In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. **CALVIN DION CHISM,** Defendant and Appellant.	**CAPITAL CASE** S101984

Los Angeles County Superior Court No. NA043605
The Honorable Richard R. Romero, Judge

RESPONDENT'S BRIEF

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STATEMENT OF THE CASE

In an information filed by the Los Angeles County District Attorney, appellant, Samuel Taylor, and Marcus Johnson were charged with first degree murder (count I; Pen. Code,[1] § 187, subd. (a)) and attempted second degree robbery (count II; §§ 664/211) for events that occurred at Eddie's Liquor in Long Beach.[2] Appellant was also charged with second degree robbery (count III; § 211) for events that occurred at Riteway Market in Compton. As to count I, the information alleged that the offense was committed during the attempted commission of a robbery within the meaning of section 190.2, subdivision (a)(17). As to counts I and II, the information alleged that a principal was armed with a firearm during the commission of the offenses. As to all three counts, the information alleged that, during the commission of the offenses, appellant personally used a firearm within the meaning of section 12022.5, subdivision (a)(1), and that he suffered one prior serious or violent juvenile adjudication within the meaning of the Three Strikes Law (§§ 1170.12, subds. (a)-(d), 667, subds. (b)-(i)). (1CT 138-141.) Appellant pled not guilty and denied the allegations. (1CT 144-145; 2RT 3.)

Appellant was tried by jury. (2CT 578-579.) The jury found appellant guilty as charged and found the special allegations to be true. (3CT 734-737.)

The jury was unable to reach a verdict during the first penalty phase, and the trial court declared a mistrial. (3CT 822.) A second jury was

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

[2] Codefendants Johnson and Taylor are not parties to the instant appeal. They were both convicted as charged and sentenced to life in prison without the possibility of parole. The Court of Appeal affirmed their convictions in an unpublished decision in case number B145068.

impaneled. (3CT 863-866.) After the second penalty phase trial, the jury fixed the penalty for count I at death. (4CT 1041-1043.)

The trial court found true the allegation that appellant suffered one prior serious or violent felony juvenile adjudication within the meaning of the Three Strikes Law. (4CT 1109-1112; see also 19RT 4341-4345 [testimony that appellant's fingerprints matched those in Peo. Exh. No. 55].)

The trial court sentenced appellant to a consecutive term of 20 years on count III (the upper term of five years, doubled to 10 years pursuant to the Three Strikes Law, plus 10 years for the section 12022.5, subdivision (a)(1), enhancement) and imposed and stayed sentence on count II. Appellant received 643 days of presentence custody credit for his actual days served. (4CT 1092-1102.)

The trial court denied appellant's motion for a new trial and the automatic motion to modify the penalty pursuant to section 190.4, subdivision (e). The court imposed a sentence of death on count I. (4CT 1088-1091, 1113-1136.) The instant appeal is automatic. (§ 1239, subd. (b).)

STATEMENT OF FACTS

INTRODUCTION

Appellant shot and killed Richard Moon during an attempted armed robbery that appellant planned and orchestrated at Eddie's Liquor in Long Beach. Just prior to the attempted robbery, appellant assigned tasks to his codefendants, Samuel Taylor and Marcus Johnson, as well as to Marcia Johnson.[3] Appellant sent Marcia inside the store to scout the location.

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[3] Respondent will refer to Marcia Johnson by her first name to avoid confusion with her brother, codefendant Johnson, as well as another prosecution witness with the same last name.

Moon was the only person working in the store at the time. Appellant and codefendant Johnson then entered with a nine-millimeter Glock firearm while codefendant Taylor, who acted as the getaway driver, and Marcia waited around the corner in a van. Appellant shot Moon in the back within a few moments of entering the store. Moon died before paramedics arrived.

Appellant killed Moon less than three months after his release from the California Youth Authority (hereinafter "CYA"), for committing an assault with a deadly weapon and another attempted robbery, and only one month after he committed an armed robbery at Riteway market in Compton. During the Riteway robbery, appellant went inside the market to scout the location before his group entered. Jung Chung was the only person working in the store at the time. Appellant left and then re-entered with his accomplices, including codefendant Johnson. One of the suspects pointed a gun at Jung's head and demanded money. Appellant took a nine-millimeter Glock firearm owned by Chun Chung, Jung's husband. Chung's nine-millimeter Glock firearm was the gun appellant used to kill Moon approximately one month later, and was found in appellant's residence one week after Moon's murder.

GUILT PHASE

PROSECUTION EVIDENCE

A. Riteway Robbery

In May 1997, Chun Chung and his wife, Jung Ja Chung[4], owned the Riteway Market at 520 West Alondra Boulevard in Compton. The market

[4] During the guilt phase, the Korean interpreter stated that the witness's name was Ja Chung Jung. (6RT 1147.) However, during the penalty phase, Chun Chung testified that his wife's name was Jung Ja (continued...)

had a video system underneath the front counter and the cash register. Chung owned a nine-millimeter Glock firearm, loaded with ammunition, that he kept under the cash register and behind the video system. (6RT 1147, 1150; 7RT 1331, 1338.)

Between 11:30 a.m. and 12:00 p.m. on May 18, 1997, after Chung had left for lunch and while Jung was working alone at Riteway, appellant entered the market and asked for hair gel. He left when Jung told him that she did not have the gel. Approximately 15 or 20 minutes later, four boys, including appellant and codefendant Johnson, entered the store. Jung was behind the counter. One of the boys approached the counter and pointed a gun at her. He told Jung to put her hands up and "[g]ive me your back." Jung complied because she feared that the boys would kill her. As the first boy pointed the gun at her, a second boy moved behind the counter and told her to open the cash register. Jung complied. The second boy took money from the register. The third and fourth boys took wine and other items from the store. (5RT 897-900; 6RT 1147-1151, 1154-1155; 7RT 1331-1332.)

After taking money from the register, the second boy told Jung to get the videotape for him. While Jung retrieved the surveillance videotape, the second suspect took Chung's nine-millimeter Glock. (5RT 897-900; 6RT 1150-1151.)

When Chung returned from lunch, his gun was gone. (7RT 1331-1332.) Chung was uncertain whether the bullets were all the same brand because he had purchased ammunition at the firing range when he ran out of the bullets he had purchased with the gun. (7RT 1339-1340.)

(...continued)
Chung. (18RT 4109.) Respondent will refer to her as "Jung" simply to avoid confusion with her husband, Chun Chung.

The parties stipulated that the videotape of the Riteway robbery was a true and accurate recording of the robbery charged in count III, which was the subject of Jung's testimony. (6RT 1166.) Jung could not remember the faces of the boys who robbed her that day and was not sure of any identification during her preliminary hearing testimony. (6RT 1166-1167.)

Compton Police Sergeant Frederick Reynolds investigated the robbery at Riteway. He viewed the videotape of the incident five or six times during the course of the investigation. Sergeant Reynolds met codefendant Johnson on June 23, 1997, after viewing the video, and recognized him as one of the suspects shown in the video. (7RT 1341-1342, 1364-1365, 1369; see Peo. Exh. No. 3 [video of Riteway robbery].) Sergeant Reynolds took a photograph of codefendant Johnson that day. (7RT 1370; Peo. Exh. No. 28.) The trial court took judicial notice of the facts that Johnson had pled guilty to committing the Riteway robbery on May 18, 1997, admitted that he personally used a firearm during the commission of the offense, and was serving a prison term for the offense. (6RT 1168.)

Kenneth Lipkin, a law enforcement officer for a state agency, knew appellant and had spoken with him on many occasions.[5] Lipkin viewed the surveillance video of the Riteway robbery. (5RT 895-897; Peo. Exh. No. 3.) He identified appellant in the video as the person who first went inside the store asking for hair gel. The video showed him returning with the others and pointing a gun at Jung. Another individual also had a gun. Appellant was the last person to leave the store with the gun and wore a blue sweatshirt. Lipkin recognized appellant's voice on the video saying, "We're in the house. They don't have a video." Appellant also said,

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[5] The parties agreed that Lipkin would not reveal his status as appellant's parole officer to avoid any potential prejudice to appellant. (5RT 752.)

"There's a Glock." There was also a reference to "187," the Penal Code section for murder. Lipkin believed that, based on the situation, appellant and/or his companions meant that "this is a robbery, don't make it a murder." (5RT 897-900.)

B. The Murder of Richard Moon and Attempted Robbery at Eddie's Liquor

In June 1997, Richard Moon was a day manager for Eddie's Liquor, located at 299 East Artesia Boulevard, at the intersection of Artesia and Butler, in the City of Long Beach. Edward Snow owned the store and had employed Moon there for more than two years. Snow had employed Moon for approximately five years before that at different stores. He had never known Moon to keep a weapon at any of the stores. (5RT 916-918; 7RT 1307-1310.)

Marcia, who was codefendant Johnson's sister and an acquaintance of appellant and codefendant Taylor, was at home in Compton with codefendant Johnson on the morning of June 12, 1997.[6] Appellant arrived at approximately 9:00 a.m. Codefendant Taylor arrived a short time later. (8RT 1550-1554.) Appellant had a Glock semiautomatic firearm in the waistband of his pants, which Marcia had seen him carrying around the neighborhood for approximately one month prior to June 12. (8RT 1561-1563.)

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[6] At the time of Marcia's trial testimony, murder and attempted robbery charges were also pending against her in connection with the June 12, 1997, incident at Eddie's Liquor. She testified pursuant to an agreement with the Los Angeles County District Attorney's Office which provided that she would serve a 12-year sentence in exchange for her truthful testimony. Marcia understood that, if the trial court found that her testimony was untruthful, she could receive a term of life in prison rather than the agreed upon 12-year term. (8RT 1575-1575.)

Appellant, codefendant Johnson, codefendant Taylor, and Marcia had a conversation wherein appellant planned for the group to rob Eddie's Liquor. Appellant told Marcia that he wanted her to go inside the liquor store to look for clerks and cameras. He directed Taylor to drive and codefendant Johnson to go inside the liquor store with him. During the ten-minute conversation, no one in the group objected to appellant's plan.[7] (8RT 1554-1556.) Marcia expected to receive a portion of any money taken during the robbery. (8RT 1574.)

The group left the Johnson residence for Eddie's Liquor approximately fifteen minutes after their conversation. Appellant wore black jeans and a black Nike "Air" T-shirt, depicting the Nike Air symbol.[8] Codefendant Johnson wore black shorts and a green Gap shirt or sweater. (8RT 1554-1558, 1564, 1568, 1583-1584.)

At the time, Zonita Wallace, who had dated codefendant Taylor and who knew appellant and codefendant Johnson, owned a light gray Plymouth Voyager van with a sliding door. (5RT 731-734; Peo. Exh. Nos. 1, 35 [photographs of van].[9]) She loaned the van to Taylor at approximately 1:30 that afternoon.[10] (5RT 734-741; 7RT 1347-1348, 1359.)

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[7] Marcia initially testified that she was afraid appellant would kill her if she did not comply with his instructions. She later admitted that, on the one hand, she did not feel threatened by appellant, but, on the other, was concerned for her safety and felt she had no choice but to participate because she was a girl. (8RT 1579, 1649-1650, 1653.)

[8] Marcia identified a photograph of the Nike Air T-shirt found in appellant's closet as the T-shirt he wore on June 12, 1997. (8RT 1563-1564.)

[9] Sergeant Reynolds photographed the van at the Compton Police Department on June 19, 1997, after Wallace drove it there to meet with him. (7RT 1347-1348.)

[10] At trial, Wallace recalled that she had loaned her van to Taylor on a Thursday in June 1997, but did not recall the exact date. She admitted that what she had earlier told Sergeant Reynolds was accurate. (5RT 734-

(continued...)

Codefendant Taylor drove the group – which included appellant, codefendant Johnson, and Marcia – to Eddie's Liquor in Wallace's van. Appellant rode in the front passenger seat, codefendant Johnson sat in the rear passenger seat nearest to the sliding door, and Marcia sat in the rear driver's side seat. At appellant's direction, codefendant Taylor drove directly to Eddie's Liquor via surface streets. (8RT 1558-1560, 1589-1590, 1595.) Codefendant Taylor parked the van around the corner and approximately one block away from the liquor store. (8RT 1558-1560, 1563.)

Marcia got out of the van and went into Eddie's Liquor while the rest of the group waited. She went inside the store and looked around. Marcia saw a camera and saw a clerk standing behind the counter. She purchased candy and left. (8RT 1565-1566.)

Marcia returned to the van and told appellant that there were two cameras and a clerk, who was behind the counter, inside Eddie's Liquor. Marcia got into the van while appellant and codefendant Johnson got out. Appellant had a bulge in his front waistband area that Marcia believed was a gun.[11] Codefendant Taylor waited in the driver's seat. Appellant and codefendant Johnson walked toward Eddie's Liquor. Marcia lost sight of them as they turned the corner. (8RT 1566-1568a, 1671, 1696-1697.)

(...continued)
741.) On June 19, 1997, Wallace had told Sergeant Reynolds that she loaned her van to codefendant Taylor at approximately 1:30 p.m. on the preceding Thursday, June 12, and that he had returned the van at approximately 4:30 that afternoon. (7RT 1347-1348, 1359.) Wallace did not loan her van to Taylor after June 12, 1997. (7RT 749-750.)

[11] Marcia testified at the preliminary hearing that she did not see a gun in appellant's waistband when they were in the van before the attempted robbery and murder, but testified at trial that her earlier statement was wrong and that she had seen a bulge in the front of his waistband as he left the van. (8RT 1671-1672.)

Approximately ten minutes after Marcia lost sight of appellant and codefendant Johnson, she heard one or two gunshots. She then saw appellant and codefendant Johnson running toward the van. Appellant got into the front passenger seat through the window. Codefendant Johnson got into the van through the open sliding door. Neither appellant nor codefendant Johnson had anything in their hands. They left the area, heading for a house in Long Beach, approximately twenty or thirty minutes away, to meet Iris Johnston. (8RT 1568a-1568b, 1570.)

Meanwhile, Steven Miller was sitting on a bus bench across the street from Eddie's Liquor.[12] He saw two African-American males enter the store. A short time later, almost immediately, he heard a popping sound, which he described as a gunshot. The same two males then ran out of Eddie's Liquor. The two males ran north on Butler approximately two blocks to Marker, and then possibly ran east on Marker. (5RT 942-943, 993.) Miller immediately ran across the street to Eddie's Liquor. He saw Moon lying on his back, bleeding and unconscious, behind the counter. Miller ran to the phone and called the police. (5RT 944-945.)

Stephanie Johnson also heard the gunshots as she approached the intersection of Artesia Boulevard and Butler. She believed she heard the shots between 2:00 and 3:00 p.m.[13] As Stephanie turned right onto Butler from Artesia, a male ran in front of her car, almost hitting it. He continued

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[12] Criminal charges were pending against Miller in an unrelated case at the time of his testimony in the present case. He refused to answer questions despite the trial court's ruling and parties' agreement that there would be no questions concerning Miller's criminal history. The court found that, given the agreement, Miller had no Fifth Amendment right to remain silent. The court found Miller to be in contempt of court and declared him to be unavailable. (7RT 1230-1242.) As such, the prosecutor elicited Miller's statements from Officer Romero.

[13] Respondent will refer to Stephanie Johnson by her first name in order to avoid confusion with codefendant Johnson or Marcia.

running toward Artesia from the direction of Eddie's Liquor. The male was of medium height, slim, dark-skinned, had a clear complexion, and his hair was curly toward the top of his head and shaved around the bottom. He was wearing a black shirt over a white T-shirt and black khaki pants. (6RT 1108-1112, 1114, 1116-1117, 1122.) Stephanie saw another male running diagonally across Artesia, but could not recall his description and did not see his face. She lost sight of them. (6RT 1112-1113.)

Peter Motta was driving west on Marker Lane, near the intersection of Artesia and Butler, the same day. He noticed a light colored van parked on Marker very close to the corner at Butler. (7RT 1264-1268, 1270.) An African-American male was in the driver's seat and another was in the passenger seat. Two other people were running "very fast" toward the van from Butler. The first person running toward the van was an African-American male who was thin and slightly tall. He had short curly hair. The second was bald, short, and stocky. (7RT 1268-1270, 1305-1307.) Motta saw the two disappear into the van. He turned left onto Butler. The van rapidly accelerated as it turned right and traveled north on Butler. (7RT 1270-1272, 1302.) Motta saw a "commotion" near Eddie's Liquor – people were hysterical and appeared to be looking for someone in the direction toward Butler. (7RT 1272-1273.)

1. Events Immediately Following the Murder and Attempted Robbery at Eddie's Liquor

Iris Johnston had known appellant for five or six months on June 12, 1997, and also knew codefendant Taylor, codefendant Johnson, and Marcia. (5RT 753-756, 792, 854-855.) Earlier that morning, Johnston and her friend, Valicia, rode the Metro to Valicia's cousin's house near Pine Street in Long Beach. At approximately 11:00 a.m., Johnston paged appellant to arrange for a ride. He called her approximately 20 minutes later, but did

not arrive to pick her up until an hour or an hour and a half later. (5RT 756-759.)

When appellant arrived, he was in a van with codefendant Taylor, codefendant Johnson, and Marcia.[14] (5RT 760-761.) Appellant was bald that day. (5RT 804.)

Marcia, appellant, codefendant Johnson, and codefendant Taylor stayed at the Long Beach residence with Johnston and Valicia for approximately ten minutes. The group, including Johnston, Valicia, and Valicia's cousin, then left in the van. (5RT 761-762; 8RT 1569-1570.) As the group traveled on the 710 Freeway toward appellant's residence in Compton, they noticed helicopters above them. (5RT 761-770; 8RT 1570-1571.) Marcia was unable to determine whether the helicopters were police or news helicopters. (8RT 1570-1571.)

Marcia mentioned the helicopters to the group in the van, but said that no one else said anything. (8RT 1572.) Johnston testified that, when the group noticed the helicopters, she asked what happened. (5RT 789.) One of the individuals in the group said, "There must have been a robbery." (5RT 791-792.) Appellant said, "We know the niggers that did it."[15] (5RT 770-771, 782-785, 840; see also Peo. Exh. No. 2 [Johnston's handwritten letter to appellant].) The others in the van also said they knew who did it,

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[14] Johnston viewed a photograph of Wallace's van, which looked similar in terms of the make and model of the van, but she thought the van she saw on June 12, 1997, was a darker color. (5RT 760-761.)

[15] Johnston did not recall at the time of trial whether appellant said that "they" or "we" "know the niggers that did it," but she confirmed that she had told Detective Cisneros the truth and was as accurate as possible when she spoke with him on December 18, 1998. (5RT 771, 782-783.) She also admitted that she wrote a letter to appellant later on June 12, 1997, wherein she had accurately written that appellant had said in the van, "Yeah, we know the niggers that did it." (5RT 783-785; Peo. Exh. No. 2.)

although Johnston did not recall who, specifically, said it. (5RT 785-787, 790.)

The group drove to appellant's home in Compton. When they arrived, appellant said that he wanted to watch the news. (5RT 790, 792-794, 803-804.) Appellant, codefendant Johnson, and codefendant Taylor went inside the house. At some point, the entire group went inside. Marcia recalled watching the news and seeing a broadcast about the crimes committed at Eddie's Liquor. After approximately twenty minutes, the group went to a store on or near Elm Street where Johnston lived. (8RT 792-794, 803-804, 1573-1574.)

Johnston recalled seeing the police as the group walked and noticed that appellant's behavior seemed different. He appeared to be nervous. When Johnston was confronted with the letter she had written to appellant, wherein she had written, "'Ya'll was getting all nervous when a police car would pass by[,]'" she confirmed that she wrote the statement, but said that she did not recall what occurred. (5RT 795-796.) She admitted the letter explained to appellant her concerns about his behavior that day. (5RT 796-797.)

Johnston was on a three-way telephone call with Marcia and appellant later on June 12, 1997. Appellant told Johnston not to talk when a news story aired. Johnston was concerned because appellant and Marcia wanted to talk privately, exclusive of her, while the news story was on. (5RT 797-800.)

Taylor returned the van to Wallace at approximately 4:30 p.m. on June 12, 1997. (5RT 734-741; 7RT 1347-1348, 1359.)

2. The Investigation

At 2:06 p.m. on June 12, 1997, police received a 911 call from Eddie's Liquor. (6RT 1079-1081.) At 2:07 p.m., Long Beach Police

Officers Rudy Romero and Stacey Holdredge responded to a radio call directing them to Eddie's Liquor. They arrived at 2:08 p.m. and were the first officers on the scene.[16] (5RT 933-935; 6RT 1084-1085; 7RT 1313-1314; Peo. Exh. No. 36.) Officers Romero and Holdredge drove into the parking lot and saw Steven Miller, Debra Williams, and a man with the last name Pakhchanian standing by the northeast side of the building. (5RT 935-940, 979; 7RT 1314-1315.) Officer Holdredge also contacted another person, Michael Cayton, at the scene. (5RT 979-980; 7RT 1323.)

Officer Romero contacted Miller, who seemed "shaken up" and was "very, very nervous." (5RT 940-941.) Miller said, "I think he's dead." Miller told Officer Romero that he and his girlfriend were sitting on a bus bench across the street when he saw the two African-American males enter Eddie's Liquor, almost immediately heard a gunshot, and saw the same two males leave the store. Miller described both of the suspects as approximately 17 or 18 years old, about five feet, eight or nine inches tall, with short Afro-style hair and thin builds. One of the suspects wore a black shirt with white stripes on the front and dark jeans. The second suspect wore long dark shorts. (5RT 942-945, 953, 959, 993.) Officer Romero confirmed that there was a bus bench across the street from Eddie's Liquor, near the corner of Butler and Artesia, and that Marker Lane was two blocks northeast of Artesia. (5RT 946-947.) Officer Romero also briefly spoke to Williams, who was with Miller. (5RT 950-951.)

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[16] Officer Holdredge's log for the crime scene showed that she and Officer Romero responded at 2:07 p.m. and arrived at 2:12 p.m., but the surveillance video shows they walked inside Eddie's Liquor at 2:08:36 p.m. and the call record showed they arrived at the scene at 2:09 p.m. (5RT 973-976; 6RT 1075-1079, 1084-1085; 7RT 1321-1322; Peo. Exh. No. 17 [transcript of call history]).) The clock on the video reflects the events as occurring during the 1:00 p.m. hour, but the events actually occurred during the 2:00 p.m. hour. (See 7RT 1313-1314, 1319; see also 21RT 4657-4658.)

After Miller briefly told the officers what he witnessed, Officer Holdredge went inside Eddie's Liquor. She went behind the counter and saw Moon, whom she recognized as the clerk she often saw working there, lying on the ground with blood on his face. Officer Holdredge checked for a pulse, called for paramedics, and radioed that there was a possible homicide. Officer Romero also went inside, saw Moon on the ground, and saw cash and other items on the counter. Merchandise was on the floor in the store as well and there was what appeared to be a video camera near the ceiling directly behind the counter. Officers Holdredge and Romero cordoned off the area and called for assistance. (5RT 951-957; 7RT 1316-1317.)

Long Beach Police Officer Teryl Hubert also responded to the call at Eddie's Liquor. He set up the crime scene tape and assisted in locating and securing evidence. (5RT 916-918.) He saw a bullet next to Moon's right hip, a spent cartridge casing on the floor next to the liquor shelves, and what appeared to be a bullet dent in an ice cream machine. The dent was consistent with the type of mark caused when a bullet ricocheted off a hard item. (5RT 918-920, 922; 7RT 1245-1248.)

Long Beach Police Officer Aldo DeCarvalho measured the counter and the distance of particular items of evidence from the north wall of Eddie's Liquor. (7RT 1245-1248.) Moon's body was 28 feet, two inches south of the north wall and six feet, three inches east of the west wall. A bullet slug was near Moon's body, 24 feet and 10 inches south of the north wall and six feet east of the west wall. A cartridge casing was found 11 feet, five inches south of the north wall and one foot, 10 inches east of the west wall. A mark that appeared to be a bullet impact was on the surface of the ice cream machine. (7RT 1249-1253.) Officer DeCarvalho diagrammed the inside of the store as well as the parking lot, pay phone outside, and entire corner of the intersection as it appeared at the time. He

also recorded license plates and information regarding the make and model of all cars in the parking lot, including a van. (7RT 1254-1257, 1263.)

The Long Beach Police Department's Air Support Unit, a helicopter, responded to the call at Eddie's Liquor and arrived on the scene at 2:15 p.m. The helicopter circled an area covering several blocks and including the area where the 710 Freeway met the 91 and 405 Freeways, with the intersection of Artesia and Butler being the center of the orbit. Downtown Long Beach was included within or near the helicopter's orbit. (6RT 1011-1014.) News helicopters were also circling the area. The Air Support Unit stopped circling the area at 3:55 p.m. (6RT 1010-1016, 1085-1086; see also 5RT 977.)

Long Beach Police Sergeant Jorge Cisneros also investigated the murder at Eddie's Liquor on June 12, 1997. (8RT 1458-1459.) Sergeant Cisneros retrieved a videotape that was taken from the video recorder inside the store and had still photographs created from the video that day. (8RT 1459-1469; Peo. Exh. Nos. 36 [surveillance video[17]], 41-44 [still photographs].)

Snow was familiar with the inside of Eddie's Liquor. The dent that appeared on the ice cream machine after Moon was shot was not there prior to June 12, 1997. (7RT 1310-1311.) After the shooting, Snow found cash inside the cash register and it did not appear that anything had been taken from it. It did not appear to Snow that anything was missing from the store. (7RT 1311-1312.)

Stephen Scholtz, a deputy medical examiner for the Los Angeles County Department of Coroner, who had performed autopsies in over 600

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[17] Officer Holdredge identified the surveillance video, which depicted, inter alia, Miller directing Officer Holdredge to the area behind the counter at Eddie's Liquor on June 12, 1997. (7RT 1319-1320.)

cases involving gunshot wounds, performed an autopsy on Moon's body on June 13, 1997. (6RT 1024-1026.) Moon's cause of death was a through-and-through gunshot wound wherein the bullet entered his back and exited through his chest. The wound to Moon's back was determined to be an entry wound because it had a central, uniform, round disk and an abrasion zone, or a rim of skin that had been partially rubbed away. The chest wound was determined to be an exit wound, as it was irregular and larger than the entry wound and the skin was torn rather than perforated. (6RT 1026-1027, 1042-1043, 1050; Peo. Exh. Nos. 21-24 [photos of gunshot wounds].) The bullet path was level and went from back to front and slightly from left to right. The wound path involved the spine, aorta, windpipe, trachea, and breast bone. The distance from the top of Moon's head to the exit wound was 15 1/2 inches. (6RT 1045, 1047.)

Moon had bruising on his scalp and a scuff mark on his right knee. (6RT 1026-1027, 1048; Peo. Exh. Nos. 21-24 [autopsy photographs].) The bruise appeared to be "acute," meaning it could have occurred around the time of Moon's death, and was toward the back, left side of his head. (6RT 1048-1050.)

Scholtz saw neither gunpowder residue nor soot on Moon's shirt, which had holes consistent with his gunshot wounds. (6RT 1051-1056.) Stippling, a marking of the skin by powered particles that are discharged from a firearm, also was not present on Moon's body. (6RT 1056-1057.)

3. The Search of Appellant's Residence One Week After Moon's Murder and Subsequent Search of Johnston's Residence

On the morning of June 19, 1997, Lipkin assisted Compton Police Officers Larry Urrutia and Victor Locklin with a search of appellant's grandmother's home, located at 926 North Chester Street in the City of

Compton. Appellant lived there and was present at the time of the search.[18] Lipkin searched a bedroom. He found a loaded firearm on the top shelf in the closet, a letter that Johnston wrote to appellant on the top of the dresser, and articles of clothing. (5RT 890-893, 909-914; 6RT 999-1002, 1005-1007; Peo. Exh. No. 9 [gun]; Peo. Exh. No. 2 [letter].) Lipkin took the letter to the living room and discussed its contents with appellant. (5RT 893-894.) The nine-millimeter, semiautomatic, Glock handgun and the letter, dated June 12, 1997, were booked into property at the Compton Police Station the same day. (5RT 909-914; 7RT 1341-1342.)

Compton Police Sergeant Reynolds contacted Long Beach Police Sergeant Cisneros and Detective Collette the same day. (7RT 1345-1346.) Sergeant Reynolds, Sergeant Cisneros, Detective Collette, and Lipkin all went to appellant's residence to conduct a second search. Sergeant Cisneros recovered shoes and clothing, including a black Nike T-shirt with a Nike emblem, a "swoosh," and the word "Air" on the front, as well as a pair of brown "FILA" shoes. (5RT 906; 7RT 1345-1347; 8RT 1469-1474.)

Sergeant Reynolds met Johnston at her home, at 442 Elm Street in Compton, in June 1997. He later searched her residence on August 20, 1997, and recovered a letter authored by appellant that was addressed to Johnston and postmarked August 11, 1997. (7RT 1370-1371, 1384.) Sergeant Reynolds prepared a property report and booked the letter from appellant to Johnston at the Compton Police Department property room. He was unable to retrieve the letter the morning of his testimony because the Compton Police Department was in the process of moving to the Los

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[18] Lipkin identified a photograph of appellant that accurately depicted appellant's appearance on June 19, 1997. (5RT 895-896; Peo. Exh. No. 4 [photo of appellant].) He identified two additional still photographs of appellant. (5RT 905-906; Peo. Exh. Nos. 6 & 7 [photos of appellant].)

Angeles County Sheriff's Department at the time and he could not locate the letter. (7RT 1380-1381.)

4. Firearms Evidence

Chung identified the gun found in appellant's bedroom as the nine-millimeter Glock he had kept under the counter at Riteway on May 18, 1997. The gun he identified also had the same serial number, TF560. (7RT 1332, 1334-1335.)

Robert Hawkins, a firearm and tool mark examiner for the Los Angeles County Sheriff's Department Crime Laboratory, examined and tested firearm evidence and examined crime scene photos from Moon's murder. (6RT 1169-1171.) Hawkins examined the nine-millimeter Glock, model 19, Luger pistol found in appellant's bedroom. The pistol was a "single double action" semiautomatic, meaning that a person could not fire the gun without pulling the slide so that a round would load into the chamber and cock the trigger. The gun functioned properly. (6RT 1172-1173; Peo. Exh. No. 9 [gun].)

Hawkins test fired the gun, using the magazine that was provided to him with the gun, in order to obtain expended cartridge casings and fired bullets to compare to evidence recovered at the crime scene. (6RT 1176-1177, 1187.) He further examined the magazine, which held nine rounds of ammunition. "Ammunition" was a cartridge or a case filled with gun powder and with a bullet on one end and primer on the other. The nine rounds of ammunition were not of the same brand and type, and one was a reloaded round, or round that had been fired and then repacked with powder, a bullet, and primer. (6RT 1173-1175; Peo. Exh. No. 30 [magazine].)

Hawkins further examined the bullet and cartridge casing that were recovered from Eddie's Liquor. The bullet was a "total metal jacket" bullet which was completely plated with copper and, unlike the typical bullet, did

not have any exposed lead. The casing was manufactured by Remington Peters and was a "Plus-P" round of ammunition. The bullet was not the same brand as the casing and had been reloaded into the casing by someone other than Remington Peters. (6RT 1175-1179, 1213; Peo. Exh. No. 11 [bullet and casing].)

Hawkins determined that the bullet displayed characteristics consistent with a Glock semiautomatic pistol and that it could have been fired from the Glock pistol he examined. He explained that the polygonal rifling marks, or marks caused by the lands and grooves of the gun barrel as the bullet was fired, were very typical of the same type and brand of firearm. Hawkins was unable to state conclusively that the bullet was fired from that particular gun, however, because there were not enough marks on the bullet. (6RT 1179-1182.)

From the markings on the cartridge casing — from the firing pin, primer, and bolt face — that were caused when the gun was fired, Hawkins was positive that the cartridge casing was fired from the Glock firearm he examined. The markings sufficiently showed that the casing could not have been expended by any other firearm. (6RT 1182-1184, 1219-1220.)

Hawkins explained that every firearm extracts and ejects cartridge casings in different ways when a bullet is fired. When a bullet was fired from the Glock firearm, the cartridge casing was ejected to the right and a little bit to the rear. (6RT 1186-1187.)

The bullet recovered from Eddie's Liquor was a total metal jacket bullet that had an area, on the nose and around the side, that was damaged. The damage consisted of a very smooth area that had been pushed in, which was typical of striking a hard or metal object that had "some give to it[.]" It did not appear to have struck glass, but it was an object that was smooth and caused it to form in a rounded way. (6RT 1188, 1191.) Hawkins explained that a ricochet occurred when a bullet struck an object and

bounced away, usually when it struck at an angle and bounced at an angle away from the object. A bullet impact occurred when a bullet struck a hard object "straight on," not at an angle, and left an impression. (6RT 1188-1189, 1192.) Hawkins viewed the photographs taken of the metal ice cream cooler at Eddie's Liquor and determined that it had a mark that was consistent with and typical of a bullet strike. (6RT 1189-1190.) The area where the bullet was found was consistent with having hit the metal ice cooler, causing the dent, and falling away from the door of the cooler. (6RT 1193.)

Hawkins examined Moon's shirt. A hole in the back of the shirt and another in the front were consistent with a bullet entering Moon's back and exiting through his chest. (6RT 1194-1196.) Two partially burned particles of gun powder were found three and a half and two and a half inches, respectively, from the entry hole in the back of the shirt. A lead dot was also present at the edge of the entry hole, but none was found on the front of the shirt. (6RT 1196-1198.) Hawkins explained that the presence of lead on the back of the shirt confirmed the bullet traveled from the back to the front of the shirt. (6RT 1199.)

Hawkins further explained that gunpowder particles and gasses follow behind the bullet when a gun is fired and, if the muzzle is close enough to the target, will form a circular pattern of particles on the target. The closer the muzzle is to the target when fired, the more narrow the pattern of gunpowder particles. Typically, gunpowder particles would not be found on a target that was more than five feet from the gun muzzle, while a few particles might be found at a distance of three to five feet, and more would be found at closer distances. The gun powder particles on Moon's shirt showed that the gun muzzle was likely four or five feet away from Moon, with a range of error at two-to-seven feet away, when the gun was fired. (6RT 1199-1202, 1206.) The gunpowder particles were also typical of

"flake" gunpowder, which commonly traveled three-to-five feet without a pattern. There was no contact wound. (6RT 1202-1203.)

5. Statements Made By Johnston, Marcia, and Wallace During the Investigation of Moon's Murder

a. Johnston's Statements to Police

Sergeant Cisneros spoke with Johnston on June 25, 1997, at her residence. Johnston's mother and Detective Collette were also present. Johnston seemed to be afraid to speak with the officers. She told them that appellant and codefendant Taylor picked her up in a gray van around 11:00 a.m. on June 12, 1997. The group stayed at Valicia's residence for a couple of hours and then left for appellant's residence around 12:00 or 1:00 p.m. (8RT 1474-1475, 1490, 1494.) Sergeant Reynolds showed Johnston a photograph of Wallace's van. Johnston said that Wallace's van was not the van that appellant and Taylor had when they picked her up on June 12, 1997. (7RT 1372-1374.)

Sergeant Cisneros interviewed Johnston again at her residence on February 18, 1998. Johnston initially repeated the same version of events she had given on June 25, 1997, and denied that she had seen any police helicopters, but said that the group left for appellant's residence around 2:00 or 3:00 p.m. on June 12, 1997. Sergeant Cisneros then showed Johnston the letter she had written to appellant that the officers recovered from appellant's residence. She seemed surprised that Sergeant Cisneros had the letter. (8RT 1475-1477, 1479-1480, 1490.)

After Johnston read the letter, her mother entered the room and told her to tell the truth. (8RT 1480.) Johnston then changed her version of events. She told Detective Cisneros that she had paged appellant while she was at Valicia's residence on June 12, 1997. He arrived later with

codefendant Johnson, codefendant Taylor, and Marcia in a gray van that belonged to Taylor's girlfriend. They stayed at Valicia's residence for approximately 10 minutes and then the group — which included Johnston, Valicia, appellant, codefendants Johnson and Taylor, and Marcia — left together in the van. They traveled on the 710 Freeway to appellant's residence. During the drive, Johnston saw two or three helicopters. Appellant said, "'There must have been a robbery, we know the niggas that did that.'" (8RT 1480-1484.) Johnston repeated her statements while Sergeant Cisneros tape-recorded her. On the tape, Johnston said that the van was blue, and then said "I don't know." (5RT 815-816; 8RT 1483-1485.)

At trial, Johnston acknowledged that she wrote the letter to appellant. She wrote the letter later on June 12, 1997, and hand-delivered it to him that night. Appellant did not respond to the letter. Johnston did not see him again after June 12, 1997, but he had telephoned her approximately one month prior to the trial. (5RT 801-802.) Johnston testified that she was attracted to appellant at the time of the incident, but he was not her boyfriend. She wrote the letter in order to stop their relationship from going any further. (5RT 825.)

Johnston admitted that, during her February 18, 1998, interview with Sergeant Cisneros, her mother told her to tell the truth after Sergeant Cisneros showed her the letter she had written to appellant. She denied changing her version of events after he presented her with her letter. (5RT 862-863.) Johnston did not recall telling Detective Collette that appellant and codefendant Taylor picked her up in a gray van on June 12, 1997, at her house. She also did not recall saying that appellant and codefendant Taylor stayed at Valicia's cousin's house with her until 12:00 or 1:00 p.m. that day. (5RT 807-811.)

On June 23, 1997, Sergeant Reynolds showed Johnston a photograph of Wallace's van. Johnson said that Wallace's van was not the van that appellant and Taylor had when they picked her up on June 12, 1997. (7RT 1372-1374.) When Johnston testified, she said she did not recall whether she told Sergeant Reynolds on June 23, 1997, that the photograph of Wallace's van did not depict the van that appellant and codefendant Taylor were in when they picked her up. (5RT 813.)

b. Marcia's Statements

Marcia first spoke to police about the events of June 12, 1997, on September 23, 1999. She admitted she initially told them that codefendant Taylor picked codefendant Johnson up from school around noon, Taylor and Johnson picked Marcia up from school, and then the three of them went to Compton High School to watch the cheerleaders. (8RT 1598-1602.) She admitted telling the officers that she and codefendants Johnson and Taylor went to Eddie's Liquor at approximately 4:00 p.m., but testified that she had never said anything about a brown Cutlass. (8RT 1602-1605.)

Marcia had also told Long Beach Police Detective Paul Edwards that she saw two clerks inside Eddie's Liquor, although she was not sure if both men were clerks. She said she had heard rumors "on the street" that the store had been robbed and that the clerk was shot. The detective suggested that the plan was made the night before the incident, and Marcia agreed. (8RT 1605-1609.) Marcia initially told Detective Edwards that codefendant Johnson wore black shorts and a T-shirt, and then admitted that he wore shorts and a green Gap sweater. (8RT 1609-1612.) Marcia testified that, when she had testified at the preliminary hearing that appellant began discussing his plan to rob Eddie's Liquor at noon on the day before the robbery, the statement was untrue and she was confused. (8RT 1646-1647.)

Marcia testified at trial that she did not receive any money after she, appellant, codefendant Johnson, and codefendant Taylor left Eddie's Liquor. (8RT 1575.)

c. Wallace's Statements and Fear of Testifying

Wallace met with Compton Police Officer Catherine Chavers and Sergeant Reynolds at the Compton Police Department on June 19, 1997. Between 5:15 and 5:30 p.m., Wallace drove toward her home in the van with Officer Chavers. Sergeant Reynolds followed behind them in another vehicle. Based on something that occurred during the ride, Officer Chavers pointed out a particular vehicle to Sergeant Reynolds. He went to look for the vehicle. (7RT 1360; 8RT 1446-1449.) Shortly thereafter, Officer Chavers saw the vehicle again at a gas station at Alondra and Alameda in Compton. Wallace identified the two males in the vehicle as codefendant Johnson and his cousin, Michael. (8RT 1449-1450.)

Officer Chavers waited in the van while Wallace spoke to codefendant Johnson and Michael at the gas station. The males spoke in a low tone. When they asked Wallace about Officer Chavers, Wallace said that Officer Chavers was a social worker. Officer Chavers overheard one of the males accuse Wallace of speaking to the police. Wallace, who appeared to be uncomfortable, denied it. As the conversation continued, Officer Chavers noticed that Wallace's demeanor changed from appearing uncomfortable to appearing frightened. (8RT 1450-1453.)

Sergeant Reynolds received a radio call to meet Wallace and Officer Chavers at the gas station on the corner of Alondra and Alameda. When he arrived, Wallace still appeared to be frightened. (8RT 1452.) With Wallace in their presence, Detective Chavers told Sergeant Reynolds that Wallace had pointed out codefendant Johnson. Wallace did not deny

identifying codefendant Johnson. (7RT 1360-1361.) Wallace said she would not come to court because she was afraid. (7RT 1363.)

At trial, Wallace testified that she did not recall being in the company of a female police officer on June 19, 1997, denied anything happened that day that made her fearful, denied identifying anyone to the officer, and said she did not recall telling a police officer that she saw codefendant Johnson. (5RT 747-749.)

6. Physical Appearance of Appellant and His Codefendants at the Time of Trial

The parties stipulated that, on June 12, 1997, appellant was five feet, nine inches tall and weighed 152 pounds. Codefendant Taylor was six feet tall and weighed 176 pounds. (7RT 1418.) The parties further stipulated that a fingerprint card was a true and accurate copy of the fingerprints maintained by Los Padrinos Juvenile Hall. (7RT 1424.) Appellant, codefendant Taylor, and codefendant Johnson all stood and turned to show their profiles to the jury. (7RT 1425.)

DEFENSE EVIDENCE

Lipkin searched appellant's residence based on information he received. (9RT 1827-1831.) He confirmed that he saw the Glock firearm in appellant's closet. Lipkin also searched a spare bedroom and noticed tires and stereo equipment in the room. A person would have to travel through appellant's bedroom to reach the spare bedroom from the front of the house. A person could enter the spare bedroom through the wash room if the person entered from the back of the house. (9RT 1827, 1835-1843.)

Defense Investigator Daniel Mendoza took measurements of appellant's residence and prepared a diagram representing those measurements. Appellant's room measured approximately twelve feet by

twelve feet. The spare bedroom measured approximately twelve feet by nine feet. (9RT 1846-1849.) There was no door between appellant's room and the spare bedroom. A person could enter the spare bedroom without going through appellant's bedroom only if the person entered the backyard of the residence and went in through the locked back door of the house. (9RT 1850-1853.)

Michael Cayton, an off-duty Long Beach Harbor Patrol officer,[19] testified on behalf of codefendant Johnson. Cayton was at a barber shop near the intersection of Butler and Artesia from approximately 12:00 to 3:00 p.m. on June 12, 1997. (9RT 1864-1865, 1879.) At approximately 2:00 p.m., Cayton noticed three men standing near the parking lot as he drove away from the barber shop. (9RT 1866-1867.) The men looked as if they were "up to no good." (9RT 1868, 1881.) The men had dark skin and were between five feet, nine inches and six feet, one inch in height. As Cayton drove past them, one of the men walked toward Eddie's Liquor. Another followed and the two men entered the liquor store as one stayed outside looking around. (9RT 1869-1870.)

Approximately 45 minutes to an hour later, Cayton noticed helicopters in the area of the liquor store. He drove back to the location and gave a statement to Officer Holdredge, describing the men as dark-skinned and in their early twenties. Cayton had told Officer Holdredge that two of the three males stood outside, while one entered Eddie's Liquor. (9RT 1870-1871, 1884, 1889-1895.) He also spoke to the media. (9RT 1888.) Cayton stated at the time that he would be able to identify the men. He was unable to recall what the three men were wearing, unable to identify

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[19] Cayton admitted that he was not a sworn peace officer and that his job duties were to direct traffic and work dispatch. He had taken some courses at a police academy in 1985, but had never been employed as a peace officer. (9RT 1876-1878.)

appellant or his codefendants in a six-pack photographic lineup (hereinafter "six-pack"), and unable to state in court whether appellant, codefendant Johnson, or codefendant Taylor were or were not the three men he saw that day at Eddie's Liquor. (9RT 1873, 1887.)

PENALTY PHASE[20]

PROSECUTION EVIDENCE

A. Appellant's Prior Crimes

1. The December 9, 1993, Shooting at Gilbert West High School

In December 1993, Cheryl Quadrelli-Jones was an assistant principal at Gilbert West High School, a continuation school appellant attended in Anaheim. (17RT 3735-3736.) On the morning of December 9, 1993, before classes began, Quadrelli-Jones was in the parking lot area of the

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[20] The instant factual summary is taken from the evidence presented during the second penalty phase wherein the jury reached a verdict of death. The jury during the original penalty phase trial was unable to reach a verdict although almost all of the same witnesses testified during both penalty phase trials and the witnesses testified in substantially the same manner. One additional victim-impact witness testified on behalf of the prosecution during the original penalty phase. Robert Bernhardt, Moon's friend since childhood, had testified during the original penalty phase about Moon's childhood and the odds Moon had overcome during his life, but Bernhardt's testimony was not presented during the second penalty phase. (11RT 2386-2395 [Bernhardt's testimony during original penalty phase]; compare RB Penalty Phase Statement of Facts with AOB First and Second Penalty Phase Statement of Facts].) As the evidence presented was substantially the same in both penalty phases, the prosecution presented less victim-impact evidence in the second penalty phase, and appellant has not raised any arguments necessitating a comparison of the detailed evidence presented during the first penalty phase with that presented during the second penalty phase, respondent has not included a summary of the evidence adduced during the original penalty phase.

school when she saw appellant with a group of boys in the parking lot area of a Jack-in-the-Box adjacent to the school. Appellant's group appeared to be having difficulties with another group. Appellant made a telephone call. Within a short time after the call, a person, who was not a student, rode up on a bicycle and spoke "closely" with appellant. The 8:05 a.m. warning bell rang and appellant and the other students went to class. (17RT 3737-3740, 3761-3762.)

Quadrelli-Jones was in the Gilbert High School parking lot again after the morning session classes. Approximately 10 minutes later, around 11:30 a.m., appellant passed her as he left the school and walked across the street. When a male came out from an opening in a wall across the street from the school, and approximately 100 feet away from appellant, appellant extended his arm outward in front of him with a closed hand. Quadrelli-Jones heard multiple "popping" noises, which sounded like gunshots from a .22 caliber gun, coming from the area where appellant was standing. Qaudrelli-Jones yelled for the students to "get down." (17RT 3742-3745, 3751, 3820-3822.) Appellant appeared to put the item that was in his hand into his pants. He slowly went through the pedestrian opening in the wall and left the area. (17RT 3746-3747.) Appellant went to school the following day, December 10, 1993, but was no longer a student after that day. (17RT 3803-3804.)

2. The January 31, 1994, Cypress Arnold Park Shooting and Attempted Robbery

Bradley Turner was at Cypress Arnold Park in Cypress coaching a girls' softball team from about 4:00 to 6:00 p.m. on January 31, 1994. Shortly before 6:00 p.m., Turner walked to the parking lot to put the softball team equipment in his car. Many other people were in the parking lot area. As Turner opened the tailgate of his car, he saw in his rear

window the reflection of three African-American males coming up very quickly from behind him. Turner saw a gun. One of the males put the gun against Turner's temple, and pulled him to the side of the car. The male kept the gun pressed against Turner's temple and stayed on Turner's left side. Another male stood in front of Turner, told him to squat down, and kept saying, "Give us your money, you mother fucker, or we're going to kill you right now." The third male stood to Turner's right side. Turner told the men that his wallet was inside the car. The male that had demanded the money searched the car for the wallet. When he did not see the wallet, he twice said to his companions, "Just kill the mother fucker now." (17RT 3830-3836.) Turner grabbed the gunman's hand and pushed the gun down. The gunman pushed the gun into Turner's leg. The other two men then "rushed" Turner. The gun fired into Turner's leg. The three males ran away. (17RT 3836-3837.)

