; *People v. Anderson* (2001) 25 Cal.4th 543, 606.) Vargas has not shown any current pre-execution delay is attributable to anything but the appeal process. Thus, he advances no persuasive reason to re-examine this Court's holdings on the issue.

XIII. THERE WAS NO CUMULATIVE ERROR

Vargas argues that the cumulative effect of the claimed errors in this case warrants reversal of the judgment and sentence. (AOB 233-236.) As discussed above, there are no errors to cumulate. (See *People v. Thornton* (2007) 41 Cal.4th 391, 453.)

A criminal defendant is entitled to a fair trial, but not a perfect one, even where he has been exposed to substantial penalties. (See *People v. Marshall* (1990) 50 Cal.3d 907, 945; *People v. Hamilton* (1988) 46 Cal.3d 123, 156; see also *Schneble v. Florida* (1972) 405 U.S. 427, 432 [92 S.Ct. 1056, 31 L.Ed.2d 340]; see, e.g., *United States v. Hasting* (1983) 461 U.S. 499, 508-509 [103 S.Ct. 1974, 76 L.Ed.2d 96] ["[G]iven the myriad safeguards provided to assure a fair trial, and taking into account the reality of the human fallibility of the participants, there can be no such thing as an

error-free, perfect trial, and ... the Constitution does not guarantee such a trial."].)

Notwithstanding Vargas's arguments to the contrary, the record contains no errors and to the extent any error arguably occurred, Vargas was not prejudiced. Review of the record without the speculation and interpretation offered by Vargas shows that he received a fair and untainted trial. The constitution requires no more.

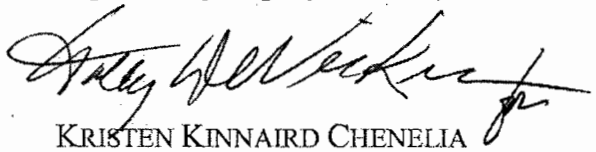
CONCLUSION

Respondent respectfully requests the judgment of conviction and sentence of death be affirmed in its entirety.

Dated: July 10, 2012

Respectfully submitted,

KAMALA D. HARRIS
Attorney General of California
DANE R. GILLETTE
Chief Assistant Attorney General
JULIE L. GARLAND
Senior Assistant Attorney General
HOLLY D. WILKENS
Supervising Deputy Attorney General



KRISTEN KINNAIRD CHENELIA
Deputy Attorney General
Attorneys for Plaintiff and Respondent

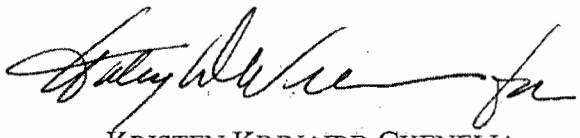
KKC:HDW:sam
SD2001XS0007
80656058.doc

CERTIFICATE OF COMPLIANCE

I certify that the attached RESPONDENT'S BRIEF uses a 13 point Times New Roman font and contains 33,597 words.

Dated: July 10, 2012

KAMALA D. HARRIS
Attorney General of California



KRISTEN KINNAIRD CHENELIA
Deputy Attorney General
Attorneys for Plaintiff and Respondent

KKC:HDW:sam
SD2001XS0007
80656058.doc

DECLARATION OF SERVICE BY U.S. MAIL

Case Name: ***People v. Vargas***
No.: **S101247**

I declare:

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

On **July 10, 2012**, I served the attached **RESPONDENT'S BRIEF** by placing a true copy thereof enclosed in a sealed envelope in the internal mail collection system at the Office of the Attorney General at 110 West A Street, Suite 1100, P.O. Box 85266, San Diego, CA 92186-5266, addressed as follows:

Russell S. Babcock, Attorney at Law
1901 First Avenue, Suite 138
San Diego, CA 92101
Attorney for Appellant
(2 Copies)

California Appellate Project (SF)
101 Second Street, Suite 600
San Francisco, CA 94105

The Honorable Tony J. Rackauckas
District Attorney
Orange County District Attorney's Office
401 Civic Center Drive West
Santa Ana, CA 92701

Governor's Office
Legal Affairs Secretary
State Capitol, First Floor
Sacramento, CA 95814 E-15

Orange County Superior Court
The Honorable Francisco P. Briseno
Central Justice Center
700 Civic Center Drive West
Department C45
Santa Ana, CA 92701

and I furthermore declare, I electronically served a copy of the above document from Office of the Attorney General's electronic notification address ADIEService@doj.ca.gov on **July 10, 2012,** to Appellate Defenders, Inc.'s electronic notification address eservice-criminal@adi-sandiego.com.

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on **July 10, 2012**, at San Diego, California.

S. McBrearty
Declarant

S McBrearty
Signature

SD2001XS0007
7054054 8