In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA, **Plaintiff and Respondent,** **v.** **RAMON SANDOVAL, JR.,** **Defendant and Appellant.**	**CAPITAL CASE** Case No. S115872

San Francisco County Superior Court Case No. BA240074
The Honorable Joan Comparet-Cassani, Judge

RESPONDENT'S BRIEF

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STATEMENT OF THE CASE

On February 9, 2001, a Los Angeles County Grand Jury returned an indictment against appellant Ramon Sandoval, Jr. (hereafter "appellant"), Adolfo Bojorquez, and Miguel Camacho.[1] (2CT 482-486.) In Count One, the indictment charged appellant with murder (Pen. Code, § 187, subd. (a)) with the following special circumstances: the murder was committed for the purpose of preventing or avoiding a lawful arrest (Pen. Code, § 190.2, subd. (a)(5)); the victim was a peace officer who was intentionally killed during the performance of his duties, and appellant knew or reasonably should have known that the victim was a peace officer engaged in the performance of his duties (Pen. Code, § 190.2, subd. (a)(7)); appellant intentionally killed the victim by means of lying in wait (Pen. Code, § 190.2, subd. (a)(15)); and appellant intentionally killed the victim while he was an active participant in a criminal street gang, and the murder was carried out to further the activities of the criminal street gang (Pen. Code, § 190.2, subd. (a)(22)). (2CT 482-486.)

Additionally, in Count One the indictment alleged that appellant: personally and intentionally discharged an assault rifle that proximately caused the death of Long Beach Police Officer Daryle Black (Pen. Code, § 12022.53, subds. (d), (e)(1)); personally and intentionally discharged an assault rifle (Pen. Code, § 12022.53, subds. (c), (e)(1)); discharged a firearm at an occupied motor vehicle causing Officer Black's death (Pen. Code, § 12022.5, subd. (b)); and committed the charged crimes for the benefit of, at the direction of, and in association with a criminal street gang with the specific intent to promote, further, and assist in criminal conduct by gang members (Pen. Code, §186.22, subd. (b)(1)). (2CT 482-486.)

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[1] Adolfo Bojorquez and Miguel Camacho are not parties to the instant appeal.

In Count Two, the indictment charged appellant with the willful, deliberate, and premeditated attempted murder of a peace officer (Pen. Code, §§ 664, subds. (e) and (f), 187, subd. (a)). Count Two further alleged that appellant: personally and intentionally discharged an assault rifle causing great bodily injury to Long Beach Police Officer Rick Delfin (Pen. Code, § 12022.53, subds. (d), (e)(1)); personally and intentionally discharged an assault rifle (Pen. Code, § 12022.53, subds. (c), (e)(1)); and committed the charged crimes for the benefit of, at the direction of, and in association with a criminal street gang with the specific intent to promote, further, and assist in criminal conduct by gang members (Pen. Code, §186.22, subd. (b)(1)). (2CT 482-486.)

In Count Three, the indictment charged appellant with the crime of assault with an assault weapon on a police officer (Pen. Code, § 254, subd. (d)(3)). Count Three further alleged that appellant: personally and intentionally discharged an assault rifle causing great bodily injury (Pen. Code, § 12022.53, subds. (d), (e)(1)); personally and intentionally discharged a firearm (Pen. Code, § 12022.53, subds. (c), (e)(1)); and committed the charged crimes for the benefit of, at the direction of, and in association with a criminal street gang with the specific intent to promote, further, and assist in criminal conduct by gang members (Pen. Code, §186.22, subd. (b)(1)). (2CT 482-486.)

In Count Four, the indictment charged appellant with assault with an assault weapon (Pen. Code, § 245, subd. (a)(3)). Count Four further alleged that appellant personally inflicted great bodily injury upon Martha Cervantes (Pen. Code, § 12022.7, subd. (a)), and that appellant personally used an assault rifle (Pen. Code, §§ 12022.5, 1192.7, subd. (c), and 667.5, subd. (c)).

On February 9, 2001, the court found the indictment to be a true bill. (2CT 494.)

On February 16, 2001, appellant pleaded not guilty to all counts and denied all special allegations contained in the indictment. (2CT 497.)

Trial was by jury, which commenced on September 23, 2002. (5CT 1137, 1154.) On October 21, 2002, the jury returned guilt phase verdicts against appellant. The jury convicted appellant as charged, and found all special allegations to be true. (5CT 1267-1286.)