Rhonda Griffin was in the park, approximately fifteen feet away from the parking lot, when she heard a loud noise that sounded like a firecracker coming from the parking lot area. She heard voices screaming that someone had been shot. (16RT 3689-3695.) She saw an African-American male running north. Griffin ran through the park to cut him off and chase him. When she got within arm's length of the man, he turned, pointed the gun between her forehead and nose, and said, "Do you want some of this, also, you fucking bitch?" Griffin froze. She was afraid for her life. As she backed up, she realized some of the children had followed her and she held them back as well. (16RT 3695-3696; 17RT 3704.) A car, with at least two people inside, drove up on Crescent from the parking lot. The gunman dove head first through the window of the car. The car traveled east on Crescent and left the area. (16RT 3696-3697; 17RT 3728-3729.)

Cypress Police Corporal Brian Walquist and Officer Christopher McShane responded to a call at Cypress Arnold Park at approximately 5:50

that evening. Turner was lying in the back of a white Ford Explorer near the west side of the parking lot. His left leg was bleeding. (18RT 3984-3986, 3989, 4004-4006, 4014.) Corporal Walquist retrieved a .25 caliber shell casing that was near the right rear tire of Turner's Explorer. (18RT 3987-3991, 4006-4007.)

An ambulance transported Turner to La Palma Hospital. A bullet was extracted from his leg by a doctor and collected by Cypress Police Officer Thomas Bruce. (17RT 3840-3841; 18RT 4025-4027, 4029-4031.)

Between 5:30 and 6:00 that evening, Officer Bruce responded to a La Palma Police Department broadcast and went to South Street and Gridley where La Palma Police Officers were conducting a felony stop on a car. (18RT 4021-4024.) Four African American males, including appellant, were ordered out of the car. Officer Bruce's attention was drawn to a firearm that was hidden in the dashboard of the car where the stereo would normally be. (18RT 4024-4025.)

Corporal Walquist and Officer McShane both went to South Street, near the intersection at Bloomfield and the Cerritos Mall, where other officers had stopped a car. Corporal Walquist recovered a loaded .25 caliber automatic handgun from an area behind the radio in the car. (18RT 3991-3996, 4007.) Four suspects, including appellant, were detained at the scene. Officer McShane transported appellant to the Cypress Police Department and brought him to the juvenile detention facility, which was the report writing room at the time. (18RT 4009-4011.)

Griffin accompanied police officers to South Street, near the Cerritos mall, that evening to view some individuals who had been detained. She was still afraid at the time and was concerned that the suspects could see her in the police car. Griffin recognized one of the suspects as the man who pointed the gun at her face earlier that day, but she could not recall if she

identified anyone for the police officers. (17RT 3706-3708, 3722-3723; 11RT 2306.)

Officer Douglas McManus also investigated the shooting at Cypress Arnold Park and contacted appellant, who was in custody, at approximately 8:30 the same evening. Officer McManus advised appellant of his constitutional rights pursuant to the Cypress Police Department's form. Appellant confirmed that he understood his rights. (17RT 3857-3862.) When Officer McManus asked about the shooting at Cypress Arnold Park, appellant denied knowledge of the incident. Officer McManus left the room 10 to 15 minutes later. (17RT 3866-3867.)

Officer McManus returned 15 to 30 minutes later with Officer McShane. Officer McManus told appellant that he believed appellant was involved in the Cypress Arnold Park incident because he had information that three suspects robbed and shot a victim, that those suspects ran to a car, and that, when police stopped the car, appellant was inside. Appellant then admitted he went to the park with two friends, Miller and McKinney, looking for someone who had assaulted one of their friends. As they walked through the parking lot, Miller handed appellant a chrome handgun and told him to rob Turner. Appellant and Miller approached Turner. Appellant pointed the gun to Turner's head and told him to kneel down. Turner told them that his wallet might be in the car. Miller looked around the car, then came back out and said, "Shoot the mother fucker." Appellant said that he thought Miller was attempting to frighten Turner into telling them the location of his wallet. Turner then jumped up and the gun went off, shooting Turner in the leg. Appellant, Miller, and Kinney ran to a car that was parked on a nearby street. (17RT 3867-3868, 3872-3876.)

Corporal Walquist gave Officer McManus a small chrome handgun that was loaded with one .25 caliber bullet in the chamber and two in the magazine. (17RT 3876-3879, 3900.) Officer McManus explained that the

slide on the semiautomatic handgun had to be pulled back in order for a bullet to enter the chamber and fire. The gun was equipped with a safety button that would prevent it from firing. (17RT 3879-3880.) Appellant told Officer McManus that the safety on the gun was disengaged at the time of the shooting, but he did not know if the gun was loaded before it fired. (17RT 3881-3882.)

Appellant's fingerprints were taken at the jail, and he signed the fingerprint card. (18RT 4011-4012.) Appellant was 16 at the time of the arrest. (18RT 4017, 4020.)

A criminalist for the Orange County Sheriff's Department Crime Laboratory, examined the .25 caliber, Raven, semiautomatic firearm found in the car with appellant and his companions. (18RT 4046, 4055-4057.) To fire a semiautomatic gun, a magazine holding the bullets must be loaded into the grip of the gun and the slide must be pulled back to load a cartridge into the chamber and to cock the striker. (18RT 4056-4057.) The gun was test-fired and functioned properly. (18RT 4057-4058.) The cartridge casing found near Turner's truck and the bullet removed from Turner's leg were both fired from the .25 caliber Raven. (18RT 4060-4065.)

On February 3, 1994, Officer McManus showed a six-pack, with appellant's photograph in position number two, to Griffin. She identified appellant as the person she had chased and who had pointed the gun at her face. (17RT 3884-3886.)

At trial, Griffin could not recall if she identified anyone in the photographs, but identified her writing and signature on the forms. (17RT 3708-3712.) She could no longer recall what the gunman looked like at that point. (17RT 3732.)

Officer McManus showed four six-packs to Turner on February 3, 1994. Turner identified appellant in one six-pack and McKinney in another. Turner was not certain if either appellant or McKinney was the shooter.

(17RT 3887-3888.) McKinney was another one of the suspects that had been contacted and booked by Officer McManus the night of the shooting. Officer McManus identified the booking photograph of appellant that was taken on January 31, 1994. (17RT 3888-3890.)

At trial, Turner recalled pointing out two of the people in the six-packs on February 3, 1994, but told the officers he was not certain of the identifications. (17RT 3841-3843.)

The parties stipulated that, on July 25, 1994, appellant admitted allegations in a juvenile petition that charged him with the attempted second degree robbery of Turner and assault with a semiautomatic handgun upon Turner. (22RT 4909.)

3. The May 18, 1997, Riteway Robbery

On May 18, 1997, Chun Chung and his wife, Jung Ja Chung, owned the Riteway Market located at 524 West Alondra Boulevard in Compton. At that time, Chung owned a Glock firearm, serial number TF560. He also had a surveillance system in the market. (18RT 4109-4112, 4165.)

Chung left the Riteway Market sometime after 11:30 a.m. or close to noon to purchase lunch that day. His firearm was under the cash register. The firearm was loaded with one bullet in the chamber and eleven in the magazine, which may or may not have been different brands. Jung was in the store when he left. (18RT 4112-4115, 4166.)

While Jung was in the Riteway Market alone, an African-American male who appeared to be about 18 years old came into the market and asked for hair gel. He left when Jung told him that she did not have the hair gel. Four African-American males then entered the market while Jung stood at the cash register. One walked up to Jung and pointed a gun at her. Jung was very scared and put her hands up behind her head. A second male walked around the counter and took money from the cash register. The

third and fourth males walked to the beer and wine coolers near the back of the store. The second male, who was taking money from the cash register, asked about a videotape. When he lifted a newspaper that covered the video system, he saw Chung's gun and took it without taking the videotape. From what Jung recalled, the males took the gun, money, beer, and a hat. (18RT 4167-4171.) When Chung returned, his gun was gone. (18RT 4112.)

Police officers took the videotape of the incident. (18RT 4113-4114.) Jung later viewed the videotape. The parties stipulated that the videotape marked as People's Exhibit Number 3 was a true and accurate recording of the events that were the subject of Jung's testimony. (18RT 4169, 4171.)

Ken Lipkin, a parole agent for the CYA, was assigned to supervise appellant from March 28, 1997, through June 19, 1997. (18RT 4123-4124, 4131.) Lipkin viewed a videotape of the Riteway robbery at the Compton Police Department. He identified appellant and appellant's voice in the videotape. Appellant could be seen entering the store and asking for hair gel. He then reappeared on the videotape and stood in front of the counter for a while. Appellant said, "We got a Glock." He also made reference to "187," the California Penal Code section for murder. (18RT 4144, 4149-4151; Peo. Exh. No. 3.) Toward the end of the video, appellant could be seen pointing a gun. (18RT 4152.) Lipkin identified two still photographs, taken from the videotape, depicting appellant pointing the gun. (18RT 4151-4152; Peo. Exh. Nos. 6, 7.)

B. The Murder of Richard Moon and Attempted Robbery at Eddie's Liquor

On the morning of June 12, 1997, Marcia was in her home with codefendant Johnson, appellant, and codefendant Taylor.[21] Appellant suggested that the group commit a robbery at Eddie's Liquor in Long Beach. He told Marcia to go inside the liquor store and "check the place out." Appellant designated codefendant Taylor as the driver and told codefendant Johnson to go inside and rob the liquor store with him. (21RT 4732-4738.) Appellant had a black Glock firearm in his hand at some point while he was at the Johnson residence. Marcia had seen him with the gun on previous occasions. He kept the gun in his waistline. (21RT 4753-4754.) Appellant was wearing a black Nike Air T-shirt and black jeans. Codefendant Johnson was wearing a green, long-sleeved, Gap sweater and black shorts. (21RT 4748-4749.)

At the time, Zonita Wallace owned a light gray Plymouth Voyager van. She knew codefendant Taylor, appellant, codefendant Johnson, and Marcia. Wallace loaned her van to codefendant Taylor sometime after 1:00 that afternoon. (18RT 4173- 4177; Peo. Exh. Nos. 1 & 35.)

Codefendant Taylor drove the group to Long Beach in Wallace's gray van and parked on a side street near Eddie's Liquor. (21RT 4738-4739, 4760.) Appellant was in the passenger seat. Marcia and codefendant Johnson were in the backseat. (21RT 4745.)

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[21]Marcia had entered into an agreement with the prosecution that, in exchange for her truthful testimony, she would receive a sentence of twelve years in prison for the robbery and murder at Eddie's Liquor. She understood that, if the trial court found that her testimony was not truthful, she could receive life in prison. (21RT 4756-4758.) Marcia admitted that her brother was tried in the prior proceeding and that she wanted to help him, but she had told the truth. (21RT 4763.)

When they arrived, Marcia went inside Eddie's Liquor and looked around for clerks and cameras. She saw an older Caucasian man behind the counter and another person she believed might have been a clerk. Marcia purchased Jolly Rancher candy and left. (21RT 4739-4744.)

Marcia returned to the van and told appellant that she saw two clerks and two cameras inside Eddie's Liquor. She believed that appellant had a gun in his waistband area, but did not recall if she saw it at that time. Appellant and codefendant Johnson got out of the van and walked toward the liquor store while Marcia and codefendant Taylor waited in the van. (21RT 4743-4746, 4754, 4790.)

Approximately five minutes later, Marcia heard two gunshots. Appellant and codefendant Johnson then ran out of Eddie's Liquor and up Butler toward the van. Appellant got back into the passenger seat of the van through the window. Codefendant Johnson got into the backseat through the open sliding door. They left the area, heading for a residence in Long Beach to meet Iris Johnston. (21RT 4746-4748.) Marcia did not receive any money from her participation in the incident at Eddie's Liquor, and did not believe that the group had recovered any money. (21RT 4759.)

Johnston knew appellant and was friends with Marcia, codefendant Johnson, and codefendant Taylor. (21RT 4559-4563.) Sometime earlier on June 12, 1997, Johnston had taken the Metro to her friend's residence in Long Beach. She paged appellant around 10:00 or 11:00 a.m., and he called her 10 or 20 minutes later. Appellant arrived at Johnston's friend's residence a "couple" of hours later in a light colored van that belonged to codefendant Taylor's girlfriend. Codefendant Taylor, codefendant Johnson, and Marcia were with him. (21RT 4563-4566, 4572, 4616, 4622.) The group, including Johnston, Johnston's friend Valicia, and a child who was Marcia's cousin, left together in the van within 10 to 15 minutes. Codefendant Taylor drove. (21RT 4566-4567, 4572, 4611-4612, 4628,

4749-4750.) Johnston noted that appellant wore his hair that day the way it appeared at trial and shown in a photograph. (21RT 4603; Peo. Exh. No. 4.)

As the group traveled north on the 710 Freeway, toward appellant's residence in Compton, Marcia mentioned that there were helicopters in the air. (21RT 4567, 4570-4574, 4579, 4750-4751, 4755.) Johnston asked the group what had happened. Appellant said that there was a robbery and he knew "'who it was.'" (21RT 4574-4577.)

When the group arrived at appellant's residence, appellant went inside with codefendants Taylor and Johnson. Johnston, Valicia, and Marcia waited outside. After a short time, appellant came outside and said, "'Let's go watch the news.'" The entire group went inside the residence. (21RT 4579-4583, 4751-4752.) After a broadcast aired regarding Eddie's Liquor, Marcia recalled that someone in the group said that he or she wondered if "he" was dead. (21RT 4751-4752.)

The group stayed at appellant's residence for approximately 30 minutes and then walked to Elm Street, where Johnston and codefendant Taylor lived. Johnston and Marcia both noticed that appellant appeared nervous and "kind of paranoid" when they saw police vehicles in the area.[22] Marcia left at that point. (21RT 4583-4586, 4752-4753.) Johnston and appellant returned to appellant's residence. Codefendant Taylor drove Johnston home in the van. (21RT 4588.) He returned the van to Wallace later that day. (18RT 4176-4177.)

Johnston had a telephone conversation with appellant later that night. Marcia was involved in the conversation, but Johnston could not recall if

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[22] Johnston initially testified that appellant appeared normal, but then admitted that a letter she had written refreshed her memory and that appellant appeared nervous when he saw a police vehicle. (21RT 4583-4586.)

Marcia was on the telephone or at appellant's or Johnston's residence. The news came on during the conversation. (21RT 4589-4593.)

After the conversation, Johnston wrote a letter to appellant that she hand-delivered to him that night. (21RT 4593-4595; Peo. Exh. No. 2A.) In the letter, Johnston wrote that she believed appellant and his friends committed the robbery in Long Beach. She noted observations she had made that day that concerned her and caused her to believe they committed the robbery, including appellant's statement after he saw the helicopters, what was shown on the news that afternoon, and the telephone conversation she had with appellant and Marcia wherein appellant and Marcia became quiet while watching the news and made comments to the effect that they did not want Johnston to hear it.[23] (21RT 4596-4602, 4624.) Johnston did not speak to appellant about the letter and he never responded to it. (21RT 4595-4596.) Johnston did not hear from appellant after she wrote the letter until sometime after he was arrested. (21RT 4626.)

1. The Investigation

Long Beach Police Officers Rudy Romero and Stacy Holdredge responded to a 911 call from Eddie's Liquor on June 12, 1997. They arrived between 2:07 and 2:08 p.m., and were the first officers on the scene. The officers saw Steven Miller, Miller's girlfriend, and another male standing the parking lot when they arrived. (21RT 4630-4632, 4651-4652, 4657-4658, 4672-4674, 4681.) Officer Romero contacted Miller, who appeared to be very nervous and shaken. Miller said, "I think he's dead." (21RT 4632, 4640.)

Officer Holdredge entered Eddie's Liquor and saw Moon lying on his back on the ground behind the counter. She leaned over to determine if he

[23] Johnston read the letter to the jury. (21RT 4624-4625.)

was still breathing and then called for paramedics. Officer Holdredge walked back outside, and noticed a cartridge casing on the ground as she walked out. (21RT 4640-4641, 4675-4677, 4683-4685.) She described Miller's demeanor when she went back outside as "very excited," sweating, and nervous. (21RT 4687.)

Officer Romero went inside Eddie's Liquor and noticed that miscellaneous items, such as chips and candy, that had been on an aisle display had been knocked into the aisle.[24] (21RT 4641-4642.) Officer Romero saw Moon lying on his back and noticed he appeared to be bleeding from the area of his face. Paramedics arrived and then left a short time later. (21RT 4643-4645.)

Immediately after walking out of Eddie's Liquor, Officer Romero contacted Miller again. Miller still appeared to be very uneasy and shaken, and he remained that way throughout the conversation. Miller told Officer Romero that he and his girlfriend were waiting on a bus bench, on the southeast corner of Butler and Artesia, when he saw two African-American males enter Eddie's Liquor. The parking lot and liquor store otherwise appeared to be empty. Almost immediately after Miller saw the African-American males enter the liquor store, he heard a popping sound. The African-American males then ran out of the liquor store. They ran north on Butler about two blocks and turned east on Marker. (21RT 4645-4650, 4656.) The first African-American male wore a black T-shirt with white stripes and possibly dark jeans. The second male wore a colored shirt and long dark shorts. Miller described both as being approximately five feet, eight to nine inches tall and said that both had short Afro-style hairstyles.

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[24] Officer Romero viewed and identified a videotape of the scene, depicting himself and Miller inside Eddie's Liquor. (21RT 4638-4639; Peo. Exh. No. 36.)

(21RT 4650-4652.) Officer Romero secured the parking lot area. (21RT 4652.)

Long Beach Police Officer Teryl Hubert also went to Eddie's Liquor. Officers Romero, Holdredge, and Aldo DeCarvalho were already on the scene. (20RT 4396-4397.) Officer Hubert secured and marked the crime scene. He collected a cartridge casing and a copper colored bullet. (20RT 4397-4399, 4410-4411, 4435.) Officer Hubert saw a dent, which appeared to be a ricochet mark, on an ice cream machine in the store. Money was on the counter and the cash register drawer was shut. (20RT 4406-4408, 4415.) He recognized Moon as he had frequented Eddie's Liquor and became familiar with Moon. (20RT 4401, 4409.)

Long Beach Police Officer Aldo DeCarvalho, who was also on the scene at Eddie's Liquor on June 12, 1997, prepared a diagram of the liquor store. (20RT 4441-4448.) He had observed thousands of bullet impacts in his experience as a police officer. (20RT 4442-4443.) Officer DeCarvalho observed what appeared to be a bullet impact on an ice cream machine in the liquor store. (20RT 4448.) He also saw a cartridge casing and an expended bullet. (20RT 4449-4450.) The cartridge casing was found 11 feet, five inches from the north wall of the liquor store and six feet east of the west wall. The expended bullet was 24 feet, 10 inches from the north wall and six feet east of the west wall. The bullet was found 13 feet, five inches away from the cartridge casing. (20RT 4452-4454.) Moon's body was found 28 feet, two inches south of the north wall and six feet, three inches east of the west wall. (20RT 4454.)

Long Beach Police Detective Jorge Cisneros also responded to the scene at Eddie's Liquor that day. Detective Cisneros saw Moon's body behind the counter in the liquor store and contacted Detective Prell, who had two still photographs with him as well as the surveillance videotape

from the store. (19RT 4227-4229, 4248-4249; Peo. Exh. Nos. 36, 43A, and 43B.)

Detective Cisneros later viewed the videotape in the robbery detail section of the Long Beach Police Department. He brought the videotape to Aerospace Corporation and viewed it in a video machine that displayed more of the frame and allowed a view of the faces of some of the people depicted on the tape. (19RT 4230-4235, 4246.) The Aerospace Corporation employee provided Detective Cisneros with still photographs created from the videotape and a copy of the video in a slower speed, which allowed him to view the tape on a regular VCR. (19RT 4235-4236, 4250.)

The Long Beach Police Department Air Unit, a helicopter, had also responded to a call at the intersection of Butler and Artesia at approximately 2:09 p.m. on June 12, 1997. (19RT 4362-4365.) The helicopter orbited the area surrounding the intersection, and crossed over the 91 and 710 Freeways during the orbit, for approximately one hour and 40 minutes. At 3:55 p.m., the helicopter was low on fuel and left the area. (19RT 4365-4369.) One news helicopter also orbited the intersection of Butler and Artesia at the time. (19RT 4373-4376.)

Stephen Scholtz, a deputy medical examiner for the Los Angeles County Department of Coroner, performed an autopsy on Moon's body on June 13, 1997. (19RT 4294-4297.) Moon's cause of death was a gunshot wound to his thorax, or chest area. The bullet had entered his back and exited through his chest. The bullet traveled through the left side of Moon's spinal column, his aorta, the lower portion of his windpipe, and through his breast bone as it exited. The bullet entry wound was 15 3/4 inches down from the top of Moon's head and 2 inches from the center line of his body. The exit wound was 15 1/2 inches from the top of his head and 1 1/2 inches from the center line of his body. He also had bruising behind

and above his ear on the left side of his scalp and a scuff mark on his right kneecap. (19RT 4298-4301, 4303-4304, 4308; 21RT 4672.)

Scholtz explained that soot was a smudge-like appearance on skin caused by smoky gunpowder residue when a gun was fired within a close distance to the body, usually within one foot. Stippling was a marking of the skin caused by incompletely burned gunpowder particles ejected by the gun, usually when a gun was fired within two to two and a half feet from the body. Neither soot nor stippling could be seen on Moon's body or the shirt he wore at the time of the shooting. (19RT 4308-4309, 4312.)

On June 19, 1997, Wallace drove her van to the Compton Police Department and spoke with Compton Police Sergeant Frederick Reynolds. Sergeant Reynolds photographed the van. (18RT 4177; 21RT 4709-4710; Peo. Exh. No. 35.) Wallace testified that June 12, 1997, was the last time she had loaned her van to codefendant Taylor. She did not recall telling Sergeant Reynolds which date she loaned the van to codefendant Taylor or who was with him when he returned it, but testified that she was truthful and the events were fresh in her mind when she spoke to him. (18RT 4178-4179.)

Detective Reynolds confirmed that, during his June 19, 1997, meeting with Wallace, Wallace told him that she had loaned her van to codefendant Taylor at approximately 1:30 p.m. on the preceding Thursday (June 12, 1997). When codefendant Taylor returned the van around 4:30 p.m., appellant and codefendant Johnson were with him. (21RT 4711-4716.) Wallace told Detective Reynolds that she did not want to get involved and would not come to court because she afraid. (21RT 4721.)

Wallace identified a photograph of codefendant Johnson. (18RT 4181.) She also admitted that a female officer traveled with her in her van the day she brought the van to the Compton Police Department. (18RT

4181.) Detective Reynolds contacted and photographed codefendant Johnson on June 23, 1997. (21RT 4721-4722.)

2. The Search of Appellant's Residence and Subsequent Search of Johnston's Residence

Ken Lipkin, a parole agent for the CYA, was assigned to supervise appellant from March 28, 1997, through June 19, 1997. (18RT 4123-4124, 4131.) Lipkin identified a Jurisdiction and Confinement History for appellant, which was a record prepared and kept by the CYA that included identity, confinement, and parole information on a particular person. The History reflected that appellant was first received by the CYA on September 4, 1994, and was paroled on March 28, 1997. Appellant was released to Maryann Vaughn, his grandmother. The record showed that Lipkin arrested appellant again and took him into custody on June 19, 1997. (18RT 4125-4130, 4161.)

On June 19, 1997, Lipkin went to 926 North Chester in Compton, the home to which appellant had been released, with Compton Police Department officers to conduct a parole search. Appellant answered the door and was immediately placed in handcuffs.[25] Lipkin and the officers, including Compton Police Officer Victor Locklin, searched the home. Lipkin found what appeared to be a nine-millimeter handgun in the closet of a spare room next to appellant's bedroom. Lipkin explained that a person could enter the spare room only through appellant's bedroom or the back door to the residence. Officers Locklin and Larry Urretia took the gun, with nine live nine-millimeter rounds in the magazine, into custody. The serial number on the gun was TF560. (18RT 4131-4133, 4140, 4154-4155,

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[25] Lipkin identified a photograph of appellant that accurately depicted appellant's appearance on June 19, 1997. (18RT 4143.)

4186-4192, 4195.) Lipkin also found a two-page letter on the bed in appellant's bedroom. He read the letter and asked appellant about its contents. The letter was booked at the Compton Police Department. (18RT 4133, 4136-4137, 4139-4141, 4198; 19RT 4215-4216; Peo. Exh. No. 2A [letter].)

Detective Reynolds took custody of the gun and letter from Johnston found in appellant's residence. (21RT 4704-4707.) After reading the letter, Detective Reynolds contacted and met with Long Beach Police Detectives Cisneros and Collette. After the meeting, he returned to appellant's residence with the Long Beach detectives as well as Lipkin and Compton Police Officers Locklin and Urrutia. The officers searched the home again. (18RT 4143-4144; 21RT 4708-4709.) Detectives Cisneros and Collette removed clothing and shoes from appellant's residence, including a black T-shirt with the word "Air" on the front and the Nike "swoosh" emblem near the neck area on the back. The T-shirt was taken from a closet in the middle bedroom of appellant's residence, which had a doorway to a spare bedroom. (19RT 4251-4253, 4258, 4264.)

During an August 20, 1997, search of Johnston's residence, the officers found a letter written by appellant to Johnston. The letter was postmarked August 11, 1997. The letter had been booked into evidence at the Compton Police Department, but could not be located at the time of trial because the Compton Police Department had merged with the Los Angeles County Sheriff's Department and the property was in the process of being moved to the Sheriff's Department at the time. (21RT 4723-4725.)

3. Firearms Evidence

Chung identified the gun recovered from appellant's residence as his firearm and noted that the serial number matched. He also identified the

firearm registration form that he had filed with the Department of Justice. (18RT 4111-4112, 4116-4117.)

Robert Hawkins, a firearms examiner, examined the Glock semiautomatic pistol found in appellant's residence. The Glock could not be fired unless the shooter pulled the slide back, let it go forward again, which allowed a round to chamber, and then pulled the trigger. (20RT 4494-4501.) The Glock was loaded with nine complete rounds of ammunition, or rounds with the bullet, cartridge casing, and primer intact. There were four different brands of ammunition in the gun and different types of bullets. The majority of the rounds were full metal jacket rounds, meaning that the rounds were lead core and covered by a heavy metal jacket. One round was a jacketed hollow point that appeared to have been reloaded. A reloaded round had a cartridge casing that had been fired and ejected from a firearm and then reloaded with a new bullet and primer. (20RT 4502-4505.)

Hawkins test fired the Glock firearm and determined that it functioned properly. (20RT 4505-4506.) The gun required the typical five to six pounds of pressure to fire. The gun ejected the cartridge casings to the right of the gun. (20RT 4506-4507.)

Hawkins examined the expended bullet and cartridge casing found at Eddie's Liquor. (20RT 4508-4511.) The bullet was a total metal jacket bullet that had been damaged from hitting a soft metal object that was smooth. (20RT 4510-4511.) The cartridge casing appeared to have been a reloaded casing. (20RT 4511.) The general polygonal rifling marks created by the Glock firearm found in appellant's residence and those seen on the expended bullet found at Eddie's Liquor matched, but Hawkins was unable to determine whether the bullet was positively fired from the gun. He was certain that the cartridge casing found in Eddie's Liquor was fired from the Glock found in appellant's residence. (20RT 4520-4522.)

Hawkins also examined the shirt removed from Moon's body. The shirt had a bullet hole and blood on it. (20RT 4524, 4530.) Hawkins explained that, in addition to a bullet, gunshot residue (smoke, dust, debris, and powder) is ejected when a gun is fired. If a gun is fired from a close distance, gunshot residue may appear on the target. The pattern of gunshot residue gets larger the further the gun is from the target, and a pattern will not appear at a distance of more than three to four feet. None of the particles will appear on a target that is too far away. (20RT 4530-4531, 4535.) Hawkins performed a chemical gunshot residue test and detected two gunshot residue particles on the sides of the bullet hole in the back of Moon's shirt. (20RT 4530-4531.) Because there was no pattern, and only two particles, Hawkins was unable to determine the distance of the shooter from Moon other than to conclude that the shooter was more than three to four feet from Moon. (20RT 4535.) The gunshot wound was not a contact shot. (20RT 4533.)

Hawkins also examined a photograph of the stainless steel ice cream refrigerator from Eddie's Liquor.[26] The dent in the machine was consistent with a bullet impact. (20RT 4535, 4537-4538.) Hawkins explained that a bullet traveling at a sufficient velocity could penetrate a metal object, while a bullet that traveled with insufficient velocity, or slowed down because it passed through an intermediate object, would create a dent. A bullet that traveled through a human body would slow down. (20RT 4539-4540.) If a bullet hit and dented a metal object, the bullet would bounce back from the metal. (20RT 4540-4541.)

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[26] The ice cream refrigerator was no longer inside Eddie's Liquor Store when Hawkins went to the store in August 2000 to examine it. (20RT 4535-4536.)

4. Statements Made By Marcia During the Investigation of Moon's Murder

Marcia admitted that, during a September 23, 1999, interview with Long Beach Police Detective Paul Edwards, she had lied about or omitted certain details. She did not tell him the correct timing of when the robbery was planned, she said that she had not seen appellant with a gun prior to June 12, 1997, she did not initially mention that appellant was involved, and she told him that the group was in a brown Cutlass the day of the incident. (21RT 4767, 4779-4781, 22RT 4798-4799.)

Detective Edwards testified that he met with Marcia on September 23, 1999, after her arrest in connection with the shooting at Eddie's Liquor. (22RT 4823-4825.) Marcia told him that she went to Eddie's Liquor one time in 1997 to purchase Jolly Rancher candy. She went to the liquor store with codefendants Johnson and Taylor in codefendant Taylor's brown Oldsmobile Cutlass. Marcia said she purchased the candy and they all drove back to Compton. (22RT 4832.)

After Detective Edwards told Marcia that other people had given a different version of events, she changed her statements. Marcia admitted that she went to the liquor store in a gray van with appellant, codefendant Johnson, and codefendant Taylor. They parked on a side street. She went into the liquor store alone and purchased Jolly Rancher candy for .65 cents. (22RT 4833-4834.) Marcia returned to the van, and appellant and codefendant Johnson got out and walked to the liquor store. She saw that appellant had a gun in his right hand as he got out of the van, and said that was the only time she had seen him with a gun. A short time later, appellant and codefendant Johnson ran back to the van. Appellant dove through the passenger window. The group left the area. (22RT 4834, 4838.) Marcia mentioned that, after the group picked up Johnston and

Valicia in Long Beach and traveled on the 710 Freeway toward Compton, she saw several helicopters flying overhead. (22RT 4839.)

Detective Edwards suggested that he thought the group planned the robbery on the previous night at Marcia's residence. Marcia agreed. (22RT 4835.) She said that, at the time of the incident, appellant was wearing black pants and a black T-shirt with white writing on it, while codefendant Johnson was wearing black shorts and a green Gap sweater. (22RT 4836.) Marcia also later admitted that she had seen appellant with the gun one or two months prior to June 12, 1997. (22RT 4838.)

C. Victim Impact Evidence

Stephen Morris was Moon's son-in-law and considered Moon to be his best friend. Moon referred to Morris as his son. They first met in 1996, when Morris began dating Moon's daughter, Maryann. Morris described Moon as the most generous person he had met and felt that Moon was responsible for all of his accomplishments. Morris was a Los Angeles Police Department Officer and credited Moon with his ability to complete the police academy. Moon had invited Morris to live with him and his wife, Catherine, while Morris attended the police academy. (22RT 4867-4869.) Moon had also taken in one of his nieces as well as the mother of his grandson at other times. He was always willing to take in anyone who needed him. (22RT 4870.)

Morris spent often spent time with Moon and they often saw movies together. Moon loved life and enjoyed music, food, and making jokes with strangers or anyone around. He had a great sense of humor. (22RT 4869-4870.)

Morris identified several photographs of Moon with his family, including photographs of Moon and Catherine on a trip to Hawaii, Moon at his nephew's and son's high school graduations, several family members at

Christmas, Moon wearing a Santa Claus suit with family members, Moon tossing a friend's grandchild in the air on a family trip to Lake Mead, and Moon with his granddaughter (Morris's daughter). In many of the photographs, Moon could be seen "clowning around" as was typical of him. (22RT 4870-4874.) He also loved his grandchildren and it was common for him to have one of the grandchildren on his lap, to be singing songs with them, or to be tossing one of them in the air. (22RT 4877.)

Morris was working in the Wilmington area, bordering Long Beach, when he heard of Moon's death. He broke down and cried. Another officer had to drive him home. (22RT 4874.) Morris felt guilty about Moon's death because Moon had been so supportive of him getting through the police academy, but when Moon was shot only a few blocks from where Morris was working, Morris was unable to help. Morris missed him a great deal. (22RT 4874-4875.)

Catherine lived with Morris and Maryann for approximately one year after Moon's death. She was living with her son, who was able to assist her, at the time of the trial. Morris noticed that, after Moon's death, Catherine spent a significant amount of time with her grandchildren and appeared to be filling a large "hole" in her life. (22RT 4875-4877.)

Jolene Watson had known Moon since the early 1980s. He was the grandfather of her son, Christopher, and her family's very good friend. Moon was like a father to her. (22RT 4883-4884.) Watson lived with Moon after Christopher was born. Moon helped and played with Christopher every night when he came from work until the day he died. (22RT 4884-4885.)

Watson and Moon's son, Billy, were living together with Christopher at time of Moon's death. Moon and Billy were "the best of friends" and Watson had never seen them argue. Watson informed Billy of Moon's death and had to try to explain to Christopher, who was only two and a half,

that his grandfather could no longer play with him. (22RT 4885, 4891-4892.) At the time of trial, Christopher still asked why Moon was not there to play with him anymore. Watson often heard Christopher, when he was alone in his room, talking to Moon and telling him about his toys and soccer. (22RT 4886.) Watson identified a photograph of Moon at her high school graduation and explained that he was there for every milestone in her life, including birthdays and the night Christopher was born. (22RT 4886-4887.)

Maryann Morris was Moon's step-daughter. Moon married her mother, Catherine, when Maryann was eight. Moon always treated Maryann and her two younger brothers, who also were not his biological children, as if they were his biological children. Moon always played with them when they were children. He was a very generous, positive, and happy person. (22RT 4893-4895.)

Maryann had just returned from shopping for a Father's Day gift when Morris called and told her of Moon's death. She screamed and cried and had to call for a neighbor to help her with her daughter. Maryann described that moment as the most painful event she had ever experienced. Since Moon's death, Maryann felt there was a void in the family. Moon was always "the life of the party" and he was no longer present to fill that role. Maryann was very upset that her daughter was unable to remember Moon. (22RT 4896-4897.)

Moon and Catherine had a very happy and supportive relationship. After Moon's death, Catherine appeared to be very lonely and seemed to have lost "the sparkle in her eye." (22RT 4897-4898.)

DEFENSE EVIDENCE

Appellant testified on his own behalf. He was born on August 24, 1977. Appellant was taken away from his mother, Edna Brown, when he

was six or seven years old. He lived with his paternal grandmother, Mary Chism Vaughn, from that time until he was 10 or 11. (23RT 5234-5235.) He was 10 years old and living with Vaughn and his father, Kelvin Chism, when Kelvin was killed.[27] Appellant recalled having to identify Kelvin's body at Martin Luther King Hospital. The incident greatly affected him. (23RT 5235-5236.) At some point before Kelvin was killed, a neighbor sexually abused appellant on two occasions. (23RT 5236.)

Appellant began attending church while living with Vaughn. He enjoyed gospel music and he was a believer in the church. (23RT 5237.) Appellant admitted he began using drugs and alcohol when he was 11 years old. (23RT 5236.)

Appellant addressed the jury. He admitted committing the crimes noted by the prosecutor during the trial, but denied killing Moon and said, "I value human life too much for me to kill a man over a dollar." Appellant addressed Moon's wife and said, "[S]orry wouldn't even amount to say how I feel." He said that, every night when he returned to his cell, he thought about Catherine's life before Moon was killed. Appellant further said, ". . . I wish I could change the hands of time. I wish I could bring him back." (23RT 5238.) He then sang the first verse of "Amazing Grace" for the jury. (23RT 5239.)

Appellant admitted that Vaughn and Edna Cartwright, his maternal grandmother, both taught him the difference between right and wrong, and that he attended church which helped him understand the difference between right and wrong. (23RT 5240-5241.) Appellant knew it was wrong to steal, to point a loaded firearm at a human being, and to fire a

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[27] Respondent will refer to Kelvin Chism by his first name to avoid confusion with appellant.

loaded firearm at a human being's head. He also admitted he knew it was wrong to commit the crimes he had committed. (23RT 5241-5142.)

Appellant spent a significant amount of time with Reverend Curry while at CYA. He felt that he experienced a religious awakening during that time, and that was about the third time he had such an awakening. (23RT 5242-5243.)

Appellant understood the value of human life on June 12, 1997. He was familiar with firearms, had fired a firearm, and understood that a firearm was a lethal weapon that could kill. Appellant also believed in God at that time. (23RT 5246-5248.)

Appellant then denied entering Eddie's Liquor on June 12, 1997. He denied that he was depicted in two photographs taken from inside the store. (23RT 5243-5244; Peo. Exh. Nos. 41 & 42.) Long Beach Police Officers picked appellant up from a CYA facility on January 24, 2000, and arrested him for Moon's murder. Appellant had a conversation with Detective Edwards. He denied admitting to Detective Edwards that he was depicted in one of the photographs taken from Eddie's Liquor. (23RT 5245; Peo. Exh. No. 41.) Appellant further denied telling Detective Edwards that he had traveled to Eddie's Liquor in a gray van with Marcia, codefendant Taylor, and codefendant Johnson, or that he had entered the liquor store with codefendant Johnson. (23RT 5245-5246.)

On redirect examination, appellant said that a "snitch" was someone who would "tell on somebody." Codefendants Taylor and Johnson were also in the prison system. Appellant testified that, despite his religious beliefs, he would lie to avoid snitching on someone else. (23RT 5248-5250.) On recross-examination, appellant said that he was not lying to protect codefendants Taylor or Johnson and that he would not lie under oath to avoid snitching. (23RT 5251-5252.) He then said he would not implicate codefendants Taylor and Johnson. (23RT 5254-5255.)

Appellant admitted he had turned in weapons on many occasions while at CYA. He was not afraid of being a snitch then, and said there were ways of turning in the weapons without being concerned about snitching. (23RT 5252-5253.)

Appellant's mother, Edna Brown, testified on appellant's behalf. She was 14 on August 24, 1977, when appellant was born.[28] Kelvin was 15 when appellant was born. Brown had five additional children with four different men, none of whom were appellant's father. Cartwright was Brown's mother and appellant's grandmother. (22RT 4936-4940.)

Brown lost custody of appellant and two of his younger brothers when appellant was seven years old because she was selling drugs from her apartment. The boys had been separated and Cartwright spent approximately one month attempting to locate them. (22RT 4941-4943.) Appellant then lived with Cartwright. At approximately age 10, appellant lived with Vaughn and Kelvin. (22RT 4940, 4944-4946.) During that time, appellant and Kelvin were close. (22RT 4952.) Brown did not know how long appellant lived with Vaughn and Kelvin. (22RT 4963-4965.)

During the time that appellant lived with Kelvin and Vaughn, Brown left to attend Victory Outreach, an 18-month drug program in Arizona. At some point while Brown was in Arizona, Kelvin was killed. Appellant was asked to view the body and identify Kelvin. (22RT 4940, 4944-4946, 4952.) Brown was not certain whether appellant lived with Vaughn and Kelvin when Kelvin was killed. (22RT 4963-4965.)

Brown said that, during the time appellant lived with her, from birth to age seven, he was a happy and helpful child. At age four, he helped with his brothers and cooked meals with Brown. There were times when

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[28] Brown used several other names, including Edna McKinney and Angela Chism. (22RT 4937.)

appellant handled the cooking, feeding, and care of his brothers alone. (22RT 4946-4948.) Brown saw appellant just before she left for Arizona, when he was seven. She noticed that he seemed somewhat disturbed and mentioned that he had tried to fight the police when they took him away from her. (22RT 4948-4949.)

When Brown returned from Arizona, she saw appellant and noticed a change in his attitude. He was 10 or 11 years old at the time. Appellant told Brown that he was very hurt she had left him and that his father was gone. He said, "'I don't give a fuck if I die. Just bury me on top of my father.'" (22RT 4949-4950.) After leaving Vaughn's home, appellant moved back in with Cartwright when he was 14 or 15. (22RT 4954-4955.)

Brown admitted that she was in custody at the time of her testimony and on her way to prison. She had been released on parole, but had absconded and sold drugs. Brown did not visit appellant while she had been released on parole, and said that she had not visited him because she knew she could not see him. (22RT 4950-4953.)

Brown admitted that she lived with Cartwright, who helped her care for appellant, from appellant's birth to age one. Cartwright continued to visit and help Brown care for appellant until Brown lost custody of appellant. Kelvin did not visit appellant at any point during that time. (22RT 4957-4958.)

Cartwright took custody of appellant and his two younger brothers after they were released from social services, approximately one month after they were taken from Brown. Brown agreed that Cartwright was a good Christian woman who regularly took appellant to church with her and that Cartwright taught appellant the difference between right and wrong. (22RT 4961-4963.)

Brown also admitted that appellant's brother, Russell McKinney, was married at the time of trial, working as a medical assistant, and was

expecting a child. Jeff Brown, another of appellant's brothers, was in high school playing basketball and planning to go to college. Takesha McKinney and Christina Arthur, appellant's sisters, were in high school playing sports and engaging in several extracurricular activities, respectively. (22RT 4939, 4965-4967.) All of the children were raised by their grandparents. (22RT 4967.)

Brown clarified that Russell was raised by Cartwright, Jeffrey and Takesha were raised by their respective paternal grandmothers, and Christina was raised by Brown's cousin. (22RT 4969-4970, 4980.) Brown spent more time in custody than out of custody over the preceding 10 or 15 years. (22RT 4970.)

Vaughn testified that she had lived at 926 North Chester Avenue in Compton for almost 30 years at the time of trial. Appellant moved in with her when he was seven or eight years old after Kelvin received a telephone call from McClaren Hall, where appellant had been for a day or so after being removed from his mother's home. At the time, her husband and four of her sons, including Kelvin, were also living with her. Vaughn initially testified that Kelvin died about three years after appellant moved in with Vaughn. She later testified that Kelvin died when appellant was seven or eight years old and in the fourth grade at Mayo School, and that appellant was in her home for only a short time before Kelvin was killed. (22RT 4982-4986, 4995-4996, 4998-4999.)

While Kelvin was alive and appellant lived with him, they had a close relationship. Appellant loved his father and they went places together. Kelvin Junior, known as "Little Kelvin," was also Kelvin's son, but he and appellant did not have the same mother. Appellant and Little Kelvin became close. (22RT 4988-4989.)

Kelvin had been shot and Vaughn saw him on life support in the hospital. Appellant was not permitted to see him until the open casket

funeral. (22RT 4992-4994.) After Kelvin's death, appellant went from being an "A" student to getting expelled from school. Appellant regularly attended church and became an altar boy. (22RT 4986-4988.) Appellant stayed in Vaughn's home for one or two years after Kelvin's death. (22RT 4982-4986.)

Around the time that appellant was in the sixth grade, Vaughn sent him to live with Cartwright. (22RT 4998-4999.) Vaughn had taught him the difference between right and wrong. (22RT 5001.)

Vaughn learned that appellant was in custody at the CYA sometime around 1997. He was released to her custody on March 29, 1997, and lived in her home until June 19, 1997, when he was arrested again. (22RT 5002-5003, 5007.) Appellant stayed in the bedroom with the television, and the adjacent room was vacant. (22RT 5004, 5011; Def. Exh. P.) Vaughn's husband had suffered from several strokes around that time, and appellant cared for him during the day while Vaughn was at work. (22RT 4989-4990.) Vaughn admitted that appellant assisted with her husband only during the period from March 1997 to June 1997 and because Vaughn paid him $300 per month to do so. The arrangement was that appellant was supposed to stay home during the day to take care of Vaughn's husband. (22RT 5004-5007.)

Cartwright testified that she was Brown's mother and appellant's grandmother. Appellant's siblings, Russell McKinney and Christina Arthur, lived with Cartwright at certain points. (22RT 5012-5015.) Brown gave birth to appellant when she was 13. She lived with Cartwright "off and on" while appellant and his siblings were young. (22RT 5015-5016.) Cartwright assisted Brown with appellant from the time he was an infant. Brown lived on her own with appellant and her children for three or four years. Cartwright saw her grandchildren approximately once per week

during that time, and assisted them with food and clothing. (23RT 5050-5053.)

When appellant was six or seven years old, Cartwright learned that the children had been taken from Brown. The Children's Court awarded custody of the children to their respective grandparents, and Vaughn and Kelvin took custody of appellant at that point. (22RT 5017-5020.) Appellant lived with Vaughn from 1985 until 1991. (23RT 5055-5062.)

Cartwright believed that appellant was close with Kelvin and that they spent time together. Appellant also regularly attended church during the time that he lived with Kelvin. (22RT 5020-5022.)

Cartwright testified that Kelvin was killed in 1989 or 1990, when appellant was 12 years old. Appellant's behavior changed at that point and he became rebellious and angry. Vaughn called Cartwright at that point to inform her that appellant had been expelled from school for having a knife or another item. Vaughn said she could no longer handle appellant. Cartwright agreed to take care of appellant at that point. (22RT 5022-5024.)

During that time, appellant told Cartwright that he missed Kelvin. He cried sometimes and appeared to be very sad. Cartwright took appellant to weekly therapy sessions at a church in Los Angeles. (22RT 5023.) Cartwright said that appellant's classroom work in school was excellent, but he had trouble when he was outside on the school grounds with his friends. (22RT 5025-5026.)

During the time that appellant lived with Cartwright, Brown lived with them intermittently, but for only a week or a month at a time. Brown went to Arizona for approximately one year, then returned and lived with Cartwright and appellant for approximately nine months. (22RT 5027-5030.) Appellant continued to attend church while he lived with Cartwright, and he participated in church activities such as the choir. (22RT 5030-5033.)

Cartwright knew that appellant went to the CYA during the time period that he lived with her. He graduated from high school in 1996 while in the CYA. Appellant was 18 at the time. (23RT 5047-5049.)

On cross-examination, Cartwright said she was not sure if Gilbert West High School was a continuation school. She denied that he was enrolled there because he had insufficient credits to attend a regular high school. After reviewing appellant's transcript, Cartwright admitted that he had not performed well academically while attending Gilbert West. Cartwright admitted that appellant began attending Gilbert West on September 23, 1993, and was suspended by the end of December or beginning of January. In middle school, he received grades of A, B, C, and D. (23RT 5063-5066.)

Cartwright recalled picking appellant up from the Cypress Police Department, but did not recall the date. He was committed to the CYA after that arrest. (23RT 5070-5071, 5074.) Russell McKinney also lived with Cartwright in 1994 and was also committed to the CYA with appellant for the same incident. At the time of trial, McKinney worked as a security guard and had graduated from a medical assistant school. (23RT 5084.)

Arthur Gray had been a senior Pastor of the Abundant Joy Christian Fellowship in Inglewood from 1994 through the time of trial. He met Cartwright approximately twenty years earlier when he became a member of the congregation. Gray first had contact with appellant in the 1980s when appellant was a small child. Appellant participated in religious activities. Gray sometimes saw appellant extensively at the church, and then would not see him for a period of time. Appellant was always pleasant, courteous, and friendly, though there were times when he seemed shy and reserved. Appellant never said anything antagonistic or disruptive that Gray observed. He appeared to get along with the other children and adults. (23RT 5085-5093.)

Gray thought only a few years had passed since he had seen appellant and believed it was after he became a pastor in 1994. He did not know that appellant had been in custody continuously from January 31, 1994, though March 28, 1997, or that he was again placed in custody on June 19, 1997, and had remained in custody. (23RT 5094-5095.)

Lorraine Wahlberg participated as a religious volunteer in the Epiphany Program at the CYA in Paso Robles in 1996. She met appellant in the CYA. Wahlberg heard him speak in classes, as did the other class members, about the Lord being in his life. She felt that he was a very encouraging person and had a positive influence on a few of the young men who were also in the CYA, including Anthony Lara and Deandre Brown.[29] Appellant was also encouraging to Wahlberg. He had suggested ways for her to reach other young men and she felt that he had encouraged her to try to help others more before they got into situations such as his situation at the time of trial. (23RT 5102-5110, 5115, 5128-5131.) Appellant believed he could reach other young men through God and appeared to enjoy speaking and offering encouragement to other young men. (23RT 5128-5131.) Wahlberg felt that, from 1996 until the time he was paroled, appellant was on the path to Christ. (23RT 5118-5119.)

Robert Curry, a chaplain with the CYA in Paso Robles, met appellant in 1995. Appellant went to Curry's office and offered to sing, clean the floors or windows, or do anything else he could to assist with the chapel. Curry said that, while there were people who wanted to be around, it was not often that they wanted to work. Appellant was always willing to work, and he did so without compensation. He was also permitted to sing in the choir and, at one point, preach. Curry explained that appellant was one of

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[29] Respondent will refer to Deandre Brown by his first name to avoid confusion with Edna Brown.

the first wards to be encouraged to speak to the congregation because he appeared to be reaching the other young men. He assisted the other young men in getting "straight" or leaving behind community or gang tensions. Appellant acted as a peer counselor and helped other young men in the facility get along and manage violence. (23RT 5136-5141, 5154.) Curry testified that only one other ward had a similar ability to inspire others, and that ward was a law clerk at the time of trial. (23RT 5140.)

Curry described appellant as intelligent and charismatic. He was a leader in the spiritual arena and he enjoyed preaching to the other young men. Curry believed that appellant was somewhat of an evangelist. The young men in appellant's cottage looked up to him, and he was able to move a few of them to action. (23RT 5165-5171.)

Curry further testified that appellant assisted with reducing racial tensions within his unit. Other wards of all different races came together and prayed for appellant during an incident where doctors had mistakenly told appellant that he had cancer. (23RT 5142-5143.) Appellant also inspired Curry when he questioned his faith. (23RT 5146.) He often told Curry where weapons or homemade knives or shanks could be found. (23RT 5149-5150.) Appellant also completed over 200 high school units and received his diploma while in the CYA. (23RT 5143.)

Curry taught victim impact classes and preached about victim issues, meaning that he attempted to show the wards how their victims were impacted by the crimes. He specifically discussed with appellant the impact his acts had on victims, the community, and family. (23RT 5156-5161.)

Deandre met appellant at the CYA in Paso Robles in 1994. Deandre had been there since 1992 for a manslaughter offense. (23RT 5179-5180.) He was in a cell next to appellant, and they became friends. Appellant influenced Deandre to believe in God and himself. Deandre's brother and

cousin had been killed, and he felt angry all the time before he met appellant. Appellant helped Deandre change his outlook. Deandre and appellant both sang in the choir. He observed appellant preach on some Sundays. (23RT 5180-5185.)

Appellant encouraged Deandre to attend school while they were in CYA, and they graduated together. Appellant also used his money vouchers to purchase a student bible and a cake for Deandre's birthday. (23RT 5201-5202.) Appellant was well-liked and the other inmates were willing to follow and listen to him. (23RT 5189-5190.)

Deandre admitted that he had violated parole for possession of a firearm and conspiracy to sell drugs, but said that he had not engaged in violence since his release and still felt that appellant had a positive influence on him. (23RT 5185.) Deandre was initially released from CYA on March 26, 1997, the same date as appellant. He was taken into custody again on June 26, 1997, after being found in a stolen vehicle with a firearm. Deandre was sent to "YTA" or "Hemen G. Stark," where he again met with appellant. They were cellmates for a few weeks and then saw each other at church and school. Appellant spoke with him about God. Deandre was released from Hemen G. Stark on October 26, 1998. (23RT 5188, 5190-5193.) He was arrested again on August 30, 1999, for conspiracy to sell rock cocaine. Deandre claimed the rock cocaine belonged to his girlfriend. (23RT 5193-5195.) He was sent back to Hemen G. Stark, where he again saw appellant at church, school, and the gym. He was released on December 4, 2000. (23RT 5195.)

Lawrence Mills worked for the CYA in Chino, California, at the Hemen G. Stark Youth Training School/Laural Egan High School. Appellant enrolled in Mills's class on warehouses and distribution in 1997. Appellant became a leader in the class. Mills acted as the manager and appellant acted as the supervisor, reporting back to Mills when the other

wards had finished their work. (23RT 5220-5222.) In 1998, after appellant was returned to the CYA for the instant case, he earned a fork-lift training certificate from the class, which qualified him for a job as a fork-lift driver. He also earned a warehousing certificate that qualified him for jobs relating to inventory control, management and procedures, and stocking. (23RT 5222-5223, 5229.)

In the afternoons after Mills's class, appellant participated in the church choir. He often discussed singing and motivated other students to participate in the choir. (23RT 5224, 5231.) The other students were willing to follow appellant's lead. (23RT 5232.) Appellant was always pleasant with the instructors and students. (23RT 5222, 5233.)

ARGUMENT

I. THE TRIAL COURT PROPERLY CONDUCTED THE DEATH-QUALIFYING VOIR DIRE OF THE PROSPECTIVE JURORS AS A GROUP

Appellant contends that the trial court erroneously failed to conduct the death-qualifying voir dire of the prospective jurors individually and in sequestration, as provided in *Hovey v. Superior Court* (1980) 28 Cal.3d 1, 80 (*Hovey*), and requests reconsideration of this Court's prior rulings rejecting such an argument. (AOB 58-59.) As this Court has repeatedly rejected essentially the same argument in several previous cases and appellant fails to present any persuasive grounds for reconsideration, his request for reconsideration must be denied.

In the present case, appellant requested that the trial court conduct the death-qualifying voir dire of the prospective jurors individually and in sequestration. (2RT 52-53.) The court denied the request and conducted a group death-qualifying voir dire. (2RT 54.)

As this Court has repeatedly found, trial courts are not required to conduct death-qualifying voir dire of each prospective juror individually and/or in sequestration. (*People v. Stitely* (2005) 35 Cal.4th 514, 536 (*Stitely*); *People v. Navarette* (2003) 30 Cal.4th 458, 490 (*Navarette*); *People v. Slaughter* (2002) 27 Cal.4th 1187, 1199 (*Slaughter*); *People v. Box* (2000) 23 Cal.4th 1153, 1180 (*Box*), disapproved on other grounds in *People v. Martinez* (2010) 47 Cal.4th 911, 948, fn. 10 (*Martinez*); *People v. Waidla* (2000) 22 Cal.4th 690, 713 (*Waidla*).) Although this Court had set forth in 1980, in *Hovey*, *supra*, 28 Cal.3d at page 80, that death-qualifying voir dire should be conducted individually and while the prospective jurors are sequestered, *Hovey* was abrogated as of June 6, 1990, the effective date of Proposition 115. (*Stitely*, *supra*, 35 Cal.4th at p. 536; *Navarette*, *supra*, 30 Cal.4th at p. 490; *Slaughter* , *supra*, 27 Cal.4th at p. 1199; *Box*, *supra*, 23 Cal.4th 1153, 118; *Waidla*, *supra*, 22 Cal.4th at p. 713.) Proposition 115 added section 223 to the Code of Civil Procedure, which provides that voir dire of prospective jurors in a capital case "shall, where practicable, occur in the presence of the other jurors." (*Ibid.*) As appellant has failed to set forth any compelling argument for this Court to depart from its numerous previous rulings on the issue, appellant's request for reconsideration should be denied.

II. DEATH-QUALIFICATION DURING VOIR DIRE IS PROPER

Appellant contends that the guilt and penalty judgments must be reversed because death qualification is unconstitutional. (AOB 60-61.) He recognizes that this Court and the United States Supreme Court have both rejected the argument that the use of death-qualified jurors violates a defendant's state or federal constitutional rights, but nevertheless seeks reconsideration of the decisions. (AOB 61, citing *Lockhart v. McCree* (1986) 476 U.S. 162 [106 S.Ct. 1758, 90 L.Ed.2d 137], *People v. Lenart*

(2004) 32 Cal.4th 1107, 1120, *People v. Steele* (2002) 27 Cal.4th 1230, 1240, and *People v. Jackson* (1996) 13 Cal.4th 1164, 1198-1199.) Based on the foregoing authority – clearly ruling that a death-qualified jury is not unconstitutional as appellant claims – appellant's request for reconsideration should be rejected. (See *Lockhart, supra*, 476 U.S. at pp. 176-177; see also *People v. Mickey* (1991) 54 Cal.3d 612, 662; *People v. Kaurish* (1990) 52 Cal.3d 648, 674.)

III. THE TRIAL COURT PROPERLY ADMITTED STEVEN MILLER'S NON-TESTIMONIAL, SPONTANEOUS STATEMENTS TO OFFICERS AT THE MURDER SCENE

Appellant argues that the trial court erroneously admitted the statements Miller made to police at the crime scene, in violation of appellant's Sixth Amendment right to confrontation under *Crawford v. Washington* (2004) 541 U.S. 36, 68 [126 S.Ct. 1354, 158 L.Ed.2d 177] (*Crawford*) as well as his Fifth and Fourteenth Amendment due process rights. (AOB 62-82.) Appellant concedes that Miller's statement was properly characterized as a spontaneous statement under Evidence Code section 1240,[30] but argues that his right to confrontation was nevertheless violated because the statement was testimonial and Miller, who was unavailable at trial, had not been subjected to cross-examination. (AOB 68.) Appellant forfeited the instant claim by failing to object on Confrontation Clause grounds in the trial court. In any event, *Crawford* is inapplicable to

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[30] Evidence Code section 1240 provides as follows:

> Evidence of a statement is not made inadmissible by the hearsay rule if the statement:
>
> (a) Purports to narrate, describe, or explain an act, condition, or event perceived by the declarant; and
>
> (b) Was made spontaneously while the declarant was under the stress of excitement caused by such perception.

the instant case because Miller's statement was made primarily to deal with a contemporaneous emergency and was, therefore, non-testimonial.

A. The Relevant Proceedings Below

At trial, Officer Romero testified that Steven Miller was the first person he contacted at Eddie's Liquor. He described Miller as appearing "very nervous" and "shaken." When the prosecutor asked what Miller said to Officer Romero, appellant objected on hearsay grounds. Codefendant Johnson's counsel objected. Codefendant Johnson's counsel explained at side-bar that he may or may not object to the spontaneous statements, depending upon the scope of the statements. At sidebar, the prosecutor explained that Miller briefly stated that he heard a popping sound, saw two African-American males running out, and then saw Moon laying on the ground unconscious. Miller also told Officer Romero the direction in which the suspects had fled. Defense counsel agreed to withdraw the objection. (5RT 940-942.)

Officer Romero then relayed Miller's statements as follows. When Officer Romero approached Miller, Miller said, "I think he's dead." (5RT 942-959.) Miller explained that he was sitting on a bus bench across the street from Eddie's Liquor when he saw two African-American males enter the store. A short time later, almost immediately, he heard a popping sound, which he described as a gunshot. The same two males then ran out of Eddie's Liquor. The two males ran north on Butler approximately two blocks to Marker, and then possibly ran east on Marker. (5RT 942-943, 993.) Miller immediately ran across the street to Eddie's Liquor. He saw Moon lying on his back, bleeding and unconscious, behind the counter. Miller ran to the phone and called the police. (5RT 944-945.)

Miller described both of the suspects as approximately 17 or 18 years old, about five feet, eight or nine inches tall, with short Afro-style hair and

thin builds. One of the suspects wore a black shirt with white stripes on the front and dark jeans. The second suspect wore long dark shorts. (5RT 942-945, 953, 959, 993.) Officer Romero called for assistance and confirmed that there was a bus bench across the street from Eddie's Liquor, near the corner of Butler and Artesia, and that Marker Lane was two blocks northeast of Artesia. (5RT 946-947, 954.)

At trial, before the prosecution called Miller as a witness, the parties discussed that Miller was in custody awaiting trial on an unrelated Three Strikes Law case. Miller's counsel stated that Miller would invoke the Fifth Amendment privilege against self-incrimination and refuse to testify. The prosecutor noted that she had discussed use immunity for Miller, but his counsel believed Miller would refuse to testify in any event. (6RT 1101-1106.)

The following morning, Miller's counsel again stated that Miller would invoke his Fifth Amendment rights. The prosecutor responded that she had no evidence suggesting Miller could be the subject of an investigation or prosecution in the instant case, and noted that the information she had pointed to the "contrary conclusion." Defense counsel agreed. The parties agreed not to attempt to impeach Miller with any of his prior offenses. Based on the parties' representations and agreement to avoid any attempts at impeachment with Miller's prior offenses, the court ruled that Miller did not have any Fifth Amendment privilege to invoke as to any events regarding the instant trial. (7RT 1231-1237.)

At a hearing outside the jury's presence, the prosecution called Miller to the witness stand. The trial court informed him that he had no Fifth Amendment privilege to invoke because nothing he could say would incriminate him. (7RT 1237-1238.) When the prosecutor asked her first question, Miller said, "I'm remaining silent. I'm not answering questions." Miller thereafter remained silent when asked additional questions. The

court ordered Miller to answer and advised him that he would be subject to punishment and held in contempt of court if he refused to testify. When the prosecutor asked her questions again, Miller remained silent. The court found Miller to be in contempt and unavailable to testify. (7RT 1238-1242.)

B. Appellant Forfeited His Confrontation Clause Claim

Appellant forfeited the instant confrontation clause claim because he objected on only hearsay grounds in the trial court and, in fact, withdrew that objection. (5RT 940-942.) A defendant generally may not complain for the first time on appeal that admission of evidence violated his right to confrontation. (*People v. Dennis* (1998) 17 Cal.4th 468, 529 (*Dennis*); *People v. Alvarez* (1996) 14 Cal.4th 155, 185-186 (*Alvarez*); *People v. Zapien* (1993) 4 Cal.4th 929, 979; see *Melendez-Diaz* (2009) 129 S.Ct. 2527, 2534, fn. 3 [174 L.Ed.2d 314] [noting that "[t]he right to confrontation may, of course, be waived, including by failing to object to the offending evidence; and States may adopt procedural rules governing the exercise of such objections."].) Under certain circumstances, an objection on state law grounds may preserve an appellate claim of federal constitutional error, such as where "the appellate claim is of a kind (e.g., failure to instruct sua sponte; erroneous instruction affecting defendant's substantial rights) that require[s] no trial court action by the defendant to preserve it, or (2) the new arguments do not invoke facts or legal standards different from those the trial court itself was asked to apply, but merely assert that the trial court's act or omission, insofar as wrong for the reasons actually presented to that court, had the additional legal consequence of violating the Constitution." (*People v. Boyer* (2006) 38 Cal.4th 412, 441, fn. 17, citing *People v. Partida* (2005) 37 Cal.4th 428, 433-439.) However, such circumstances were not present here.

Even if appellant had not withdrawn his objection, the objection on state law hearsay grounds would not have preserved any claim that admission of Miller's statements to Officer Romero violated appellant's federal constitutional right to confrontation. The trial court was asked to determine whether Miller's statements were spontaneous statements under Evidence Code section 1240 and/or whether the statements constituted hearsay. The court was not asked to determine whether Miller was unavailable at that time or whether the statements carried sufficient indicia of reliability.[31] (See *Alvarez*, *supra*, 14 Cal.4th at p. 186 [finding that defendant failed to preserve confrontation clause claim by objecting only on the ground that the statement was inadmissible hearsay and not a spontaneous statement]; *Dennis*, *supra*, 17 Cal.4th at p. 529.) Appellant apparently acknowledges the difference between a hearsay objection based on Evidence Code section 1240 and an objection based on the confrontation clause in admitting that Miller's statements met the requirements of Evidence Code section 1240. (See AOB 68.)

While appellant may not have anticipated Miller's later refusal to testify at the time of Officer Romero's testimony, he certainly could have objected on confrontation clause grounds at the time Miller was found to be unavailable. Appellant then could have requested that the trial court strike Officer Romero's recitation of Miller's statements. As he failed to do so, he forfeited the instant claim.

C. Miller's Statements Were Non-Testimonial Statements Made Primarily to Meet an Ongoing Emergency

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[31] Since the trial here occurred well before *Crawford*, respondent has applied the *Ohio v. Roberts* (1980) 448 U.S. 56 [100 S.Ct. 2531, 65 L.Ed.2d 597] analysis for a claimed violation of the Confrontation Clause.

Even if appellant preserved the claim on appeal, the trial court properly admitted Miller's statements, although he was unavailable as a witness at trial and was not previously subject to cross-examination, because his statements were made primarily to meet an ongoing emergency and were therefore non-testimonial. As such, *Crawford* is inapplicable here.[32]

The United States Supreme Court, in *Crawford*, established a new rule for determining whether hearsay statements made by an unavailable witness are admissible. (*Crawford*, *supra*, 541 U.S. at pp. 67-69.) The Court focused on the testimonial versus non-testimonial nature of the out-of-court statement, and ruled that out-of-court testimonial statements are admissible only if the declarant is available at trial or if the declarant is unavailable but was previously subjected to cross-examination.[33] (*Id.* at p. 68.)

The Court declined to define the term "testimonial" in *Crawford*, although it listed grand jury testimony, prior trial testimony, ex parte testimony at a preliminary hearing, and statements taken by police officers in the course of interrogations as examples of testimonial statements. (*Crawford*, *supra*, 541 U.S. at pp. 51-53.) It further noted that statements made "under circumstances which would lead an objective witness

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[32] Because appellant concedes that Miller's statements were properly admitted as spontaneous statements under Evidence Code section 1240, respondent will not address the law regarding general admissibility of statements and/or hearsay exceptions and will focus only on appellant's claim that his right to confrontation was violated pursuant to *Crawford*.

[33] The Court made clear in a footnote that "when the declarant appears for cross-examination at trial, the Confrontation Clause places no constraints at all on the use of his prior testimonial statements." (*Id.* at p. 59, fn. 9.)

reasonably to believe that the statement would be available for use at a later trial" could be considered "testimonial." (*Id.* at p. 52.)

Following *Crawford*, both the United States Supreme Court and this Court have ruled that statements made to meet an ongoing emergency are non-testimonial. In *Davis v. Washington* (2006) 547 U.S. 813, 828 [126 S.Ct. 2266, 165 L.Ed.2d 224] (*Davis*), the United States Supreme Court ruled that statements made primarily "to enable police assistance to meet an ongoing emergency" are not testimonial within the meaning of *Crawford* and the Confrontation Clause. In *People v. Romero* (2008) 44 Cal.4th 386, 422 (*Romero*), this Court explained that "statements are not testimonial simply because they might reasonably be used in a later criminal trial. Rather, a critical consideration is the primary purpose of the police in eliciting the statements." (Citing *People v. Cage* (2007) 40 Cal.4th 965, 991 (*Cage*).) "Statements are testimonial if the primary purpose was to produce evidence for possible use at a criminal trial; they are nontestimonial if the primary purpose is to deal with a contemporaneous emergency such as assessing the situation, dealing with threats, or apprehending a perpetrator." (*Romero*, *supra*, 44 Cal.4th at p. 422, citing *Cage*, *supra*, 40 Cal.4th at p. 984.)

In the present case, Miller's statements to Officer Romero were non-testimonial because the statements were made to meet an ongoing emergency. Officer Romero received a "priority one" radio call, meaning a call that required prompt assistance. (5RT 940.) He saw Miller as soon as he arrived at the crime scene. (5RT 934-940.) Miller, who appeared to be "shaken up" and very nervous, immediately said, "I think he's dead." (5RT 940-942.) At that point, Officer Romero certainly had to elicit information from Miller as to what had happened in order to assess the situation and determine his course of action. For example, he would have reasonably had to determine whether emergency medical assistance was necessary, whether

there were any suspects still on the scene who could pose an immediate danger to officers or others in the area, and whether there were armed suspects at large. Accordingly, Officer Romero elicited information from Miller – that Miller saw two African-American males enter Eddie's Liquor Store, he heard a gunshot, and he saw the African-American males run out of the store down Butler and turn east on Marker (5RT 942-944) – and properly relayed that information at trial. (See, e.g., *Romero*, *supra*, 44 Cal.4th at p. 422 [holding that statements made by an agitated victim to an officer after an ax attack had ended, describing the attack by the defendant, was information necessary for officers to assess and deal with the situation and was, thus, non-testimonial].)

Miller's further statements, relaying the physical descriptions of the suspects, were also necessary to meet an ongoing emergency. Contrary to appellant's suggestion (see AOB 71-73), Moon's safety was not the only potential emergency at that time. The safety of the officers and others in the general vicinity was still a serious concern because armed suspects were at large. Although Miller said that the suspects ran down the street, the officers had no way of knowing whether any other suspects were still in the immediate area of the liquor store or whether the two suspects were still in the general vicinity. Indeed, a suspect does not need to be within close proximity in order to kill or injure another with a firearm. Additionally, the officers had been on the scene for only a few minutes, it took Officer Holdredge only a few moments to check on Moon, and Miller was still very nervous. This was not, as appellant contends (see AOB 72), a situation where the emergency had ended and the officers and witness were calm and safe from any threats. (See *Davis*, *supra*, 547 U.S. at pp. 827-828 [contrasting the situation in *Crawford*, where the witness was calm and safe and was responding to police officer questions at the police station hours after the incident, with the situation in *Davis*, where the witness frantically

made the statements at issue during a 911 call wherein the operator asked for the identity of the suspect and what had occurred]; *Romero*, *supra*, 44 Cal.4th at p. 422 [holding that victim's identification of suspects, five minutes after police arrived, "was to determine whether the perpetrators had been apprehended and the emergency situation had ended or whether the perpetrators were still at large so as to pose an immediate threat"].)

In arguing that the emergency situation had ended when Miller spoke to Officer Romero, appellant inaptly compares Miller's statements to those made by Amy Hammon and found to be testimonial in *Davis*. (AOB 69-73, citing *Davis*, *supra*, 547 U.S. 813.) In *Hammon*, officers responded to a domestic violence call and found Amy Hammon sitting on her front porch. (*Davis*, *supra*, 547 U.S. at pp. 819-820.) Although she appeared "somewhat frightened," she said that "'nothing was the matter.'" (*Ibid.*) Her husband, Hershel, was in the house. He told officers that he and Amy had an argument, but it never became physical and everything was fine at that point. The officers separated Amy and Hershel and asked them what had happened. Amy told an officer that Hershel had broken the furnace, pushed her into the broken glass, broke other items, and "attacked" her daughter. At trial, Amy was unavailable and the officer who had spoken to her after the incident testified as to her statements. (*Ibid.*)

On review, in *Davis*, the United States Supreme Court held that Amy Hammon's statements were testimonial in nature and, thus, had been erroneously admitted at trial. (*Davis*, *supra*, 547 U.S. at pp. 829-832.) The Court noted that the officers had not witnessed any indication of an ongoing assault, Amy said that nothing was wrong, there was no immediate threat to her person, the officer who testified agreed there was no ongoing threat, and the officers had separated Hammon and her husband in order to find out the truth of what had occurred. (*Ibid.*) Under the circumstances, the Court found that the primary purpose of the officers' interrogation was to

find the truth of what had already occurred, not to meet an ongoing emergency. Thus, the statements were testimonial in nature. (*Ibid.*)

Here, however, Officer Romero had just arrived on the scene of a priority one call where Miller, who was "shaken up" and very nervous, immediately told him that a victim might be dead. Miller also immediately told him that there had been a shooting and at least two armed suspects were at large. Officer Romero was clearly concerned at the time with assessing the situation, ensuring the safety of everyone in the immediate area, and apprehending the armed suspects. Unlike *Hammon* – where the domestic violence victim was no longer in danger because the dispute had ended and the perpetrator was known, unarmed, and speaking to officers – there was still an immediate threat of danger when Officer Romero obtained Miller's statements. (See *Davis*, *supra*, 547 U.S. at pp. 829-832; see also *Romero*, *supra*, 44 Cal.4th at p. 422 [ruling that statements are non-testimonial when "primary purpose is to deal with a contemporaneous emergency such as assessing the situation, dealing with threats, or apprehending a perpetrator," and finding that a contemporaneous emergency exists when officers know or must determine whether perpetrators are "still at large so as to pose an immediate threat"].)

Moreover, even if the admission of Miller's statements to Officer Romero violated the Confrontation Clause, any error was harmless beyond a reasonable doubt. (*Romero*, *supra*, 44 Cal.4th at p. 422 [applying *Chapman v. California* (1967) 386 U.S. 18, 36 [87 S.Ct. 824, 17 L.Ed.2d 705] (*Chapman*) harmless error analysis to *Crawford* error]; *Cage*, *supra*, 40 Cal.4th at pp. 991-992 [same].) While Miller's statements were helpful for the prosecution in that he provided a description of the fleeing suspects, the direction they fled, and the time frame of the shooting, his statements were not necessary for the guilty verdicts.

The evidence showing appellant's identity as one of the two suspects was strongly established apart from Miller's statements. The surveillance video from Eddie's Liquor and the still photographs printed from the video provided the jury with essentially the same information as that conveyed by Miller regarding the suspects' descriptions and the timing of the shooting, but also allowed the jury to compare the body build, hair, and general facial features of the suspects to appellant. While the video and photographs are not clear enough for any obvious identification of appellant's and codefendant Johnson's faces, both show two African-American males, one wearing a black T-shirt with the distinctive Nike "swoosh" symbol in white on the front and the other wearing long shorts, enter the liquor store and then run out less than two minutes later. Appellant can also be seen, in the Nike T-shirt, blocking his face from the camera as he walked by it. The still photographs further show some of appellant's distinctive features as well as the fact that he was bald – features that could be seen in the Riteway robbery surveillance video and a photograph of appellant that were identified by Lipkin. (See 10RT 2058-2060 [prosecutor's closing argument, describing what is depicted in video and still photographs from Eddie's Liquor, including that appellant was bald and that his distinctive ear, facial structure, upper lip, facial hair, and T-shirt identified him]; Peo. Exh. Nos. 36 [surveillance video], 41-44 [still photographs].)

Other witnesses also established that appellant and codefendant Johnson fled from Eddie's Liquor in the direction of the intersection of Marker and Butler. Motta saw two African-American males running "very fast" from Butler toward a light-colored Plymouth Voyager that was parked on Marker, near the corner of Butler. The two males got in the van and the van quickly drove away, turning right onto Butler. (7RT 1268-1272, 1275-1277, 1302, 1305-1307.) Stephanie testified that one of the two fleeing suspects ran into her car as he ran down Butler, toward Artesia, away from

the area of Eddie's Liquor. She confirmed that one of the suspects wore a black T-shirt. (6RT 1108-1113, 1114, 1116-1117, 1122.)

Moreover, Marcia not only identified appellant as the suspect who wore the Nike Air T-Shirt and identified the Nike Air T-shirt found in appellant's residence, but she also explained that appellant planned and committed the attempted robbery at Eddie's Liquor. She testified that appellant assigned tasks to her and his codefendants, he brought a firearm when they left for the store, he directed codefendant Taylor as codefendant Taylor drove the group to the liquor store in Wallace's van, and he had a bulge in his waistband that appeared to be a gun when he walked toward the liquor store. (8RT 1550-1568, 1568a-1568b, 1570, 1583-1584, 1671, 1696-1697.)

Significantly, the nine-millimeter Glock firearm used to kill Moon at Eddie's Liquor was found in appellant's residence one week after the crimes. The cartridge casing found at Eddie's Liquor was fired from that gun, and the bullet found next to Moon's body was consistent with having been fired from the gun. (6RT 999-1002, 1005-1006, 1182-1184, 1219-1220; Peo. Exh. No. 9 [gun].)

Marcia further testified that she had seen appellant with the Glock firearm approximately one month prior to Moon's murder. Chung identified the Glock firearm as the gun that was stolen from him during the Riteway robbery, which occurred approximately one month prior to Moon's murder, and Lipkin identified appellant as one of the perpetrators holding a gun in the surveillance video from the Riteway robbery. (5RT 897-900; 7RT 1332, 1334-1335.)

Johnston also testified that appellant, Marcia, codefendant Johnson, and codefendant Taylor picked her up in Wallace's van shortly after the

attempted robbery and murder.[34] When the group noticed a helicopter overhead, someone in the group said that someone must have committed a robbery. Appellant responded that he knew who had committed the crime. (5RT 770-771, 789-792, 840.) Johnston also admitted that appellant appeared nervous later that day when he saw police officers, and he did not respond to accusations in Johnston's letter that he and his friends had committed the robbery at Eddie's Liquor. (5RT 792-797.) From the foregoing, appellant's identity as one of the suspects and, specifically, as the shooter was well-established apart from Miller's statements.

Finally, the short time frame of the shooting was more convincingly shown in the surveillance video from Eddie's Liquor. The time reflected in the video shows that appellant was inside Eddie's Liquor for less than two minutes. (See Peo. Exh. No. 36 [time-stamp on video showing appellant entering at 2:00:59 p.m. and running back out at 2:02:46 p.m.].[35])

Appellant nevertheless contends he was prejudiced because, inter alia, the defense was unable to cross-examine Miller on the fact that he was a defendant in a Three Strikes Law case and would have a "willingness to curry favor with the prosecutor in this case to achieve a better result in his Three Strikes case." (AOB 80.) However, all of the parties agreed in the trial court that they would not attempt to impeach Miller with evidence of his criminal history, apparently because they did not believe his criminal history was relevant to his observations. (7RT 1231-1237.) Additionally, there is no evidence suggesting that the prosecutor could or would have considered offering Miller a deal on an unrelated case, which may have

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[34] Wallace confirmed that she had loaned her Plymouth Voyager van to Taylor on the day of Moon's murder.

[35] As previously noted, the clock on the video reflects the hour as 1 p.m., but the clock had not been updated and the events actually occurred during the 2 p.m. hour. (See 7RT 1313-1314, 1319.)

been charged in a different jurisdiction, in exchange for his testimony in the present case. Further, even if Miller testified under a grant of immunity and the defense attempted to impeach him by suggesting he had recently fabricated information to curry favor with the prosecution, the prosecutor could have rebutted any such claim with Officer Romero's testimony.

As essentially all of the information conveyed by Miller was shown through other evidence and Miller never directly implicated or identified appellant, appellant cannot show that any erroneous admission of Miller's statements contributed to the verdict. Accordingly, any error was harmless beyond a reasonable doubt.

IV. THE TRIAL COURT PROPERLY ADMITTED DETECTIVE CHAVERS'S TESTIMONY THAT ZONITA WALLACE WAS FEARFUL OF TESTIFYING

Appellant contends the trial court erroneously admitted Detective Chavers's testimony that Wallace was threatened by codefendant Johnson and his cousin. He argues that the prosecutor's true purpose in offering the statement was to show codefendant Johnson's consciousness of guilt and, in turn, to show appellant's consciousness of guilt. (AOB 83-94.) Respondent disagrees, as Detective Chavers's testimony was properly admitted to explain Wallace's state of mind, in that she was afraid to testify.

A. The Relevant Trial Court Proceedings

At trial, Wallace testified that she did not recall being in the company of a female police officer on June 12, 1997. She denied that anything happened on June 12 that made her fearful, denied identifying anyone to the officer, and said she did not recall telling a police officer that she saw codefendant Johnson. (5RT 747-749.)

During Detective Reynolds's testimony, the prosecutor asked questions about the June 12, 1997, incident with Wallace. (7RT 1349.) Defense counsel requested an offer of proof regarding the prosecutor's attempt to elicit statements made to Wallace during her run-in with codefendant Johnson and his cousin at the gas station. The prosecutor explained that Wallace's identification of codefendant Johnson and his cousin, the accusation they made that she had spoken with police, Wallace's demeanor, and her statement that she would not testify were all relevant to her state of mind because her testimony reflected intentionally evasive answers wherein Wallace claimed that she did not recall such events. (7RT 1349-1358.)

Counsel for codefendant Johnson objected again as the prosecutor called Detective Chavers to testify. Codefendant Johnson argued that his alleged accusation, that Wallace had spoken to police, was hearsay and could not be admitted to show his consciousness of guilt because there was no showing he had made the statements. He further argued that Wallace was never specifically asked if codefendant Johnson accused her of talking to the police. (8RT 1431-1433.) Counsel for codefendant Taylor objected, based on *People v. Aranda* (1965) 63 Cal.2d 518 (*Aranda*), arguing that he was unable to cross-examine codefendant Johnson about the statement and that the statement, an admission by codefendant Johnson, implicated codefendant Taylor. (8RT 1433.) Appellant's counsel later joined in only the *Aranda* objection. (8RT 1442.)

The prosecutor responded that *Aranda* was not implicated because the statement did not reference codefendant Taylor. She also stated that Detective Chavers would directly impeach Wallace's denials that anything occurred on June 12, 1997, which made her fearful, that she had identified anyone to Detective Chavers, and that she did not recall whether codefendant Johnson was one of the two males she spoke to at the gas

station. (8RT 1433-1436.) The prosecutor further explained that Detective Chavers's impeachment testimony was relevant to Wallace's state of mind – it would show that Wallace was not forthcoming during the trial because she was afraid. (8RT 1437-1438.)

In overruling the objections, the trial court found that Detective Chavers's proposed testimony, that she overheard either codefendant Johnson or his cousin accuse Wallace of talking to the police, was properly being admitted to show Wallace's state of mind, not the truth of the matter asserted. (8RT 1439-1442.) The court further found that there was no *Aranda* issue. (8RT 1441-1442.)

During trial, Detective Chavers testified that she rode with Wallace in Wallace's van on June 19, 1997. They saw a vehicle at one point that they saw again later that day at a gas station in Compton. Wallace identified codefendant Johnson and his cousin, Michael, as the two occupants of the vehicle. (8RT 1449-1450.) Officer Chavers further testified that Wallace spoke to codefendant Johnson and his cousin while Officer Chavers waited in the van. When the two males, who spoke in low tones, asked Wallace about Officer Chavers, Wallace said that Officer Chavers was a social worker. Officer Chavers overheard one of the males accuse Wallace of speaking to the police. Wallace appeared to be uncomfortable and denied the accusation. As the conversation continued, Wallace's demeanor changed. She initially appeared uncomfortable and then appeared frightened. (8RT 1450-1453.) Wallace still appeared to be frightened when Sergeant Reynolds later met her and Detective Chavers at the gas station. (8RT 1452.)

B. The Applicable Law

Trial courts have broad discretion in determining the admissibility of evidence. (*People v. Pollock* (2004) 32 Cal.4th 1153, 1170 (*Pollock*); *People v. Weaver* (2001) 26 Cal.4th 876, 933; *People v. Lewis* (2001) 25 Cal.4th 610, 641 (*Lewis*).) The exercise of that discretion will not be disturbed absent a finding the trial court acted in "'an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice.'" (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124-1125 (*Rodrigues*).) The defendant has the burden of showing a clear abuse of discretion by the trial court in admitting evidence. (See *Rodrigues*, *supra*, 8 Cal.4th at pp. 1124-1125; *People v. Cudjo* (1993) 6 Cal.4th 585, 609.)

Evidence is relevant if it has "any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (Evid. Code, § 210.) Under Evidence Code section 352, however, a trial court may exercise its discretion to exclude relevant evidence if "its probative value is substantially outweighed" by the probability of undue prejudice, undue consumption of time, confusing the issues, or misleading the jury. (See also *People v. Lewis* (2001) 26 Cal.4th 334, 374 (*Lewis II*).) The trial court has broad discretion to determine whether evidence should be excluded under Evidence Code section 352. (*People v. Gurule* (2002) 28 Cal.4th 557, 654; *People v. Ramos* (1997) 15 Cal.4th 1133, 1170.) As such, the trial court's ruling under Evidence Code section 352 will not be disturbed on appeal unless it "exceeds the bounds of reason." (*People v. Giminez* (1975) 14 Cal.3d 68, 72.)

"'The prejudice which exclusion of evidence under Evidence Code section 352 is designed to avoid is not the prejudice or damage to a defense that naturally flows from relevant, highly probative evidence.'" (*People v. Zapien* (1993) 4 Cal.4th 929, 958 (*Zapien*), quoting *People v. Karis* (1988) 46 Cal.3d 612, 638.) In applying Evidence Code section 352, "'prejudicial'

is not synonymous with 'damaging.'" (*People v. Kipp* (2001) 26 Cal.4th 1100, 1121 (*Kipp*); *People v. Bolin* (1998) 18 Cal.4th 297, 320.)

C. Appellant Forfeited the Instant Challenge to Detective Chavers's Testimony

Appellant forfeited the instant challenge to Detective Chavers's testimony, on the grounds that the statements were hearsay and improperly showed consciousness of guilt, because he failed to object or join in codefendant Johnson's objection on those grounds in the trial court. (See 8RT 1431-1442.) To preserve an appellate claim regarding the admissibility of evidence, the general rule is that a defendant must make "a specific and timely objection in the trial court on the ground sought to be urged on appeal." (*People v. Waidla* (2000) 22 Cal.4th 690, 717; *Kipp*, *supra*, 26 Cal.4th at p. 1124 [defendant waives claim of error by failing to specifically object to admission of evidence at trial on Evidence Code section 352 grounds].) The general rule applies to claims of federal law error as well as state law error. (See *People v. Monterroso* (2004) 34 Cal.4th 743, 759 (*Monterroso*) [failure to object on grounds of due process, violation of right to fair trial, and violation of right to unbiased jury forfeited claims]; *People v. Koontz* (2002) 27 Cal.4th 1041, 1077 (*Koontz*) [failure to specifically object on grounds of due process, equal protection, a fair trial, etc. forfeited claims on appeal]; see also *Partida*, *supra*, 37 Cal.4th at pp. 434-435 [defendant may not advance due process claim on appeal where defendant objected on only Evidence Code section 352 grounds at trial and appellate argument includes analysis different from objection or argument made at trial].) As appellant failed to object on the basis that Detective Chavers's testimony was hearsay or showed codefendant Johnson's consciousness of guilt, under state or federal law, and joined only in codefendant Taylor's *Aranda* objection, neither

appellant's instant state claim nor his federal claim is cognizable on appeal. (See 8RT 1442.)

Although codefendant Johnson addressed the state claim raised here in the trial court, appellant did not join in the objection and cannot show that joining in the objection would have been futile. "'Generally, failure to join in the objection or motion of a codefendant constitutes a waiver of the issue on appeal.'" (*People v. Wilson* (2008) 44 Cal.4th 758, 794 (*Wilson*), quoting *People v. Santos* (1994) 30 Cal.App.4th 169, 180, fn. 8.) In some cases, a codefendant's objection may preserve a defendant's appellate claim, but only where the defendant can show that joining in the codefendant's objection would have been futile. (See *Wilson*, *supra*, 44 Cal.4th at p. 793.)

Here, codefendant Johnson argued that testimony regarding his or his cousin's alleged threat to Wallace inappropriately showed consciousness of his guilt because Detective Chavers was uncertain which of them uttered it and, thus, the threat was not shown to have come from him. (8RT 1432-1433.) To preserve such a claim as to appellant, appellant would have had to articulate in the trial court how codefendant Johnson's argument would apply to and adversely affect him. The statements allegedly showed consciousness of guilt by codefendant Johnson or his cousin, not appellant. As appellant's concerns would have been different than codefendant Johnson's concerns, he cannot show that any objection by him or any articulation of how codefendant Johnson's claim applied to him would necessarily have been futile. (See *People v. Mitcham* (1992) 1 Cal.4th 1027, 1048 [holding that defendant lacked standing on appeal to assert grounds for severance that were argued by codefendant in trial court because codefendant's argument was relevant to him only, not defendant]; see also *Wilson*, *supra*, 44 Cal.4th at p. 1063 [defendant's failure to object or join in codefendant's objection regarding the admission of evidence was

not excused due to futility of such an objection where record showed he might have been successful if he had made a proper showing as to him].)

D. Even if Appellant Properly Preserved the Instant Claim For Appeal, The Trial Court Properly Admitted Detective Chavers's Testimony As Evidence of Wallace's Fear of Testifying

The trial court properly admitted Detective Chavers's testimony, regarding the encounter Wallace had at the gas station with codefendant Johnson and his cousin, because it explained Wallace's fear of testifying and why she denied the encounter at trial. It is well settled that a witness's fear of testifying or fear of retaliation is relevant to an assessment of the witness's credibility. (*People v. Gonzalez* (2006) 38 Cal.4th 932, 946 (*Gonzalez*); *People v. Burgener* (2003) 29 Cal.4th 833, 869 (*Burgener*); *People v. Malone* (1988) 47 Cal.3d 1, 30; see also Evid. Code, § 780 [setting forth that court or jury may consider, as relevant to witness credibility, factors such as witness demeanor, character of witness's testimony, the extent of the opportunity or capacity to perceive the matter, any bias or other motive, admission of untruthfulness, consistent and inconsistent statements, or attitude toward the action in which witness testifies].) "An explanation of the basis for the witness's fear is likewise relevant to [his or] her credibility and is well within the discretion of the trial court." (*Burgener*, *supra*, 29 Cal.4th at 869.)

Here, regardless of whether codefendant Johnson or his cousin was the person who accused Wallace of talking to the police, or whether the statement was ever connected to appellant in any way, Detective Chavers heard one of the two males make the statement. Wallace appeared to be uncomfortable and frightened immediately after the statement was made. After the encounter, Wallace told the detectives that she was afraid and would not come to court. Earlier that day, Wallace had told the detectives

that she had loaned her van to codefendant Taylor on the day of Moon's murder. At trial, Wallace was less than forthcoming when she testified about loaning her van to codefendant Taylor, she denied identifying codefendant Johnson at the gas station, and denied that the incident between her and codefendant Johnson occurred. (5RT 747-749.) Detective Chavers's testimony was, therefore, relevant to Wallace's state of mind at trial and explained why Wallace changed her statements, claimed a lack of memory, and denied events that had occurred and statements she had earlier made to the detectives.

Appellant argues that Detective Chavers's testimony was impermissible in any event because the threat made by codefendant Johnson was never connected to appellant. (AOB 89-92.) However, where a witness fears testifying due to a threat, the prosecution need not demonstrate that the threat or witness's fear is directly linked to the defendant in order for the threat to be admissible. (*Burgener*, *supra*, 29 Cal.4th at 869, citing *People v. Gutierrez* (1994) 23 Cal.App.4th 1576, 1588.) "It is not necessarily the source of the threat – but its existence – that is relevant to the witness's credibility." (*Ibid.*) Wallace's trial testimony did not conform to her earlier statements to the detectives. Thus, the prosecution reasonably sought to explain that Wallace was less than forthcoming at trial because she was afraid – her encounter with codefendant Johnson and his cousin, their accusation, and her fearful reaction was highly relevant evidence showing her fear. Appellant cannot show that the trial court abused its discretion in admitting such evidence.

E. Even If The Trial Court Erroneously Admitted Detective Chavers's Testimony, Any Error Was Harmless

Even if the trial court erroneously admitted Detective Chavers's testimony regarding Wallace's fear of testifying, any error was harmless. A criminal conviction may be reversed due to the erroneous admission of evidence only when an appellate court is of the opinion that it is reasonably probable that, in the absence of the error, a result more favorable to the defendant would have been reached. (See *People v. Watson* (1956) 46 Cal.2d 818, 836 (*Watson*).)

An outcome more favorable to appellant was not reasonably probable absent Detective Chavers's testimony that Wallace was afraid of testifying. First, the threat that caused Wallace's fear came from codefendant Johnson or his cousin, not appellant, and was never connected to appellant. Second, the import of the testimony from or about Wallace was that Wallace loaned her van to Taylor on June 12, 1997, around the time of Moon's murder. Despite Wallace's fear and inability to recall the exact date she had loaned her gray Plymouth Voyager to codefendant Taylor, she confirmed at trial that she had loaned the van to him on a Thursday in June 1997. (5RT 732-741.) Sergeant Reynolds also testified that Wallace, during a June 19, 1997, interview, which was much closer in time to the event, had told him that she loaned the van to codefendant Taylor around 1:30 p.m. on the preceding Thursday. The preceding Thursday would have been June 12, 1997, the day of the shooting.[36] (7RT 1347-1348, 1359.) The van was also identified at trial by Marcia, Motta, and for the most part Johnston as the vehicle used during and after the shooting at Eddie's Liquor. (5RT 560-561 [Johnston's testimony that appellant and his companions picked her up

[36] It appears appellant challenges admission of only Detective Chavers's testimony on the subject. (See AOB 89-90.)

in the van]; 7RT 1264-1268, 1270, 1275-1277, 1302-1307 [Motta's description and identification of the van and testimony that suspects ran to it at scene]; 8RT 1558-1560, 1589-1590, 1595 [Marcia's testimony that she, appellant, codefendant Johnson, and codefendant Taylor used Wallace's van during the robbery and shooting at Eddie's Liquor].)

Third, the evidence against appellant was strong apart from the threat or evidence of Wallace's fear and/or her testimony generally. As was set forth in more detail in Argument III, subheading (B), Marcia testified that appellant planned and committed the robbery at Eddie's Liquor. He assigned tasks to her, codefendant Taylor, and codefendant Johnson. Appellant and codefendant Johnson went inside the liquor store and committed the crimes while codefendant Taylor and Marcia waited in the van. (See Statement of Facts, *ante*.)

Appellant was further identified by witness testimony, the surveillance video and still photographs from Eddie's Liquor, and his clothing and hair. Marcia testified that appellant wore a Nike Air T-shirt and codefendant Johnson wore shorts during the crimes. Miller, Motta, and Stephanie all provided general descriptions of the two suspects who fled from Eddie's Liquor. Miller said that one of the suspects wore a black shirt with white stripes and Stephanie said that the suspect wore a black shirt. (5RT 945, 953, 959.) The surveillance video and photographs showed the two suspects inside the store, one wearing a Nike T-shirt with the "swoosh" and the other wearing shorts. Although the suspects' facial features cannot be seen clearly, some features that are distinctive to appellant can be seen on the suspect wearing the Nike T-shirt, including the fact that he was bald at the time. (See 10RT 2058-2060 [prosecutor's closing argument, describing what is depicted in the photographs and surveillance video and noting appellant's distinctive features]; Peo. Exh. Nos. 36 [video], 41-44 [still photographs].) Officers also found the Nike T-shirt in appellant's

bedroom. (8RT 1469-1474; see also 8RT 1563-1564 [Marcia's identification of the shirt found in appellant's bedroom].)