The penalty phase of the trial began on October 23, 2002. On November 5, 2002, the trial court declared a mistrial as to the penalty phase. (5CT 1344.) Penalty phase retrial began on March 17, 2003. (5CT 1386.) On April 14, 2003, the penalty phase jury fixed the penalty as death. (6CT 1500, 1503.)

On May 5, 2003, appellant filed a motion for a new trial and a new penalty phase. (6CT 1505.) On May 9, 2003, the trial court denied the automatic motion to modify the jury's death verdict (Pen. Code, § 190.4, subd. (e)), and also denied appellant's motion for a new trial. (6CT 1549-1562.)

Appellant was sentenced as follows: as to Count One, appellant was sentenced to death, plus an additional term of 35 years to life. As to Count Two, appellant was sentenced to an additional consecutive term of 50 years to life. As to Count Three, appellant was sentenced to an additional term of 39 years to life. As to Count Four, appellant was sentenced to an additional consecutive term of 25 years. The determinate and indeterminate sentences were stayed pending execution of appellant's death sentence. (6CT 1560-1561.)

Appellant filed a notice of appeal on May 3, 2003. (6CT 1573.) The instant appeal is automatic. (Pen. Code, § 1239, subd. (b).)

STATEMENT OF FACTS

A. Guilt Phase Prosecution Evidence

1. The Murder of Detective Black, and the Attempted Murder of Detective Delfin

On April 29, 2000, Angela Estrada (hereafter "Angela") and her sister, Christine Estrada (hereafter "Christine"), were living on Dairy Street in the City of Long Beach. (5RT 1172, 1194, 1222; 6RT 1158.) Christine (a.k.a. "Lazy") was an active member of the Barrio Pobre criminal street gang. (6RT 1214, 1249; 7RT 1305.) That day, Miguel Camacho (a.k.a. "Rascal") organized a meeting of Barrio Pobre gang members. Rascal took notes as he planned the meeting. (7RT 1398.) Ultimately, Rascal recorded the names of the Barrio Pobre gang members who were invited to the meeting in a notebook (Peo. Exh. 26). (7RT 1399.)

Later, a meeting of approximately 30 Barrio Pobre gang members from the Compton and Long Beach cliques took place at Christine's home. (5RT 1158, 1172-1173, 1193, 1222, 1227, 1251; 6RT 1158, 1163, 1193; 7RT 1314, 1377-1379, 1404.) Appellant (a.k.a. "Menace") was present at the meeting. (5RT 1156-1157; 6RT 1213, 1227, 1239; 7RT 1305.) During the meeting, Miguel Lonzo (a.k.a. "Wackoe") was "court checked," which meant that he was beaten by his fellow gang members because he did something disapproved of by the gang. (5RT 1223-1226; 6RT 1224-1225; 7RT 1315.) The meeting ended between 3:00 p.m. and 4:00 p.m. (7RT 1318, 1341, 1404.)

Following the meeting, appellant and approximately 15 other members of the Barrio Pobre gang went to an alleyway near an abandoned house in Compton. (2CT 276; 10RT 1968.) While the Barrio Pobre gang members were "hanging out drinking," a car pulled up. One of the occupants of the car yelled out, "Fuck B.P.! East Side!" and opened fire on

the Barrio Pobre gang members. Appellant and others attempted to follow the car, but could not. (2CT 278; 10RT 1968.)

Thereafter, appellant and fellow Barrio Pobre gang members Adolfo Bojorquez (a.k.a. "Grumpy"), Juan Camacho (a.k.a. "Pipas"), and Rascal returned to Christine's house. The men decided to "go hit . . . East Side Paramount" in retaliation for the earlier drive-by shooting. Specifically, the men decided to kill Vincent Ramirez (a.k.a. "Toro") from the East Side Paramount ("E.S.P.") gang because he was "the shot-caller from the East Side."[2] (2CT 287-288; 10RT 1968.) Each man armed himself, appellant with a CAR-15 rifle (Peo. Exh. 28). At approximately 10:40 p.m., five men left Christine's house, got into Pipas's car, and drove away. (5RT 1159, 1207-1209; 6RT 1162-1164, 1209; 7RT 1323-1324, 1326-1328, 1330-1331, 1343, 1381-1383, 1388, 1405.)

Appellant, Rascal, Pipas, Grumpy, and Julio Del Rio (a.k.a. "Sparky") drove from Christine's house to Toro's house. (2CT 281-288; 10RT 1968.) The plan was for some of the Barrio Pobre gang members – those armed with handguns – to knock on the front door, and as soon as Toro appeared, appellant would use the CAR-15 to kill him. (2CT 289; 10RT 1968.)