Moreover, the nine-millimeter Glock firearm that was used to kill Moon at Eddie's Liquor, and stolen from Riteway approximately one month earlier, was found in appellant's residence one week after Moon's murder. (5RT 897-900; 6RT 999-1002, 1005-1006, 1182-1184, 1219-1220.) Marcia had seen appellant with the gun approximately one month prior to the crimes at Eddie's Liquor, and she saw a bulge in his waistband as he headed toward the liquor store immediately prior to committing the crimes. (8RT 1561-1563, 1671-1672.) Lipkin also identified appellant as one of the perpetrators holding a gun in the Riteway surveillance video. (18RT 4111-4112, 4169, 4171.)

Finally, Johnston was in Wallace's van with appellant and his companions just after the shooting at Eddie's Liquor. When the group noticed a helicopter overhead and someone said that there must have been a robbery, appellant said that he knew who had committed the crime. (5RT 770-771, 789-792, 840.) He also appeared nervous later that day when he saw police officers. Johnston further testified that appellant never responded to accusations in her letter that he and his friends committed the crimes at Eddie's Liquor. (5RT 792-797.)

The foregoing evidence strongly showed, apart from any explanation of Wallace's fear of testifying, that appellant was with codefendant Taylor in Wallace's van during the time of the murder and attempted robbery at Eddie's Liquor. The evidence also strongly showed that appellant was one of the two suspects who actually entered Eddie's Liquor to commit the crimes and that he was the one who used the firearm. The evidence further showed that appellant committed the robbery at Riteway. As he cannot show that an outcome more favorable to him was reasonably probable

absent Detective Chavers's testimony regarding Wallace's fear of testifying, any error in the admission of such evidence was harmless.

Moreover, even if the instant claim implicated appellant's federal constitutional rights, for the reasons set forth in the *Chapman* analysis in Argument III, subheading (B), any error was also harmless beyond a reasonable doubt.

V. THE TRIAL COURT PROPERLY PERMITTED DETECTIVE EDWARDS'S TESTIMONY REGARDING AN INCONSISTENT STATEMENT MADE BY MARCIA JOHNSON

Appellant contends the trial court erroneously admitted Detective Edwards's testimony that, after he told Marcia he did not believe a portion of her story, Marcia told him of different and/or additional facts and statements made by appellant. Appellant argues that his statements, as relayed by Marcia to the detective, constituted hearsay and were not prior inconsistent statements. (AOB 95-106.) To the contrary, Marcia's prior statements to Detective Edwards were inconsistent with her trial testimony and were properly admitted under Evidence Code sections 1235 and 770.

A. The Relevant Trial Court Proceedings

Marcia testified on direct examination that appellant, codefendant Johnson, and codefendant Taylor discussed robbing Eddie's Liquor while at her home around 9:00 a.m. the day of the shooting. Appellant told each person what his or her role would be. Marcia was to go inside the liquor store first to look for cameras and clerks, codefendant Taylor was to drive, and codefendant Johnson was to enter the liquor store with him. (8RT 1554-1556.)

During cross-examination, all three defense counsel questioned Marcia about her September 23, 1999, conversation with Detective

Edwards. (8RT 1594-1603, 1631.) She denied making certain statements to Detective Edwards, such as telling him that codefendant Johnson drove a brown Cutlass on the day of the shooting. (8RT 1601-1602.) Appellant's and codefendant Johnson's counsel further asked whether Detective Edwards had suggested certain facts to Marcia. She said that Detective Edwards suggested the plan was made the night before the shooting. (8RT 1607-1609, 1631.)

Codefendant Johnson's counsel questioned Marcia about appellant's statement that he wanted to her to go inside the liquor store and make a purchase. She admitted that, although she told the detective she did not know why she was asked to make the purchase, she did know the reason. (8RT 1607-1609, 1615.) Counsel further questioned Marcia about the discrepancies in her statements to Detective Edwards regarding the plans that were made, what the defendants were wearing, and her preliminary hearing testimony. She admitted she initially testified at the preliminary hearing that appellant had not made any statements about robbing the liquor store on the morning of the incident, but then later testified that he had made statements about the robbery on the morning of the incident. (8RT 1615-1617, 1621.)

Appellant's counsel also cross-examined Marcia on her statements to Detective Edwards, and asked whether she initially told the detective that appellant was present. She admitted that she had excluded appellant from her initial version of events. Appellant's counsel asked whether Detective Edwards suggested that the planning occurred the night before the shooting at Eddie's Liquor and whether she had said that appellant was a leader in the planning. She agreed. (8RT 1631-1632, 1654.) He questioned Marcia in detail about statements she had made to the detective – about planning, who was present, and what was said – that were inconsistent with her trial or preliminary hearing testimony. (8RT 1632-1661.) Specifically,

appellant's counsel asked Marcia whether she remembered the following discussion with Detective Edwards from the transcript of their interview:

> [Appellant's counsel]: Okay. [¶] The very next line says: "Okay what happened at your – your house the night before?"
>
> And the answer is: "[Appellant] said he came to me and told me that he needed me to do something and he needed me to go to the store and go buy, go check out and see how many people was in there and to buy something. He said he needed the money. He was going to rob a liquor store."

(8RT 1638-1639.)

Detective Edwards testified later that he interviewed Marcia on September 23, 1999. (9RT 1728.) After Marcia gave him an initial version of the events leading to the shooting at Eddie's Liquor, he told her that he did not believe some of her story. Detective Edwards said that he thought the planning occurred the night prior to the robbery. Marcia agreed. She then told Detective Edwards what was said during the planning, including that appellant had said he watched the store in Long Beach, had been there, and saw that only one clerk worked there. (9RT 1746.) Appellant's counsel's hearsay objection was overruled. When Detective Edwards further testified that appellant described the clerk as "one old man" in the store, appellant's counsel again objected. (9RT 1746.)

The parties addressed the issue at sidebar. The trial court stated initially that, if the statements were in any way inconsistent with Marcia's testimony that the group got together the morning of the incident and that appellant told them what to do, the statements would properly be admitted as inconsistent statements. (9RT 1747.) Appellant's counsel argued that, since Marcia was not asked about appellant's specific statements regarding the store clerk and what he looked like, Marcia was the proper person to question on the topic. (9RT 1747-1749.) The prosecutor responded that Detective Edwards's recitation constituted an inconsistent statement

because the prosecutor had asked Marcia what was said during the planning and Marcia's statements were inconsistent with what she generally told Detective Edwards. The prosecutor further noted that, due to objections on the ground of leading, she could not question Marcia more specifically, but that the statements were generally inconsistent. (9RT 1748-1749.)

As Marcia had not been excused from giving further testimony in the case, the trial court found that she could be recalled under Evidence Code section 770. The court further noted that Marcia's prior statements were inconsistent with her trial testimony because her trial testimony did not include appellant's statements about the Eddie's Liquor clerk. (9RT 1750-1751.)

Detective Edwards then testified as follows. Marcia told him that appellant planned the robbery, appellant said there was one "old man" working in the store, and appellant told Marcia to make a purchase in the store to determine how many clerks were working there. (9RT 1752.)

B. The Applicable Law

As set forth previously in more detail in Argument IV, subheading (B), trial courts have broad discretion in determining the admissibility of evidence. (*Pollock*, *supra*, 32 Cal.4th at 1170.) On appeal, the defendant bears the burden of showing a clear abuse of that discretion to prevail on a claim that evidence was erroneously admitted. (See *Rodrigues*, *supra*, 8 Cal.4th at pp. 1124-1125.)

Hearsay is "evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated." (Evid. Code, § 1200, subd. (a).) However, "[a] statement by a witness that is inconsistent with his or her trial testimony is admissible to establish the truth of the matter asserted in the statement under the conditions set forth in Evidence Code sections 1235 and 770."

(*People v. Johnson* (1992) 3 Cal.4th 1183, 1219 (*Johnson*).) Evidence Code section 1235 provides that, "Evidence of a statement made by a witness is not made inadmissible by the hearsay rule if the statement is inconsistent with his testimony at the hearing and is offered in compliance with [Evidence Code] Section 770." Evidence Code section 770 states as follows:

> Unless the interests of justice otherwise require, extrinsic evidence of a statement made by a witness that is inconsistent with any part of his testimony at the hearing shall be excluded unless:
>
> (a) The witness was so examined while testifying as to give him an opportunity to explain or to deny the statement; or
>
> (b) The witness has not been excused from giving further testimony in the action.

The Law Revision Comment to Evidence Code section 770 further explains as follows:

> Permitting a witness to explain or deny an alleged prior inconsistent statement is desirable, but there is no compelling reason to provide the opportunity for explanation *before* the inconsistent statement is introduced in evidence. Accordingly, unless the interests of justice otherwise require, Section 770 permits the judge to exclude evidence of an inconsistent statement only if the witness during his examination was not given an opportunity to explain or deny the statement *and* he has been unconditionally excused and is not subject to being recalled as a witness. Among other things, Section 770 will permit more effective cross-examination and impeachment of several collusive witnesses, since there need be no disclosure of prior inconsistency before all such witnesses have been examined.
>
> Where the interests of justice require it, the court may permit extrinsic evidence of an inconsistent statement to be admitted even though the witness has been excused and has had no opportunity to explain or deny the statement. An absolute rule forbidding introduction of such evidence where the specified conditions are not met may cause hardship in some

> cases. For example, the party seeking to introduce the statement may not have learned of its existence until after the witness has left the court and is no longer available to testify.

(Italics added.)

C. The Trial Court Properly Permitted Detective Edwards to Relay Marcia's Prior Inconsistent Statements

Marcia's statements to Detective Edwards were admissible under Evidence Code sections 1235 and 770 because the statements were inconsistent with her trial testimony. At trial, Marcia testified that appellant planned the robbery and made several statements in furtherance of that plan on the morning of the incident, but she did not mention that appellant said anything about a prior visit to the liquor store wherein he saw that there was only one clerk. (See 8RT 1554-1556.) In contrast, in Marcia's prior statements to Detective Edwards, she said that appellant planned the robbery the night before the incident and told her and his codefendants that he had been to Eddie's Liquor and saw only one clerk inside. (9RT 1746, 1752.) These prior statements were inconsistent with Marcia's rendition of events at trial. (See *People v. Avila* (2006) 38 Cal.4th 491, 579-580 [witness's prior statement, that he saw defendant put gun to victim's head while defendant raped her, was properly admitted under Evidence Code sections 1235 and 770 because it was inconsistent with his trial testimony that he did not see defendant at the scene].)

Although Marcia was not specifically asked whether she told Detective Edwards that appellant said he had been to Eddie's Liquor and had seen one clerk, she was asked by the prosecutor, appellant's counsel, and codefendant Taylor's counsel what appellant said during the planning and what she told Detective Edwards about those discussions. (8RT 1554-1556 [prosecutor], 1607-1609, 1615-1617, 1621 [codefendant Johnson's

counsel], 1632-1661 [appellant's counsel].) Marcia was further questioned about her prior statements to Detective Edwards regarding the time and place of the planning. (8RT 1554-1556, 1607-1609, 1615-1617, 1621, 1631-1632, 1654.) She admitted some statements, including that she had previously said the planning occurred the night before the incident, while denying others. Marcia, however, did not testify that she told Detective Edwards that appellant had said he had been inside the liquor store and saw the clerk. Because Marcia was asked about the time and place of the planning discussion, who was involved in the discussion, what appellant said, and what she told Detective Edwards about the content as well as the time and place of those discussions, the record sufficiently establishes that she was given an opportunity to explain or deny her prior statements to Detective Edwards. (See *People v. Garcia* (1990) 224 Cal.App.3d 297, 304 [an opportunity to explain or deny the prior statement means that the witness must "reference more than one of the following, (1) the people involved in the conversation, (2) its time and place, or (3) the specific statements made during it."].)

Moreover, even if this Court were to determine that Marcia was not questioned specifically enough in order to find that she had an opportunity to explain or deny the statements, her prior statements were, nevertheless, properly admitted because she was subject to recall. (Evid. Code, § 770 [witness must have been given an opportunity to explain or deny statement, or subject to recall].) Marcia had been excused, but the trial court determined that she was subject to recall and stated that appellant's counsel could recall her. (9RT 1750-1751; see Evid. Code, § 778 [leave to recall a witness may be granted in court's discretion].) Appellant's counsel could have done so if he believed she was not sufficiently provided an opportunity to explain or deny her prior statements. (See *People v. Green* (1971) 3 Cal.3d 981, 1004 [ruling that the Confrontation Clause is satisfied

if defense had opportunity to cross-examine witness, regardless of whether witness was actually cross-examined], citing *Pointer v. Texas* (1965) 380 U.S. 400, 407 [85 S.Ct. 1065, 13 L.Ed.2d 923].) Appellant cannot now contend, because he chose not to avail himself of the opportunity to recall Marcia, that Marcia's statements to Detective Edwards did not constitute prior inconsistent statements.

D. Even if Marcia's Prior Statements to Detective Edwards's Statements Were Improperly Admitted, Any Error Was Harmless

Even if Marcia's prior statements to Detective Edwards were not properly admitted as prior inconsistent statements under Evidence Code section 1235, appellant cannot show that an outcome more favorable to him was reasonably probable absent admission of those prior statements. (See *Johnson*, *supra*, 3 Cal.4th at p. 1220 [applying *Watson* harmless error analysis to erroneous admission of prior inconsistent statement under Evidence Code sections 770 and 1235]; *People v. Espinoza* (2002) 95 Cal.App.4th1287, 1317 [applying *Watson* harmless error analysis to erroneous admission of impeachment evidence].) Apart from Marcia's prior statements, the jury was presented with sufficient evidence to infer that appellant had made a prior trip to the liquor store. Marcia testified that appellant planned the robbery and assigned specific tasks to her and his codefendants. He told Marcia to go inside first to look for clerks and cameras, told codefendant Taylor how to get to Eddie's Liquor, and told codefendant Taylor and Marcia to wait outside while he and codefendant Johnson went inside. From this testimony, the jury certainly would have believed that appellant targeted Eddie's Liquor ahead of time and, necessarily, had been to the store on a prior occasion.

Additionally, as previously set forth in more detail in Argument IV, subheading (E), other independent evidence strongly showed appellant's guilt on all counts. Marcia's testimony established that appellant planned the robbery, codefendant Taylor drove Wallace's van to the scene at appellant's direction, and appellant and codefendant Johnson were the two suspects who actually entered Eddie's Liquor and killed Moon. Johnston's testimony strongly corroborated Marcia's testimony by showing that appellant made incriminating statements while he was in Wallace's van with Marcia, codefendant Taylor, and codefendant Johnson immediately after the shooting. (See Arg. IV, subh. (E), *ante.*)

Significantly, the gun that was stolen from Chung during the Riteway robbery and later used to kill Moon at Eddie's Liquor was found in appellant's residence one week after the shooting. The Nike Air T-shirt worn by one of the suspects, shown in the surveillance video and photographs from Eddie's Liquor, was also found in appellant's room. Lipkin further identified appellant as one of the suspects depicted in the surveillance video from Riteway. (See Arg. IV, subh. (E), *ante.*) Consequently, even if Marcia's prior statements to Detective Edwards – that appellant had been inside Eddie's Liquor on a prior occasion – had been excluded at trial, appellant cannot show that an outcome more favorable to him was reasonably probable.

For the same reasons, even if appellant could show that the instant claim implicated his federal constitutional rights, he cannot show that the alleged error affected the verdict. As such, any error was also harmless beyond a reasonable doubt under *Chapman.* (See *Chapman, supra*, 386 U.S. at p. 36.)

VI. THE TRIAL COURT PROPERLY ADMITTED APPELLANT'S FAILURE TO RESPOND TO A LETTER JOHNSTON HAD WRITTEN TO HIM AS AN ADOPTIVE ADMISSION

Appellant argues that his failure to respond to Johnston's letter to him was erroneously admitted as an adoptive admission under Evidence Code section 1221, and that the error was not cured by the fact that the letter was admissible under Evidence Code sections 770 and 1235 because only portions of the letter were inconsistent with Johnston's trial testimony. He further contends that his federal constitutional rights were violated by law enforcement's loss of a letter he wrote to Johnston after receiving her letter. (AOB 107-145.) Contrary to appellant's position, his failure to respond to the letter was properly deemed an adoptive admission, and appellant cannot show that he suffered prejudice as a result of the loss of his love letter to Johnston.

A. The Relevant Trial Court Proceedings

The instant argument addresses a letter Johnston wrote to appellant, a letter appellant wrote to Johnston, and the fact that law enforcement misplaced the letter appellant wrote to Johnston.

1. The Proceedings Relevant to Johnston's Letter to Appellant

On direct examination, the prosecutor questioned Johnston about statements appellant made while the group traveled in Wallace's van on the day of the shooting. Johnston testified that, after seeing a helicopter overhead on the 710 Freeway, one of the occupants of the van said there must have been a robbery. (5RT 761-762.) Appellant then said, "'They knew the guys who did it.'" (5RT 771.) When asked whether she had

previously told officers that appellant used the word "we" instead of "they," Johnston said, "I can't remember." (5RT 771.)

Appellant's counsel objected when the prosecutor attempted to elicit a prior inconsistent statement Johnston had made, regarding appellant's statement, in a letter she had written to appellant. (5RT 772.) Defense counsel argued that the letter contained conjecture. (5RT 772-773.) The prosecutor responded that she planned to use the letter, at that point, only for the prior inconsistent statement that Johnston had placed in quotes – "we know the niggers that did it" – showing that she originally said "we," not "they." The prosecutor clarified that she would later identify the letter and show that Johnston wrote it to appellant for the purpose of showing that appellant never denied the portion wherein Johnston accused him of committing the crime at Eddie's Liquor. (5RT 773-774.)

Codefendant Taylor's counsel objected only on *Aranda* grounds. (5RT 774-776.) Appellant's counsel argued that his silence, in response to the accusation in Johnston's letter, did not amount to an adoptive admission. (5RT 778-779.) The prosecutor argued that, because Johnston had also written in the letter that she wanted a response from appellant and he should not be afraid to tell her, in context, appellant would have responded or at least denied the accusation if it were false. (5RT 779-780.)

The trial court overruled the defense objection, finding the letter sufficiently accusatory to prompt a response. (5RT 780-781.) The parties agreed the letter would be redacted to avoid references to the codefendants. (5RT 781.)

The prosecutor continued the direct examination of Johnston. Johnston reviewed the transcript of her February 18, 1998, interview with Detective Cisneros, but said she still could not recall whether appellant said "we" or "they." The prosecutor questioned her about the letter she wrote on June 12, 1997. Johnston confirmed that she wrote the letter and wrote,

in quotes, that appellant said, "'Yeah, we know the niggers that did that.'" (5RT 783-785.) The prosecutor further refreshed Johnston's recollection with the letter when Johnston could not recall whether appellant seemed nervous after he saw police later on the day of the incident and whether a conversation she had with Marcia and appellant later that day caused her to be concerned. (5RT 795-796, 798-800.)

The prosecutor elicited from Johnston that Johnston hand-delivered the letter to appellant later on the night of June 12, 1997. Appellant did not read the letter in her presence. He never responded or discussed the contents of the letter with Johnston. Johnston did not speak to appellant again until approximately one month prior to the trial. (5RT 800-802, 825-826, 834.)

After Johnston left the stand, appellant's counsel again argued that his failure to respond to Johnston's letter was not an adoptive admission because there was no evidence he opened or responded to it. The court overruled the objection, noting that the evidence, although weak, was legally sufficient for the jury to conclude that appellant read the letter. The court further noted that appellant's argument was a question for the jury. (5RT 886-888.) The prosecutor noted that she had not offered the letter as evidence yet and would address the matter at a later time. (5RT 889.)

Lipkin testified that, on June 19, 1997, he found the letter Johnston wrote to appellant on top of a dresser in appellant's bedroom. Lipkin discussed the letter with appellant and then gave it to Detective Reynolds. (5RT 891, 892-894.)

The defense renewed its objection to Johnston's letter. The trial court overruled the objection and admitted a redacted version of the letter that omitted the border. (9RT 1795-1799, 1807.)

The trial court instructed the jury with CALJIC No. 2.71.5, regarding adoptive admissions, over appellant's counsel's objection. (10RT 1951-1952.)

2. The Proceedings Relevant to Appellant's Letter to Johnston

Detective Reynolds testified that, on August 20, 1997, he found a letter in Johnston's home that appellant had written to her. The letter was dated August 11, 1997. Detective Reynolds attempted to retrieve the letter from the property room of the Compton Police Department the day he testified, but was unable to locate it because the Compton Police Department, which was merging with the Los Angeles County Sheriff's Department, was in the process of moving its property. (7RT 1370-1371, 1380-1381.)

Appellant's counsel argued that appellant's failure to respond to Johnston's letter could not be deemed an adoptive admission when the letter that appellant wrote to Johnston was missing. (7RT 1381-1382; 8RT 1477-1479.) The prosecutor responded that Detective Reynolds had told her and appellant's counsel that appellant's letter to Johnston was "completely a love letter with no references to any crime." Codefendant Taylor's counsel argued that, although Detective Reynolds said that it was a love letter, he could not recall any details such as whether appellant wrote that Johnston was wrong or misunderstood. The trial court overruled the defense objection. (8RT 1477-1479.)

B. Applicable Law

The general law relevant to the admissibility of evidence and to the admissibility of hearsay evidence was set forth in detail in Arguments IV and V. Specifically, Evidence Code section 1221 provides that, "Evidence

of a statement offered against a party is not made inadmissible by the hearsay rule if the statement is one of which the party, with knowledge of the content thereof, has by words or other conduct manifested his adoption or his belief in its truth." If a person is accused of committing a crime, "'under circumstances which fairly afford him an opportunity to hear, understand, and to reply,' and the Fifth Amendment is not implicated, 'and he fails to speak, or he makes an evasive or equivocal reply, both the accusatory statement and the fact of silence or equivocation may be offered as an implied or adoptive admission of guilt'" under Evidence Code section 1221. (*People v. Riel* (2000) 22 Cal.4th 1153, 1189 (*Riel*), quoting *People v. Preston* (1973) 9 Cal.3d 308, 313-314; see also *People v. Fauber* (1992) 2 Cal.4th 792, 852 (*Fauber*) [same].) "'When a person makes a statement in the presence of a party to an action under circumstances that would normally call for a response if the statement were untrue, the statement is admissible for the limited purpose of showing the party's reaction to it. [Citations.] His silence, evasion, or equivocation may be considered as a tacit admission of the statements made in his presence.'" (*Riel, supra*, 22 Cal.4th at p. 1189, quoting *Estate of Neilson* (1962) 57 Cal.2d 733, 746.)

"'To warrant admissibility, it is sufficient that the evidence supports a reasonable inference that an accusatory statement was made under circumstances affording a fair opportunity to deny the accusation; whether defendant's conduct actually constituted an adoptive admission becomes a question for the jury to decide.'" (*People v. Geier* (2007) 41 Cal.4th 555, 590 (*Geier*), quoting *People v. Edelbacher* (1989) 47 Cal.3d 983, 1011 (disapproved on other grounds in *People v. Lloyd* (2002) 27 Cal.4th 997, 1008, fn. 12).) A direct accusation is not necessary. (*Fauber*, 2 Cal.4th at p. 852; accord, *Riel, supra*, 22 Cal.4th at p. 1189.) Moreover, Evidence Code section 1221 applies to both oral and written accusatory statements. (See Cross References to Evid. Code, § 1221 [noting that "statement" is

defined in Evid. Code, § 225]; Evid. Code, § 225 [defining "statement" as an oral or written verbal expression].)

C. The Trial Court Properly Admitted Appellant's Failure to Respond to Johnston's Letter as an Adoptive Admission

The trial court properly admitted appellant's failure to respond to Johnston's letter as an adoptive admission because a reasonable person would have responded to the letter to refute his guilt. (Compare AOB 123-124.) Johnston's letter stated that she believed appellant and his friends committed the robbery at Eddie's Liquor. She wrote that her belief was based on the following events that had occurred the day of the shooting: (1) as a helicopter flew overhead, appellant and his codefendants said that they knew who committed the robbery; (2) appellant and his codefendants ran to the television to watch the news later the same day; (3) appellant got nervous when police passed by; and (4) appellant told her to be quiet that night when a news station aired a story regarding a robbery. (Peo. Exh. No. 2.) Johnson further stated in the letter that she did not want the relationship to continue because, if appellant got caught, she would be "ass out." (Peo. Exh. No. 2.) Finally, the letter asked appellant to respond and added, "Don't be afraid to tell me something!" (Peo. Exh. No. 2.) The foregoing showed the letter accused appellant of committing a crime, under circumstances where a reasonable person would have responded. Johnston requested a response and appellant, if he had not committed the crime, certainly would have denied it to prevent her from ending their relationship.

Although Johnston did not see appellant read the letter, the evidence sufficiently supported the inference that he had read it. Johnston personally gave the letter to appellant. The letter was found on the dresser in his bedroom one week later. (5RT 891-894.) A reasonable jury would not

likely believe that appellant took the letter from her and placed it on his dresser without ever reading it. (See generally *Geier*, *supra*, 41 Cal.4th at p. 590, fn. 8 [noting that silence may be admitted as an adoptive admission where the circumstances allow for a reasonable inference that the defendant heard the accusation].) Additionally, Lipkin likely would have noted that he was the first to open the letter if that had been the case. His testimony, instead, implied that the letter had already been opened.

Appellant cites three criminal cases wherein a written accusatory statement and a failure to respond were properly admitted, but he contends that all three are distinguishable because those written statements were read orally and required a response. (AOB 123, citing *People v. Rollins* (*Rollins*) (1910) 14 Cal.App. 134, 137-138, *People v. Mechler* (1925) 75 Cal.App. 181, 18-188 (*Mechler*), and *People v. Porter* (1923) 64 Cal.App. 4, 11-12 (*Porter*).) While the written statements were orally read to the defendants in *Rollins*, *Mechler*, and *Porter*, neither those cases nor the Evidence Code set forth any rule stating that an oral reading is a prerequisite to the admission of a lack of response to a written statement as an adoptive admission. (See *ibid.*) Contrary to appellant's contention, Evidence Code section 1221 directly references Evidence Code section 225's definition of "statement," which expressly includes a writing as well as an oral statement. As such, the only prerequisites for admissibility of an adoptive admission are that the accusation is made under circumstances where the defendant had an opportunity to hear or understand it and had a reasonable opportunity to respond, but failed to do so or did so in an equivocal manner. (See *Geier*, *supra*, 41 Cal.4th at p. 590; *Fauber*, *supra*, 2 Cal.4th at p. 852.)

Appellant further relies on the ruling in *Security-First Nat. Bank of Los Angeles v. Spring Street Properties* (1937) 20 Cal.App.2d 618, 626 (*Security-First*), to argue that a failure to respond to a written accusation cannot constitute implied consent to its contents. (AOB 122.) However,

Security-First announced a general rule that was expressly limited to the circumstances presented. There, the defendant (lease-holder for a property) sent a letter to the plaintiff (a bank, which was a trustee of the sub-lessee) stating that the letter served as notice of cancellation of the lease, which, in effect, would have resulted in a modification to a trust indenture. (*Id.* at pp. 625-626.) Another pre-existing document provided that the terms of the trust indenture could not be modified in such a manner. (*Ibid.*) The plaintiff responded in writing, stating that the sublease could not be cancelled without plaintiff's concurrence because plaintiff was a trustee. The defendant wrote a second letter stating, in effect, that the second letter served as cancellation of the lease and that, if there was no reply to the letter, the defendant would assume the plaintiff agreed with the cancellation. The plaintiff did not reply. (*Ibid.*)

The Court of Appeal in *Security-First* rejected the defendant's argument that its second letter and plaintiff's failure to respond held any evidentiary value. (*Security-First*, *supra*, 20 Cal.App.2d at p. 626.) The court found that the letter could not serve to modify the terms of the trust indenture and explained that, "Silence, *under such circumstances*, is never the equivalent of consent; such a doctrine would place the whole world at the mercy of letter writers." (*Ibid.*, italics added.)

The court's concern in *Security-First* was focused on modifications of legal agreements such as that presented by the facts before it. Indeed, a contrary ruling would mean that any person could terminate a contract, lease, or other legal arrangement simply by writing a letter, even where there was no evidence the intended recipient received or understood the letter or where other legally binding documents provided that the terms of the legal arrangement could not be modified in such a manner.

Under other circumstances, however, a party's failure to respond to an accusatory writing would reasonably carry evidentiary value. For example,

the courts in the criminal cases of *Rollins*, *Mechler*, and *Porter* all found that a defendant's failure to respond to an accusatory writing constituted an adoptive admission because the evidence reasonably supported a finding that the defendants had perceived and understood the accusation, but failed to respond. (See *Rollins*, *supra*, 4 Cal.App. at pp. 137-138; *Mechler*, *supra*, 75 Cal.App. at pp. 187-188; *Porter*, *supra*, 64 Cal.App. at pp. 11-12.)

Likewise, here, the evidence sufficiently showed that Johnston's letter accused appellant of a crime and that appellant reasonably perceived and understood the accusation, but failed to respond. Unlike *Security-First*, Johnston's letter did not purport to modify terms of some pre-existing legal contract. Johnston's letter also was not a second accusation issued after an initial denial by the defendant. Johnston, instead, wrote her one letter to appellant immediately after the events she described had occurred, and appellant never denied the accusation even though he may have been able to salvage his relationship with her by issuing a denial. He had also apparently written a letter to her later, which was described as a love letter without any reference to any crimes, showing that he was selectively responding to the letter. As also noted, the evidence demonstrated that appellant personally received the letter which allowed the jury to reasonably infer that he had read it. Accordingly, the circumstances here sufficiently showed that the letter accused appellant of a crime, appellant received and would have understood the letter, a reasonable person in his situation would have issued a denial to the contents of the letter if not guilty, and appellant had a reasonable opportunity to respond, but did not.

Moreover, as the trial court properly noted, whether appellant's failure to respond to Johnston's letter could be considered an admission was a question for the jury to decide, not a question addressed to the *admissibility* of the evidence. (5RT 886-888; see *Geier*, *supra*, 41 Cal.4th at p. 590.) Johnston's letter directly accused appellant of committing the robbery at

Eddie's Liquor and explained the reasons for Johnston's belief. The letter conveyed that, if appellant had committed the crime, Johnston was ending their relationship. Appellant personally took the letter from her and it was found on his dresser one week later. The foregoing supported a reasonable inference that appellant had read and understood the letter. (See *Geier*, *supra*, 41 Cal.4th at p. 590.) As the foundational requirements for admission were met and the question of whether the circumstances actually constituted an admission was properly left to the jury, appellant's argument to the contrary should be rejected.

D. The Trial Court Properly Admitted Johnston's Entire Letter

Appellant further contends that the trial court erroneously admitted the entirety of Johnston's letter when it should have admitted only the specific accusatory statement(s). (AOB 125-127.) However, as the court properly found, the entire letter provided necessary context for the accusatory statements.

Johnston's entire letter was properly admitted because the statements explaining why she believed appellant committed the crimes at Eddie's Liquor were inextricable from the accusations. Almost every sentence of the letter contains an accusatory statement along with the reasons Johnston made the accusation. (See Peo. Exh. No. 2.) For example, the third sentence of the letter states, "First of all I wanted to say I have a little idea that you guys did that little r[o]bbery in Long Beach, because ya'll ran to the T.V. to watch the news and th[e]n when ya'll seen the helicopters ya'll was like, 'yeah we know the niggas that did that.'" (Peo. Exh. No. 2.) Johnston's reasons were part of the accusations and necessary to explain both the accusations and why a reasonable, innocent person in appellant's position would have issued a denial to the letter. (See *People v. Davis*

(2005) 36 Cal.4th 510, 535-536 (*Davis*) ["an out-of-court statement is admissible if offered solely to give context to other admissible hearsay statements"] (*Davis*), citing *People v. Turner* (1994) 8 Cal.4th 137, 189-190 (*Turner*).)

Appellant's reliance on *Williamson v. United States* (1994) 512 U.S. 594 [114 S.Ct. 2431, 129 L.Ed.2d 476] to argue that the trial court should have excluded all but the specific and express accusations made in Johnston's letter (AOB 125-127), is misplaced. The Court in *Williamson* held that the trial court had erroneously admitted, as a declaration against penal interest, the entirety of a confession by the defendant's accomplice. (*Id.* at pp. 598-605.) The Court ruled that the trial court should have examined each statement individually to determine admissibility. (*Ibid.*) Noting that accomplice statements implicating a defendant are traditionally viewed with caution, the Court found that some of the statements made in the confession were clearly self-inculpatory while others were self-*exculpatory* and, thus, not admissible as statements against penal interest. (*Id.* at pp. 601, 604.)

The instant case is easily distinguished. First, Johnston's written accusations and appellant's failure to respond were admitted as an adoptive admission by appellant, not statements against penal interest made by a witness. Johnston was not an accomplice, there was no reason for the jury to view her statements with caution, and the trial court was not required to parse through to determine whether a particular statement was inculpatory or exculpatory. The only requirement regarding the admission of her statements was that the statements had to be accusatory in nature. Second, the trial court reviewed Johnston's entire letter and determined that all of the statements were admissible as either an accusation or as a statement that gave context to the accusation. As noted, the reásons for Johnston's accusations were inextricably bound to the accusations, and were

admissible and necessary to provide context to the accusations. (See *Davis*, *supra*, 36 Cal.4th at pp. 535-536 ["an out-of-court statement is admissible if offered solely to give context to other admissible hearsay statements"].) *Williamson*, as a result, does not support appellant's argument, and he has failed to show that the letter was erroneously admitted.

E. Even if Johnston's Entire Letter Was Erroneously Admitted, Any Error Was Harmless

Even if Johnston's letter should not have been admitted in its entirety as part of the adoptive admission, appellant cannot show that an outcome more favorable to him was reasonably probable if the letter had been redacted. (See *Watson*, *supra*, 46 Cal.2d at p. 835; Cal. Const., art. VI, § 13; Evid.Code, § 353, subd. (b); see also *Davis*, *supra*, 36 Cal.4th at p. 538 [applying *Watson* harmless error analysis to hearsay claim].) Apart from Johnston's letter, the jury was made aware of the reasons for her accusations.

First, the jury was aware of the statements Johnston made in her letter in any event. Johnston's recollection was refreshed and/or she was impeached at trial under Evidence Code sections 771 (writing used to refresh memory) as well as 770 and 1235 (prior inconsistent statements) with the following statements from her letter: (1) while the group was in Wallace's van the day of the crimes and a police helicopter was overhead, appellant and/or his companions said there must have been a robbery and appellant said, "we know the niggers that did it" (5RT 783-787, 790); (2) appellant seemed nervous after he saw police later on the day of the incident (5RT 795-796, 798-800); and (3) a conversation Johnston had with Marcia and appellant later on the day of the shooting caused her to be concerned because appellant and Marcia wanted to talk privately, exclusive of her, while a news segment was on television. (5RT 797-800). The fact

that the letter itself was admitted would not reasonably have resulted in a more favorable outcome to appellant since the jury had already properly heard all of its relevant contents directly from Johnston.

Additionally, as set forth in detail in Argument IV (E), other independent evidence strongly showed appellant's guilt on all counts. Marcia's testimony established that appellant planned and committed the crimes with codefendants Taylor and Johnson, that he had a gun for approximately one month prior Moon's murder, and that he appeared to have the gun as he walked toward Eddie's Liquor. Johnston's testimony, even apart from her letter, strongly corroborated Marcia's testimony. She placed appellant in Wallace's van during the time frame immediately after the shooting at Eddie's Liquor. Marcia and Wallace further established that appellant was in Wallace's van on the day of the shooting at Eddie's Liquor. Wallace's van was identified as the suspects' getaway vehicle. Appellant was further identified in the surveillance video of the Riteway robbery as one of the perpetrators. The gun stolen during the Riteway robbery was the same gun that was used to kill Moon, and it was found in appellant's home one week after Moon was killed. Finally, appellant's Nike Air T-shirt, found in his closet one week after the crimes, could be seen on the surveillance video from Eddie's Liquor and was generally identified by witnesses who saw the suspects fleeing from the scene. Due to the strong evidence showing appellant's guilt on all counts, apart from Johnston's letter, he cannot demonstrate that an outcome more favorable to him was reasonably probable if Johnston's letter had been redacted.

F. Appellant Cannot Show That He Suffered Any Violation of His Due Process Rights Due to Law Enforcement's Loss of His Letter to Johnston

The Compton Police Department's inability to locate the letter appellant had written to Johnston did not result in a violation of appellant's due process rights. "Law enforcement agencies have a duty, under the due process clause of the Fourteenth Amendment, to preserve evidence that might be expected to play a significant role in the suspect's defense." (*People v. Farnam* (2002) 28 Cal.4th 107, 166 (*Farnam*), internal quotes omitted; see *California v. Trombetta* (1984) 467 U.S. 479, 488 [104 S.Ct. 2528, 81 L.Ed.2d 413] (*Trombetta*); *People v. Carter* (2005) 36 Cal.4th 1215, 1246; *People v. Beeler* (1995) 9 Cal.4th 953, 976 (*Beeler*).) Such evidence "'must both possess an exculpatory value that was apparent before the evidence was destroyed, and be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means.' [Citations.]" (*Farnam*, *supra*, 28 Cal.4th at p. 166.)

The responsibility to preserve evidence is further limited when the defendant challenges "'the failure of the State to preserve evidentiary material of which no more can be said than that it could have been subjected to tests, the results of which might have exonerated the defendant.'" (*Farnam*, *supra*, 28 Cal.4th at p. 166, quoting *Arizona v. Youngblood* (1988) 488 U.S. 51, 57 [109 S.Ct. 333, 102 L.Ed.2d 281] (*Youngblood*).) In such situations, "'unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law.'" (*Farnam*, *supra*, 28 Cal.4th at p. 166, quoting *Youngblood*, *supra*, 488 U.S. at p. 58; accord *Beeler*, *supra*, 9 Cal.4th at p. 976.) On appeal, the reviewing court must determine "whether, viewing the evidence in the light most favorable

to the superior court's finding, there was substantial evidence to support its ruling. [Citation.]" (*People v. Roybal* (1998) 19 Cal.4th 481, 510.)

Appellant cannot show that his letter to Johnston had any apparent exculpatory value. His only argument was that the letter *might* have contained some denial of Johnston's accusations, which could have rendered her letter inadmissible as part of an adoptive admission. (See 8RT 1477-1479.) However, the prosecutor informed the court that, although Detective Reynolds could not remember the details of the letter, he recalled that it was a love letter which made no reference to any crimes. Detective Reynolds would have likely recalled, and found very significant, any references by appellant to the crimes that were being investigated if such references were in the letter. Also, even if the letter contained a denial by appellant, any such self-serving statement would not necessarily have been exculpatory. (See, e.g., *People v. Jurado* (2006) 38 Cal.4th 72, 130 (*Jurado*) [finding that defendant had no constitutional right to present self-serving post-crime statements that minimized or denied culpability and, in turn, lacked trustworthiness].) As, at best, appellant can argue only that the letter potentially could have been useful to his defense, he cannot show that it held any apparent exculpatory value. (See *Youngblood*, *supra*, 488 U.S. at pp. 57-58; *Farnam*, *supra*, 28 Cal.4th at p. 166.)

Since appellant's letter to Johnston did not possess any apparent exculpatory value at the time it was misplaced, and law enforcement's loss of the letter was due to inadvertence rather than bad faith, appellant cannot show that he suffered any violation of his due process rights. (See *Farnam*, *supra*, 28 Cal.4th at p. 166, quoting *Youngblood*, *supra*, 488 U.S. at p. 58; accord *Beeler*, *supra*, 9 Cal.4th at p. 976.) Detective Reynolds testified that he booked appellant's letter to Johnston into the property room of the Compton Police Department on the day it was found. He explained that the property room was unable to locate the letter when he attempted to retrieve

it on the day of his testimony because the Compton Police Department had merged with the Los Angeles County Sheriff's Department and all of the property was in the process of being moved to the Sheriff's Department at that time. (7RT 1370-1371, 1380-1381.) As the letter had simply been misplaced, appellant did not suffer any violation of his due process rights. (See *Trombetta*, *supra*, 467 U.S. at p. 488 [explaining that bad faith would be "a calculated effort to circumvent the disclosure requirements" of *Brady*, "a conscious effort to suppress exculpatory evidence," or "official animus" toward the defense relating to the destruction of the evidence]; see, e.g., *Youngblood*, *supra*, 488 U.S. at p. 58 [officers' failure to refrigerate rectal swab and clothing from night of crime, which precluded later testing by the defense, was at worst negligent, but not bad faith].)

Additionally, even if appellant could have shown that the letter carried an exculpatory value that was apparent to law enforcement and that no reasonably comparable evidence was available, any error was harmless. As law enforcement's loss of appellant's letter prevented appellant from presenting only certain evidence that may or may not have related to his defense, but did not prevent him from presenting the defense, the *Watson* harmless error analysis should apply here. (See *People v. Garcia* (2005) 160 Cal.App.4th 124, 133 [in assessing *Trombetta* error for prejudice, finding that, "Where a trial court's erroneous ruling is not a refusal to allow a defendant to present a defense, but only rejects certain evidence concerning the defense, the error is nonconstitutional and is analyzed for prejudice under *Watson* []-i.e., the judgment should be reversed only if it is reasonably probable that defendant would have obtained a more favorable result absent the error"], citing *People v. Cudjo* (1993) 6 Cal.4th 585, 610-614 [holding that trial court's error in refusing to allow a defense witness, who confessed to the crime, to testify was harmless under *Watson*].)

Even if appellant could show that he had denied Johnston's accusations in his missing letter, he cannot show that an outcome more favorable to him was reasonably probable. At best, such evidence might have shown that Johnston's letter should not have been admitted as part of an adoptive admission. However, as noted above (Arg. VI (E)), most of the incriminatory statements made in Johnston's letter were presented to the jury in any event when the prosecutor used the letter to refresh Johnston's memory and/or to impeach her. Additionally, the evidence against appellant was strong apart from any of the statements made in Johnston's letter. (See Arg. VI (E).) Accordingly, any error was harmless.

Indeed, given the strength of the other evidence against appellant – including that the gun stolen from Chung during the Riteway robbery and used to kill Moon at Eddie's Liquor was found in appellant's home one week after Moon's murder, that appellant could be seen on both surveillance videos, appellant's Nike Air T-shirt that was found in his home one week after Moon's murder could be seen on the surveillance video from Eddie's Liquor and was identified by Marcia as the shirt appellant wore at the time of the crimes, and that Marcia testified to appellant's leadership role in the murder – any error would not have contributed to the verdict. Thus, any error was also harmless beyond a reasonable doubt under *Chapman*. (See *Chapman*, *supra*, 386 U.S. at p. 36.)

G. The Trial Court Properly Instructed the Jury With CALJIC No. 2.71.5

Appellant further argues that the trial court erroneously instructed the jury with CALJIC No. 2.71.5 because there was no evidentiary basis for

finding that appellant made an adoptive admission.[37] (AOB 141-142.) Even if Johnston's letter and appellant's failure to respond were not properly admitted as an adoptive admission, the court's instruction with CALJIC No. 2.71.5 was harmless.

When evidence showing that a defendant made an adoptive admission is properly admitted at trial, the trial court has a sua sponte duty to instruct the jury with CALJIC No. 2.71.5 only when the defense requests the instruction. (*People v. Carter* (2003) 30 Cal.4th 1166, 1198 (*Carter*).) The trial court, however, "certainly" has discretion to instruct with CALJIC No. 2.71.5 if it "think[s] it best to do so." (*Ibid.*)

Even if, as appellant contends, there was an insufficient evidentiary basis regarding his adoptive admission, CALJIC No. 2.71.5 could not have resulted in prejudice in the instant case. The instruction informs the jury

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[37] The court instructed the jury in accordance with CALJIC No. 2.71.5 as follows:

> If you should find from the evidence that there was an occasion when a defendant (1) under conditions which reasonably afforded him an opportunity to reply; (2) failed to make a denial in the face of an accusation, expressed directly to him or in his presence, charging him with the crime for which this defendant now is on trial or tending to connect him with this commission; and (3) that he heard the accusation and understood its nature, then the circumstance of his silence on that occasion may be considered against him as indicating an admission that the accusation was true.
>
> Evidence of an accusatory statement is not received for the purpose of proving its truth, but only as it supplies meaning to a [sic] silence of the accused in the face of it.
>
> Unless you find that a defendant's silence at the time indicated an admission that the accusatory statement was true, you must entirely disregard the statement.

(10RT 2015-2016.)

that, "[u]nless you find that a defendant's silence and conduct at the time indicated an admission that the accusatory statement was true, you must entirely disregard the statement." The instruction is cautionary and expressly informs the jury not to consider the statement at all if the jury does not believe appellant's failure to respond was an adoptive admission.

Additionally, as explained above (Arg. VI, subdhs. (E & F)), whether appellant's failure to deny Johnston's accusations was an admission would not have affected the outcome of the trial given the strength of the other, independent evidence of appellant's guilt. Accordingly, he cannot show under any standard that the court's instruction with CALJIC No. 2.71.5 contributed to the verdicts.

VII. THE TRIAL COURT PROPERLY ADMITTED TWO STILL PHOTOGRAPHS CREATED FROM THE SURVEILLANCE VIDEO TAKEN AT EDDIE'S LIQUOR

Appellant argues that the trial court erroneously and prejudicially admitted two still photographs that were printed from the surveillance video of the shooting at Eddie's Liquor. He contends the photographs might have been enhanced and the prosecution failed to lay a proper foundation. (AOB 146-160.) Respondent disagrees, as the photographs were images printed directly from the original videotape without any enhancement.

A. The Relevant Trial Court Proceedings

Sergeant Cisneros testified at trial that he retrieved a videotape from the surveillance camera at Eddie's Liquor on the day of Moon's murder. (8RT 1459-1469.) Sergeant Cisneros and other officers played the videotape on a video cassette recorder (hereinafter "VCR") at the police station that day. The officers printed still photographs from the videotape. (8RT 1468-1469, 1538; Peo. Exh. Nos. 43A, 43B, and 44 [still

photographs].) Officer Cisneros explained that the quality of the photograph marked as People's Exhibit Number 44 was different than Numbers 43A and 43B because Number 44 was printed at a later time when the police department had a new VCR. (8RT 1538-1541.)

On a later date, Sergeant Cisneros brought the surveillance videotape to the Aerospace Corporation "to have it enhanced and still photos" to be made. He provided the videotape to an Aerospace employee and waited while the employee printed the still photographs. (8RT 1459-1460, 1468-1469, 1538; Peo. Exh. Nos. 41-42 [still photographs].)

Appellant's counsel objected to the admission of the still photographs, arguing that the photos had been enhanced or "doctored." (8RT 1461-1462.) The trial court noted that the photographs did not depict anything prejudicial, in that people walking into the liquor store could be seen and nothing more. (8RT 1463.) Codefendant Johnson's counsel also objected, arguing that an adequate foundation had not been laid in that there was no testimony showing whether anything had been edited in or out of the videotape. (8RT 1463.)

The prosecutor clarified that a comparison of the videotape and the still photographs showed there was no enhancement. The videotape did not show the top portion of what was recorded when played in a standard VCR, whereas the still photographs displayed more of what was captured by the camera lens. The still photographs showed the necks and heads of the people walking into the store. (8RT 1464.) The court overruled the defense objection, finding there was no showing that the photographs had actually been enhanced. (8RT 1465-1466.)

On cross-examination, Sergeant Cisneros testified that he brought the videotape to Aerospace in an attempt to get the tape enhanced or to make it more "clear." (8RT 1517-1518.) He received two videotapes back from Aerospace, the original he gave them and a copy that could be played in a

regular VCR.[38] The original was a standard VCR tape, but the timing was much faster than the typical tape speed and it could not be played at normal speed on a standard home VCR. (8RT 1518-1519.)

When appellant's counsel asked whether the original videotape was clear when played in a normal VCR, Sergeant Cisneros said, "it was clear to a certain degree." (8RT 1520-1521.) He further explained that all of the still photographs were made from the original. Sergeant Cisneros watched the Aerospace employee place the videotape in the Aerospace VCR/machine. He pointed out scenes on the videotape that he wanted printed into still photographs, and the Aerospace employee printed the photos. Sergeant Cisneros asked Aerospace to make the videotape more clear, but he was not certain whether anything was done. (8RT 1521, 1523-1524, 1527-1528.)

On redirect examination, Sergeant Cisneros explained that he had viewed the original videotape when it was played at the police station and then when it was played on the Aerospace VCR. The only difference in content was that, when played on the Aerospace VCR, more of the subjects' faces could be seen. (8RT 1529-1531.) When the original videotape was played in the VCR at the police station, the top and bottom portions of the scene were cut off. When played in the Aerospace VCR, the full length of the film could be seen. As a result, the subjects' faces were visible on the stills printed at Aerospace. (8RT 1539-1540.)

The trial court asked Sergeant Cisneros whether, assuming the Aerospace still photographs were of superior quality, it was due to the

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[38] Contrary to appellant's suggestion that Sergeant Cisneros did not know which tape was the original, he testified that he could not discern from the boxes containing the two videotapes which tape was the original, but clarified that he would be able to determine which was which if he was shown the actual videotapes. (8RT 1518-1519.)

Aerospace equipment being superior or whether Aerospace had actually enhanced the videotape. Sergeant Cisneros said that the Aerospace employee had told him that the videotape could not be enhanced. (8RT 1542-1543.)

Appellant's counsel again objected to the admission of the still photographs at the end of the prosecution's case. The trial court found that no enhancement had been performed and admitted the photographs into evidence. (9RT 1782-1786.)

B. The Trial Court Properly Found That the Still Photographs Were Duplicate Images Printed From the Original Surveillance Video

The trial court properly admitted the still photographs as duplicate images printed from the original videotape. A photograph may be used at trial to aid a witness in explaining his or her testimony or as probative evidence, in itself, of what is depicted. (*People v. Bowley* (1963) 59 Cal.2d 855, 860-861 (*Bowley*), citing *People v. Doggett* (1948) 83 Cal.App.2d 405, 409 (*Doggett*).) A video or photograph is treated as a writing under the Evidence Code and must meet the foundational requirements for the admission of a writing. (See Evid. Code, §§ 250, 1400.) Thus, it is necessary to show when the video or photograph was taken and that it accurately portrays what it purports to show. (*Bowley*, *supra*, 59 Cal.2d at p. 862; *Doggett*, *supra*, 83 Cal.App.2d at p. 409 ["The general rule is that photographs are admissible when it is shown that they are correct reproductions of what they purport to show."].) "This foundation is usually provided by the testimony of a person who was present at the time the picture was taken, or who is otherwise qualified to state that the representation is accurate." (*Bowley*, *supra*, 59 Cal.2d at p. 862.) The foundation may also be provided by an expert in situations where no one is

qualified to authenticate the photograph or video from personal observation. (*Ibid.*)

A proper foundation must also be laid for new scientific techniques used to enhance an image in a photograph or video pursuant to *People v. Kelly* (1976) 17 Cal.3d 24 (*Kelly*). (See *People v. McWhorter* (2009) 47 Cal.4th 318, 364-367; see also *People v. Williams* (1996) 46 Cal.App.4th 1767, 1777-1778.) Under the *Kelly* standard, evidence based on a new scientific technique may be admitted after the proponent establishes that the method used is reliable, usually through a properly qualified expert, that correct scientific procedures were used, and that the technique has gained general acceptance in the field. (*McWhorter*, *supra*, 47 Cal.4th at p. 364, citing *Kelly*, *supra*, 17 Cal.3d at p. 30.)

Here, the trial court properly determined that an adequate foundation had been laid for the still photographs printed at Aerospace, as the photographs were simply duplicates printed directly from the original surveillance video. First, the original surveillance video was properly authenticated and admitted at trial. (Peo. Exh. No. 36 [video].) Sergeant Cisneros recovered the original videotape directly from the surveillance camera at Eddie's Liquor on the day of Moon's murder. Officer Holdredge, who arrived within minutes of the shooting and who was the first officer on the scene, authenticated the contents of the video at trial. (7RT 1313-1317.) She viewed the surveillance video and identified it as an accurate portrayal of what occurred when she, Officer Romero, and Miller went inside the store after she arrived. (7RT 1319; Peo. Exh. No. 36.) Thus, the original videotape was shown to be an accurate portrayal of what it purported to be, a recording of the events that occurred inside Eddie's Liquor at or near the time of the shooting.

Second, Sergeant Cisneros explained that the still photographs (Peo. Exh. Nos. 41 & 42) were images printed directly from the surveillance

video authenticated by Officer Holdredge. He watched the video at the Long Beach Police Station later on the day of the murder. When Sergeant Cisneros brought the videotape to Aerospace, he watched the Aerospace employee place the videotape in a VCR and he again watched it. He directed the Aerospace employee to print stills from certain portions of the videotape. The only difference between what Sergeant Cisneros saw at the police station and what he saw at Aerospace was that the Aerospace VCR showed the full length of the film, e.g., more of the top and bottom of the screen. As a result, the still photographs that were printed from the original videotape at Aerospace showed more of the suspects' heads. This testimony clearly showed that the Aerospace VCR was of superior quality when compared to the police station VCR in that it displayed the full screen of what was captured at Eddie's Liquor, but it did not alter the content of the video.

Finally, the prosecution was not required to meet any showing under *Kelly* because the images in the still photographs had not been enhanced. Sergeant Cisneros stated that, although he did not know what, if anything, occurred with the Aerospace VCR or how it worked, he was told that Aerospace could not enhance the videotape. As he also testified that the content was the same, except that more of the full screen was shown on the Aerospace VCR, the trial court properly determined that no image enhancement had been performed and, implicitly, that the still photographs were simply duplicates printed from the original videotape. (See Evid. Code, § 1553 ["A printed representation of images stored on a video or digital medium is presumed to be an accurate representation of the images it purports to represent."].) As the original videotape was properly authenticated and the still photographs were printed directly from the videotape without any image enhancement, no further foundational showing was required.

C. Even if Additional Foundational Testimony Was Required, Any Error Was Harmless

Even if the trial court erroneously admitted the still photographs without requiring additional foundational testimony, appellant cannot show that an outcome more favorable to him was reasonably probable had the still photographs (Peo. Exh. Nos. 41 & 42) been excluded. (See *Watson*, *supra*, 46 Cal.2d at p. 836.) Appellant argues he was prejudiced because the still photographs depicted his head whereas the original videotape did not, and the prosecutor argued that certain features, like appellant's ear and the structure of his head and face, were distinctive. (AOB 157-158, citing 10RT 2058-2060.) However, like the still photographs, the video showed one of the suspects wearing the distinctive Nike Air T-shirt that was found in appellant's bedroom approximately one week after the murder, identified by Marcia as the shirt appellant wore on the day of the murder, and generally described by Miller as the T-shirt worn by one of the fleeing suspects.

Additionally, as set forth in detail in Argument IV (E), Marcia's testimony established that appellant planned and executed the incident at Eddie's Liquor. She further testified that appellant had a gun when he went into the liquor store with codefendant Taylor, that he ran to the van from the liquor store after the gunshot, and he fled in Wallace's van with the group. (See Statement of Facts, *ante*.)

Johnston corroborated Marcia's testimony. Johnston confirmed that the group – appellant, Marcia, and codefendants Taylor and Johnson – were in Wallace's van together shortly after Moon's murder. When the group saw a helicopter overhead and one person said that a robbery must have been committed, appellant said that he and his group knew who committed the crime. Johnston further admitted that she accused appellant of

committing the crime, but he never denied or responded to the accusation. (See Statement of Facts, *ante*.)

Motta and Wallace also corroborated Marcia's testimony. Motta saw the suspects flee the scene in Wallace's van, and Wallace admitted that she had loaned her van to codefendant Taylor on the day of the crimes. (See Statement of Facts, *ante*.)

Finally, the nine-millimeter Glock firearm that was stolen from Chung and used to kill Moon was found in appellant's residence one week after Moon's murder. From the foregoing evidence, the jury certainly would have found that appellant was one of the two suspects who entered Eddie's Liquor and killed Moon even without admission of the still photographs that showed a portion of his head. Appellant, as a result, cannot show that an outcome more favorable to him was reasonable probably absent admission of the still photographs. (See Statement of Facts, *ante*.)

Since appellant failed to show any error here, his claim of federal constitutional error necessarily fails. In any event, for the reasons stated above, he cannot show that any error affected the verdict. Thus, any error was also harmless beyond a reasonable doubt. (See *Chapman*, *supra*, 386 U.S. at p. 36.)

VIII. THE TRIAL COURT PROPERLY ADMITTED EVIDENCE OF THE RITEWAY ROBBERY

Appellant argues that the trial court erroneously admitted evidence of the Riteway robbery (count 3) because (1) appellant had offered to enter a guilty plea to the offense and admit that the gun stolen during the Riteway robbery was found in his home, thus resolving all disputed issues regarding the Riteway robbery, and (2) the Riteway robbery would not have been admissible under Evidence Code section 1101, subdivision (b), in any event because it was not sufficiently similar to the Eddie's Liquor crimes to

properly show identity, common plan, intent, or knowledge. (AOB 161-191.) Respondent again disagrees because appellant's offered guilty plea to the Riteway robbery and stipulation regarding the gun did not resolve all of the disputed issues. Moreover, even if appellant had entered his guilty plea, the trial court properly found that the evidence would have been admissible under Evidence Code section 1101, subdivision (b).

A. The Relevant Trial Court Proceedings

During jury voir dire, appellant's counsel informed the trial court that appellant would enter an open guilty plea to count 3, the robbery at Riteway. Counsel also noted that the prosecutor intended to admit the evidence in any event, but the defense objected. (2RT 177-178.)

The matter was addressed again after the prosecution filed a written motion to admit evidence of the Riteway robbery in the case against appellant for the murder and attempted robbery at Eddie's Liquor (counts 1 & 2) under Evidence Code section 1101, subdivision (b). (2CT 557-568.) The prosecutor argued the Riteway robbery was relevant to show that appellant and his codefendants acted pursuant to a common plan or scheme and that they entered Eddie's Liquor with the intent to rob it. The latter theory also showed the specific intent required for the attempted robbery charge. (2CT 564.)

The prosecution specifically argued that appellant and codefendant Johnson acted pursuant to a common design and plan, as shown by the following similarities in the crimes. Appellant and codefendant Johnson committed both crimes together in the same month. The stores were "small neighborhood stores" in close proximity to each other as well as to the neighboring cities of Compton and North Long Beach. In each case, the suspects entered the stores during daytime hours. An accomplice initially entered the store alone, posing as a customer, in order to scout the location.

After the first accomplice left, two or more males entered together with a firearm. They made no attempt to conceal their identities and again initially posed as customers. The males then went behind the counter area of the store. Finally, the gun stolen during the Riteway robbery was used to kill Moon during the attempted robbery at Eddie's Liquor. (2CT 564-568.)

At the hearing on the motion, appellant's counsel argued that evidence of the Riteway robbery was inadmissible during the trial on the Eddie's Liquor charges because appellant was willing to plead guilty to the Riteway robbery and admit that he obtained Chung's gun during the incident, which meant the issues related to the Riteway incident were no longer in dispute. He further argued that the Riteway robbery and Eddie's Liquor attempted robbery were similar only in that both were carried out as most robberies were committed, and the only genuine similarity was that a person entered to scout the store beforehand. (4RT 651-654.) Codefendant Johnson's counsel joined in arguing that admission of evidence concerning the Riteway robbery was to show propensity, appellant's admission to the crime would resolve any disputed issues, and the prejudicial effect of the evidence would outweigh any probative value. (4RT 661-664.)

The prosecutor explained that the surveillance video from Eddie's Liquor showed the two suspects entering the store and running out, and then Miller entering and looking over the counter. The video did not show the conduct of the two suspects between their entry and exit or how the killing occurred. There also were no witnesses to the killing or conduct inside the store. Since the prosecutor had to prove that appellant and codefendant Johnson entered with the intent to rob Eddie's Liquor, that they killed Moon during an attempted robbery, and that the attempted robbery took place, the specifics of the earlier Riteway robbery were relevant. She further noted that the prosecution had to corroborate the testimony of Marcia, their accomplice. (4RT 665-668.) The prosecutor

also noted, as to her burden of proving intent, that appellant had made statements to law enforcement officers to the effect that he thought the group entered Riteway only to go on a "beer run," but not to rob the store. (4RT 668-669.) Finally, the prosecutor had to prove codefendant Taylor's intent vicariously. (4RT 671-672.)

Appellant's counsel again argued that the crimes were not similar, noting that there were four or five suspects during the Riteway robbery but only two at Eddie's Liquor and that appellant was the leader in the latter case while codefendant Johnson had the gun during the former. (4RT 678.)

After viewing the surveillance videos from both crimes, the trial court granted the prosecution's motion to admit evidence of the Riteway robbery. (4RT 680, 688.) The court found as follows:

> . . . [Appellant's] plea or a stipulation regarding the Rite Way robbery is no substitute for evidence of his conduct and Mr. Johnson's conduct in the Rite Way incident, which is relevant to issues in this case involving an overall plan and their intent, which I do believe is at issue.
>
> There are similarities sufficient to warrant it[]s admissibility. Particularly, presence of a firearm stolen in one and used in a robbery in the second.
>
> There is no undue prejudice to any defendant, particularly as to Mr. Johnson where he is shown pointing the gun in the Rite Way, and no direct evidence that he is using a gun at Eddie's. There will be a limiting instruction.
>
> As I said before, there's nothing inflammatory in my mind in the Rite Way robbery or in the video tape as to Mr. Taylor. The court, obviously, will instruct the jury that the Rite Way incident goes only to the intent and knowledge of Mr. Chism and Johnson at Eddie's and is not evidence of what Mr. Taylor's intent was. Although, it can be used to show the underlying felony for purposes of establishing felony murder and liability. That remains viable.

> The quality of evidence that the People are entitled to present requires that they be allowed to prove up the Rite Way robbery, and a stipulation or court records involving pleas of guilty or no[] contest are not adequate. They bear the burden of proof beyond a reasonable doubt, and the jurors are entitled to see the degree of participation of [appellant] and Mr. Johnson in that prior incident.
>
> And there is no undue prejudice. I've looked at it carefully. I was initially of the mind to prohibit the People from introducing this evidence, but I do believe that it is appropriate. So her motion is granted.

(4RT 687-688.) Appellant, thereafter, withdrew his offer to plead guilty to count 3. (4RT 692.)

After the close of evidence, the trial court instructed the jury with CALJIC No. 2.50 as to codefendant Johnson, which informed the jury to consider evidence of the Riteway robbery only as to whether there was a common scheme or plan, but not to prove that codefendant Johnson had a bad character or propensity to commit such crimes. (10RT 2012-2013; 3CT 667-668.)

B. The Trial Court Was Not Required to Deny the Prosecution's Motion to Admit Evidence of the Riteway Robbery Simply Because Appellant Offered to Plead Guilty to the Offense

The trial court properly granted the prosecution's motion to present evidence of the Riteway robbery, despite appellant's willingness to plead guilty and admit that the gun stolen during the robbery was found in his home, because appellant's offered plea and stipulation would not have adequately resolved all of the contested issues. A trial court is "not obliged to force the prosecutor to accept a partial stipulation . . . instead of proving [an element] by an accumulation of circumstantial and direct evidence." (*People v. Sakarias* (2000) 22 Cal.4th 596, 629 (*Sakarias*)). "At least

where the defense proposal does not constitute an offer to admit completely an element of a charged crime (see *People v. Bonin* (1989) 47 Cal.3d 808, 849 []), the general rule is that the prosecution in a criminal case cannot be compelled to accept a stipulation if the effect would be to deprive the state's case of its persuasiveness and forcefulness." (*Sakarias*, *supra*, 22 Cal.4th at p. 629, internal quotations omitted, citing *People v. Arias* (1996) 13 Cal.4th 92, 131; *People v. Garceau* (1993) 6 Cal.4th 140, 182; *People v. Edelbacher* (1989) 47 Cal.3d 983, 1007.)

Appellant's offered plea and stipulation would not have included an admission that he intended to commit a robbery at Eddie's Liquor. In order to prove the robbery-murder special circumstance and the attempted robbery charge, the prosecution was required to show that appellant and codefendant Johnson acted with the intent to rob Eddie's Liquor. The prosecution could not rely upon circumstantial evidence showing that property had been taken because count 2 charged *attempted* robbery in that nothing appeared to be missing. Also, Marcia's testimony that appellant planned and committed the crimes at Eddie's Liquor had to be corroborated. A bare guilty plea to the Riteway robbery and an admission that the gun was taken during that robbery would not sufficiently establish appellant's intent during the Eddie's Liquor incident. The circumstances of the Riteway robbery, however, as shown through the surveillance video and witness testimony, were crucial for the prosecution to demonstrate that appellant and codefendant Johnson possessed a similar intent to rob when they entered Eddie's Liquor store in a similar fashion. (See *Sakarias*, *supra*, 22 Cal.4th at p. 629 ["the prosecution in a criminal case cannot be compelled to accept a stipulation if the effect would be to deprive the state's case of its persuasiveness and forcefulness"].)

In the final analysis, the trial court's ruling was that evidence of the Riteway robbery was admissible regardless of whether appellant pleaded

guilty or no contest to the Riteway charges. The court's ruling was correct because, under Evidence Code section 1101, subdivision (b), the circumstances of the Riteway robbery were relevant to show identity, a common design or plan, and intent.

Under Evidence Code section 1101, subdivision (a), evidence of a person's character or trait of character is generally inadmissible "when offered to prove his or her conduct on a specified occasion." Evidence Code section 1101, subdivision (b), however, clarifies that evidence of uncharged prior misconduct may be admissible if relevant to establish facts, other than criminal disposition, such as motive, opportunity, intent, preparation, common plan or scheme, knowledge, identity, absence of mistake or accident, or whether the defendant believed a victim consented to a sex act.[39] (*People v. Ewoldt* (1994) 7 Cal.4th 380, 402 (*Ewoldt*); *People v. Walker* (2006) 139 Cal.App.4th 782, 795-796 (*Walker*).) Such evidence is admissible to prove identity, intent, or common design or plan where the prior uncharged misconduct is sufficiently similar to the charged conduct, with the least degree of similarity required to show intent, a greater degree of similarity to prove a common design or plan, and the greatest degree of similarity to show identity. (*Ewoldt, supra*, 7 Cal.4th at p. 402; *Walker, supra*, 139 Cal.App.3d at pp. 796, 803.)

In determining whether evidence of uncharged bad acts or conduct is admissible, the trial court must also determine whether the probative value of the act is substantially outweighed by the danger of undue prejudice,

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[39] The Riteway robbery was not a prior *uncharged* act admitted as to appellant under Evidence Code section 1101, subdivision (b), since appellant withdrew his offer to plead guilty and the robbery was charged and proved in this case along with the Eddie's Liquor offenses. However, respondent will refer to this section in analyzing the propriety of the trial court's finding of admissibility.

undue consumption of time, confusing the issues, or misleading the jury. (*Ewoldt*, *supra*, 7 Cal.4th at p. 404, citing Evid. Code, § 352.) As noted, "'[t]he prejudice which exclusion of evidence under Evidence Code section 352 is designed to avoid is not the prejudice or damage to a defense that naturally flows from relevant, highly probative evidence.'" (*Zapien*, *supra*, 4 Cal.4th at p. 958, quoting *Karis*, *supra*, 46 Cal.3d at p. 638.) "'[P]rejudicial' is not synonymous with 'damaging.'" (*Kipp*, *supra*, 26 Cal.4th at p. 1121.) A trial court's admission of evidence under Evidence Code section 1101, subdivision (b), is reviewed for an abuse of discretion. (*Lewis*, supra, 25 Cal.4th at p. 637; *Ewoldt*, *supra*, 7 Cal.4th at p. 405.)

As the trial court found, the similarity of the Riteway offense to the Eddie's Liquor offenses was substantial. In each case, a small retail market was targeted during the daytime. The stores were in close proximity and the incidents occurred within a short time period. Each involved a group of people, two of them principally confronting the store clerk. In each case, the group sent one person inside the store to scout the location immediately prior to the planned robbery. The group was armed and focused on the cash register, and a suspect apparently entered the area behind the store counter, in each incident. Significantly, the gun stolen during the Riteway robbery was used in the Eddie's Liquor murder and ultimately found in appellant's residence. Although Moon was actually shot and killed during the Eddie's Liquor incident, appellant and codefendant Johnson apparently contemplated doing the same during the Riteway robbery as appellant could be heard on the surveillance video telling Jung not to make the incident a murder rather than a robbery. (See Statement of Facts, *ante*.) The foregoing similarities were more than sufficient to show a common design or plan, intent, and even identity.

Specifically, the circumstances of the Riteway robbery were highly probative on the issue of intent. As noted, the prosecution was required to

establish that appellant intended to rob Eddie's Liquor in order to prove both the attempted robbery charge and the robbery-murder special circumstance allegation. Since the offense committed was not a completed robbery in that nothing appeared to be missing, the prosecution could not rely upon circumstantial evidence that property had been taken. Moreover, Marcia's testimony, which provided strong evidence of appellant's culpability, had to be corroborated because she was an accomplice. Thus, the circumstances of the Riteway robbery were crucial in demonstrating that appellant and codefendant Johnson possessed a similar intent to rob when they entered Eddie's Liquor in a similar fashion. (See *People v. Denis* (1990) 224 Cal.App.3d 563, 567-568 [evidence of intent was central disputed issue in prosecution for attempted robbery and felony-murder and, therefore, evidence that defendant had participated in prior robberies with codefendant was admissible]; *People v. Haston* (1968) 69 Cal.2d 233, 249-250 [fact that prior robbery had been committed by same two perpetrators acting together provided great probative value in favor of admitting prior offense evidence]; see also *People v. Brandon* (1995) 32 Cal.App.4th 1033, 1049 [that each robbery involved targeting lone woman in car at gunpoint, asking victim to get into car, then demanding money warranted admission of prior offense evidence on issue of intent]; *People v. Bunyard* (1988) 45 Cal.3d 1189, 1205-1207 (*Bunyard*) [evidence of prior misconduct admissible to corroborate accomplice testimony].)

The evidence from the Riteway robbery was also sufficiently similar to show a common design or plan. The common features of a prior act and current offense need not reveal any signature method to be relevant to show a common plan. (*People v. Kraft* (2000) 23 Cal.4th 978, 1031.) While the common features "must indicate the existence of a plan rather than a series of similar spontaneous acts, [] the plan thus revealed need not be distinctive or unusual." (*Ewoldt, supra*, 7 Cal.4th at p. 403.) The similarities of the

Riteway and Eddie's Liquor offenses, and specifically the fact that appellant and codefendant Johnson committed them together, demonstrated the relationship between them and that they committed the offense in the manner alleged by the prosecution. (See *Ewoldt, supra*, 7 Cal.4th at pp. 393-394; see, e.g., *People v. Earley* (2004) 122 Cal.App.4th 542, 548 [finding that prior uncharged act of possession of marijuana, where defendant was found outside an apartment building with marijuana, and later charged act of possession of marijuana for sale, where defendant, who appeared to be intoxicated, was found outside the same apartment building with a much larger quantity of marijuana, was part of common plan or design]; *People v. Tapia* (1994) 25 Cal.App.4th 984, 1021-1022 [evidence that prior and charged offenses each involved plan to hit victim over head and take victim's wallet and keys in order to obtain money and car for trip to Colorado sufficient to admit prior offense evidence to show common design].)

The Riteway robbery evidence was even probative of the identity of appellant and codefendant Johnson as the Eddie's Liquor offenders.[40] Because the weapon stolen in the Riteway robbery, in which both were involved, was used in the Eddie's Liquor murder and ultimately found in appellant's residence, the evidence strongly tended to establish that appellant and codefendant Johnson had been involved in the Eddie's Liquor murder. The evidence also tended to establish identity in that appellant and

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[40] Appellant contends that the trial court later, and mistakenly, stated that it found the evidence relevant to show identity. (AOB 166.) It appears, however, that identity was simply an additional ground for the court's ruling. A correct ruling will be upheld on appeal even if given as an alternate reason or for the wrong reason. (See *People v. Brown* (2004) 33 Cal.4th 892, 901.) Thus, even if there was not sufficient similarity to show identity, for example, the court's ruling should nevertheless be upheld as to intent and/or common plan.

codefendant Johnson had committed the Riteway robbery together approximately one month prior to the charged offense at a location close to Eddie's Liquor. (See, e.g., *People v. Medina* (1995) 11 Cal.4th 694, 748 (*Medina*) [in aggregate, evidence that each crime involved robbery-murder of a convenience store clerk, that same car was seen at location of the shootings, that victims were shot in the head, that same weapon was used and later traced to defendant, and that each offense occurred close in time and along the same route warranted admission of prior uncharged offenses on issue of identity]; *People v. Grant* (1988) 45 Cal.3d 829, 865; *Haston, supra*, 69 Cal.2d at pp. 249-250.)

Given the highly relevant nature of the Riteway robbery evidence, the trial court properly determined that its probative value was not substantially outweighed by the danger of undue prejudice. Regarding the Riteway robbery, neither the videotape nor the testimony of witnesses was unduly inflammatory, particularly in comparison to the evidence of the Eddie's Liquor crimes. The evidence also was not cumulative, confusing, or time-consuming. Thus, any risk of prejudice was minimal in relation to the strong probative value of the evidence. (See *Ewoldt, supra*, 7 Cal.4th at pp. 405-406.)

Because the evidence was highly probative as to matters other than criminal propensity, and because the risk of any prejudice to appellant was slight, the trial court's decision to admit evidence of the Riteway robbery to show intent, common design, and identity did not constitute an abuse of discretion. The trial court rendered its ruling only after careful consideration, which included viewing the surveillance videos of both crimes, and extensive argument by all counsel. Appellant's arguments should therefore be rejected.

Even if the evidence was admitted erroneously, however, any such error was harmless, as appellant would not have obtained a more favorable

verdict had the evidence been excluded. The erroneous admission of uncharged acts of misconduct is not cause for reversal unless there is a reasonable probability an outcome more favorable to the defendant would have resulted in the absence of the error. (*Walker*, *supra*, 139 Cal.App.4th at p. 808; see also Evid. Code, § 353, subd. (b); *People v. Bradford* (1997) 15 Cal.4th 1229, 1323-1324; *Watson, supra,* 46 Cal.2d at p. 836.) Other independent evidence of appellant's culpability sufficiently supported the charges and corroborated the testimony of Marcia. As set forth above, the evidence provided by Marcia was sufficient to sustain appellant's convictions for the charged crimes. Her testimony was corroborated by substantial evidence – the evidence provided by Johnston, Wallace, the on-scene witnesses, and the surveillance video. Additionally, other circumstantial evidence, such as evidence of the gun and T-shirt found in appellant's residence, corroborated the accomplice testimony. Accordingly, an outcome more favorable to appellant was not reasonably probable absent the admission of the Riteway robbery evidence.

Appellant's claim of federal constitutional error must also fail because it is predicated entirely on his claim of state law error. As there was no error, his claim of federal constitutional error is meritless. (*People v. Carter*, *supra*, 30 Cal.4th at p. 1196 [finding that the "[d]efendant's claims of federal constitutional error, entirely dependent as they are on his claim of state law error, likewise must fail."].) In any event, any error was harmless beyond a reasonable doubt in light of the overwhelming evidence of appellant's guilt and identity as the perpetrator. (See *Chapman*, *supra*, 386 U.S. at p. 36.)

IX. THE TRIAL COURT'S INSTRUCTION WITH CALJIC NO. 17.41.1 WAS HARMLESS

Appellant contends that the trial court's instruction with CALJIC No. 17.41.1 infringed upon his rights to trial by jury and a unanimous verdict and resulted in structural error. (AOB 192-196.) However, as appellant acknowledges, this Court already rejected the argument in *People v. Engelman* (2002) 28 Cal.4th 436 (*Engelman*). Although this Court directed that CALJIC No. 17.41.1 should no longer be given due to the risk that the instruction could potentially interfere with a jury's deliberative process, the Court found no error in the giving of the instruction and ruled that it "does not infringe upon [a] defendant's federal or state constitutional right to trial by jury or his state constitutional right to a unanimous verdict[.]" (*Id.* at pp. 439-440, 449.) Appellant's claim must be rejected.

X. THE PROSECUTION PRESENTED SUFFICIENT EVIDENCE TO CORROBORATE MARCIA JOHNSON'S TESTIMONY

Appellant argues that Marcia was an accomplice and her testimony, which supported the murder and attempted robbery charges in counts 1 and 2, was not sufficiently corroborated. (AOB 197-228.) Respondent agrees that Marcia was an accomplice, but disagrees with appellant's contention that her testimony was not sufficiently corroborated. Her testimony was strongly corroborated by other evidence, including the testimony of Johnston, Wallace, the on-scene witnesses, and physical evidence such as the gun found in appellant's residence and the surveillance video taken from Eddie's Liquor.[41]

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[41] The trial court instructed the jury that Marcia was an accomplice as a matter of law (10RT 2012) and that accomplice testimony had to be corroborated (10RT 2010-2011).

A. The Applicable Law

Section 1111 provides that a defendant shall not be convicted on the testimony of an accomplice unless that testimony is corroborated by other evidence. (Accord, *People v. Williams* (2008) 43 Cal.4th 585, 635-636 (*Williams*).) An accomplice is "one who is liable to prosecution for the identical offense charged against the defendant on trial in the cause in which the testimony of the accomplice is given." (§ 1111.) The witness must be a principal under section 31, which defines principals as "'[a]ll persons concerned in the commission of a crime, whether . . . they directly commit the act constituting the offense, or aid and abet in its commission . . . .'" (*People v. Avila* (2006) 38 Cal.4th 491, 564 (*Avila*), quoting § 31; accord, *Williams*, *supra*, 43 Cal.4th at p. 636.) "An aider and abettor is one who acts with both knowledge of the perpetrator's criminal purpose and the intent of encouraging or facilitating commission of the offense." (*Avila*, *supra*, 38 Cal.4th at p. 564.)

Whether a person is an accomplice under section 1111 is a question of fact for the jury to decide, "[u]nless there can be no dispute concerning the evidence or the inferences to be drawn from the evidence[.]" (*Williams*, *supra*, 43 Cal.4 at p. 636; see *Avila*, *supra*, 38 Cal.4th at p. 565.) The trial court should instruct the jury that a witness is an accomplice as a matter of law only where the facts showing the witness is an accomplice are clear and undisputed. (*Ibid.*)

If the jury could conclude from the evidence that a witness is an accomplice, the trial court must sua sponte instruct on accomplice testimony. (*Lewis II*, *supra*, 26 Cal.4th at p. 369.) The accomplice instructions inform the jury that an accomplice's testimony should be viewed with caution and must be corroborated by evidence, independent of his or her testimony, tending to connect the defendant with the crime. (*Zapien*, *supra*, 4 Cal.4th at p. 982.)

"'Corroborating evidence may be slight, may be entirely circumstantial, and need not be sufficient to establish every element of the charged offense.'" (*Williams*, *supra*, 43 Cal.4th at p. 636, quoting *People v. Hayes* (1999) 21 Cal.4th 1211, 1271; see also *Avila*, *supra*, 38 Cal.4th at pp. 562-563 [finding corroborative evidence "may be slight and entitled to little consideration when standing alone"].) "The [corroborating] evidence 'is sufficient if it tends to connect the defendant with the crime in such a way as to satisfy the jury that the accomplice is telling the truth.'" (*Lewis II*, *supra*, 26 Cal.4th at p. 370, quoting *People v. Fauber* (1992) 2 Cal.4th 792, 834 (*Fauber*).) However, the evidence need not establish the accomplice has actually told the truth. (*People v. Hoyt* (1942) 20 Cal.2d 306, 312; *People v. Yeager* (1924) 194 Cal. 452, 473 (*Yeager*).) "Unless a reviewing court determines that the corroborating evidence should not have been admitted or that it could not reasonably tend to connect a defendant with the commission of a crime, the finding of the trier of fact on the issue of corroboration may not be disturbed on appeal.' (Citation.)" (*People v. Szeto* (1981) 29 Cal.3d 20, 27.)

B. Marcia's Testimony Was Strongly Corroborated By The Testimony of Other Witnesses and Physical Evidence

The evidence tending to corroborate Marcia's testimony was much stronger than the slight showing required to corroborate accomplice testimony. Marcia's testimony established that appellant planned and committed the Eddie's Liquor offenses with her, codefendant Johnson, and codefendant Taylor. Appellant assigned tasks to her and his codefendants, he brought a firearm when they left for the liquor store, he directed codefendant Taylor as codefendant Taylor drove the group to the liquor store in Wallace's van, and he had a bulge in his waistband that appeared to

be a gun when he walked toward Eddie's Liquor. Marcia explained where she and codefendant Taylor waited in Wallace's van. Marcia also identified appellant as the suspect who wore the Nike Air T-Shirt and codefendant Johnson as the suspect who wore shorts. She identified the Nike Air T-shirt found in appellant's residence as the one he wore during the Eddie's Liquor crimes. (8RT 1550-1568, 1568a-1568b, 1570, 1583-1584, 1671, 1696-1697.) Marcia had also seen appellant with the Glock firearm approximately one month prior to the robbery and murder of Moon. Marcia further established that the group fled in Wallace's van, picked up Johnston, and went to appellant's residence in Compton. (8RT 1568a-1568b, 1570.)

The surveillance video from Eddie's Liquor corroborated Marcia's identification of appellant as one of the suspects. The video showed two African-American males, one wearing a Nike T-shirt with the distinctive white "swoosh" on the front and the other wearing shorts, enter the liquor store and later run out. The video showed appellant, in the Nike T-shirt, initially blocking his face from the camera. The jurors were later able to see some of appellant's distinctive features as well as the fact that he was bald in the still photographs taken from the video – features that could also be seen in the Riteway robbery surveillance video and a photograph of appellant that were identified by Lipkin. (See 10RT 2058-2060 [prosecutor's closing argument, describing what is depicted in video from Eddie's Liquor Store, including that appellant was bald and that his distinctive ear, facial structure, upper lip, facial hair, and T-shirt identified him]; Peo. Exh. Nos. 36 [video], 41-44 [still photographs].)

Miller, who saw the two African-American males walk in and then run out of Eddie's Liquor after the gunshot, further confirmed that one suspect wore a black T-shirt with white stripes and pants while the other

wore long dark shorts. (5RT 945, 953, 959.) Stephanie likewise recalled that one suspect wore a black T-shirt. (6RT 1112-1117, 1122.)

Miller, Motta, and Stephanie all also confirmed Marcia's testimony regarding the location of Wallace's van. Immediately after the shooting, all three witnesses saw two African-American males run from Eddie's Liquor in the direction of Marker and Butler, where Marcia said that she and codefendant Taylor waited in the van. Motta saw the suspects run to a gray Plymouth Voyager that was stopped on Marker near the corner at Butler. He identified Wallace's van as the same make, model, and color as the suspects' getaway van and noted that it had the same sliding door. (5RT 942-943, 993; 6RT 1108-1113, 1114, 1116-1117, 1122; 7RT 1268-1272, 1275-1277, 1302, 1305-1307.)

Wallace and Johnston further corroborated Marcia's testimony by placing appellant and his group in Wallace's van shortly after the shooting. Wallace admitted that she loaned her van to codefendant Taylor on the day of the shooting. Johnston testified that appellant, Marcia, codefendant Taylor, and codefendant Johnson were all together when they picked her up in Wallace's van shortly after the time of the Eddie's Liquor store shooting. (5RT 770-771, 789-792.)

Johnston additionally corroborated Marcia's testimony by admitting that, when the group traveled to appellant's home in the van and noticed a helicopter overhead, someone in the group said that someone must have committed a robbery. Appellant responded that he knew who had committed the crime. (5RT 770-771, 789-792, 840.) He appeared nervous later that day when he saw police officers, reacted to television news reports about the crimes at Eddie's Liquor, and did not respond to accusations in Johnston's letter that he and his friends had committed the crimes. (5RT 792-797.)

Appellant's possession of the nine-millimeter Glock firearm that was stolen during the Riteway robbery and used to kill Moon during the attempted robbery at Eddie's Liquor further strongly corroborated Marcia's testimony. The Riteway robbery occurred approximately one month prior to the shooting at Eddie's Liquor, and Marcia had seen appellant with the gun approximately one month before the Eddie's Liquor incident. Chung identified the Glock firearm as the gun that was stolen from him during the Riteway robbery, and Lipkin identified appellant as one of the perpetrators depicted in the surveillance video from the Riteway robbery. (5RT 897-900; 18RT 4111-4112, 4169, 4171.) Officers found the gun in appellant's residence one week after Moon was murdered. (6RT 999-1002, 1005-1006, 1182-1184, 1219-1220.) Appellant's possession of the gun corroborated not only Marcia's identification of appellant as one of the suspects, but also her testimony that he intended to commit a robbery at Eddie's Liquor and that he occupied a position of leadership during the commission of the crimes because he was the one who brought the gun. The foregoing further directly refutes appellant's claim that there was no physical evidence corroborating Marcia's testimony.[42]

Finally, the similarity of the circumstances of the Riteway robbery to the attempted robbery at Eddie's Liquor also tended to corroborate Marcia's testimony. The surveillance video from the Riteway robbery, depicting appellant and codefendant Johnson committing a similar type of robbery with a gun, as well as the testimony of Jung and Chung regarding the robbery, corroborated Marcia's identification of appellant and codefendant Johnson as the two Eddie's Liquor store suspects. The

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[42] Respondent notes, however, that physical corroborating evidence is not required. For example, a defendant's own admissions, without more, may sufficiently corroborate an accomplice's testimony. (*Williams*, *supra*, 16 Cal.4th at p. 680; *Bunyard*, *supra*, 45 Cal.3d at p. 1208, fn. 9.)

Riteway robbery evidence also tended to support Marcia's description of the manner in which the crimes were planned and carried out, including that appellant entered Eddie's Liquor with the intent to rob the clerk inside.

Appellant's arguments, that there was insufficient evidence to corroborate Marcia's testimony because the corroborative evidence did not prove either the first degree murder or the attempted robbery, miss the point. (AOB 212-222.) Corroborative evidence is necessary to satisfy the jury that the accomplice is telling the truth, not to independently prove the crime by itself. (See *Lewis II*, *supra*, 26 Cal.4th at p. 370; *People v. Coffey* (1911) 161 Cal. 433, 438 (*Coffey*); *People v. Narvaez* (2002) 104 Cal.App.4th 1295, 1304 (*Narvaez*).) An accomplice may have a strong incentive to lie or minimize his or her role in an offense. (See *Coffey, supra*, 161 Cal. at p. 438 [explaining that an accomplice's testimony may be "tainted" because he is also guilty and usually testifies in the hope of gaining favor or immunity]; accord, *People v. Guiuan* (1998) 18 Cal.4th 558, 565-568; *People v. Williams* (1997) 16 Cal.4th 153, 245 (*Williams*); *Narvaez*, *supra*, 104 Cal.App.4th at p. 1304.) Thus, to be considered trustworthy, the accomplice testimony must be bolstered by independent evidence. (*Ibid.*) The independent evidence, however, need not be sufficient to establish the crime. (*People v. McDermott* (2002) 28 Cal.4th 946, 986; *People v. Rodrigues* (1994) 8 Cal.4th 1060, 1128 (*Rodrigues*); *Yeager*, *supra*, 194 Cal. at p. 473.)

In arguing that Marcia's testimony regarding appellant's intent to rob Eddie's Liquor was not specifically corroborated, appellant suggests that accomplice testimony must be corroborated in all respects. (AOB 222-228.) The corroborative evidence, however, "need not corroborate the accomplice as to every fact to which he testifies . . . ." (*Williams*, *supra*, 16 Cal.4th at p. 680.) The evidence need only relate to *some* act or fact that is an element of the crime. (*Rodrigues*, *supra*, 8 Cal.4th at p. 1128; *Zapien*, *supra*, 4

Cal.4th at p. 982.) In any event, Marcia's testimony that appellant intended to rob Eddie's Liquor was corroborated by the following facts: (1) the circumstances of the previous Riteway robbery, as shown in the surveillance video and testimony, strongly suggested that he had the same intent to rob the clerk at Eddie's Liquor; (2) appellant had the gun that was stolen during the Riteway robbery; (3) appellant and codefendant Johnson approached the counter area in Eddie's Liquor, but outside of the view of the surveillance camera; (4) although appellant apparently did not have an opportunity to actually take the money, cash was found on the ground near Moon's body; (5) a short time after the crimes, appellant said to Johnston that someone must have committed a robbery and he knew who did it; (6) appellant made an admission that he committed the robbery (ultimately the attempted robbery) by failing to respond to Johnston's accusation; and (7) there was no other apparent motive for appellant and codefendant Johnson to enter Eddie's Liquor and kill Moon.

Appellant's challenges to the sufficiency of the evidence as to first degree murder, attempted robbery, and the special circumstance allegation all rest on his baseless claim that Marcia's testimony lacked sufficient corroboration. However, as demonstrated, the gun, surveillance videos, and testimony of Wallace, Johnston, Miller (through Officer Romero), Motta, Stephanie, Chung, Jung, Lipkin, and other officers all substantially corroborated different aspects of Marcia's testimony. Given all of the foregoing evidence, appellant fails to show any deficiency with the corroborating evidence. The evidence strongly showed that appellant not only committed first degree murder and attempted robbery, but that he committed the crimes in the manner the prosecution alleged. Appellant planned the Eddie's Liquor store incident, intended to rob the clerk once inside, brought a loaded nine-millimeter gun with him to facilitate the intended robbery, shot and killed Moon during the attempt to rob him, and

apparently quickly ran out of the liquor store without taking any money. Appellant's argument to the contrary should be rejected.

XI. APPELLANT WAS NOT PREJUDICED BY THE CUMULATIVE IMPACT OF ANY ERRORS

Appellant contends that he was prejudiced at the guilt phase by the cumulative impact of the alleged errors raised in Arguments III through X. (AOB 230-236.) However, he cannot show that he was denied a fair trial because he failed to show error or that he suffered prejudice as a result of any particular error or combined errors.

As set forth in detail, the trial court properly admitted Miller's statements to Officer Romero as spontaneous statements made primarily to meet on ongoing emergency (see Arg. III); Detective Chavers properly relayed Wallace's fear of testifying at trial (see Arg. IV); the court properly admitted Detective Edwards's recitation of a prior inconsistent statement made by Marcia (see Arg. V); Johnston's letter to appellant and his failure to respond were properly admitted as an adoptive admission, and portions of the letter were also properly used to refresh Johnston's recollection (see Arg. VI); the prosecution properly authenticated the still photographs printed from the surveillance video at Eddie's Liquor (see Arg. VII); the court properly determined that the prosecution was not required to accept the defense stipulation regarding the Riteway robbery because it was relevant to prove disputed issues as well as intent, a common plan, and identity (see Arg. VIII); the trial court's instruction with CALJIC No. 17.41.1 was harmless (see Arg. IX); and Marcia's testimony was sufficiently corroborated (see Arg. X). As further noted in each argument, even if there was error, appellant failed to show prejudice as to any of the foregoing claims.

Because appellant has failed to show error or that he suffered prejudice as a result of any particular error or combined errors, he has failed to show he was denied a fair trial or otherwise prejudiced as a result of any cumulative error. As stated by this Court, defendants are entitled to "a fair trial but not a perfect one." (*People v. Cunningham* (2001) 25 Cal.4th 926, 1009 (*Cunningham*); *Box, supra*, 23 Cal.4th at p. 1214; *People v. Barnett* (1998) 17 Cal.4th 1044, 1182 (*Barnett*); see also *People v. Horning* (2004) 34 Cal.4th 871, 913 (*Horning*) [no denial of right to fair trial where there was "little, if any, error to accumulate"].)

XII. THE TRIAL COURT PROPERLY DENIED APPELLANT'S CLAIM THAT THE PROSECUTION EXERCISED PEREMPTORY CHALLENGES IN A RACIALLY DISCRIMINATORY MANNER DURING THE PENALTY PHASE VOIR DIRE

Appellant contends that the trial court erroneously denied his *Batson v. Kentucky* (1986) 476 U.S. 79 [106 S.Ct. 1712, 90 L.Ed.2d 69] (*Batson*) and *People v. Wheeler* (1978) 22 Cal.3d 258 (*Wheeler*) motions. (AOB 237-274.) However, as the trial court found in ruling that appellant failed to make a prima facie showing of discrimination, there were valid race-neutral reasons for the prosecutor's two complained-of peremptory challenges.

A. The Relevant Trial Court Proceedings

During jury voir dire, appellant's counsel made motions pursuant to *Wheeler/Batson* as to the prosecutor's exercise of peremptory challenges to Prospective Juror No. 2 and, a short time later, to Prospective Juror No. 1.

1. The Information Provided By the Two Prospective Jurors At Issue

The trial court questioned Prospective Juror No. 2 about his views on the death penalty. He felt he would or would not vote for death depending upon the evidence presented. (13RT 2870, 2873-2874.) During the general voir dire conducted by the court, Prospective Juror No. 2 revealed that he lived in Carson, was single, and was a driver for UPS. (14RT 2965-2966.) He had served on two prior criminal juries, one involving a murder charge and the other involving a robbery. The jury deadlocked in the murder case, while the jury in the robbery case reached a verdict. Prospective Juror No. 2 felt somewhat frustrated by the deadlock, but believed it resulted from a difference in opinion rather than anything improper in the jury room. (14RT 2966.) He had also been robbed eight to ten years earlier while he was making UPS deliveries. The robber, who was ultimately convicted, held a gun to Prospective Juror No. 2's back during the incident. (14RT 2967-2968.)

Appellant's counsel did not question Prospective Juror No. 2. The prosecutor asked whether Prospective Juror No. 2 had held any other jobs. He said that he had not worked for anyone other than UPS since high school. Prospective Juror No. 2 explained that he originally started working for UPS part time while he attended school and initially loaded and unloaded the trucks. He had worked for UPS for 18 years, but never held any supervisory positions. (14RT 3048-3049.)

The prosecutor asked Prospective Juror No. 2 about his children and his relationship with the mother of his children. He responded that he had a 12-year-old and a one-year-old, and was cohabiting with their mother. (14RT 3049-3050.) The prosecutor asked whether Prospective Juror No. 2 was involved in any other activities, to which he responded that he played golf and coached a youth basketball team. He had to be certified to coach

the team, and had been coaching for approximately four years. (14RT 3049-3051.)

The trial court questioned Prospective Juror No. 1 about her views on the death penalty. She responded that she would or would not vote for death depending upon the circumstances of the case. (14RT 3079 [questioned while she was still Prospective Juror No. 15].) The prosecutor clarified with Prospective Juror No. 1 that the matter at hand involved only a penalty determination and asked if she felt she could vote for death or life without parole. Prospective Juror No. 1 said that she could vote for death under the appropriate circumstances. (14RT 3096-3097.)

During general voir dire by the trial court, Prospective Juror No. 1 revealed that she lived in Carson, "designed" telephone circuits for Pacific Bell, and was divorced. Her ex-husband was a plumber. Prospective Juror No. 1 had three sons, one 12-year-old and two who were adults. One of her adult children was a tree trimmer and the other worked for Avis Rent-a-Car. (14RT 3105.) Prospective Juror No. 1 had served on two prior juries, both of which reached verdicts. She had served on a criminal child molestation case and a civil case involving personal injury. Prospective Juror No. 1's home had been burglarized twice. (14RT 3105-3106.)