As the Barrio Pobre gang members were assembling on Lime Street, Long Beach Police Detectives Daryle Black and Rick Delfin from the department's gang unit were dispatched to the area of 21st Street and Olive Avenue in the City of Long Beach, to investigate a possible gang fight. (8RT 1560.) When they arrived, Detectives Black and Delfin saw two people standing on the street corner. Detectives Black and Delfin got out of their car and asked the two people if they had seen anything in the area

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[2] Desiree Ramirez and Toro lived on the 1900 block of Lime Street, next to Maria Cervantes. (6RT 1136, 1266; 7RT 1277, 1284.) Toro was a member and "shot caller" from E.S.P. (5RT 1136, 1139; 6RT 1139; 7RT 1277, 1284.)

recently. (8RT 1561.) The two people were unaware of anything that may have taken place. (8RT 1562.)

Detectives Black and Delfin got back into their car and drove away. As they drove down Lime Street, they noticed a car that was double-parked. Detective Delfin was driving, and stopped the police car approximately two car-lengths behind the car that was double-parked. Detective Delfin saw Rascal standing by the rear bumper of the double-parked car. (8RT 1567.) Rascal made eye contact with Detective Delfin, and had a "worried" look on his face. Thereafter, Rascal began walking across to the east side of Lime Street. (8RT 1568.)

Meanwhile, Jimmy Lee Falconer was driving his car up Lime Street. As Mr. Falconer backed his car into a driveway in order to make a u-turn, he saw the car driven by Detectives Black and Delfin pass by. When he turned his car around, Mr. Falconer's headlights flashed onto a "car with some people around it." (9RT 1762-1763.)

Without warning, appellant opened fire with his CAR-15 assault rifle from the other side of the street.[3] The officers' car windows were shattered, and the car was "torn apart." Detective Delfin was shot in the side of his head, across his bullet-resistant vest, and in his right knee.[4] Detective Black was shot in the head. (7RT 1364; 8RT 1570-1576, 1582-1583; 9RT 1763-1764, 1768; 2CT 296.)

Detective Delfin attempted to protect himself by getting as low as possible in the police car. Using his uninjured (left) leg, Detective Delfin

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[3] Mr. Falconer described the attack as "sort of like an ambush" and being like "a turkey shoot" where "you can't miss." (9RT 1763, 1768.)

[4] Lawrence Door, M.D., was an orthopedic surgeon. Dr. Door treated Detective Delfin for gunshot wounds. (7RT 1492-1493.) As a result of a gunshot wound Detective Delfin received to his knee, Dr. Door was required to perform major reconstructive surgery, including replacing Detective Delfin's knee with an artificial knee joint. (7RT 1494-1495.)

put his foot on the accelerator and navigated by looking up through the windshield, holding the car between the street lights and telephone wires. As soon as he cleared the immediate area, Detective Delfin made an emergency radio call for assistance. (8RT 1579-1581.)

At 11:08 p.m., Long Beach Police Department dispatcher Melina Runnels received a "9-9-9" emergency radio call from Detective Delfin, meaning that an officer required immediate assistance. Detective Delfin reported that he and his partner, Detective Black, had been shot. (6RT 1110-1111, 1115.) Long Beach Police Detectives Hugo Cortes and Abel Morales responded to Detective Delfin's "9-9-9" emergency radio call. While Detectives Cortes and Morales were monitoring the radio, they heard Detective Delfin ask the dispatcher to "please send help," because they "had been shot," and "not to let them die" because Detective Delfin "wanted to see his children." (7RT 1504, 1518.) When Detectives Cortes and Morales arrived, they discovered that the car driven by Detectives Black and Delfin had been severely damaged by gunfire. The rear quarter panel, right passenger window, windshield, and right passenger door were all "riddled [with] holes." (7RT 1507-1508, 1517-1518.)

Detective Cortes approached the car and saw Detectives Black and Delfin covered in blood. Detective Cortes and another officer removed Detective Black from his car and placed him in a nearby car to drive him to the hospital. Detective Black was unconscious, and the "back of his head was blown off." During the trip to the hospital, Detective Cortes attempted to speak with Detective Black, but Detective Black was unresponsive and had trouble breathing. (7RT 1509-1510, 1519.) Detective Black died as a result of the gunshot wound to his head inflicted by appellant. (8RT 1710-1731 [testimony of Deputy Medical Examiner Eugene Carpenter, Jr., MD].)