Appellant's counsel asked Prospective Juror No. 1 several questions regarding whether she would express her views and listen to others and whether she would express her opinion if the majority disagreed with her. She said she could. (14RT 3123-3124.)

The prosecutor questioned Prospective Juror No. 1 about her occupation with Pacific Bell. Prospective Juror No. 1 said that she had worked for Pacific Bell for thirty years. She had worked briefly while in school for the District Attorney's Office, handling transcript filings, but had continuously worked at Pacific Bell since then. Prospective Juror No. 1 had never held a supervisory position. She began as a clerk, but, for the

previous 20 years, had trained others on how to input information into the computer system. When the prosecutor asked what Prospective Juror No. 1 did as a circuit designer, Prospective Juror No. 1 responded, "We get an order, then we have to put together the circuit, where it's going from and where it ends up at." (14RT 3137-3139.)

2. The Peremptory Challenges, *Wheeler/Batson* Motions, and the Trial Court's Ruling

Jury voir dire commenced. The prosecutor and defense counsel exercised peremptory challenges to three prospective jurors each. (14RT 3147-3148.) When the prosecutor exercised her fourth peremptory challenge, to Prospective Juror No. 2, appellant's counsel requested a sidebar. (14RT 3148.) The trial court stated, "Juror Two is a black male. Juror One is a black female. [¶] Defendant is a black male. [¶] I offhand don't recall any other African-Americans on the twelve panel now." (14RT 3148-3149.) Appellant's counsel believed there were two or three additional African-American prospective jurors in the audience, but was not certain. (14RT 3149.)

Appellant's counsel argued that Prospective Juror No. 1 seemed open-minded regarding the penalty, served on two prior juries – one that reached a verdict and one that hung, had been gainfully employed by UPS, and appeared to be an ideal juror. (14RT 3149.) The trial court noted that some deputy district attorneys would automatically exclude a prospective juror who had served on a hung jury. The court then stated, "I'm not asking you for an explanation, if you want to make a record. I'm not making a prima faci[e] finding." (14RT 3150.)

The prosecutor responded, "I think it's important to make a record, although I'm not saying that there is a prima faci[e] case. [¶] No significant life experience that indicates strong decision-making skills." (14RT 3150.)

When questioned by defense counsel, the prosecutor clarified that Prospective Juror No. 1 did not have any life experiences that suggested strong decision-making skills. He had continuously worked for UPS, but had never supervised anyone. She noted that, "in a different type of case, I think he would be a wonderful juror, but this is a penalty where I'm going to be asking him to bring back a verdict of death. I want strong decision-making skills." (14RT 3150.)

Defense counsel argued that Prospective Juror No. 1 appeared to make decisions in his capacity as a coach. (14RT 3151.) The trial court denied the motion and again found that appellant failed to make a prima facie showing. (14RT 3151.) The prosecutor noted that, "The decision in a death penalty case, the penalty phase, is far more stressful and of greater magnitude than your ordinary case, and I bear that in mind when I excuse jurors." (14RT 3152.)

After several more peremptory challenges on both sides, the prosecutor exercised a peremptory challenge to Prospective Juror No. 5. Appellant's counsel made a second *Wheeler* motion, claiming that the prosecutor improperly excused Prospective Juror No. 5 based on the fact that she was homosexual. (14RT 3199-3200.) The trial court stated that it accepted the prosecutor's previous statement of what she looked for in a penalty phase, and found that the prospective "at first blush" did not appear to fit into the category. The court noted that the prospective juror did not deal with peers in decision-making. (14RT 3200-3202.)

The parties exercised several more peremptory challenges. (14RT 3203-3247.) When the prosecutor exercised a peremptory challenge to Prospective Juror No. 1, appellant's counsel requested another sidebar conference. (14RT 3247.) Appellant's counsel argued that Prospective Juror No. 1 was the second African-American prospective juror the prosecutor had excused, and there were only two or three remaining on the

panel. He argued that she had supervised and trained people and seemed like a good juror. (14RT 3248.) The trial court noted that the prosecutor had relied upon life experience previously, and asked if the prosecutor wanted to comment on that. The court also noted that the prospective juror had not supervised anyone, although she had trained others. (14RT 3248-3249.) The prosecutor responded that Prospective Juror No. 1 said she had not supervised anyone. The prosecutor also commented as follows:

> From what I can glean from her job assignment is she's got a very fancy, but misleading, job description, which she is basically, from my understanding, she is into data entry. She makes no decisions. She is given specifications and she inputs that information into a computer. She is basically a more sophisticated form of a filing clerk. And, basically, she's held nothing but clerk positions. She has trained individuals in terms of inputti[]ng data. She is a data entry specialist, basically.
>
> I don't think the fact she trains people in how they input data makes her specifically qualified for high-stress decision-making jobs. And that's basically what this is. This is going to be a very stressful[] deliberative process. It also requires individuals who are seasoned decision makers. They could handle the stress of a tough decision.
>
> The fear factor involved any time you get a stressful and difficult decision to make, that can be very crippling in terms of the deliberation process when you get somebody in the jury room who doesn't have that experience. And that's one of the things, one of the many things that I look at in terms of a juror.
>
> I've looked at her job description. She has basically been in clerk positions. If I were to not kick her, it seems to me that it would only be because she is an African American. And I don't believe that I'm going to discriminate in one direction or the other. I'm not going to keep her simply because she is African American.

(14RT 3249-3250.)

The trial court stated, "The D.A.'s comments have been non-solicited. I asked a prima facie showing, that prima facie showing has not been made." (14RT 3250.) After further argument from the parties, the court stated, "I am confident the D.A. is not using a protected category basis for her peremptories." (14RT 3253, 3255.)

After the parties accepted the panel, the prosecutor set forth the racial composition of the impaneled jury as follows. Juror No. 1 was an African-American male and the remaining jurors were Caucasian, half of whom were men. Of the alternate jurors, one was African-American, two were Caucasian, and the fourth appeared to be either Hispanic or Filipino. (15RT 3491, 3505.)

The prosecutor further set forth the racial composition of the prospective jurors she and appellant's counsel had dismissed. She exercised 11 peremptory challenges to the following prospective jurors in chronological order: (1) a white male; (2) an Asian male; (3) a Caucasian male; (4) an African-American male; (5) a Caucasian male; (6) a Caucasian male; (7) a male who appeared to be Caucasian or an unknown racial or ethnic background, but who did not appear to be African-American, Asian, or Hispanic; (8) an Hispanic male; (9) an African-American female; (10) a Caucasian male; and (11) a Caucasian male. (15 RT 3506.) Appellant's counsel exercised peremptory challenges to nine Caucasian males, four Caucasian females, and three Asian males. (15RT 3507.)

B. The Applicable Law

Both the state and federal constitutions prohibit the use of peremptory challenges to exclude prospective jurors based on group bias – that is, bias against members of a cognizable group, such as one identified by race, ethnicity, or gender. (*J. E. B. v. Alabama ex rel. T. B.* (1994) 511 U.S. 127, 129 [114 S.Ct. 1419, 128 L.Ed.2d 89]; *People v. Hawthorne* (2009) 46

Cal.4th 67, 77; *People v. Bell* (2007) 40 Cal.4th 582, 596 (*Bell*); see also *Batson*, *supra*, 476 U.S. at p. 89; *Wheeler*, *supra*, 22 Cal.3d at pp. 276-277.) Peremptory challenges are proper when exercised to eliminate a specific "bias relating to the particular case on trial or the parties or witnesses thereto." (*Wheeler*, *supra*, 22 Cal.3d at p. 276.) The improper use of peremptory challenges violates a criminal defendant's federal constitutional right to equal protection and state constitutional right to be tried by a jury drawn from a representative cross-section of the community. (See *Batson*, *supra*, 476 U.S. at p. 89; *Wheeler*, *supra*, 22 Cal.3d at pp. 265-266, 272; *People v. Griffin* (2004) 33 Cal.4th 536, 553; see also U.S. Const., 14th amend.; Cal. Const., art. I, § 16.)

A trial court's evaluation of a *Batson/Wheeler* motion involves three steps. (*Johnson v. California* (2005) 545 U.S. 162, 168 [125 S.Ct. 2410; 162 L.Ed.2d 129] (*Johnson*); *Miller-El v. Cockrell* (2003) 537 U.S. 322, 328-329 [123 S.Ct. 1029; 154 L.Ed.2d 931] (*Miller-El*); *Bell*, *supra*, 40 Cal.4 at p. 596.) "First, the defendant must make out a prima facie case 'by showing that the totality of the relevant facts gives rise to an inference of discriminatory purpose.'" (*People v. Taylor* (2010) 48 Cal.4th 574, 611 (*Taylor*), quoting *Johnson*, *supra*, 545 U.S. at 168.) Second, if a prima facie case is shown, the burden shifts to the prosecution to provide a race-neutral explanation for the strike. Finally, if the prosecution meets this burden, then the defendant must show the prosecutor's reasons were pretextual and the true reason for the strike was purposeful discrimination. (*Ibid.*)

If a party believes the opponent is using peremptory challenges to strike jurors on the ground of group bias alone, he or she must raise the point in timely fashion and make a prima facie case of such discrimination. (*Farnam*, *supra*, 28 Cal.4th at p. 135; *Turner*, *supra*, 8 Cal.4th at p. 164; *People v. Howard* (1992) 1 Cal.4th 1132, 1153-1154 (*Howard*); *Wheeler*,

supra, 22 Cal.3d at pp. 280-281.) The party must establish that the persons excluded are members of a cognizable group and should make as complete a record of the circumstances as is feasible. (*Ibid.*)

A prosecutor's reasons for striking a juror must be genuine, but need not be objectively reasonable. (*People v. Reynoso* (2003) 31 Cal.4th 903, 924.) "All that matters is that the prosecutor's reason for exercising the peremptory challenge is sincere and legitimate, legitimate in the sense of being nondiscriminatory." (*Ibid.*) "[A] 'legitimate reason' is not a reason that makes sense, but a reason that does not deny equal protection. [Citations.]." (*Ibid.*, citing *Purkett v. Elem*, *supra*, 514 U.S. at p. 769.) A prosecutor is presumed under *Wheeler* to have used his or her peremptory challenges in a constitutional manner. (*People v. Alvarez* (1997) 14 Cal.4th 155, 193; *Wheeler*, *supra*, 22 Cal.3d at p. 278.)

As *Wheeler* elaborated, permissible factors for dismissing a potential juror may be less focused on the background or basic impression of a potential juror, "but more commonly involve a 'gut feeling' or the seat-of-the-pants subjectivity of prosecutors and defense attorneys alike." (*People v. Jordan* (2006) 146 Cal.App.4th 232, 255.) Peremptory challenges may be predicated on evidence suggestive of juror partiality that ranges from "the virtually certain to the highly speculative." (*Wheeler*, *supra*, 22 Cal.3d at p. 275.)

Peremptory challenges may be based on a juror's manner of dress, a juror's unconventional lifestyle, a juror's experiences with crime or with law enforcement, or simply because a juror's answers on voir dire suggested potential bias. (*Wheeler*, *supra*, 22 Cal.3d at p. 275.) "[A] prosecutor may fear bias on the part of one juror . . . simply because his clothes or hair length suggest an unconventional lifestyle." (*Ibid.*) In *Purkett*, *supra*, 514 U.S. at pp. 766, 769, the prosecutor struck a prospective juror based on his long unkempt hair and his beard. The United States

Supreme Court held that the prosecutor's reasons "satisfie[d] the prosecution's step two burden of articulating a nondiscriminatory reason for the strike." The United States Supreme Court further held that the trial court's inquiry properly proceeded to the last step, where the state court correctly found that the prosecutor was not motivated by discriminatory purpose. (*Id.* at pp. 769-770.)

C. The Trial Court's Express Findings That Appellant Failed to Make a Prima Facie Showing of Discrimination Was Not Mooted

Appellant argues that the trial court's finding of no prima facie showing of discrimination was rendered moot because the prosecutor provided her justifications for dismissing Prospective Juror Nos. 1 and 2 and the court ruled based upon those justifications. (AOB 257-258.) The court's express and repeated statements that it found no prima facie showing of discrimination and that the prosecutor was simply making a record, both *before and after* the prosecutor offered her reasons, belies appellant's contention.

When a trial court requests that the prosecution justify its peremptory challenges after a *Wheeler* motion has been made, the question whether the defendant has made a prima facie showing under *Batson*'s first step may be considered moot (*Hernandez v. New York* (1991) 500 U.S. 352, 359 [111 S.Ct. 1859, 114 L.Ed.2d 395]) or a finding of a prima facie showing may be considered implicit in the request (*People v. Fuentes* (1991) 54 Cal.3d 707, 715-716). However, this Court has explained why, under circumstances like that present in the instant case, neither applies:

> . . . [W]hen, as here, the trial court states that it does not believe a prima facie case has been made, and then invites the prosecution to justify its challenges for purposes of completing the record on appeal, the question whether a prima facie case has been made is not mooted, nor is a finding of a prima facie

> showing implied. (*People v. Turner* [(1994)] 8 Cal.4th [137,] 167.) When the trial court under these circumstances rules that no prima facie case has been made, "the reviewing court considers the entire record of voir dire. [Citation.] 'If the record "suggests grounds upon which the prosecutor might reasonably have challenged" the jurors in question,' we reject the challenge. (*People v. Davenport* (1995) 11 Cal.4th 1171, 1200 [parallel citation omitted].)

(*People v. Welch* (1999) 20 Cal.4th 701, 745-746; accord, *Taylor*, *supra*, 48 Cal.4th at p. 613; *People v. Howard* (2008) 42 Cal.4th 1000, 1018 (*Howard*); compare *People v. Arias* (1996) 13 Cal.4th 92, 135-136 [failure of trial court to expressly state whether it was finding a prima facie case required reviewing court to consider steps two and three].) Even if the trial court solicited the prosecutor's reasons for exercising a particular peremptory challenge, there is no basis to proceed beyond step one (e.g., the trial court's finding of no prima facie case) on appeal if the trial court expressly found no prima facie case after the prosecutor stated the reasons. (*People v. Lewis* (2008) 43 Cal.4th 415, 470-471 (*Lewis III*).)

Here, the trial court repeatedly found no prima facie showing of discrimination in the prosecutor's exercise of peremptory challenges to Prospective Juror Nos. 1 and 2 both before and after the prosecutor stated her reasons. Indeed, after appellant's first *Wheeler* motion, as to Prospective Juror No. 2, the court stated to the prosecutor, "I'm not asking you for an explanation, if you want to make a record. I'm not making a prima faci[e] finding." (14RT 3150.) As to Prospective Juror No. 1, the court similarly permitted the parties to make a record, stating that it was not finding a prima facie case. After the prosecution and defense made a record, the court clarified, "The D.A.'s comments have been non-solicited. I asked a prima facie showing, that prima facie showing has not been made." (14RT 3250.) The court then again concluded, "I am confident the

D.A. is not using a protected category basis for her peremptories." (14RT 3253, 3255.) Under the circumstances, the court's finding of no prima facie showing of discrimination was not mooted. (See *Taylor*, *supra*, 48 Cal.4th at p. 613; *Lewis III*, *supra*, 43 Cal.4th at pp. 470-471; *Howard*, *supra*, 42 Cal.4th at p. 1018; *Welch*, *supra*, 20 Cal.4th at pp. 745-746.)

D. The Trial Court Properly Found No Prima Facie Showing of Discrimination

When a trial court denies a *Wheeler* motion without finding a prima facie showing of discrimination, the reviewing court will "undertake an independent review of the record to decide 'the legal question whether the record supports an inference that the prosecutor excused a juror on the basis of race.'" (*Taylor*, *supra*, 48 Cal.4th at p. 614, quoting *Hawthorne*, *supra*, 46 Cal.4th at p. 79, and citing *Johnson*, *supra*, 545 U.S. at p. 170; see *People v. Davis* (2009) 46 Cal.4th 539, 582, quoting *People v. Kelly* (2007) 42 Cal.4th 763, 779 (*Kelly II*).) Specifically, in *Davis*, this Court discussed the types of evidence on which a prima facie case may be based:

> "Though proof of a prima facie case may be made from any information in the record available to the trial court, we have mentioned 'certain types of evidence that will be relevant for this purpose. Thus the party may show that his opponent has struck most or all of the members of the identified group from the venire, or has used a disproportionate number of his peremptories against the group. He may also demonstrate that the jurors in question share only this one characteristic--their membership in the group--and that in all other respects they are as heterogeneous as the community as a whole. Next, the showing may be supplemented when appropriate by such circumstances as the failure of his opponent to engage these same jurors in more than desultory voir dire, or indeed to ask them any questions at all. Lastly, the defendant need not be a member of the excluded group in order to complain of a violation of the representative cross-section rule; yet if he is, and especially if in addition his alleged victim is a member of the group to which the majority of the remaining jurors belong,

> these facts may also be called to the court's attention.'" (*People v. Bell* (2007) 40 Cal.4th 582, 597, quoting *Wheeler*, supra, 22 Cal.3d at pp. 280-281.)

(*Davis*, *supra*, 46 Cal.4th at p. 583; see also *Johnson*, supra, 545 U.S. at pp. 168, 170; *Batson*, *supra*, 476 U.S. at p. 96.)

Here, an independent review of the record will show that appellant did not meet his burden of raising an inference of discrimination with the prosecutor's challenges to Prospective Juror Nos. 1 and 2. Prospective Juror No. 1 was an African-American woman and Prospective Juror No. 2 was an African-American male. Appellant was an African-American male. (14RT 3148-3149.) As both parties noted, however, there were two or three additional African-American prospective jurors in the venire at the time. (14RT 3149; 15RT 3491, 3505-3507.) The prosecutor also ultimately accepted the panel with one African-American juror (Juror No. 1) and one African-American alternate juror. (15RT 3505; see *Turner*, *supra*, 8 Cal.4th 168 [finding that, "[w]hile the fact that the jury included members of a group allegedly discriminated against is not conclusive, it is an indication of good faith in exercising peremptories, and an appropriate factor for the trial judge to consider in ruling on a *Wheeler* objection"], citing *People v. Snow* (1987) 44 Cal.3d 216, 225; accord, *People v. Jenkins* (2000) 22 Cal.4th 900, 994.)

Additionally, the prosecutor's challenges to Prospective Juror Numbers 1 and 2 constituted only two of her 11 peremptory strikes. Her nine other peremptory challenges were used to exclude five Caucasian males, one Caucasian female, one Asian male, one Hispanic male, and one male of an unidentified race which was not African-American. (15RT 3507.) The prosecutor's dismissal of only two African-American prospective jurors did not constitute a disproportionate amount of her

peremptory challenges in the present case. (See *Davis*, *supra*, 46 Cal.4th at p. 583.)

Appellant disagrees and argues that a prima facie case was made because the prosecutor excused 40 to 50 percent of the African-American prospective jurors. (AOB 258-259.) This statistic is insufficient to show a prima facie case. Even if the prosecutor used a peremptory challenge to strike the sole prospective African-American juror in the venire, that circumstance alone would not have been enough to establish a prima facie case. (*People v. Guerra* (2006) 37 Cal.4th 1067, 1101-1102.) From the diversity of the prosecutor's challenges as well as the fact that other African-American prospective jurors remained and were ultimately accepted by the prosecutor, there was no basis for the trial court to find a prima facie showing of discrimination.

Moreover, Prospective Juror Numbers 1 and 2 shared a characteristic other than race and the prosecutor thoroughly questioned both before dismissing them. (See *Davis*, *supra*, 46 Cal.4th at p. 583.) Prospective Juror Numbers 1 and 2 both held jobs with one employer for a lengthy period of time – 30 years and 18 years, respectively – without ever having been promoted to a supervisory position. (14RT 3048-3049, 3137-3139.) The prosecutor questioned both prospective jurors and specifically asked about their employment and the lack of any supervisory position. (14RT 3048-3051, 3137-3139.) Thus, appellant cannot show that the prospective jurors at issue shared only their race in common or that the prosecutor engaged in only desultory questioning of them. (See *Davis*, *supra*, 46 Cal.4th at p. 583.)

Nothing in the foregoing statistics suggests the prosecutor excused the two challenged prospective jurors based on race. As the trial court properly found that appellant failed to make a prima facie showing of discrimination,

this Court need not proceed to steps two and three of the *Batson/Wheeler* analysis. (See *Lewis*, *supra*, 43 Cal.4th 415, 470-471.)

E. The Prosecutor Provided Legitimate Race-Neutral Reasons for Her Peremptory Challenges

Even if the trial court had proceeded to steps two and three of the *Batson/Wheeler* analysis and evaluated the prosecutor's justifications for the peremptory challenges, or if this Court determines that an analysis of the prosecutor's justifications is necessary, the prosecutor provided legitimate race-neutral reasons for the challenges to Prospective Juror Numbers 1 and 2.

A prosecutor asked to explain a challenge "must provide a clear and reasonably specific explanation of his or her legitimate reasons for exercising the challenges." (*People v. Lenix* (2008) 44 Cal.4th 602, 613 (*Lenix*), quotations and internal citations omitted.) "The justification need not support a challenge for cause, and even a 'trivial' reason, if genuine and neutral, will suffice." (*Ibid.*) In the third stage of the *Batson/Wheeler* inquiry, "'the issue comes down to whether the trial court finds the prosecutor's race-neutral explanations to be credible. Credibility can be measured by, among other factors, the prosecutor's demeanor; by how reasonable, or how improbable, the explanations are; and by whether the proffered rationale has some basis in accepted trial strategy.'" (*Ibid.*) The trial court may draw upon its "contemporaneous observations of the voir dire," as well as the court's "own experiences as lawyer and bench officer," and even "the common practices of the advocate and the office who employs him or her." (*Ibid.*, internal quotations and citations omitted.)

Reviewing courts apply a deferential standard of review in considering third-stage *Batson/Wheeler* issues under the substantial evidence standard, and review such trial court determinations "with great

restraint." (*Lenix*, *supra*, 44 Cal.4th at pp. 613-614, internal quotations and citations omitted.) The court presumes the prosecutor used the peremptory challenges constitutionally, and great deference is accorded "to the trial court's ability to distinguish bona fide reasons from sham excuses." (*Ibid.*) If the trial court makes a "sincere and reasoned effort to evaluate the nondiscriminatory justifications offered, its conclusions are entitled to deference on appeal." (*Ibid.*) The trial court is not required to give specific or detailed reasons for accepting the prosecutor's race-neutral reasons. (*Reynoso*, *supra*, 31 Cal.4th at p. 919, 924.)

In determining whether the prosecutor's reasons for a peremptory challenge are pretextual, the trial court must focus on the subjective genuineness, rather than objective reasonableness, of the race-neutral reasons given. (*Reynoso*, *supra*, 31 Cal.4th at p. 924.) Even a brief reference to the prosecutor's reasons and the trial court's own observations of a challenged juror can constitute a sincere and reasoned evaluation of the credibility of the prosecutor's justifications. (*People v. Jackson* (1996) 13 Cal.4th 1164, 1197-1198; *People v. Montiel* (1993) 5 Cal.4th 877, 909.) The trial court must consider all relevant circumstances including those that are subtle, subjective, and incapable of being transcribed. (*Jackson*, *supra*, 13 Cal.4th at p. 1197.) When the prosecutor's reasons are inherently plausible and supported by the record, the trial court need not question the prosecutor or make detailed findings. (*People v. McDermott* (2002) 28 Cal.4th 946, 980; *People v. Silva* (2001) 25 Cal.4th 345, 386.)

Here, the prosecutor's justifications were valid and race-neutral. As to both of the challenged peremptory strikes, the prosecutor explained that she wanted jurors with strong decision-making skills, but neither Prospective Juror Number 1 nor Prospective Juror Number 2 had life experiences suggesting they were seasoned decision-makers. (14RT 3150, 3249-3250.) At the time, the parties were selecting a jury solely for the

penalty phase trial; thus, the only choice to make was whether death or life without parole was the appropriate punishment. As the prosecutor explained after her dismissal of Prospective Juror No. 2, "The decision in a death penalty case, the penalty phase, is far more stressful and of greater magnitude than your ordinary case, and I bear that in mind when I excuse jurors." (14RT 3152.) She elaborated after dismissing Prospective Juror No. 1 that, "The fear factor involved . . . can be very crippling in terms of the deliberation process when you get somebody in the jury room who doesn't have [decision-making] experience." (14RT 3249.) Accordingly, the prosecutor wanted jurors who at least appeared to have life experience showing they were "seasoned decision makers" or "could handle the stress of a tough decision." (14RT 3250.)

The record shows that both of the prospective jurors at issue held jobs with the same employer for many years – 30 and 18 years, respectively – but were never elevated to supervisory positions. (14RT 3150-3152, 3249-3250.) Due to the specific types of jobs held – Prospective Juror No. 1 essentially engaged in computer data entry and Juror Number 2 was a delivery truck driver – and the lack of any supervisorial positions, the prosecutor did not believe that either of the two prospective jurors had significant life experiences that qualified them to make "high-stress" decisions. (See 14RT 3150, 3249-3250.)

Specifically, regarding Prospective Juror Number 1, the prosecutor said, "in a different type of case, I think he would be a wonderful juror, but this is a penalty where I'm going to be asking him to return a verdict of death." She did not believe he had life experience suggesting that he possessed strong decision-making skills, and noted that he held his job as a truck driver for UPS for many years without ever supervising anyone. (14RT 3150.) The trial court stated that its notes included that Prospective Juror No. 1 had no supervisory experience. (14RT 3151.)

As to Prospective Juror Number 2, immediately after defense counsel made his *Wheeler/Batson* motion and before any comments were made by the prosecutor, the trial court noted that the prosecutor had previously relied upon life experience and that Prospective Juror Number 2 had not supervised anyone, although she had trained others. (14RT 3248-3249.) The prosecutor then noted that the prospective juror had not supervised anyone and did not make decisions in the course of her employment. Although Prospective Juror Number 2 trained others on "circuit design," which she explained was inputting information into a computer system (14RT 3137-3138), she did not supervise anyone, basically engaged in data entry, and did not have life experience suggesting that she "could handle the stress of a tough decision." (14RT 3249-3250.)

Because the prosecutor was specifically looking for jurors who could return a verdict of death, the lack of decision-making or leadership experience was certainly a valid, race-neutral reason for the peremptory challenges. (See *People v. Ledesma* (2006) 39 Cal.4th 641, 679 [finding prosecutor's concern that prospective juror was not a leader and that group appeared to be lacking in prospective jurors with leadership abilities to be a valid basis for peremptory challenge], citing *Johnson*, *supra*, 43 Cal. 3d at p. 1220.) Indeed, the prosecutor asked the other prospective jurors about leadership or supervisorial experience (see, e.g., 14RT 3052- 3055, 3057, 3061-3066, 3143, 3192-3194; 15RT 3245, 3641), and she apparently was not the only party concerned about those skills as defense counsel questioned several of the prospective jurors on the same point (see, e.g., 15RT 3180, 3183, 3187-3189, 3229-3230). On this record, there is no basis for finding the prosecutor's justifications to be pretextual.

F. A Comparative Analysis Shows That the Prosecutor's Justifications Were Valid and Race-Neutral

This Court ruled in *Lenix*, *supra*, 44 Cal.4th at page 622, that a comparative juror analysis is appropriate on appeal. The court reasoned that, because "comparative juror analysis is but one form of circumstantial evidence that is relevant, but not necessarily dispositive, on the issue of intentional discrimination , . . evidence of comparative juror analysis must be considered in the trial court and even for the first time on appeal if relied upon by the defendant and the record is adequate to permit the urged comparisons." (*Id.* at p. 622; see *Miller-El v. Dretke* (2005) 545 U.S. 231, 241 [125 S.Ct. 2317, 162 L.Ed.2d 196] [in habeas corpus context, finding that, under a comparative juror analysis, "[i]f a prosecutor's proffered reason for striking a African-American panelist applies just as well to an otherwise-similar non[-]African-American who is permitted to serve, that is evidence tending to prove purposeful discrimination to be considered at *Batson*'s third step."].)

However, this Court explained in *Lenix* that "comparative juror evidence is most effectively considered in the trial court where the defendant can make an inclusive record, where the prosecutor can respond to the alleged similarities, and where the trial court can evaluate those arguments based on what it has seen and heard." (*Lenix*, *supra*, 44 Cal.4th at p. 624.) "Defendants who wait until appeal to argue comparative juror analysis must be mindful that such evidence will be considered in view of the deference accorded the trial court's ultimate finding of no discriminatory intent." (*Id.* at p. 624, citing *Hernandez*, *supra*, 500 U.S. at p. 365.) This Court further recognized that "appellate review is necessarily circumscribed," and noted as follows:

> The reviewing court need not consider responses by stricken panelists or seated jurors other than those identified by the defendant in the claim of disparate treatment. Further, the trial

> court's finding is reviewed on the record as it stands at the time the *Wheeler/Batson* ruling is made. If the defendant believes that subsequent events should be considered by the trial court, a renewed objection is required to permit appellate consideration of these subsequent developments.

(*Lenix*, *supra*, 44 Cal.4th at p. 624.)

Here, appellant contends a comparative juror analysis shows that the prosecutor's reasons were pretextual because several of the non-African-American jurors who ultimately served on the penalty phase jury (Juror Nos. 2, 4, 5, 6, 7, 8, 9, and 10) were similarly lacking in leadership or decision-making skills, but the prosecutor did not strike those jurors. (AOB 265-270.) Even on this record wherein the prosecutor did not have an opportunity to explain any differences, a review of the identified jurors' responses shows a distinction in their life experiences. (*Lenix*, *supra*, 44 Cal.4th at p. 624 [recognizing one of the limitations of engaging in a comparative juror analysis for the first time on appeal is that "the prosecutor is never given the opportunity to explain the differences he perceived in jurors who seemingly gave similar answers"].) Moreover, the remaining jurors do not need to possess supervisory skills to show that the prosecutor's reasons as to Prospective Juror Numbers 1 and 2 were not pretextual, as other appropriate factors may have reasonably made them appear to be favorable jurors for the prosecution.

First, Juror Number 2 said, inter alia, that she was an assistant manager at a high school cafeteria for seven years. (15RT 3340, 3361-3363, 3370.) Appellant argues that she "was never a true supervisor" because she said she "was in charge of seeing that the food was served properly and on time and that everybody was doing their duties." (AOB 266, citing 15RT 3361-3362.) However, Juror Number 2's statement conveyed that she supervised other cafeteria employees. She also apparently became a supervisor relatively quickly within that job, whereas Prospective Juror

Numbers 1 and 2 held positions for 18 and 30 years, respectively, without being promoted to supervisorial roles. This circumstance, alone, distinguished Juror Number 2 from the challenged prospective jurors.

Appellant similarly argues that Juror Number 4 lacked any supervisory responsibilities (AOB 267); however Juror Number 4 clearly stated that he had supervised two or three other people in a previous job.[43] (14RT 3052.) Juror Number 4 explained that he was a "network technician," meaning he engaged in computer troubleshooting, for the Huntington Beach School District. He held that job for three years, and held a similar position for Long Beach Unified School District for the two years prior to that. Juror Number 4 also said that he was an office manager prior to working for the school districts. In that capacity, he supervised two or three employees and sometimes temporary employees. (14RT 3051-3052.) As such, unlike the prospective jurors at issue here, Juror Number 4 had supervised others. Although he was not in a supervisorial role at the time of the jury voir dire, he had been at that position for only three years. (14RT 3052.)

Appellant next contends that Juror Number 5 gave comparable responses regarding the lack of leadership or decision-making skills. (AOB 267.) Appellant fails to acknowledge several factors related to Juror Number 5 that were not present with Prospective Juror Numbers 1 or 2, which tended to show he was a strong decision-maker or an otherwise favorable juror for a prosecutor despite the lack of a supervisory job. Juror Number 5 worked as a diesel equipment operator for the County of Los Angeles for 11 years and was not a supervisor. However, he had served on two prior juries, including a double murder case involving a penalty phase

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[43] Juror Number 4 was male. (Compare AOB 267 with 14RT 3051-3052.)

trial. The jury reached verdicts in both the guilt and penalty phases of the murder trial. (15RT 3341-3343.) Because Juror Number 5 had already served as a juror in a penalty phase trial, his jury had reached a verdict in both phases, and his responses in no way suggested that he had any problems with his decisions in the case, any reasonable prosecutor would have been satisfied with Juror Number 5's ability to make a decision in a penalty phase trial. (See *People v. Gray* (2005) 37 Cal.4th 168, 190 (*Gray*) [rejecting claim that prosecutor's possible reason for dismissing prospective juror was pretextual where accepted juror and prospective juror shared age as a common characteristic, but accepted juror might have been viewed as favorable juror for the prosecution because the juror served on a prior double murder case wherein the jury reached a verdict].)

Moreover, Juror Number 5's brother-in-law was the Police Chief for the Long Beach Airport, his sister was a 911 operator, and a family acquaintance worked for the Long Beach Police Department. (15RT 3343-3344, 3349.) His connections to law enforcement further suggested that he would be a favorable juror for the prosecution. (See *Gray*, *supra*, 37 Cal.4th at pp. 190-191 [rejecting claim that prosecutor's possible reason for peremptory challenge was pretextual where the accepted juror and dismissed prospective juror shared religious affiliation, but the prosecutor might have believed the accepted juror would favor the prosecution because her husband was a police officer]; *People v. Dunn* (1995) 40 Cal.App.4th 1039, 1052 (*Dunn*) [rejecting claim that prosecutor's reasons for peremptory challenges, that the dismissed prospective jurors had relatives with drug problems, were pretextual where an accepted juror similarly had a relative with a drug problem, but the accepted juror was not "chummy" with that relative and was inclined to have a favorable attitude toward the prosecution due to having relatives in law enforcement].)

Juror Number 5 had additionally witnessed two separate killings, including a murder and attempted murder where he identified the suspect on the scene and went to court to testify, although he ultimately was not called to testify. The second killing was a vehicular manslaughter case, and he testified in that trial. (15RT 3344-3345, 3350-3353.) Juror Number 5 did not appear to be intimidated about the prospect of testifying or identifying a suspect, which further suggested that he would not be intimidated by other jurors or the prospect of having to return a verdict in a penalty phase trial.

Juror Number 5 also coached his son's baseball park league for about seven years, then coached a high school baseball team for five years, and was helping at a grammar school at the time. (15RT 3365-3366.) While Prospective Juror Number 2 similarly had some coaching experience, although not as extensive, he was lacking in all of the other relevant experience listed above by Juror Number 5. Prospective Juror Number 2 served on a prior jury that was unable to reach a verdict, did not have law enforcement ties, had not made an on-scene identification of a murder suspect, and had not testified in murder trials. (14RT 2966.) His background was, therefore, not comparable to Juror Number 5's background.

While appellant correctly notes that Juror Number 6, like the two dismissed prospective jurors at issue, held her job for many years without serving in any supervisory capacity, he fails to acknowledge that Juror Number 6's job involved problem-solving and significant interaction with others. (See AOB 267-268.) Juror Number 6 had been an administrative assistant at Boeing for approximately 20 years "off and on," handling worker's compensation and medical claims. (14RT 3220, 3224-3226, 3241-3243.) The prosecutor questioned Juror Number 6 in detail about her role at Boeing and whether it included decision-making and working with

others. (14RT 3241-3243.) Juror Number 6 explained that she facilitated the making and processing of claims, working as "a buffer between the injured worker and the insurance carrier." She engaged in "a lot of problem solving to eliminate [worker's compensation claims]." (14RT 3241-3242.) Although Juror Number 6 did not make decisions as to whether claims or requests for a leave of absence would be approved, she consulted with others on the decisions, had input in the decisions, and discussed pertinent information with the person who would make the ultimate decision. (14RT 3242.) As Juror Number 6 spent approximately 20 years essentially negotiating with people and/or engaging in a type of conflict resolution, a reasonable person in the prosecutor's position would have believed that Juror Number 6 could work well with others toward reaching a verdict. Prospective Juror Nos. 1 and 2 were lacking in similar experience.

Appellant further contends that Juror Number 7 similarly lacked supervisory or leadership experience (AOB 268), but Juror Number 7 was a senior consulting engineer who directed and reviewed the work of others. (14RT 3172.) When questioned by defense counsel, Juror Number 7 said he did not directly supervise others, but was a lead process engineer. In that capacity, he directed and reviewed the work of outside engineering contractors. (14RT 3180.) The prosecutor also questioned Juror Number 7 about his employment and whether he worked with others as a team. He said that he sometimes worked as a team and sometimes worked alone on projects. At the time, he was working alone on a project, but the project would later move into another phase where he would be working with others. (14RT 3191-3192.) Unlike the two prospective jurors at issue, Juror Number 7 had experience directing the work of others and working with others as a team.

Juror Number 8 also had decision-making experience that Prospective Juror Numbers 1and 2 lacked. (Compare AOB 269 with 15RT

3339-3340, 3358-3359.) Juror Number 8 was an account coordinator for a coupon distribution company. In that capacity, she consulted with leading manufacturers and determined which type of media to use to distribute coupons for those manufacturers. (15RT 3339-3340, 3358.) The prosecutor questioned Juror Number 8 further and elicited that Juror Number 8 worked as a team with an account manager and their clients, specifically her major client, Nestle Corporation. She gathered information and made decisions with the account manager and clients regarding where to place the particular media. Prior to her five years at the distribution company, Juror Number 8 worked in a public relations advertising agency. Prior to her time at the advertising agency, she worked as a marketing manager for Little Caesar's Pizza. (15RT 3358-3359.) Additionally, Juror Number 8's brother-in-law was a Long Beach Police Officer and she saw him twice per month. (15RT 3339, 3357.)

Juror Number 8's background is distinguishable from the two prospective jurors at issue in that Juror Number 8 participated in and made fairly significant marketing decisions on a daily basis. She also worked as a team with others in reaching those decisions. Thus, her experience would have been more reassuring for a prosecutor seeking jurors who could work with 11 other people toward reaching a verdict.

Moreover, like Juror Number 5, Juror Number 8 had a fairly close tie to law enforcement and, specifically, the Long Beach Police Department – one of the investigating agencies in the present case. Juror Number 8, therefore, had a background that was distinguishable from that of Prospective Juror Nos. 1 and 2 and objectively more favorable to a prosecutor. (See *Gray*, *supra*, 37 Cal.4th at pp. 190-191 [recognizing that juror with ties to law enforcement is likely to favor or be viewed as favorable to the prosecution]; *Dunn*, 40 Cal.App.4th at p. 1052 [same].)

Despite appellant's claim to the contrary (AOB 269), Juror Number 9's experience was also distinguishable from that of Prospective Juror Numbers 1 and 2. While Juror Number 9 was not a supervisor, he was apparently in a job that did not technically involve supervisory positions. He had been a lab technician at Raytheon for approximately 15 years, dealing with metallurgy and electronic failure analysis. (14RT 2974-2975, 3029, 3032.) When the prosecutor asked if he had ever supervised employees, he said, "we're self-helping each other." Juror Number 9 explained that, depending upon the situation and who needed help, the lab technicians might receive instructions from engineers or might give instructions to others. (14RT 3057 [stating "whether it's up-or-down-flow, it goes both ways"].) He also said that he had an advanced degree in finance, which was related to and necessary for his job. (14RT 3057.) Thus, it appears Juror Number 9's job, although not supervisory, involved decision-making, working with others, and giving directions to other employees. This experience as well as the fact that he had an advanced degree to qualify for it suggested that he might have been a more driven, goal-oriented type of person than either Prospective Juror Number 1 or Prospective Juror Number 2.

Additionally, Juror Number 9 served on a prior criminal jury that reached a verdict and, unlike Prospective Juror Nos. 1 and 2, Juror Number 9's brother attended the Los Angeles Police Academy a few years earlier. (14RT 2974-2975, 3058-3059.) Juror Number 9's background, in total, suggested he might favor the prosecution and would not have difficulty rendering a verdict. (See *Gray*, *supra*, 37 Cal.4th at pp. 190-191 [recognizing that juror with ties to law enforcement is likely to favor or be viewed as favorable to the prosecution]; *Dunn*, 40 Cal.App.4th at p. 1052 [same].)

Finally, Juror Number 10's background was, likewise, distinguishable from that of Prospective Juror Numbers 1 and 2. (See AOB 269; 5CT 1280 [reflecting that Juror Number 10 was Juror Number 7387].) Juror Number 10 was a widow with nine adult children, including one attorney. She had one nephew who was a retired officer from the Los Angeles Police Department, and another nephew who worked as a translator at the Long Beach Courthouse. She had been a docent at the Torrance Courthouse for the previous thirteen years. In that capacity, Juror Number 10 worked with some of the judges' wives, and believed she had seen the trial court judge as well as the prosecutor and defense counsel at some point at the Torrance Courthouse. She also saw some of the judges' wives at St. John Fisher, where she regularly attended church and where all of her children had attended school. Juror Number 10 described herself as "active" with the church. She additionally worked as a nurse's aide for approximately five years many years before the instant case, but she otherwise had not worked outside of the home primarily because she had so many children. Finally, Juror Number 10 served on a jury in a robbery case wherein the jury reached a verdict. (15RT 3292-3293, 3307-3308, 3315.)

A prosecutor reasonably would have viewed Juror Number 10 as a more favorable juror than Prospective Juror Numbers 1 or 2. Since she spent thirteen years working in a criminal courthouse, she presumably would be more comfortable with the courtroom setting and proceedings than the average juror. Juror Number 10 also had a son who was an attorney and a nephew who worked in a courthouse as a translator. She also apparently ran a household with nine children, which would have required leadership and problem-solving skills. With this background, Juror Number 10 was much less likely to feel intimidated in the jury room. Additionally, as Juror Number 10 had a nephew who was a retired police officer and she was a homemaker who was active in her church, the

prosecutor would likely have viewed her as having a more conservative viewpoint and inclined to favor the prosecution. Accordingly, Juror Number 10 did not share a similar background with Prospective Juror Numbers 1 and 2 such that the prosecutor's reasons for dismissing the two prospective jurors could be viewed as pretextual.

Even without the benefit of any explanation from the prosecutor, the foregoing review of the information provided by the sworn jurors reveals characteristics or experience that is distinguishable from that of Prospective Juror Numbers 1 or 2 and more likely to be viewed as favorable for the prosecution. Appellant's deficient claims to the contrary fail to show that the prosecutor's reasons for exercising peremptory challenges to the two prospective jurors at issue were anything other than genuine.

XIII. DURING THE PENALTY PHASE RETRIAL, THE TRIAL COURT PROPERLY ADMITTED STEVEN MILLER'S NON-TESTIMONIAL, SPONTANEOUS STATEMENTS TO OFFICERS AT THE MURDER/ROBBERY SCENE

Similar to Argument III, appellant contends that, during the penalty phase, the trial court erroneously admitted the statements Miller made to police at the crime scene in violation of appellant's Sixth Amendment right to confrontation under *Crawford, supra,* 541 U.S. 32, as well as his Fifth and Fourteenth Amendment due process rights. (AOB 275-281.) Appellant concedes that Miller's statements were properly characterized as spontaneous statements under Evidence Code section 1240, but argues that his right to confrontation was nevertheless violated because the statements were testimonial and Miller, who was unavailable at trial, had not been subjected to cross-examination. (AOB 277-279.) For the reasons set forth in Argument III, Subheading (B), *ante*, appellant's hearsay objection did not preserve any confrontation clause objection on appeal. In any event, as

explained in detail in Argument III, Subheading (C), *ante*, *Crawford* was inapplicable to the instant case because Miller's statements were made primarily to deal with a contemporaneous emergency and were, therefore, non-testimonial.

A. The Relevant Trial Court Proceedings

As explained previously, the prosecution called Miller as a witness during the guilt phase. When Miller refused to testify, despite an offer of immunity and agreement by the defense to avoid any impeachment regarding unrelated offenses, the trial court found him to be unavailable. (Arg. III.)

During the penalty phase, Officer Romero testified and described the scene at Eddie's Liquor when he and Officer Holdredge arrived. Similar to his testimony in the guilt phase, he explained that he encountered Miller immediately upon his arrival at the scene, which was approximately one minute after receiving a radio call regarding the shooting. Miller appeared to be "very nervous and shaken" the entire time Officer Romero spoke to him. (21RT 4630-4634, 4651.) At that point in Officer Romero's testimony, appellant's counsel objected on hearsay grounds. The trial court found Miller's statements to be spontaneous statements and overruled the objection. (21RT 4634-4638.)

Officer Romero continued his testimony and explained that, when he encountered Miller, Miller immediately said, "I think he's dead." (21RT 4639-4640.) Officer Romero briefly obtained identification information from the other two people at the scene, attempted to maintain the crime scene, and briefly went inside the liquor store when paramedics arrived. He then immediately contacted Miller again. Only a short time had passed, and Miller still appeared to be shaken and very uneasy. (21RT 4640-4645.) Defense counsel again objected, arguing the statement was no longer a

spontaneous statement. The trial court found that the time period was brief, Miller was still operating under the stress and excitement of his observations, and Miller did not have sufficient time to reflect such that his statements would be untrustworthy. (21RT 4646-4648.)

Officer Romero testified that Miller told him the following. Miller and his girlfriend were sitting on a bus bench across the street from Eddie's Liquor when Miller noticed two African-American males walk to the liquor store. Almost immediately after the males walked into the store, Miller heard a popping sound. The two males then ran out of the store. The two suspects ran north on Butler for approximately two blocks, and then turned east on Marker Street. The first suspect was wearing a shirt with white stripes on it and possibly dark jeans, while the second suspect wore long, dark shorts. Both suspects had short afro-style haircuts and were approximately five feet, eight or nine inches tall. (21RT 4649-4651.)

B. Appellant Forfeited Any Confrontation Clause Challenge

Appellant argues that the trial court's admission of Miller's statements, through Officer Romero, violated his due process rights as well as his Sixth Amendment right to confrontation. (AOB 277.) However, appellant objected on only hearsay grounds in the trial court. (21RT 4634-4638, 466-4648.) As he failed to argue any confrontation clause grounds for his objection below and knew Miller was unavailable, he cannot raise the claim for the first time in the instant appeal. (See Arg. III, Subh. (B), citing *Alvarez*, *supra*, 14 Cal.4th at p. 186 [finding that defendant failed to preserve confrontation clause claim by objecting only on the ground that the statement was inadmissible hearsay and not a spontaneous statement]; *Dennis*, *supra*, 17 Cal.4th at p. 529 [same].)

C. Miller's Statements Were Non-Testimonial Statements Made Primarily to Meet an Ongoing Emergency

For the reasons set forth in detail in Argument III, Subheading (B), the trial court did not violate appellant's right to confrontation by admitting Miller's statements, even though Miller was unavailable and there was no prior opportunity for cross-examination, because Miller's statements were made to meet on ongoing emergency and were, therefore, non-testimonial. (See *Davis*, *supra*, 547 U.S. at pp. 829-832; *Romero*, *supra*, 44 Cal.4th at p. 422 [ruling that statements are non-testimonial when "primary purpose is to deal with a contemporaneous emergency such as assessing the situation, dealing with threats, or apprehending a perpetrator," and finding that a contemporaneous emergency exists when officers know or must determine whether perpetrators are "still at large so as to pose an immediate threat"].)

Moreover, even if the admission of Miller's statements to Officer Romero violated the Confrontation Clause, any error was harmless beyond a reasonable doubt. (*Romero*, *supra*, 44 Cal.4th at p. 422 [applying *Chapman* harmless error analysis to alleged *Crawford* error during penalty phase].) Miller's statements were relevant to show appellant's identity as one of the suspects from the Eddie's Liquor crimes, the direction in which the suspects fled, and the quick timeframe of the shooting. During the penalty phase, however, evidence of appellant's guilt was relevant only to his level of culpability and any lingering doubt. (See *People v. Gay* (2008) 42 Cal.4th 1195, 1221-1223 (*Gay*) [ruling that, while a defendant cannot relitigate guilt, "evidence of the circumstances of the offense [or related to aggravating and mitigating factors], including evidence creating a lingering doubt as to the defendant's guilt of the offense, is admissible at a penalty []trial under section 190.3"].)

The timeframe of the shooting may have been relevant to appellant's level of culpability, i.e., the jury might have been less likely to believe any

type of self-defense argument since appellant very quickly shot Moon, but the same information was shown in a more convincing manner in the surveillance video from Eddie's Liquor. The time reflected in the video shows that appellant was inside Eddie's Liquor for less than two minutes. (See Arg. III; Peo. Exh. No. 36.)

As to any lingering doubt, and as addressed in more detail in Argument III, while Miller's statements were helpful for the prosecution in that he provided a description of the fleeing suspects and told officers which direction the suspects fled, his statements certainly were not necessary because several other witnesses established the same or similar information. Additionally, appellant was convincingly identified as one of the suspects by Marcia and other evidence, including the fact that the nine-millimeter gun used to kill Moon was found in his home one week after the murder. (See Penalty Phase Statement of Facts, *ante*.) As the evidence strongly showed appellant's identity as the shooter apart from Miller's statements, appellant cannot show that any erroneous admission of Miller's statements contributed to the death verdict.

XIV. DURING THE PENALTY PHASE RETRIAL, THE TRIAL COURT PROPERLY ADMITTED APPELLANT'S FAILURE TO RESPOND TO JOHNSTON'S LETTER TO HIM AS AN ADOPTIVE ADMISSION

Appellant contends that, during the penalty phase as in the guilt phase (see Arg. IV), the trial court erroneously admitted a letter Johnston wrote to appellant and appellant's failure to respond to the letter as an adoptive admission. He argues that his silence was not an adoptive admission under Evidence Code section 1221, and that the error was not cured by the fact that the letter was also used to refresh Johnston's recollection under Evidence Code sections 770 and 1235 because only portions of the letter were inconsistent with Johnston's trial testimony. Appellant further

contends that his federal constitutional rights were violated by law enforcement's loss of a letter he wrote to Johnston after receiving her letter. (AOB 282-291.)

A. The Relevant Trial Court Proceedings

Before Johnston testified at the penalty phase trial, appellant's counsel objected to the admission of her letter to appellant, accusing appellant of committing the crimes at Eddie's Liquor, and his failure to respond to the letter as an adoptive admission. Counsel argued the letter simply ended the relationship between Johnston and appellant, and that a reasonable person in appellant's position would not respond. Appellant's second counsel added that the letter itself was not admissible because appellant never admitted its authenticity.[44] (21RT 4554-4557.) The prosecutor argued that all of the requirements for an adoptive admission were met because the letter was accusatory, Johnston hand-delivered it to appellant, and appellant failed to respond. She further argued the letter also served as a prior inconsistent statement made by Johnston. (21RT 4555-4556.)

The trial court found that the letter was accusatory and that appellant's silence, after receiving the letter, constituted an admission. The court explained that appellant's silence adopted the letter and gave it meaning, but the letter itself was not the admission. Accordingly, the court overruled the objection and noted that defense counsel could argue the point to the jury. (21RT 4557.)

During the retrial, the prosecutor initially used the letter to refresh Johnston's recollection about appellant's demeanor when he saw police officers on the afternoon of the shooting at Eddie's Liquor as well as his

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[44] Appellant had two attorneys representing him during the penalty phase.

conduct while a news story was on television. (21RT 4585, 4590-4593; Peo. Exh. No. 2A.) Johnston then testified that she wrote the letter to appellant on June 12, 1997, and hand-delivered it to him that day. Appellant did not respond to the letter. (21RT 4593-4596.) Johnston explained that, in the letter, she conveyed concerns she had about events that occurred earlier that day. She initially denied that the letter accused appellant or anyone else of committing any crimes. When asked to read the letter to herself, Johnston admitted that she wrote she believed appellant committed a robbery because he and his companions made comments about knowing "the guys that did it" when a helicopter was present. She further admitted that the letter referenced a telephone conversation she had with appellant wherein he was quiet when a news story about a robbery in Long Beach aired. Johnston admitted that the contents of her letter were truthful and the events were fresh in her mind at the time she wrote the letter. (21RT 4596-4602.)

During the prosecutor's redirect, appellant's counsel objected to Johnston reading the letter on the record. The trial court overruled the objection. Johnston read the contents of the letter. (21RT 4624-4625.)

Lipkin testified that he found Johnston's letter to appellant in appellant's bedroom. The letter was booked at the Compton Police Department. (18RT 4133, 4136-4141, 4198; 21RT 4704-4707; Peo. Exh. No. 2A.)

Detective Reynolds testified that officers found a letter appellant wrote to Johnston, postmarked August 11, 1997, in Johnston's residence. The letter was booked into evidence at the Compton Police Department, but could not be located at the time of trial. The Compton Police Department had merged with the Los Angeles County Sheriff's Department and, at the time, the property room was in the process of being moved. (21RT 4723-4725.)

Johnston's letter to appellant was admitted into evidence over appellant's counsel's objection. (22RT 4913-4914.) Over defense objection, the trial court instructed the jury with CALJIC No. 2.71.5 on adoptive admissions. (24RT 5282, 5337.)

B. The Trial Court Properly Admitted Johnston's Letter and Appellant's Failure to Respond to the Letter As An Adoptive Admission

As set forth in detail in Argument VI, Subheadings B through D, Johnston's letter was properly admitted in its entirety with appellant's failure to respond as an adoptive admission. As the trial court found, the letter clearly accused appellant of committing a robbery on the day of Moon's murder, the evidence strongly supported the inference that appellant read the letter because Johnston hand-delivered it to him and it was found in his bedroom, and a reasonable innocent person in appellant's position would have denied the accusation. (See Arg. VI, Subhs. (B)-(D).)

C. Any Error Was Harmless

Even if the trial court erroneously admitted Johnston's letter, there is no reasonable possibility the error affected the verdict. (See *Gay*, *supra*, 42 Cal.4th at p. 1223 ["Error in admitting or excluding evidence at the penalty phase of a capital trial is reversible if there is a reasonable possibility it affected the verdict"]; *People v. Lancaster* (2007) 41 Cal.4th 50, 94 (*Lancaster*) [same]; *People v. Jones* (2003) 29 Cal.4th 1127, 1264, fn. 11 (*Jones*) [state law error during penalty phase of capital case is prejudicial when there is a "reasonable possibility" the error affected the verdict, which is, in substance and effect, the same as the *Chapman* federal constitutional harmless error analysis].) The jury was aware of the statements Johnston made in her letter apart from admission of the letter itself. Johnston

testified directly to, her recollection was refreshed by (Evid. Code, § 771), and/or she was impeached with (Evid. Code, §§ 770 & 1235) her following statements: (1) she accused appellant and his companions of committing a robbery in Long Beach; (2) while a helicopter was in the area on the day of the crimes, appellant and/or his companions said they knew who did it; (3) during a telephone conversation Johnston had with appellant later on the day of the shooting, appellant was quiet while a news segment about the robbery in Long Beach was on television and then he and Marcia wanted to talk privately; and (4) appellant appeared nervous later that day when he saw police officers. (21RT 4573-4590, 4597-4601). The fact that the letter itself, which included all of the foregoing statements, was admitted would not have affected the jury's verdict since the jury had already properly heard all of the same incriminatory points directly from Johnston.

Moreover, Johnston's letter and appellant's failure to respond were relevant only to appellant's identity as one of the suspects who committed the Eddie's Liquor offenses. During the penalty phase, however, evidence of appellant's guilt for those offenses was relevant only to his level of culpability and any lingering doubt. (See *Gay*, *supra*, 42 Cal.4th at pp. 1221-1223.) Indeed, appellant's counsel argued that appellant was less culpable because he was not the actual shooter and/or did not intend to kill anyone. (24RT 5452-5455, 5459-5463; see *Gay*, *supra*, 42 Cal.4th at p. 1223 [noting that evidence relevant to whether the defendant actually killed the victim may mitigate culpability].) Johnston's letter did not address the circumstances of the crimes or implicate appellant or anyone else as the actual shooter. Thus, the letter was irrelevant to appellant's *level* of culpability.

Other independent evidence strongly showed appellant's enhanced culpability as the mastermind behind the crimes and the actual shooter. Marcia's testimony established that appellant planned and occupied a

leadership position in the crimes. He gave directions to the others, actually entered the store with codefendant Johnson, and had a gun with him that he had stolen from Riteway one month earlier. Marcia also established that appellant wore a black Nike T-shirt with the distinctive Nike "swoosh" on it. (See Penalty Phase Statement of Facts, *ante*.) The surveillance video showed a suspect, who appeared to fit appellant's general description and who had some of his distinctive features, wearing a black Nike Air T-shirt. (Peo. Exh. No. 36.) As the prosecutor argued, the surveillance video further suggested that appellant actually shot Moon not only because it showed him with the gun, but also because it showed him running out of Eddie's Liquor after Marcus Johnson fled. Moon was shot at a range of only three to ten feet, and the counter at Eddie's Liquor was 24 feet long. The suspect who fired the fatal shot would have been closer to Moon, farther inside the store, and would have taken longer to flee. (24RT 5437.) Finally, and significantly, the nine-millimeter gun used to kill Moon and the Nike Air T-shirt were both found in appellant's residence one week after Moon's murder. (See Penalty Phase Statement of Facts, *ante*.) Accordingly, Johnston's letter, which did not identify a shooter or any circumstances of the crimes, would not have affected the jury's assessment of appellant's level of culpability. Thus, there was no reasonable possibility that any error affected the death verdict.

The prosecution further established that appellant was a violent and dangerous criminal who showed little, if any, empathy for his victims and who did not appear to be amenable to rehabilitation. He had committed three prior violent crimes involving guns, two of which involved shootings and all of which were brazenly committed during the day, in front of many people, and without regard for the safety of others. On December 9, 1993, while many students and others were present, appellant fired a gun at another person just across the street from his high school campus. (17RT

3742-3745, 3751, 3820-3822.) Less than two months later, on January 31, 1994, appellant and two companions committed an armed attempted robbery at a public park where many children were present. During the crime, appellant held a gun to Bradley Turner's head and demanded Turner's wallet. One of appellant's companions told appellant to kill Turner when the companion could not find Turner's wallet. Appellant fired the gun into Turner's leg as the two struggled. As appellant ran from the scene, he pointed the gun directly at Rhonda Griffin's temple and threatened her in order to escape. (16RT 3695-3697; 17RT 3728-3729, 3830-3837.) On May 18, 1997, appellant committed the armed robbery at Riteway, during which he stole the firearm he ultimately used to kill Moon. (18RT 4109-4115, 4165-4171.) Approximately one month later, he committed the attempted robbery at Eddie's Liquor and killed Moon.

The foregoing aggravating factors outweighed any mitigating factors, especially given that appellant committed the Eddie's Liquor crimes and Riteway robbery within a few months of his release from serving approximately three years in the CYA. The mitigating circumstances consisted of evidence of appellant's troubled upbringing, including that his father was killed when he was very young and that his mother lost custody of him when he was seven due to her drug-related offenses. Appellant also presented evidence that he was active in his church before he was in custody as well as while he was in the CYA, and that he served as a positive role model and inspiring influence on the other juveniles while there. However, if appellant's religious beliefs, positive attitude, and claimed rehabilitation in the CYA were honest and sustainable, rather than simply good behavior to obtain favorable treatment while there, he would not have committed the armed robbery at Riteway less than two months after his release. (18RT 4109-4112 [Riteway robbery committed on May 18, 1997]; 23RT 5094-5095 [released from California Youth Authority on

March 28, 1997].) He also would not have committed the armed attempted robbery and murder and Eddie's Liquor less than three months later, on June 12, 1997.

Rather than a person who had truly found religion, appellant appeared to be a person who enjoyed positions of leadership and who had a unique ability to influence others – whether in a positive or negative way. He apparently assumed positive leadership roles in the CYA and was able to inspire others. (23RT 5165-5171.) However, as appellant planned and committed violent crimes both immediately before his time in CYA and shortly after his release, the evidence more strongly supported the prosecution's position that, despite having periods of time where he used his leadership skills in positive ways, he predominantly used those skills to plan and commit crimes. Appellant apparently used his ability to influence others to get codefendants Taylor and Johnson, as well as Marcia, to commit the Eddie's Liquor crimes with him. Thus, the jury did not likely view appellant's leadership skills as a truly mitigating factor.

Although appellant apologized to Moon's wife and expressed sorrow for how her life had changed, he denied killing Moon or entering Eddie's Liquor on the day of the crimes. He also denied admitting to Detective Edwards that he was depicted in one of the still photographs taken from Eddie's Liquor. (23RT 5238, 5245-5246; Peo. Exh. No. 41.) Since appellant did not accept responsibility for the crimes, the jury would not have viewed him as being truly remorseful.

Finally, Maryann Morris (Moon's step-daughter), Stephen Morris (Moon's son-in-law), and Jolene Watson (the mother of Moon's young grandchild, Christopher) all testified to the devastating impact Moon's murder had on their lives and that of their family members. They described Moon as a generous person who loved life. He had a great sense of humor, was the "life of the party," and would take care of anyone who needed him.

(22RT 4869-4870, 4884-4885, 4893-4897.) He invited Morris and Maryann to move in with him while Morris attended the police academy, invited Watson to move in with him when she was pregnant with Christopher, and he took care of Christopher every night after work until the day he was killed. Moon was Morris's best friend and Morris credited Moon with his ability to complete the police academy. (22RT 4867-4869.)

After Moon's death, his wife, Catherine, was very lonely and seemed to have lost "the sparkle in her eye." (22RT 4875-4877, 4897-4898.) There was a "void" in the family and they always felt like someone was missing. (22RT 4896-4897.) Christopher often asked why Moon was no longer there to play with him. (22RT 4886.)

All of the foregoing aggravating factors – including appellant's lack of regard for others, the callousness with which he committed his three prior violent crimes, his leadership role in Moon's death, the fact that he was the actual shooter, the fact that he used his ability to influence others to commit crimes, and the devastating impact Moon's murder had on Moon's family – foreclosed a verdict of anything other than death. Under the circumstances, there was no reasonable possibility that Johnston's letter, which made no reference to the circumstances of the crimes or who actually killed Moon, affected the death verdict.

XV. DURING THE PENALTY PHASE, THE TRIAL COURT PROPERLY ADMITTED TWO STILL PHOTOGRAPHS CREATED FROM THE SURVEILLANCE VIDEO TAKEN AT EDDIE'S LIQUOR STORE

Similar to Argument VII, appellant argues that, during the penalty phase, the trial court erroneously and prejudicially admitted two still photographs that were printed from the surveillance video of the shooting at Eddie's Liquor Store. He contends the photographs might have been enhanced and the prosecution failed to lay a proper foundation for any

enhancement. (AOB 292-300.) As set forth in detail in Argument VII, the court properly admitted the photographs as duplicates printed directly from the original videotape without any enhancement.

A. The Relevant Trial Court Proceedings

During the penalty phase, Sergeant Cisneros testified that officers retrieved a surveillance videotape at Eddie's Liquor on the day of the shooting. The officers printed two still photographs from the video. Sergeant Cisneros viewed the surveillance video at the Long Beach Police Department. He later took the video to the Aerospace Corporation in El Segundo. Sergeant Cisneros gave the video to an Aerospace employee and stayed with that employee the entire time he had the video. The employee placed the video in a video player. Sergeant Cisneros watched the video with the Aerospace employee. The frame was larger on the screen at Aerospace than when the videotape was played on the Long Beach Police Department's VCR, meaning that Sergeant Cisneros was able to see more of what the camera captured at the top and bottom of the screen. (19RT 4229-4234.) At Sergeant Cisneros's request, the Aerospace employee printed two still photographs from the videotape (Peo. Exh. Nos. 41, 42, 43A, & 43B) and made a copy of the videotape at a slower speed, which allowed viewing on a regular VCR. (19RT 4235.)

Appellant's counsel objected, arguing the prosecution failed to lay a proper foundation for the still photographs printed at Aerospace because it was unclear whether Aerospace enhanced the video. The trial court asked whether there was any difference suggesting an enhancement. Appellant's second counsel noted only that more of the top and bottom of the screen could be seen. (19RT 4237-4241.) The prosecutor clarified that Sergeant Cisneros had testified during the guilt phase that Aerospace was unable to enhance the videotape, and the only difference was that more of what was

captured by the camera lens could be seen on the Aerospace video machine. (19RT 4241-4242.) The court overruled the objection, finding no evidence of an enhancement and that defense counsel's arguments were speculative. (19RT 4244-4245.)

B. The Trial Court Properly Admitted The Two Still Photographs As Duplicates Printed From the Eddie's Liquor Surveillance Videotape

As argued in detail in Argument VII, Subdheading (D), the trial court properly admitted the two still photographs printed from the Eddie's Liquor surveillance video as duplicate images, rather than enhanced photos. Sergeant Cisneros testified that the images were the same, except that more of the frame – the top and bottom of what was captured – could be seen when the video was played on the Aerospace machine. He had also clarified during the guilt phase that Aerospace was unable to enhance the video. Accordingly, the trial court properly determined that no image enhancement had been performed and, implicitly, that the still photographs were simply duplicates printed from the original videotape. (See Evid. Code, § 1553 ["A printed representation of images stored on a video or digital medium is presumed to be an accurate representation of the images it purports to represent."].) As the original videotape was properly authenticated and the still photographs were printed directly from the videotape without any image enhancement, no further foundational showing was required. (See Arg. VI, *ante*.)

C. Even if The Still Photographs Were Erroneously Admitted, Any Error Was Harmless

Even if additional foundational testimony was required for admission of the two still photographs, there was no reasonable probability the error

affected the death verdict. (See *Gay*, *supra*, 42 Cal.4th at p. 1223; *Lancaster*, *supra*, 41 Cal.4th at p. 94.) As noted in Argument XIV, during the penalty phase, the evidence of appellant's guilt was relevant only to his level of culpability and any lingering doubt. The surveillance videotape and still photographs printed from it at Aerospace showed the two suspects inside Eddie's Liquor. The videotape showed their clothing and general physical appearances, but did not clearly show their faces, how the crimes were committed, or who shot Moon. (Peo. Exh. No. 36.) The only difference between the still photographs and the video was that a larger portion of the suspects' heads could be seen in the still photographs.[45] While the still photographs reflected some features distinct to appellant – his ear and a portion of his profile – suggesting more strongly that he was the one holding the gun and the last to run out of Eddie's Liquor, his identity as the shooter was nevertheless established by the surveillance video itself and other evidence.

Evidence apart from the still photographs strongly showed appellant's identity as the actual shooter. As noted above, the surveillance video, without showing as much of the suspects' heads, showed one suspect wearing a black Nike Air T-shirt and the other wearing long, dark shorts. Marcia established that appellant wore a black Nike Air T-shirt during the crimes. Miller and Stephanie confirmed that one of the suspects wore a T-shirt matching the general description of the Nike Air T-shirt. The Nike Air T-shirt was found in appellant's residence one week later. Additionally, the gun used to kill Moon, which appellant stole one month earlier during the Riteway robbery and which could be seen in appellant's hand in the

[45] The suspects' heads can be seen to some extent in the video as well, as they get further into the entrance of the store, but not immediately as they walk through the doorway. (Peo. Exh. No. 36.)

surveillance video from Riteway, was also found in appellant's residence one week later. Accordingly, the evidence strongly showed that appellant was the shooter apart from the still photographs.

Moreover, for the reasons set forth in detail in Argument XIV, Subheading (C), the aggravating factors outweighed any mitigating factors regardless of the fact that the jury was able to see more of appellant's features in the two still photographs printed at Aerospace. As noted, the evidence strongly showed that appellant occupied a position of leadership in the attempted robbery and murder at Eddie's Liquor, he actually killed Moon, and he committed three prior armed offenses in a brazen fashion and without regard for the safety of others in the immediate area. Additionally, although he knew right from wrong, had served as a positive influence on others while in CYA, and had supposedly found religion while in CYA, he committed the Riteway and Eddie's Liquor offenses within a few months of his release. (See Arg. XIV, Subh. (C).) Under the circumstances, it is not reasonably possible that admission of the still photographs, which simply provided additional evidence of appellant's identity, in any way affected the death verdict.

XVI. DURING THE PENALTY PHASE, THE TRIAL COURT PROPERLY EXCLUDED APPELLANT'S SELF-SERVING STATEMENT REGARDING HIS REASON FOR SHOOTING MOON

Appellant contends that the trial court erroneously and prejudicially excluded his statement to Marcia that Moon had reached for a gun. He contends the statement was admissible under Evidence Code section 356 and necessary in order to place the remainder of appellant's statements to Marcia in context.[46] (AOB 301-317.) However, appellant's statement that

[46] Evidence Code section 356 provides as follows:

(continued...)

Moon reached for a gun was not admissible pursuant to Evidence Code section 356 because it was irrelevant to the jury's understanding of the statements elicited by the prosecution from Marcia. The statement was simply inadmissible and self-serving. In any event, the jury was aware of appellant's claim that Moon reached for a gun apart from any statement by appellant to that effect.

A. The Relevant Proceedings

The prosecution called Marcia as a witness during the penalty phase. On cross-examination, appellant's counsel questioned Marcia about her interview with Detective Edwards. He specifically asked, "Do you remember telling [Detective Edwards] that the defendant said the man tried to get a gun?" (21RT 4767-4768.) The prosecutor objected on hearsay grounds. The trial court sustained the objection. (21RT 4768.)

At appellant's counsel's request, the trial court held a sidebar conference in chambers. Appellant's counsel argued that appellant's statement was a statement against interest because, although he addressed the circumstances of the shooting, appellant admitted to being the shooter. (21RT 4768.) Appellant's counsel read the following statement made by Detective Edwards, which was a statement Marcia had earlier relayed to him before the interview was recorded: "And Waac said the man tried to get a gun. And Waac was trying to get the money, so Waac shot him."

(...continued)

> Where part of an act, declaration, conversation, or writing is given in evidence by one party, the whole on the same subject may be inquired into by an adverse party; when a letter is read, the answer may be given; and when a detached act, declaration, conversation, or writing is given in evidence, any other act, declaration, conversation, or writing which is necessary to make it understood may also be given in evidence.

Marcia responded, "Yeah." (21RT 4769-4770.) The prosecutor argued the statement was not a statement against interest because appellant was available to testify and the statement was unreliable because appellant was justifying the shooting. The court agreed the statement was exculpatory. Appellant's counsel argued that both the incriminating and exculpatory portions of the statement should be admitted. Before again sustaining the objection, the court noted that the statement could not qualify as an admission because an admission had to be used by the opposing party. (21RT 4770-4771.)

Appellant's counsel continued cross-examining Marcia and questioned her in detail about her statements to Detective Edwards. He specifically asked about her statements to Detective Edwards regarding the plans appellant made with her, codefendant Taylor, and codefendant Johnson the morning of the Eddie's Liquor offenses. (21RT 4779-4791, 4798-4804.) On recross-examination, appellant's counsel elicited from Marcia that she initially lied to Detective Edwards about the timing of the planning and other details in order to minimize the roles she and codefendant Johnson played in the Eddie's Liquor offenses. (21RT 4816.)

The prosecutor called Detective Edwards as a witness and questioned him about Marcia's September 23, 1999, statements. (22RT 4825-4826.) Appellant's counsel objected on hearsay grounds. The court noted the statements were presumably prior inconsistent statements. The prosecutor added that the statements were also admissible under Evidence Code section 356, the rule of completion, due to defense counsel's cross-examination of Marcia. The court overruled the objection. (22RT 4826.) Appellant's counsel requested a sidebar, wherein he argued the prosecutor could address only specific statements that were inconsistent. (22RT 4827.) The prosecutor responded as follows:

My offer is that he is going to say initially she said that she was with only Sam Taylor and her brother. They traveled to Eddie's Liquor store in the brown Cutlass, and they parked in front of the liquor store. She did not mention Chism at that time. Then she says that she went in, she made a purchase, and then they went and they watched cheerleading practice.

He then confronts her and says, "I don't believe you." She changes her story and gives the story that involves the robbery and Chism. He says, "I believe part of what you're saying, but I believe that – but I believe there's more to the story. I believe it was planned the night before." The she admits, yes, it was planned the night before.

All of those areas were gone into on cross-examination in an attempt to impeach the witness with prior inconsistent statements. Unfortunately, they were taken out of context. I think it in some ways misleads the jury as to how the interview transpired, what was actually said in the statement. So I believe under the rule of completion, we're entitled to bring out all the statements that relate to the statement that was brought out by Mr. Herzstein and put it in an appropriate context.

Also, it will include prior inconsistent, as well as consistent statements.

Also, under 1202 of the Evidence Code, when a hearsay declaration is offered, we may bring in all other hearsay statements that refute or demonstrate that that particular hearsay statement is not to be credited.

And I'm referring to the statement, brought out by [appellant's counsel], where they travel to Eddie' Liquor store, they parked in front of the liquor store, they traveled in a brown Cutlass, and she was only with her brother and Mr. Taylor.

So I get to put the entire thing into context. The appropriate context.

(22RT 4827-4828.)

The trial court noted that the detective's testimony demonstrated the inconsistencies in Marcia's testimony, apart from Marcia's admission that she made an inconsistent statement. The court further explained that the prosecutor was permitted to impeach Marcia through Detective Edwards's testimony and that the jury could decide whether Detective Edwards's account was correct. (22RT 4828-4829.)

Appellant's second counsel argued the statements were inadmissible under Evidence Code section 356 because the prosecution originally proffered the witness, Marcia, and only an adverse party could seek to complete a portion of the statement. The prosecutor responded that appellant's second counsel had missed the fact that appellant's first counsel was the party who had elicited Marcia's statements to Detective Edwards during Marcia's testimony. The court overruled the objection. (22RT 4830-4831.)

As stated in more detail in the Penalty Phase Statement of Facts, *ante*, Detective Edwards testified about his September 23, 1999, meeting with Marcia. (22RT 4823-4825.) Marcia initially told him that she went to Eddie's Liquor to purchase candy with codefendants Johnson and Taylor in Taylor's brown Oldsmobile Cutlass. (22RT 4832.) After Detective Edwards told her that other people had given a different version of events, she admitted she went to the liquor store in a gray van with appellant, codefendant Johnson, and codefendant Taylor. They parked on a side street. She went into the liquor store alone and purchased Jolly Rancher candy. (22RT 4833-4834.) Marcia returned to the van, and appellant and codefendant Johnson walked to the liquor store. She saw that appellant had a gun in his right hand as he got out of the van, and said that was the only time she had seen him with a gun. A short time later, appellant and codefendant Johnson ran back to the van and the group left the area. (22RT 4834.)

Detective Edwards further testified that he had said to Marcia that he believed the group planned the robbery on the previous night at her residence. Marcia agreed. (22RT 4835.) She described the clothing worn by appellant and codefendant Johnson. (22RT 4836.) Marcia also said that appellant dove through the passenger window when he returned to the van after running out of Eddie's Liquor. (22RT 4838.) She added that, after the group picked up Johnston and Valicia in Long Beach and traveled on the 710 Freeway, she saw several helicopters flying overhead. (22RT 4839.) She later also admitted she had seen appellant with the gun one or two months prior to June 12, 1997. (22RT 4838.)

Appellant's counsel cross-examined Detective Edwards. Detective Edwards explained that Marcia initially gave him a false version of events and then gave him what he believed to be a correct version. She later told him more details of the second version of events. (22RT 4849-4850.) During the second version of events, Marcia said that appellant had a gun as he walked toward Eddie's Liquor, but she had not seen him with the gun before. Later, she admitted she had seen appellant with a gun on previous occasions. (22RT 4850-4851.) At that point, appellant's counsel attempted to elicit from Detective Edwards that Marcia told him that appellant said Moon had reached for a gun. The prosecutor objected. (22RT 4851-4852.)

At sidebar, appellant's counsel argued that appellant's statement to Marcia was admissible under Evidence Code section 356 because it was relevant to the circumstances of the crimes and what Marcia observed. (22RT 4852-4856.) The prosecutor responded that she had not addressed those areas of appellant's statements, Evidence Code section 356 was inapplicable because appellant's statements were not relevant to Marcia's activities, and there was a multiple hearsay problem. (22RT 4853.) The trial court sustained the prosecution's objection, finding that appellant's

statement did not explain prior testimony by Marcia and the evidence elicited by the prosecutor was not misleading. (22RT 4856.)

B. The Trial Court Properly Excluded Appellant's Inadmissible and Self-Serving Statement to Marcia

The trial court properly excluded testimony from Marcia, that appellant told her that he thought Moon reached for a gun, as inadmissible hearsay. As the prosecutor noted, the statement was offered by appellant and was self-serving. To qualify as an admission, a statement must be offered by the adverse party. (Evid. Code, § 1220 [an admission is a statement "offered against the declarant in an action to which he is a party"].) Although Marcia was the prosecution's witness, only appellant's counsel attempted to elicit from her that appellant said Moon reached for a gun. (21RT 4767-4768.) Thus, the statement was offered by appellant, not an adverse party.

Appellant's statement also did not qualify as a declaration against interest because appellant was available and the statement was self-serving. (Evid. Code, § 1230 [for a statement against interest, declarant must be unavailable and the statement must be "so far contrary to the declarant's pencuniary or proprietary interest, or so far subject[] him to the risk of civil or criminal liability . . . that a reasonable man in his position would not have made the statement unless he believed it to be true."].) Appellant's purpose in offering the statement was to justify and mitigate the circumstances of the shooting – he wanted the jury to believe he shot Moon only because he thought Moon was reaching for a gun. The statement was not against his interest as proffered. Appellant certainly cannot offer his own self-serving statement and then claim he is unavailable as a witness, thereby preventing cross-examination on the subject.

The trial court also appropriately precluded appellant from offering the same statement – he told Marcia that Moon reached for a gun – through Detective Edwards. Contrary to appellant's argument, the statement was not admissible under Evidence Code section 356 during Detective Edwards's testimony because it did not purport to be a statement from Marcia that explained her prior testimony. (AOB 307-316.) Evidence Code section 356 permits an adverse party to inquire into the whole of a statement or writing only where the omitted portion is necessary for an understanding of the admitted portion. "The purpose of Evidence Code section 356 is to avoid creating a misleading impression. [Citation.] It applies only to statements that have some bearing upon, or connection with, the portion of the conversation originally introduced. [Citation.] Statements pertaining to other matters may be excluded. [Citation.]" (*People v. Samuels* (2005) 36 Cal.4th 96, 130.)

Marcia's testimony addressed what she perceived during the planning of the robbery and the events leading up to and following the shooting. The prosecution did not inquire about, and Marcia did not make any statements concerning, the circumstances of the actual shooting inside Eddie's Liquor. Accordingly, any statement explaining how the actual shooting occurred was not relevant to an understanding of any portion of Marcia's testimony.

Significantly, Marcia did not convey any statement by appellant concerning the circumstances of the shooting itself that would have necessitated clarification with appellant's self-serving statement that Moon reached for a gun. Indeed, appellant attempted to improperly "clarify" Marcia's observations with a statement made by him, in a manner neither permitted nor contemplated by Evidence Code section 356.

As the prosecutor noted, appellant's proffered statement also involved multiple levels of hearsay. Appellant purportedly told Marcia that Moon reached for a gun. Marcia then told Detective Edwards that appellant said

that Moon reached for a gun. Appellant's counsel then attempted to elicit a statement from Detective Edwards, conveying Marcia's recitation of appellant's statement. In this manner, appellant sought to elicit his own statement through multiple levels of inadmissible hearsay. While a defendant in a capital case is entitled to present mitigating evidence or evidence creating a lingering doubt, he may not present evidence that is otherwise incompetent, irrelevant, or inadmissible. (*Gay*, *supra*, 42 Cal.4th at pp. 1220-1221; see also *People v. Blair* (2006) 36 Cal.4th 686, 750 [finding that "evidence proffered on the issue of lingering doubt may be excluded because the evidence in question is otherwise inadmissible as hearsay or is unreliable"].)

C. Any Error Was Harmless

Even if the trial court erroneously excluded appellant's statement to Marcia that Moon reached for a gun, any error was harmless because the jury was presented with that theory apart from appellant's statement. The jury was left to draw inferences as to how the actual murder occurred because the surveillance videotape from Eddie's Liquor did not depict the actual shooting. The evidence showed that appellant had a firearm with him when he and codefendant Johnson entered Eddie's Liquor. They were inside for less than two minutes before shooting Moon. They ran out immediately after the shooting. Since the shooting happened very quickly after appellant and codefendant Johnson entered, they were unable to take anything from the store, and there was no apparent motive for killing Moon other than to effectuate a robbery and/or escape, the jury reasonably might have inferred that Moon attempted to defend himself.

From the facts, the prosecutor argued, inter alia, that appellant committed the crimes for the thrill of committing them, as was shown by the manner in which the crimes were committed.[47] The money or robbery proceeds did not appear to be central to the crimes and were a mere "pittance" compared to the risk involved. (24RT 5384-5387, 5400, 5433-5434.) In response, appellant's counsel argued that, based on the position of Moon's legs, it appeared Moon was still in the process of turning away from the suspects when he was shot. Appellant's counsel, thus, argued that appellant fired at Moon only because he thought Moon was reaching for a gun and he simply reacted.[48] (24RT 5454-5455.)

From appellant's counsel's argument, the jury was clearly aware of appellant's claim that he thought Moon was reaching for a gun. The jury could reasonably have interpreted the evidence as supporting appellant's theory, but it either rejected the theory or did not believe it truly mitigated the circumstances of the offense. Indeed, Snow had never known Moon to keep a firearm in the store, and no firearm was found inside. Moreover, even if the jury believed that appellant thought Moon reached for a gun, he shot Moon while he attempted to rob the liquor store and had created a

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[47] Contrary to appellant's contention, the prosecutor could and certainly would have made this argument regardless of any statement by appellant that he thought Moon reached for a gun. (See AOB 316.)

[48] As counsel's argument demonstrates, neither the trial court nor the prosecutor prevented appellant's counsel from arguing the point during closing argument or prevented appellant himself from testifying that he thought Moon reached for a gun. Appellant, thus, was not prevented from presenting the information or a defense. (See AOB 313-314 [contending the trial court's ruling denied his right to present a defense].) He was simply prevented from presenting the information in an inadmissible form. (See *Smith*, *supra*, 30 Cal.4th at p. 631, fn. 11 [noting that a defendant may properly present relevant and admissible mitigating evidence during trial, and may argue the point to the jury, but he may not present the information in the form of inadmissible hearsay].)

situation where Moon had to defend himself. As any separate hearsay statement by appellant to Marcia stating that Moon reached for a gun would have added little, if anything, to the evidence already presented, there is no reasonable possibility that admission of the statement would have affected the jury's death verdict. (See *Gay*, *supra*, 42 Cal.4th at p. 1223; *Lancaster*, *supra*, 41 Cal.4th at p. 94.)

XVII. THE TRIAL COURT PROPERLY PERMITTED THREE OF MOON'S FAMILY MEMBERS TO PRESENT VICTIM IMPACT EVIDENCE

Appellant contends the victim-impact evidence presented by Moon's son-in-law (Morris), Moon's daughter (Maryann), and the mother of Moon's grandson (Watson) was overly prejudicial. The testimony, he argues, in conjunction with the presentation of photos of Moon while alive mandates reversal. (AOB 301-334.) However, only three of Moon's family members/friends testified, their testimony was fairly brief and limited to the effect of Moon's death on their lives or that of their close family members, and the photos were relevant to show who Moon was at the time appellant encountered him.

A. The Applicable Law

The United States Supreme Court has specifically authorized the use of victim impact evidence during the penalty phase of a capital trial. (*Payne*, *supra*, 501 U.S. at pp. 823-827.) The Court in *Payne* ruled that individual states are free to conclude that "evidence about the victim and about the impact of the murder on the victim's family" is "relevant to the jury's decision as to whether or not the death penalty should be imposed." (*Id.* at p. 827.) In reaching this conclusion, the United States Supreme Court overruled its prior decisions in *Booth v. Maryland* (1987) 482 U.S. 496 [107 S.Ct. 2529, 96 L.Ed.2d 440] (*Booth*), and *South Carolina v. Gathers* (1989) 490 U.S. 805 [109 S.Ct. 2207, 104 L.Ed.2d 876] (*Gathers*). In *Booth*, the Court had held that victim impact evidence was inadmissible per se, except to the extent that it "relate[d] directly to the circumstances of the crime." (*Booth*, *supra*, 482 U.S. at 507, fn. 10.) In *Gathers*, the Court extended the rule articulated in *Booth* to prohibit a prosecutor from arguing the personal qualities of the victim to the jury during the penalty phase of a capital trial. (*Gathers*, *supra*, 490 U.S. at pp. 810-812.) In *Payne*, the Court abrogated its prior rulings, and concluded that victim impact evidence,

> is simply another form or method of informing the sentencing authority about the specific harm caused by the crime in question, evidence of a general type long considered by sentencing authorities.

(*Payne*, *supra*, 501 U.S. at p. 825.) The Court noted that, "[t]here is no reason to treat such evidence differently than other relevant evidence is treated." (*Id.* at p. 827.)

More importantly, the Court recognized in *Payne* that its decisions in *Booth* and *Gathers* had resulted in an inequity. (*Payne*, *supra*, 501 U.S. at p. 822.) Under *Booth* and *Gathers*, a defendant could present any relevant

mitigating evidence, irrespective of whether it directly related to the circumstances of his offense, while the State was prevented from "demonstrating the loss to the victim's family and to society which has resulted from the defendant's homicide." (*Ibid.*) The Court explained:

> We are now of the view that a State may properly conclude that for the jury to assess meaningfully the defendant's moral culpability and blameworthiness, it should have before it at the sentencing phase evidence of the specific harm caused by the defendant. "[T]he State has a legitimate interest in counteracting the mitigating evidence which the defendant is entitled to put in, by reminding the sentencer that just as the murderer should be considered an individual, so too the victim is an individual whose death represents a unique loss to society and in particular to his family."

(*Payne*, *supra*, 501 U.S. at p. 825, quoting *Booth*, *supra*, 482 U.S. at 517 (White, J., dissenting).)

In articulating its ruling, the *Payne* Court noted:

> Payne echoes the concern voiced in Booth's case that the admission of victim impact evidence permits a jury to find that defendants whose victims were assets to their community are more deserving of punishment that those whose victims are perceived to be less worthy. [Citation.] As a general matter, however, victim impact evidence is not offered to encourage comparative judgments of this kind - for instance, that the killer of a hardworking, devoted parent deserves the death penalty, but that the murderer of a reprobate does not. It is designed to show instead *each* victim's "uniqueness as an individual human being," whatever the jury might think the loss to the community resulting from his death might be.

(*Payne*, *supra*, 501 U.S. at p. 823.) The Court did not place any limitations on the type or amount of victim impact evidence that could be admitted during a penalty phase, but explained that "[i]n the event that evidence is introduced that is so unduly prejudicial that it renders the trial fundamentally unfair, the Due Process Clause of the Fourteenth

Amendment provides a mechanism for relief." (*Payne*, *supra*, 501 U.S. at p. 825.)

Shortly after the United States Supreme Court's decision in *Payne*, this Court ruled that victim impact evidence was admissible as a circumstance of the crime under Penal Code section 190.3, factor (a). (*People v. Edwards* (1991) 54 Cal.3d 787, 833 (*Edwards*).) Penal Code section 190.3, factor (a), permits the prosecution to show aggravating factors through the circumstances of the crime. The circumstances of the crime include not only temporal and spatial circumstances, but also factors that "materially, morally, or logically" attend the crime. (*Edwards*, *supra*, 54 Cal.3d at p. 833; see also *People v. Brown* (2004) 33 Cal.4th 382, 398 (*Brown*); *People v. Taylor* (2001) 26 Cal.4th 1155, 1171; *People v. Mitcham* (1992) 1 Cal.4th 1027, 1063.)

Under Penal Code section 190.3, factor (a), the specific harm caused by the defendant may be shown, including the psychological and emotional impact on surviving victims, family members, and close personal friends. (*Ibid.*; see *People v. Prince* (2007) 40 Cal.4th 1179, 1289 (*Prince*) [victim-impact evidence is not limited to family; close personal friends may also testify about their loss and suffering]; *People v. Pollock* (2004) 32 Cal.4th 1153, 1183 (*Pollock*) [same].) Family members may also testify about the impact of the loss on other family members, not just themselves. (*People v. Panah* (2005) 35 Cal.4th 395, 494-495 (*Panah*).) Additionally, the trial court may admit "victim impact testimony from multiple witnesses who were not present at a murder scene and who described circumstances and victim characteristics unknown to the defendant." (*People v. Zamudio* (2008) 43 Cal.4th 327, 364 (*Zamudio*); accord, *People v. Hartsch* (2010) 49 Cal.4th 472, 232 P.3d 663, 712 (*Hartsch*) [ruling that victim-impact evidence should not be limited to only one witness for each victim].)

Moreover, this Court has repeatedly reaffirmed that both victim-impact evidence and related "victim character" evidence are admissible as circumstances of the crime. (*People v. Robinson* (2005) 37 Cal.4th 592, 650; *Panah*, *supra*, 35 Cal.4th at p. 495; *People v. Benavides* (2005) 35 Cal.4th 69, 107; *Brown*, *supra*, 33 Cal.4th at pp. 396-398; *Pollock*, *supra*, 32 Cal.4th at p. 1181.) The prosecution may admit, as evidence of the specific harm caused by the defendant, the loss to society and the victim's family of the unique individual who was killed. (*People v. Huggins* (2006) 38 Cal.4th 175, 238 (*Huggins*).)

On the other hand, proper victim-impact evidence does not include opinions or characterizations about the crime, the defendant, or the appropriate punishment by the victim's family or friends. (*Pollock*, *supra*, 32 Cal.4th at p. 1180.) Evidence and argument on emotional but relevant subjects that could provide legitimate reasons for the jury to show mercy or to impose the death penalty should be allowed, while "'irrelevant information or inflammatory rhetoric that diverts the jury's attention from its proper role or invites an irrational, purely subjective response should be curtailed.'" (*Edwards*, *supra*, 54 Cal.3d at 836, quoting *People v. Haskett* (1982) 30 Cal.3d 841, 864; see also *Pollock*, 32 Cal.4th at p. 1180 [evidence admissible if it "is not so inflammatory as to elicit from the jury an irrational or emotional response untethered to the facts of the case"].)

Photographs or videos of the victim that reflect his or her life may be properly admitted as a circumstance of the crime. (*Zamudio*, *supra*, 43 Cal.4th at p. 367; *Kelly II*, supra, 42 Cal.4th at p. 797; *People v. Harris* (2005) 37 Cal.4 310, 352.) A photograph of the victim while alive is admissible during the penalty phase as a circumstance of the offense because "it portrays the victim as seen by the defendant before the murder." (*People v. Anderson* (2001) 25 Cal.4th 543, 594 (*Anderson*), citing *Box*, *supra*, 23 Cal.4th at p. 1201; *People v. Lucero* (2000) 23 Cal.4 692, 714.)

Videos or filmed tributes are also permissible, but courts must exercise great caution in permitting the prosecution to use lengthy videotaped or filmed tributes, particularly if the video includes stirring music or emphasizes the childhood of an adult victim. (*Prince*, *supra*, 40 Cal.4th at p. 1289.)

B. The Relevant Penalty Phase Proceedings

Before any victim-impact evidence was introduced, appellant filed a written motion to limit victim-impact evidence. Appellant argued that victim-impact evidence was not permitted under California law because California law permits the weighing of aggravating and mitigating factors, and that victim-impact evidence should not include any future speculation about the victim's life. (3CT 836-840.) Appellant filed a supplemental motion to limit victim-impact evidence, arguing that any such evidence should be limited only to that expressly noted in *Payne*. (3CT 848-849.) As the motions did not address specific evidence and the prosecutor asked for clarification, the trial court stated it would address objections as raised during the testimony. (14RT 3012-3014.)

Morris, Moon's son-in-law, testified during the prosecution's case-in-chief. (22RT 4859.) When the prosecutor asked Morris if he could identify photographs of Moon while he was alive that were shown on a photo board, appellant's counsel objected. (22RT 4860-4861; Peo. Exh. No. 52.) Appellant's counsel noted that one photo depicted a small child and that a larger photo depicted the victim in a "Jesus Christ pose." Appellant's counsel argued the photographs were intended solely to evoke sympathy and were unrelated to the impact of the crime on the victim's family. Appellant's counsel further argued that evidence of Moon's character was inadmissible. (22RT 4860-4861, 4863.)

The prosecutor responded that the photos were appropriate under Penal Code section 190.3, factor (a), because the photos depicted Moon's character and the person appellant encountered when he entered Eddie's Liquor. (22RT 4862.) She further noted that Moon's character was admissible. (22RT 4866.)

The trial court explained to defense counsel that the termination of family relationships with Moon was a circumstance relevant to the offense. Moon's character was reflected in the relationships. (22RT 4863.) The court explained that if Moon's character was the reason he was loved by his family members, it was relevant to show how the loss of the relationships affected the family members. The court overruled the objection. (22RT 4865-4866.)

Morris continued his testimony. As noted in more detail in the Statement of Facts, *ante*, Morris explained that he first met Moon in 1996 and eventually became his son-in-law and best friend. Moon called Morris his son. Moon was the most generous person Morris knew. Morris credited Moon with his ability to complete the police academy, as Moon had invited Morris to live with him while Morris attended the academy. (22RT 4867-4869.) Appellant's counsel objected when the prosecutor questioned Morris about the time period when he began living with Moon, and moved to strike Morris's testimony that Moon knew Morris's father left when Morris was a child and he called Morris his son. The trial court overruled both objections. (22RT 4867-4869.)

Morris further noted that Moon was always willing to take in anyone who needed him. (22RT 4870.) Morris often spent time with Moon. Moon loved life and enjoyed music, food, and making jokes with strangers or anyone around. He had a great sense of humor. (22RT 4869-4870.)

Morris identified several photographs of Moon with his family, including photographs of Moon and Catherine on a trip, Moon at his

nephew's and son's high school graduations, several family members at Christmas, Moon wearing a Santa Claus suit with family members, Moon tossing a friend's grandchild in the air on a family trip, and Moon with his granddaughter. In many of the photographs, Moon could be seen "clowning around," as was typical of him. (22RT 4870-4874.) He loved his grandchildren and he commonly had one of them on his lap, sang with them, or would be tossing one of them in the air. (22RT 4877.)

Morris also testified that he was working very close to Long Beach when he heard of Moon's death. He cried and another officer had to drive him home. (22RT 4874.) Morris felt guilty because Moon had been so supportive of him getting through the police academy, but when Moon was shot only a few blocks from where Morris was working, Morris was unable to help. Morris missed him a great deal. (22RT 4874-4875.)

Morris testified that Catherine lived with him and Maryann for approximately one year after Moon's death. She was living with her son at the time of the trial. After Moon's death, Catherine spent a significant amount of time with her grandchildren and appeared to be filling a large "hole" in her life. (22RT 4875-4877.)