A subsequent search of the area revealed 24 expended .223 caliber shell casings in the area near Detectives Black and Delfin's patrol car.

Nearby were two separate piles of glass from the patrol car's windows. (6RT 1127, 1133-1135, 1256.) Four additional shell casings were found slightly further down the road. (6RT 1265.)

2. The shooting of Maria Cervantes

That same evening, Maria Cervantes was lying on her bed. At 11:08 p.m., bullets from outside penetrated the wall of her home and hit her leg and abdomen. (7RT 1533-1534.) Police received a call informing them that Ms. Cervantes had been shot as she was lying on her bed. (6RT 1124.) Long Beach Police Officer Felipa Guerrero also responded to the shooting scene. (7RT 1523.) Officer Guerrero was outside of 1960 Lime Street when she was approached by Alberto Cervantes who was "covered in blood and was hysterical, crying and screaming, 'Police, help me. My wife has been shot.'" (7RT 1524.) Officer Guerrero followed Mr. Cervantes inside his home and found Ms. Cervantes on the bed, "covered in blood, screaming, crying, looking very pale, sweaty." Ms. Cervantes, who was eight or nine months pregnant, had been shot in the legs and abdomen.[5] (7RT 1525-1527.) Eventually, a Special Weapons and Tactics ("SWAT") team responded to the Cervantes home. The SWAT team provided cover, which allowed paramedics to enter and remove Ms. Cervantes from her home. (6RT 1124, 1128-1130; 7RT 1529.)

Dr. Sameer Mistry was the emergency room physician who treated Ms. Cervantes. Ms. Cervantes suffered two bullet wounds – one to her leg, and one to her abdomen. (8RT 1739-1740.) Had the bullet that struck Ms. Cervantes in the abdomen traveled "another couple [of] inches, the baby

[5] Appellant's bullets did not injure Mrs. Cervantes's unborn child, who was later named Milagras ("Miracle") Andrea Cervantes. (7RT 1538-1539.)

would have been struck in the brain, in the skull," causing "most likely, certain death." (8RT 1742.)

3. Neighborhood witnesses

Camille Roe lived in an apartment on the 1900 block of Lime Street. At approximately 11:08 p.m., Ms. Roe heard multiple gunshots and went to the door to see what was happening. (7RT 1364.) She saw Pipas fleeing the area. (7RT 1365.) Because she was wearing only her pajamas, Ms. Roe returned to her apartment to get a robe. Afterwards, Ms. Roe went back outside and saw Rascal standing by her front door. Rascal asked Ms. Roe if he could use her telephone, but Ms. Roe refused. (7RT 1365-1367.) A subsequent search of the area revealed that Rascal had discarded his black jacket, baseball cap, and .45 caliber handgun in Ms. Roe's yard. (6RT 1266-1267; 7RT 1368.)

Virgal Wade also lived on the 1900 block of Lime Street. (7RT 1452-1453, 1459.) On April 29, 2000, at approximately 11:00 p.m., Ms. Wade heard multiple gunshots outside her home. She "hit the floor" until the gunfire subsided, at which time she opened her front door to see what had happened. Ms. Wade smelled smoke and gunpowder outside of her home. (7RT 1456-1459.)

Rosa Gallegos also lived on the 1900 block of Lime Street. (7RT 1464.) At approximately 11:00 p.m., Ms. Gallegos was awakened by the sound of gunfire. (7RT 1465.) Ms. Gallegos looked outside, and saw a white truck and a red car leaving the area. (7RT 1466-1468.)

Pedro and Lucero Rodriguez also lived on the 1900 block of Lime Street. (7RT 1470, 1477.) On April 29, 2000, at 11:08 p.m., Mr. and Mrs. Rodriguez heard multiple gunshots from outside their home. (7RT 1471.) When they looked outside, Mr. and Mrs. Rodriguez saw Detectives Black and Delfin's car "slowly roll by," as if it was "roll[ing] on its own." (7RT 1473, 1481.) A few moments later, police officers arrived at the shooting

scene. Mr. Rodriguez saw other officers remove Detectives Black and Delfin from the car. Detective Black appeared dead to Mr. Rodriguez. (7RT 1482-1483.)

4. The subsequent investigation

On April 29, 2000, at approximately 11:55 p.m., Detective Steven Lasiter received a telephone call, informing him that two police officers had been shot. Detective Lasiter went to the command post near the crime scene. (6RT 1121.) At approximately 2:00 a.m. the following morning, the Long Beach Police Department received information that a Hispanic male was hiding in the backyard of a house on the 2000 block of Lime Avenue. A SWAT team responded and arrested Rascal. (6RT 1124-1125, 1268.)