Watson testified that she had known Moon since the early 1980s, when she was approximately six years old. He was the grandfather of her son, Christopher, and her family's very good friend. Moon was like a father to her. (22RT 4883-4884, 4893.) Watson lived with Moon after Christopher was born. Moon helped with Christopher and played with him every night when he came from work until the day he died. (22RT 4884-4885.)

Watson and Moon's son, Billy, were living together with Christopher as a family at time of Moon's death. Watson had to inform Billy of Moon's death and had to try to explain to Christopher, who was two and a half, that his grandfather could no longer play with him. (22RT 4885, 4891.) At the

time of trial, Christopher still asked why Moon was not there to play with him anymore. Watson often heard Christopher, when he was alone in his room, talking to Moon. (22RT 4886.) Watson identified a photograph of Moon at her high school graduation and explained that he was there for every milestone in her life, including birthdays and the night Christopher was born. (22RT 4886-4887.)

Appellant's counsel objected when the prosecutor questioned Watson about Billy's relationship with Moon and the impact of Moon's death on him. Appellant's counsel argued there was no showing that Watson knew about Billy's relationship with Moon at the time of Moon's death, and that Watson was not a family member. The prosecutor responded that Moon was the grandfather of Watson's son, Watson knew Moon for approximately 18 years, Watson had dated his son, Billy, for seven years, and Watson saw Moon's wife on a daily basis. The trial court overruled the objection, finding that Watson was essentially a family member and noting that Watson was the person who notified Billy of Moon's death. (22RT 4888-4891.)

Watson further testified that Moon and Billy were "the best of friends" and Watson had never seen them argue. She also clarified that she and Billy were living together with their son, as a family, at the time Moon was murdered. (22RT 4891-4892.)

Maryann, Moon's step-daughter, testified that Moon married her mother, Catherine, when Maryann was eight. Moon always treated Maryann and her two younger brothers, who also were not his biological children, as if they were his biological children. Moon always played with them when they were children. He was a very generous, positive, and happy person. (22RT 4893-4895.)

Maryann had just returned from shopping for a Father's Day gift when Morris told her of Moon's death. She screamed, cried, and had to

call for a neighbor to help her with her daughter. Maryann described that moment as the most painful event she had ever experienced. Since Moon's death, Maryann felt there was a void in the family and they always felt like someone was missing. Moon was "the life of the party" and he was no longer present to fill that role. Maryann was very upset that her daughter was unable to remember Moon. (22RT 4896-4897.)

Maryann described Moon and Catherine's relationship as very happy and supportive. After Moon's death, Catherine appeared to be very lonely and seemed to have lost "the sparkle in her eye." (22RT 4897-4898.)

C. Victim-Impact Evidence Is Not and Should Not Be Limited To The Testimony of a Single Witness

Although neither *Payne* nor Penal Code section 190.3 limits victim-impact evidence in a capital case to the testimony of one witness, appellant urges this Court to adopt such a rule and to do so by making Penal Code section 1191.1[49] applicable to the penalty phase of a capital case. (See

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[49] Penal Code section 1191.1 provides, in relevant part, as follows:

> The victim of any crime, or the parents or guardians of the victim if the victim is a minor, or the next of kin of the victim if the victim has died, have the right to attend all sentencing proceedings under this chapter and shall be given adequate notice by the probation officer of all sentencing proceedings concerning the person who committed the crime.
>
> The victim, or up to two of the victim's parents or guardians if the victim is a minor, or the next of kin of the victim if the victim has died, have the right to appear, personally or by counsel, at the sentencing proceeding and to reasonably express his, her, or their views concerning the crime, the person responsible, and the need for restitution. The court in imposing sentence shall consider the statements of victims, parents or guardians, and next of kin made pursuant to this section and

(continued...)

AOB 324-330.) Appellant forfeited his claim by failing to object on this basis in the trial court. Moreover, even if appellant properly preserved the instant claim for review, this Court has repeatedly rejected similar arguments and Penal Code section 1191.1 does not assist appellant because the statute does not apply to the penalty phase of a capital case.

As shown above (see subheading B), appellant argued in the trial court that victim-impact evidence should not be permitted in California because the State provides for the weighing of aggravating and mitigating circumstances, that victim-impact evidence should be limited to the testimony of immediate family members of the victim only, and that family members should not be permitted to testify about speculative matters such as acts or events that might have occurred if the victim had lived. (3CT 836-840, 848-849.) He also objected to specific questions or answers during the direct examinations of Morris and Watson. (22RT 4860-4861, 4867-4869, 4889-4890.) However, appellant never requested that the trial court follow Penal Code section 1191.1 and/or rule that only one victim-impact witness could testify. (See 3CT 836-840; 22RT 4860-4861, 4867-4869, 4889-4890.) Consequently, he failed to preserve the instant claim for review. (*Kelly II*, *supra*, 42 Cal.4th at p. 793 [failure to object to particular victim-impact evidence forfeits issue on appeal]; *Huggins*, *supra*, 38 Cal.4th at pp. 236, 238 [failure to object to victim-impact evidence on specific constitutional grounds forfeits issue on appeal].)

Even if appellant had properly preserved his claims that Penal Code section 1191.1 should apply to the penalty phase of a capital case and that only one witness should have been permitted to testify, the contentions are

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(...continued)

shall state on the record its conclusion concerning whether the person would pose a threat to public safety if granted probation.

meritless. Penal Code section 1191.1 does not apply to the penalty phase of a capital case. (See *Brown*, *supra*, 31 Cal.4th at p. 573, fn. 24 [noting "[i]t is doubtful [Penal Code section 1191.1] applies to the penalty phase of a capital trial . . . ."].) Unlike a sentencing hearing, the penalty phase of a capital case is governed by Penal Code section 190.3. The statute specifically sets forth the factors that must or may be considered at the penalty phase. Factor (a) of Penal Code section 190.3 requires the trier of fact to consider testimony or evidence relevant to the circumstances of the crime. This Court has repeatedly found that victim-impact evidence is a circumstance of the crime, and that more than one victim-impact witness may testify. (*Pollock*, *supra*, 32 Cal.4th at p. 1183; *Boyette* 29 Cal.4th at pp. 440-441; accord, *Hartsch*, *supra*, 232 P.3d at p. 712; *Zamudio*, *supra*, 43 Cal.4th at p. 364.)

In arguing that victim-impact evidence should be limited to one witness pursuant to Penal Code section 1191.1,[50] appellant does not explain why the number of witnesses addressed in the statute should be applied to a penalty phase while the substance of the statute should not. Indeed, the statute permits a victim or next of kin to express his or her opinion on the crime, the defendant, and any potential restitution at a sentencing hearing. (Pen. Code, § 1191.1.) It is well settled, however, that victims and/or their friends and family may not express opinions on the crime, the defendant, or punishment at the penalty phase of a capital case. (*Payne*, *supra*, 501 U.S. at p. 830, fn. 2; *Lancaster*, *supra*, 41 Cal.4th at pp. 97-99; *Pollock*, *supra*, 32 Cal.4th at p. 1180.) As the foregoing demonstrates, Penal Code section 1191.1 is simply inapplicable to a penalty phase trial.

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[50] Penal Code section 1191.1 is not necessarily limited to one witness. The statute permits the victim, two of the victim's parents, or next of kin to address the court at sentencing.

Appellant further contends that other states have interpreted their statutes, governing penalty phase evidence, as more limiting than what was permitted here. (AOB 326-330.) Each state, however, is free to legislate regarding the permissible scope of evidence at a penalty phase trial as it deems appropriate as long as the state statute operates within the confines of the United States Constitution. (See *Payne*, *supra*, 501 U.S. at p. 827.) As noted, Penal Code section 190.3 governs the type of victim-impact evidence that may be permitted during a penalty phase in California, and this Court has already ruled that California Penal Code section 190.3, factor (a), permits the type of victim-impact evidence admitted here and permits more than one victim-impact witness. (See *Hartsch*, *supra*, 232 P.3d at p. 712.) Moreover, the evidence here was more limited than that addressed by appellant regarding other states' interpretations of their own statutes. For example, appellant argues that Kansas prohibits inflammatory comments or witnesses who cannot control their emotions and that Oklahoma prohibits testimony that focuses on an adult victim's childhood or his family's hopes and dreams for his future. (AOB 329.) Here, none of the victim-impact witnesses made inflammatory comments, none lost control of their emotions, and there were no references to Moon's childhood or the hopes for his future.

D. The Trial Court Properly Permitted the Photographs of Moon While Alive as Well as the Testimony of Three of Moon's Family Members

Appellant next contends that the scope and nature of the victim-impact evidence admitted was unduly prejudicial. To the contrary, the trial court appropriately permitted the prosecutor to use a photo board depicting Moon while he was alive and properly admitted the testimony of Morris, Maryann, and Watson because the evidence reflected Moon's character, his

relationships with his family members, and the impact his death had on his family. As Morris described, Moon could be seen in most of the photographs "clowning around," having fun, spending time with his wife and family, or playing with the children in his life. Morris, Maryann, and Watson described Moon as a loving, joyful person who was the life of the party. Those characteristics were reflected in the photos. As the court explained to defense counsel, those characteristics were relevant to the jury's understanding of the person Moon was at the time appellant encountered and killed him and of what Moon's family lost as a result of his death. (See *Anderson*, *supra*, 25 Cal.4th at p. 594 [photograph of the victim while alive is admissible as a circumstance of the offense because "it portrays the victim as seen by the defendant before the murder"]; accord, *Zamudio*, *supra*, 43 Cal.4th at p. 367 [photographs of the victim that reflect his or her life may be properly admitted as a circumstance of the crime].)

The testimony of Morris, Maryann, and Watson was likewise relevant to show Moon's character, the nature of his relationships with his family members, and the impact his death had on their lives. All three testified briefly about their relationships with Moon and mentioned Moon's relationships with other family members only briefly and generally. For example, Maryann testified that Moon and his wife, Catherine, had a very happy and supportive relationship. The testimony was so brief that it was transcribed in only 19 lines. (22RT 4897-4898.) Similarly, Watson's testimony about the loss to Moon's grandson, Christopher, covers only two pages of transcript (22RT 4885-4886), and her testimony about Billy's relationship with Moon likewise covers only approximately two pages of transcript (22RT 4888-4892). Under the circumstances, appellant cannot show the evidence was unduly lengthy, unfairly emotional, or otherwise prejudicial.

Appellant disagrees and argues the prejudicial nature of the photographs and testimony was evidenced by the fact that the jury asked to view the photo board during deliberations. (AOB 333.) However, appellant has not identified anything in the photographs that was irrelevant, inflammatory, or likely to invite an irrational response from the jury. (See AOB 333-334.) The prosecution, for example, did not present emotionally stirring music with the photographs or show photographs that depicted Moon in childhood. (See *Prince*, *supra*, 40 Cal.4th at p. 1289 [noting that courts must exercise great caution in admitting lengthy videotapes of the victim while alive, particularly if the video emphasizes the childhood of an adult victim or is accompanied by stirring music or such that it creates an emotional impact on the jury beyond what it might experience by viewing photographs]; see, e.g., *Zamudio*, *supra*, 43 Cal.4th at pp. 366-368 [holding that trial court properly admitted 14-minute video presentation of the victim while alive, which was narrated by victim-impact witness, because the court did not permit background music and ensured that witness's narration objectively described only what was depicted; also holding that photographs of victims' gravesites at end of video montage was proper as a circumstance of the crime].) One photograph depicted Moon in a pose that defense counsel described as a "Jesus Christ pose," but, as Morris explained, that was Moon "clowning around" and being the person he was. The court carefully limited the extent to which the jury could view the photographs to avoid any improper emotional response, as exemplified by its refusal of the jury's request to view the photographs of Moon a second time during deliberations.

Essentially, appellant is asking this Court to limit victim-impact evidence to only the type of evidence that was actually admitted in *Payne*. (See AOB 332.) However, *Payne* did not limit the amount or type of victim-impact evidence that may be admitted generally, other than to state

that due process concerns may arise if the evidence is so unduly prejudicial that it renders the trial unfair. (See *Payne*, *supra*, 501 U.S. at p. 825; *Hartsch*, *supra*, 232 P.3d at pp. 711-712.) This Court has also repeatedly rejected arguments similar to that made by appellant here. (See, e.g., *Prince*, *supra*, 40 Cal.4th at p. 1289; *Brown*, *supra*, 33 Cal.4th at p. 398; *Taylor*, *supra*, 26 Cal.4th at p. 1171; *Mitcham*, *supra*, 1 Cal.4th at p. 1063; *Edwards*, *supra*, 54 Cal.3d at p. 835.) As noted, Penal Code section 190.3, factor (a), makes evidence of the circumstances of the offense admissible in the penalty phase of a capital case in California, and this Court has repeatedly found that photographs of the victim while alive and testimony about his character are relevant as circumstances of the crime (see Pen. Code, § 190.3, factor (a)). (See *Prince*, *supra*, 40 Cal.4th at p. 1289 [photographs showing victim alive relevant and admissible]; *Robinson*, *supra*, 37 Cal.4th at p. 650 [victim character evidence admissible].)

As the victim-impact evidence presented here was relevant and brief, appellant cannot show the trial court abused its discretion in permitting the prosecution to use the photographs or admitting the testimony of Morris, Maryann, or Watson.

Moreover, as set forth in more detail in Argument XIV, Subheading (C), *ante*, the strength of the other aggravating factors presented at the penalty phase retrial – including appellant's lack of regard for others, the callousness with which he committed his three prior violent crimes, his leadership role in Moon's death, the fact that he was the actual shooter, and the fact that he used his ability to influence others to commit crimes – foreclosed a verdict of anything other than death. Under the circumstances, there was no reasonable possibility that the victim-impact evidence affected the death verdict.

XVIII. THE TRIAL COURT PROPERLY DECLINED TO INSTRUCT THE PENALTY PHASE JURY WITH APPELLANT'S PROPOSED JURY INSTRUCTIONS

Appellant contends the trial court violated his constitutional rights by declining to instruct the penalty phase jury with proposed instructions concerning the following subjects: (1) the scope of mitigating and aggravating circumstances that should be considered and the manner in which such circumstances are to be considered; (2) that the jury did not need to unanimously agree on the mitigating circumstances or find them to be true beyond a reasonable doubt; (3) the jury must assume the penalty it chose would be imposed; (4) that life without the possibility of parole meant "exactly what it says"; and (5) that a sentence of death "means that the defendant will suffer the ultimate penalty and be executed." (AOB 335-358.) As appellant concedes, this Court has already rejected similar proposed jury instructions. (AOB 336, citing *Smith*, *supra*, 30 Cal.4th at p. 638; *People v. Barnett* (1998) 17 Cal.4 1044, 1176-1177; *People v. Breaux* (1991) 1 Cal.4th 281, 314-315.)

Given this Court's prior rejection of appellant's proposed jury instructions, the trial court properly denied appellant's requests. First, appellant requested Proposed Jury Instruction Number 52.16, which provided as follows:

> The mitigating circumstances that I have read for your consideration are given to you merely as examples of some of the factors that you may take into account as reasons for deciding not to impose a death sentence in this case. You should pay careful attention to each of those factors. Any one of them may be sufficient, standing alone, to support a decision that death is not the appropriate punishment in this case. But you should not limit your consideration of mitigating circumstances to these specific factors. [¶] You may also consider any other circumstances relating to the case or to the defendant as shown by the evidence as reasons for not imposing the death penalty. [¶] A mitigating circumstance does not have to be proved

> beyond a reasonable doubt to exist. You must find that a mitigating circumstance exists if there is any substantial evidence to support it. [¶] Any mitigating circumstance presented to you may outweigh all the aggravating factors. You are permitted to use mercy, sympathy, or sentiment in deciding what weight to give each mitigating factor.

(4CT 917.)

The prosecutor objected, arguing the instruction was overbroad, conflicted with CALJIC No. 8.85 and Penal Code section 190.3, factor (k), and was argumentative in stating that mitigating circumstances did not need to shown beyond a reasonable doubt. (24RT 5304-5306.) The trial court agreed. (24RT 5307.)

The trial court's rejection of Proposed Instruction Number 52.16 was proper, as this Court has ruled in both *Lewis*, *supra*, 26 Cal.4th at page 393, and *Smith*, *supra*, 30 Cal.4th at page 638, that an instruction informing the jury it can consider "mercy" is inappropriate. Such an instruction suggests the jury may engage in arbitrary decision-making rather than use reasoned discretion based on the particular facts. (*Ibid.*) The Court held in both cases that the instruction was also cumulative because CALJIC No. 8.85 already informed the jury it could consider "any sympathetic . . . aspect of the defendant's character, or record in connection with the relevant statutory factors." (*Lewis*, *supra*, 26 Cal.4th at p. 393; accord, *Smith*, *supra*, 30 Cal.4th at p. 638.)

Additionally, in *Smith*, the Court ruled that proposed instructions on how the jury should consider mitigating circumstances were unnecessary because CALJIC No. 8.88 already informed the jury that the "weighing of aggravating and mitigating circumstances does not mean a mere mechanical counting of factors on each side of an imaginary scale . . .." (*Smith*, *supra*, 30 Cal.4th at p. 638, quoting CALJIC No. 8.88.) Finally, this Court has ruled that any instruction directing the jury that one mitigating

circumstance may outweigh all of the aggravating circumstances, without also stating the opposite, is argumentative. (*Smith, supra*, 30 Cal.4th at p. 638, citing *People v. Seaton* (2001) 26 Cal.4th 598, 689.) For the same reasons, appellant's claim regarding Proposed Instruction 52.16, which incorporates all of the above, must be rejected.[51]

Next, the court properly rejected appellant's request for Proposed Jury Instruction Number 52.25. The proposed instruction provided as follows:

> There is no requirement that all jurors unanimously agree on any matter offered in mitigation. Each juror must make an individual evaluation of each fact or circumstance offered in mitigation. Each juror must make his own individual assessment of the weight to be given such evidence. Each juror should weigh and consider such matters regardless of whether or not they are accepted by other jurors.

(4CT 921.) This Court has found that defendants are not entitled to have the jury instructed that it need not unanimously agree on a matter offered in mitigation. (*People v. Moon* (2005) 37 Cal.4th 1, 43; *Smith, supra*, 30 Cal.4th at p. 638; *People v. Coddington* (2000) 23 Cal.4th 529, 641, overruled on other grounds in *Price v. Superior Court* (2001) 25 Cal.4th 1046, 1069, fn. 13.) The Court has also ruled that CALJIC No. 8.88 sufficiently explains to a jury how it should arrive at the penalty determination, and there is no need to elaborate on how the jury should consider any particular penalty phase evidence. (*Perry, supra*, 38 Cal.4th at p. 320; *People v. Valencia* (2008) 43 Cal.4th 268, 310.)

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[51] Appellant addressed Proposed Jury Instruction Numbers 52.13, 52.15, and 52.24 in a footnote, noting that Proposed Jury Instruction Number 52.16 incorporated portions of those instructions. It does not appear that he is separately challenging the trial court's rulings as to those instructions. (See AOB 340, fn. 137.)

Third, the trial court properly rejected appellant's request to instruct the jury with Proposed Jury Instruction Number 52.26. The Proposed Instruction provides:

> The aggravating factors that I have just listed for you may be considered by you, if applicable, and established by the evidence, in determining the penalty you will impose in this case.
>
> These factors that I have listed are the only ones that you may find to be aggravating factors and you cannot take into account any other facts or circumstances as a basis for imposing the penalty of death on the defendant.

(4CT 922.) As this Court found in *Moon* and other cases, where the trial court gives the pattern sentencing instruction (CALJIC No. 8.85), as it did in this case, the court is not required to inform the jury that the list of aggravating factors is exclusive and/or that non-statutory aggravating factors cannot be considered. (*Moon*, *supra*, 37 Cal.4th at p. 42; *People v. Taylor* (2001) 26 Cal.4th 1155, 1180.)

Next, the trial court properly denied appellant's request to instruct the jury with Proposed Jury Instruction Number 52.32, which read as follows:

> The law of California does not require that you ever vote to impose the penalty of death. After considering all of the evidence in the case and the instructions given to you by the court, it is entirely up to you to determine whether you are convinced that the death penalty is the appropriate punishment under all of the circumstances of the case.

(4CT 924.) Appellant argues this instruction was necessary because the pattern instructions did not make it clear that "a death sentence is not appropriate for all defendants for whom a death penalty is warranted." (AOB 348.) However, in *Moon* and other cases, this Court has ruled that the defendant has no constitutional right to have the jury instructed "that

death must be the appropriate penalty, not just a warranted penalty[.]" (*Moon*, *supra*, 37 Cal.4th at p. 43; *Boyette*, *supra*, 29 Cal.4th at p. 465.)

The trial court likewise properly denied appellant's request for Proposed Jury Instruction Numbers 52.36, 52.39, and 52.39.1, as the instructions are also erroneous and/or cumulative. Proposed Jury Instruction Number 52.36 provided that, "In determining the penalty to be imposed, you must assume that the penalty that each of you chooses will in fact be carried out." (4CT 925.) Proposed Jury Instruction Number 52.39 provided that, "Life without the possibility of parole means exactly what it says – the defendant will be imprisoned for the rest of his life. For you to conclude otherwise would be to rely on conjecture and speculation and would be a violation of your oath as trial jurors." (4CT 927.) Proposed Jury Instruction Number 52.39.1 provided that, ". . . you must assume that a sentence of death means that the defendant will suffer the ultimate penalty and be executed. For you to conclude otherwise would be to rely on conjecture and speculation and would be a violation of your oath as trial jurors." (4CT 928.) Due to the possibility of appellate reversal or a gubernatorial pardon, this Court has ruled that an instruction informing a jury that the sentence imposed will be carried out would be inaccurate and erroneous. (*People v. Wallace* (2008) 44 Cal.4th 1032, 1091 (*Wallace*); *Kipp*, *supra*, 18 Cal.4th at p. 378.) As the Court further found in *Wallace*, "we have consistently held that the phrase 'life without possibility of parole' as it appears in CALJIC No. 8.84 adequately informs the jury that a defendant sentenced to life imprisonment without possibility of parole is ineligible for parole." (*Wallace*, *supra*, 44 Cal.4th at p. 1091.)

Finally, the trial court appropriately rejected appellant's request to instruct the jury with Proposed Jury Instruction Number 52.38 concerning victim-impact evidence as cumulative to other instructions. The instruction provided as follows:

> Evidence has been introduced in this case that may arouse in you a natural sympathy for the victim or the victim's family.
>
> You must not allow such evidence to divert your attention from your proper role in deciding the appropriate punishment in this case.
>
> You may not impose the penalty of death as a result of an irrational, purely emotional response to this evidence.

(4CT 926.) This Court rejected a proposed instruction with almost the same language in *People v. Ochoa* (2001) 26 Cal.4th 398, 455 (abrogated on other grounds as stated in *People v. Prieto* (2003) 30 Cal.4th 226, 263, footnote 14) because the instruction did not inform the jury of anything that it would not otherwise learn from CALJIC No. 8.84.1.[52] Appellant's claims to the contrary should be rejected.

XIX. APPELLANT WAS NOT PREJUDICED BY THE CUMULATIVE IMPACT OF ANY ALLEGED ERRORS DURING THE PENALTY PHASE

Appellant contends that he was prejudiced during the penalty phase by the cumulative impact of the alleged errors he addressed in Arguments XIII through XVIII. (AOB 359-363.) However, he cannot show that he was denied a fair trial because he failed to show error or that he suffered prejudice as a result of any particular error or combined errors.

During the penalty phase, as set forth in detail, *ante*, the trial court properly admitted Miller's statements to Officer Romero as spontaneous

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[52] CALJIC No. 8.84.1 provides, in relevant part:

> You must neither be influenced by bias nor prejudice against the defendant, nor swayed by public opinion or public feelings. Both the People and the defendant have a right to expect that you will consider all of the evidence, follow the law, exercise your discretion conscientiously, and reach a just verdict.

statements made primarily to meet on ongoing emergency (see Arg. XIII); Johnston's letter to appellant and his failure to respond were properly admitted as an adoptive admission, and portions of the letter were also properly used to refresh Johnston's recollection and/or as a prior inconsistent statement (see Arg. XIV); the prosecution properly authenticated the photographs printed from the surveillance video at Eddie's Liquor (see Arg. XV); the court properly excluded appellant's self-serving hearsay statement to Marcia that Moon reached for a gun (see Arg. XVI); the photographs of Moon while alive and the testimony of three family members constituted proper victim-impact evidence (see Arg. XVII); and the court properly denied appellant's request for inappropriate, cumulative, and/or argumentative jury instructions (see Arg. XVIII). As demonstrated in the responses to each of these arguments, there was no reasonably possibility of a different outcome even assuming there was error.

Because appellant has failed to show error or that he suffered prejudice as a result of any particular error or combined errors, he has failed to show he was denied a fair trial or otherwise prejudiced as a result of any cumulative error. (See, e.g., *People v. Martinez* (2010) 47 Cal.4th 911, 968 (*Martinez*) [finding cumulative impact of two arguable errors in prosecutor's argument, which were harmless when considered separately, did not result in prejudice to defendant in penalty phase] (*Martinez*); *Panah*, *supra*, 35 Cal.4th at pp. 479-480 [no cumulative error in penalty phase where court identifies few errors and such errors are harmless].) As stated by this Court, defendants are entitled to "a fair trial but not a perfect one." (*Cunningham*, *supra*, 25 Cal.4th at p. 1009; *Box*, *supra*, 23 Cal.4th at p. 1214; *Barnett*, *supra*, 17 Cal.4th at p. 1182; see also *Horning*, *supra*, 34 Cal.4th at p. 913 [no denial of right to fair trial where there was "little, if any, error to accumulate"].)

XX. THE DEATH PENALTY IS PROPER PUNISHMENT FOR FELONY-MURDER

Appellant argues that his death sentence, permitted under California law for felony-murder "simpliciter" or without any requirement that he intended to kill, is a disproportionate punishment under the Eighth Amendment and violates international law. (AOB 364-374.) This Court, however, has repeatedly rejected similar claims under the Eighth Amendment. (*People v. Taylor* (2010) 48 Cal.4th 574, 661 (*Taylor*) ["we have repeatedly held that, consistent with Eighth Amendment principles, neither intent to kill nor reckless indifference to life is a required element of the felony-murder special circumstance when the defendant is the actual killer"], citing *People v. Young* (2005) 34 Cal.4th 1149, 1204 (*Young*); *People v. Hayes* (1990) 52 Cal.3d 577, 632; see *Martinez*, *supra*, 47 Cal.4th at pp. 966-967 [same]; *People v. Smithey* (1999) 20 Cal.4th 936, 1016 [same] (*Smithey*); *Anderson*, *supra*, 25 Cal.4th at p. 601 [same]; see also *Tison v. Arizona* (1987) 481 U.S. 137, 151-152, 158, fn. 12 [107 S.Ct. 1676, 95 L.Ed.2d 127].)

The Court has also repeatedly rejected similar claims that the imposition of the death penalty without a showing of intent to kill violates international law. (See *People v. Hoyos* (2007) 41 Cal.4th 872, 925 (*Hoyos*) [California's death penalty does not violate international law because international law does not prohibit death sentences rendered in accordance with state and federal constitutional and statutory requirements]; *People v. Mendoza* (2007) 42 Cal.4th 686, 708 [California's death penalty does not violate international norms of humanity and decency]; *People v. Perry* (2006) 38 Cal.4th 302, 322 (*Perry*) [death penalty does not violate international law because the penalty is imposed only for the most serious offenders]; *Brown*, *supra*, 33 Cal.4th at pp. 403-404 [same].)

Here, the evidence more than sufficiently established that appellant was the actual killer. Although codefendant Johnson entered Eddie's Liquor with appellant, the evidence showed that only one gun was used. Appellant was identified by Marcia as the suspect who planned the attempted robbery, the suspect who wore the black Nike Air T-shirt, and the suspect who had the gun when he entered Eddie's Liquor. Appellant had the gun that was used to kill Moon, as well as the black Nike T-shirt, in his bedroom one week after the murder. The gun was the same one appellant had stolen approximately one month earlier during the Riteway robbery. (See Statement of Facts, *ante*.) The prosecutor's theory was that appellant was the actual shooter. Based on the foregoing, the jury found true the allegation that appellant personally used a firearm within the meaning of section 12022.5. (3CT 734-737.) As the evidence and jury's subsequent findings, based on that evidence, clearly established that appellant was found to be the actual killer, a finding of intent to kill was not necessary for imposition of his death sentence. (See *Young*, *supra*, 34 Cal.4th at p. 1205 [finding sufficient evidence that defendant was the actual killer, although defendant had a companion and witnesses did not see defendant shoot victims, because prosecution's theory was that defendant was the actual killer, jury found the personal gun use allegation to be true, and the evidence showed that only one gun was used].)

XXI. CALIFORNIA'S DEATH PENALTY LAW COMPORTS WITH THE UNITED STATES CONSTITUTION

Appellant raises several federal constitutional challenges to California's death penalty that he acknowledges have already been rejected by this Court. (AOB 375-410.) He raises the following claims now to present the federal constitutional issues: (1) Section 190.2 is impermissibly broad (AOB 377-378); (2) Section 190.3, factor (a), allows for arbitrary and

capricious imposition of the death penalty (AOB 379-381); (3) California's death penalty does not contain adequate safeguards: it does not require that the death sentence be based on written findings regarding the aggravating factors, the jury does not need to unanimously find beyond a reasonable doubt that aggravating circumstances exist or outweigh mitigating factors, it deprives a defendant of the right to a jury determination of each factual prerequisite for a sentence of death, inter-case proportionality review is not permitted, criminal activity as a juvenile is not required to be shown beyond a reasonable doubt by a unanimous jury in order to serve as an aggravating circumstance, the use of restrictive adjectives such as "extreme" and "substantial" acted as "barriers" to the mitigating circumstances appellant could present, and it fails to require an instruction that statutory mitigating factors are relevant (AOB 381-404); (4) California's sentencing scheme violates the equal protection clause of the United States Constitution because it denies procedural safeguards to capital defendants that are afforded to non-capital defendants (AOB 405-408); and (5) California's use of the death penalty violates international norms of humanity and decency, and imposition of the penalty violates the Eighth and Fourteenth Amendments (AOB 408-410). For the reasons set forth by this Court in the cases that will be cited with each argument below, all of appellant's constitutional challenges to his death sentence and/or California's death penalty generally should be rejected.

This Court has repeatedly rejected appellant's constitutional challenges to California's death penalty, finding as follows. First, California's death penalty law and the special circumstances set forth in the law that warrant death adequately narrows the scope of death-eligible defendants. (*Martinez*, *supra*, 47 Cal.4th at p. 967; *People v. Watson* (2008) 43 Cal.4th 652, 703 (*Watson*); *Perry*, *supra*, 38 Cal.4th at p. 322.) Second, section 190.3, factor (a), which permits the jury to consider circumstances

of the crime, does not result in the arbitrary or capricious imposition of death. (*Martinez*, *supra*, 47 Cal.4th at p. 967; *People v. Hamilton* (2009) 45 Cal.4th 863, 960 (*Hamilton*); *Watson*, *supra*, 43 Cal.4th at p. 703.)

Third, California's death penalty law contains adequate safeguards. The law "does not require that the jury achieve unanimity as to aggravating circumstances or that it be given burden of proof or standard of proof instructions for finding the existence of aggravating factors, finding that aggravating factors outweigh mitigating factors, or finding that death is the appropriate penalty." (*Martinez*, *supra*, 47 Cal.4th at p. 967; *Hamilton*, *supra*, 45 Cal.4th at p. 960; see also *People v. Welch* (1999) 20 Cal.4th 701, 767, quoting *People v. Sanchez* (1995) 12 Cal.4th 1, 81 ["Unlike the determination of guilt, 'the sentencing function is inherently moral and normative, not factual' [citation] and thus 'not susceptible to a burden-of-proof quantification'"].) The United States Supreme Court rulings 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], *United States v. Booker* (2005) 543 U.S. 220 [125 S.Ct. 738, 160 L.Ed.2d 621], or their progeny, have not affected the foregoing conclusions. (*Martinez*, *supra*, 47 Cal.4th at p. 967, citing *People v. Bunyard* (2009) 45 Cal.4th 836, 858.) Written findings are also not required safeguards. (*Martinez*, *supra*, 47 Cal.4th at p. 967; *Hamilton*, *supra*, 45 Cal.4th at p. 960.) Inter-case proportionality review is not required to render California's death penalty constitutional. (*Ibid.*; *Watson*, *supra*, 43 Cal.4th at p. 704.) The jury further "properly may consider a defendant's unadjudicated criminal activity and need not agree unanimously or beyond a reasonable doubt that the defendant committed those acts." (*Martinez*, *supra*, 47 Cal.4th at p. 967; see *Watson*, *supra*, 43 Cal.4th at p. 704.) Further, "[t]he use of restrictive adjectives, such as

"extreme" and "substantial," in the statute's list of potential mitigating factors does not render it unconstitutional." (*Ibid.*) Likewise, "[t]here is no constitutional obligation to instruct the jury to identify which factors are aggravating and which are mitigating, or to instruct the jury to restrict its consideration of evidence in this regard." (*Martinez, supra*, 47 Cal.4th at p. 967; see *Hamilton, supra*, 45 Cal.4th at p. 961.)

Fourth, California's sentencing scheme does not violate the equal protection clause by providing different procedural rights to capital and non-capital defendants because capital and non-capital defendants are not similarly situated. (*Martinez, supra*, 47 Cal.4th at p. 967; *People v. Riggs* (2008) 44 Cal.4th 248, 330 (*Riggs*).) Finally, California's use of the death penalty does not violate international law or norms, and such norms do not limit application of the penalty only to the most extraordinary crimes. (*Martinez, supra*, 47 Cal.4th at p. 967; *People v. Gutierrez* (2009) 45 Cal.4th 789, 834; *Panah, supra*, 35 Cal.4th at pp. 500-501.)

As appellant has failed to show any compelling reasons for this Court to depart from the above decisions, and has not shown that the impact of California's scheme taken as a whole denied his constitutional rights, the instant claims should be rejected.

XXII. APPELLANT'S PRIOR JUVENILE ADJUDICATION FOR ASSAULT WITH A FIREARM WAS PROPERLY TREATED AS A PRIOR SERIOUS OR VIOLENT FELONY UNDER THE THREE STRIKES LAW

Appellant contends that the trial court improperly treated his prior juvenile adjudication for assault with a firearm as a prior serious or violent felony within the meaning of the Three Strikes Law because prior juvenile offenses are not found true beyond a reasonable doubt by a jury. Thus, he argues, the court improperly doubled his sentence for the Riteway robbery based upon that prior juvenile adjudication. (AOB 411-418.) This Court,

however, recently affirmed that a qualifying prior juvenile adjudication may be used to enhance the maximum sentence for a subsequent offense absent a jury finding. (*People v. Nguyen* (2009) 46 Cal.4th 1007, 1028 (*Nguyen*).)

As this Court recognized in *Nguyen*, the United States Supreme Court ruled in *Apprendi* that "'[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.'" (*Nguyen, supra*, 46 Cal.4th at p. 1015, quoting *Apprendi, supra*, 530 U.S. at p. 490.) Thus, "any 'fact' that allows enhancement of an adult defendant's maximum sentence *for the current offense* must, unless the defendant waives his jury trial right, be determined by a jury *in the current case*." (*Nguyen, supra*, 46 Cal.4 at p. 1015, italics in original.) This Court explained that "the statutorily relevant sentencing 'fact' . . . is whether defendant's record includes a prior adjudication of criminal conduct that qualifies, under the Three Strikes Law, as a basis for enhancing his current sentence." (*Nguyen, supra*, 46 Cal.4th at p. 1015.) As California law requires the prosecution, when it seeks to enhance a current sentence based on an allegation that the defendant suffered a prior conviction, to prove to a jury in the current proceeding that he was the person who suffered the prior conviction, and a prior juvenile adjudication is included within the Three Strikes law's definition of "prior felony conviction," a prior juvenile adjudication may be treated as a strike for Three Strikes law sentencing. (*Ibid.*)

This Court further found that, although juveniles do not have the right to jury trial on any criminal allegations against them, a prior juvenile adjudication may be used to enhance a sentence for a subsequent offense. (*Nguyen, supra*, 46 Cal.4th at p. 1019.) As the court found, juveniles are afforded "virtually all the procedural rights and protections they would

enjoy as adult criminal defendants[,]" and the only right they are not afforded – the right to a jury trial – is one to which they are not constitutionally entitled. (*Ibid.*, citing *McKeiver*, *supra*, 403 U.S. at 543-547, 551-552.) As the reasons justifying the use of a prior adult offense to increase a defendant's maximum sentence for a subsequent adult offense absent a separate jury finding are equally applicable to prior juvenile adjudications, prior juvenile adjudications qualify as "strikes." (*Id.* at p. 1028.) For these reasons, appellant's claim should be rejected.

XXIII. THE TRIAL COURT PROPERLY IMPOSED UPPER TERMS ON COUNTS 2 AND 3 AND THE FIREARM ENHANCEMENTS ON COUNTS 1 AND 3

Appellant claims that under *Cunningham v. California* (2007) 549 U.S. 270 [127 S.Ct. 856, 166 L.Ed.2d 856] (*Cunningham*), the trial court erroneously imposed upper terms on counts 2 and 3 and the firearm enhancements on counts 1 and 3 based on facts that were neither found by the jury nor admitted by appellant. Accordingly, he claims that his Sixth Amendment right to a jury trial was violated and his upper terms sentences should be reversed. (AOB 419-434.) Respondent disagrees because the upper terms were based, inter alia, upon the fact that appellant was on parole. In any event, any error was harmless beyond a reasonable doubt.

A. Procedural Background

Appellant was convicted in counts 1 and 2 of the first degree murder of Moon and attempted robbery, respectively, at Eddie's Liquor. He was convicted in count 3 of second degree robbery for the robbery at Riteway. The jury found true the following allegations: (1) the special circumstance alleged as to count I, that appellant committed the murder during the commission of an attempted robbery; (2) the allegation as to counts 1 and 2

that a principal used a firearm during the commission of the offenses; (3) the allegation as to all three counts that appellant personally used a firearm; and (4) the allegation as to all three offenses that appellant suffered a prior serious or violent juvenile adjudication. (3CT 734-737.)

In imposing upper terms for counts 2 and 3, as well as the firearm enhancements as to counts 1 and 3, the trial court found that the aggravating factors outweighed any mitigating factors. The court specifically found as follows: (1) all of the crimes involved great violence, the threat of great bodily injury, and viciousness and callousness; (2) both victims were particularly vulnerable – Moon was alone, unarmed, and shot in the back, and Jung was alone, with no escape route, and a gun was held to her head while she held her hands up in a position of surrender; (3) appellant held a position of leadership and induced codefendant Johnson to participate; (4) the manner in which the crimes were carried out reflected planning, sophistication, and professionalism, including that appellant had an entourage with him during each crime, he recruited others to assist him, and he sent someone inside to check the location before entering; (5) he engaged in violent conduct indicating a threat to society; and (6) he had been recently paroled. (25RT 5589-5591.)

B. The *Cunningham* Decision

In *Cunningham*, the United States Supreme Court held that California's procedure for selecting upper terms under former section 1170, subdivision (b), violated the defendant's Sixth and Fourteenth Amendment right to jury trial because it gave "to the trial judge, not to the jury, authority to find the facts that expose a defendant to an elevated 'upper term' sentence." (*Cunningham, supra*, 549 U.S. at p. 274.) The Court explained that "the Federal Constitution's jury trial guarantee proscribes a sentencing scheme that allows a judge to impose a sentence above the

statutory maximum based on a fact, other than a prior conviction, not found by a jury or admitted by the defendant." (*Id.* at pp. 274-275.)

C. The Upper Term Was Constitutional Based on Appellant's Criminal History

An upper term sentence based on at least one aggravating circumstance complying with *Cunningham* "renders a defendant eligible for the upper term sentence," so that "any additional fact finding engaged in by the trial court in selecting the appropriate sentence among the three available options does not violate the defendant's right to jury trial." (*People v. Black* (2007) 41 Cal.4th 799, 812 (*Black II*).) An aggravating circumstance accords with *Cunningham* if it was based on the defendant's criminal history. (*Id.* at pp. 816, 818.) This "exception" for a defendant's "[r]ecidivism" must not be read "too narrowly" and encompasses "not only the fact that a prior conviction occurred, but also other related issues that may be determined by examining the records of the prior convictions." (*Id.* at pp. 818-820 [trial court's finding that a defendant's prior convictions were numerous or of increasing seriousness falls within the exception]; accord, *People v. Towne* (2008) 44 Cal.4th 63, 79-84 [trial court's findings that a defendant served prior prison terms, was on probation or parole at the time of the offense, and had unsatisfactory prior performance on probation or parole due to a prior conviction, fall within the exception].)

In imposing the upper terms, the trial court permissibly relied, inter alia, on appellant's criminal history, finding that appellant was on parole and had recently been released on parole. (25RT 5589-5591.) This rendered appellant eligible for the upper terms. (See *People v. Moberly* (2009) 176 Cal.App.4th 1191, 1198 [trial court may use the same aggravating circumstances to impose multiple upper terms for offenses or enhancements, or both].) Under the circumstances, the trial court's reliance

on other aggravating circumstance findings did not violate appellant's right to jury trial under *Cunningham*.

D. In Any Event, Any *Cunningham* Error Was Harmless

An appellate court properly finds *Cunningham* error harmless if it "concludes, beyond a reasonable doubt, that the jury, applying the beyond-a-reasonable doubt standard, unquestionably would have found true at least a single aggravating circumstance had it been submitted to the jury . . . ." (*People v. Sandoval* (2007) 41 Cal.4th 825, 839; accord, *People v. Wilson* (2008) 44 Cal.4th 758, 812-813 [any *Cunningham* error was harmless because the jury would have found that the victim was vulnerable or that appellant isolated the victim].) Here, there was undisputed evidence supporting the trial court's finding that the victims were vulnerable and that appellant isolated them. In both the Eddie's Liquor and Riteway offenses, one person in appellant's group scouted the location immediately prior to the robberies/attempted robberies to make certain that the clerks were alone or at least few in number. Both Moon and Jung were essentially trapped behind the counter in the respective stores. Moon was unarmed and there was no indication Jung ever touched, reached for, or planned to use the firearm her husband kept near the cash register. Moon was shot in the back, and a gun was pointed at Jung's head. This evidence was not refuted by appellant.

Similarly, the jury most certainly would have found beyond a reasonable doubt, and consistent with the guilt phase verdicts, that appellant occupied a position of leadership and that the crimes involved planning, sophistication, or professionalism. Marcia established that appellant was the mastermind behind the planned crimes at Eddie's Liquor, assigning tasks to her and both of his codefendants just prior to the crimes. He brought the Glock firearm and was the actual shooter. (See Arg. XXI.)

The surveillance videos from both crimes also supported the prosecution's theory that appellant occupied a position of leadership. (See Peo. Exh. Nos. 3, 36.) Appellant also used the same modus operandi at Riteway and Eddie's Liquor – he and/or one of his companions entered the location immediately before the planned crimes to scout for employees and any cameras. He then entered with his companions, in a group, and committed the crimes.

Moreover, a jury certainly would have found beyond a reasonable doubt that appellant engaged in violent conduct indicating he was a threat to society. The evidence showed he had committed a prior assault with a firearm while on his school grounds and an attempted robbery and assault with a semiautomatic handgun at a park when many children and other innocent people were present. Within two months of being released from the CYA (after serving time there for the assault at the park), he committed the Riteway robbery. Within one month of that offense, he killed Moon during yet another armed, attempted robbery. Appellant attempted to show he had a positive influence on others while in the CYA, but he did not refute the court's finding that he had engaged in violent conduct and was a threat to society.

The jury would have found any of the foregoing facts to be true beyond a reasonable doubt had they been presented, rendering the *Cunningham* error harmless. Accordingly, this Court should reject appellant's contention.

If the Court disagrees and finds prejudicial *Cunningham* error, however, it should remand for resentencing under the reformed system prescribed by this Court. (See *Sandoval*, *supra*, 41 Cal.4th at pp. 843-

852.)[53] Under this reformed system, the resentencing court would exercise its "discretion to select among the three available terms," giving a statement of reasons for its selection, but with no requirement of an additional factual finding or of a statement of "ultimate facts." (*Id.* at pp. 846-847, 852.) The court would also use the amended California Rules of Court as guidance. (*Id.* at p. 846; see Cal. Rules of Court, rules 4.405-4.452, as amended May 23, 2007.)

XXIV. PENAL CODE SECTION 2933.2 DOES NOT APPLY TO APPELLANT'S CASE

Appellant finally argues that he was erroneously denied presentence conduct credit pursuant to section 2933.2, because the statute applies only to offenses committed after its effective date of June 3, 1998. (AOB 435-437.) Section 2933.2, subdivision (a), prohibits any person convicted of murder from accruing any presentence conduct or work time credit, as specified in section 2933.

Appellant correctly notes that section 2933.2 expressly does not apply to crimes occurring before its June 3, 1998, effective date (§ 2933.2, subd. (d); *People v. Hutchins* (2001) 90 Cal.App.4th 1308, 1317), and that he committed the crimes at Eddie's Liquor on June 12, 1997. Thus, as he points out, section 2933.2 does not apply to his offenses.

As section 2933.2 is inapplicable here, any good time or work time credits are governed by section 4019, which provides for six days of credit for every four days of actual custody for defendants convicted of a crime enumerated in section 667.5. (§ 4019, subds. (b)-(c), (f); see *People v. Smith* (1989) 211 Cal.App.3d 523, 527.) Here, the trial court awarded

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[53] If the death penalty is affirmed, however, the district attorney on remand would presumably have the option of stipulating to middle terms in lieu of a resentencing hearing.

appellant 643 actual days of custody credit. However, because his offenses were enumerated in section 667.5, subdivision (c), his conduct credits were limited to "no more than 15 percent of [his] worktime credit[.]" (§ 2933.1, subd. (a).) Accordingly, if appellant is otherwise entitled to conduct credit and he actually served 643 days in custody, it appears he would be entitled to 96 days of conduct credit (15 percent of his actual credit), as he contends.

Dated: August 2, 2010

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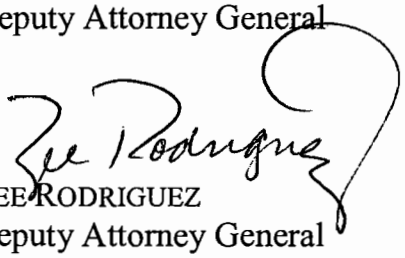

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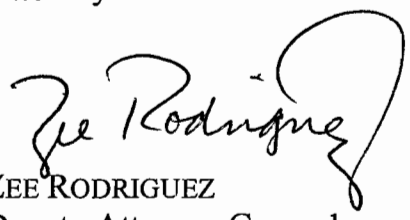
CERTIFICATE OF COMPLIANCE

I certify that the attached RESPONDENT'S BRIEF uses a 13 point Times New Roman font and contains 70,236 words.

Dated: August 2, 2009

EDMUND G. BROWN JR.
Attorney General of California



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DECLARATION OF SERVICE BY U.S. MAIL

Case Name: ***People v. Calvin Dion Chism***

No.: **S101984**

I declare:

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

On July 30, 2010, I served the attached **RESPONDENT'S BRIEF** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system at the Office of the Attorney General at 300 South Spring Street, Suite 1702, Los Angeles, CA 90013, addressed as follows:

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The one copy for the California Appellate Project was placed in the box for the daily messenger run system established between this Office and California Appellate Project (CAP) in Los Angeles for same day, personal delivery.

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 30, 2010, at Los Angeles, California.

J.R. Familo
Declarant

Signature

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