Long Beach Police Detective Brian McMahon was one of the investigating officers assigned to the murder of Detective Black. (8RT 1599.) On May 1, 2000, in an effort to find appellant, Rascal placed several phone calls to the home of appellant's sister, Nancy Sandoval, from Detective McMahon's department-issued cell phone. Unknown to Detective McMahon, the cell phone did not have a caller-I.D. block in place, so appellant was able to see the incoming number of Detective McMahon's cell phone. (8RT 1599-1600.) Although appellant did not know at the time that he was calling a police officer, he called Detective McMahon back and demanded to know who was looking for him and to speak with that person. (8RT 1603-1605.) When Detective McMahon refused to answer appellant's question, appellant stated that he knew the address and phone number from the caller I.D., and that he was "gonna come over to [Detective McMahon's] house and light it up." (8RT 1605-1606.)

At approximately midnight, Detective McMahon received another telephone call from appellant. Appellant again asked if the person who was looking for him was available. When Detective McMahon told appellant

"no," appellant said that he would give Detective McMahon until the next day to find that person.[6] (8RT 1608.)

On May 2, 2000, officers from the Long Beach Police department served and executed a search warrant at appellant's home. (8RT 1630-1631.) Appellant was discovered and arrested. (8RT 1632.) A search of appellant's home revealed a white Dodge parked in the driveway, a red Chevrolet Barreta behind the house, and a CAR-15 assault rifle (Peo. Exh. 28) concealed behind a stove in the kitchen. (8RT 1633-1637; 10RT 1961.) A forensic examination of the CAR-15 confirmed that it was the weapon used in the attack of Detectives Black and Delfin. (8RT 1667, 1696.) The examination further revealed that the rifle fired in a semi-automatic mode only, meaning that 28 separate pulls of the trigger were required in order to discharge the 28 rounds that were fired at Detectives Black and Delfin. (8RT 1693.) Because the rifle was coated in a lubricant, no fingerprints were recovered from its surface. (8RT 1691.)

Los Angeles County Sheriff's Deputy Ignacio Lugo was a gang investigator. (9RT 1781.) After discussing multiple aspects of criminal street gang life and culture, Deputy Lugo formed the opinion that some of the primary activities of the Barrio Pobre gang were "little things" such as witness intimidation, up to "anything else" such as robbery, assault with a deadly weapon, and murder. (9RT 1822-1823.)

5. Appellant's confession

Following his arrest, appellant was taken to a Long Beach Police Department interrogation room. (10RT 1959.) At approximately 8:56

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[6] Several hours later, Rascal called appellant's house from a telephone in the Long Beach Police Department. The conversation between appellant and Rascal was recorded. (8RT 1611; see Peo. Exh. 41 [recording], 41-A [transcript].)

a.m., appellant was read his *Miranda*[7] rights. Appellant read and waived each of his *Miranda* rights. Additionally, appellant verbally stated that he understood his *Miranda* rights and voluntarily waived them. (10RT 1962-1963.)

Appellant was interviewed by Detective Steven Prell. (2CT 268-322; see Peo. Exh. 73 [recording], 73-A [transcript].) He initially provided Detective Prell with two false versions of what happened to Detectives Black and Delfin. Thereafter, Detective Prell informed appellant that other police officers had recovered the murder weapon. Immediately thereafter, appellant made a statement in which he admitted (in relevant part) that he was "involved" in the shooting (2CT 273), that he "had the AR-15" (2CT 281), and that he "started shooting at the police officers" when he realized that the officers "were paying attention to Rascal" (2CT 281). Appellant confirmed that he could see Detectives Black and Delfin in their police car prior to the shooting (2CT 295, 297), that he knew the men were police officers before he shot them (2CT 319), and that he fired approximately 15 rounds at the officers in an attempt to "save Rascal . . . from not [sic] going to jail" (2CT 296-297, 320).

B. Guilt Phase Defense Evidence

Appellant did not testify or present any evidence in his behalf during the guilt phase of the trial. (See 10RT 1974, 1980-1982.)

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[7] *Miranda v. Arizona* (1966) 384 U.S. 436 [86 S.Ct. 1602, 16 L.Ed.2d 694].

C. Penalty Phase Prosecution Evidence[8]

In addition to the testimony set forth below, the prosecution presented a recap of the facts of the shooting which resulted in the murder of Detective Black and the attempted murders of Detective Delfin and Maria Cervantes. (See 18RT 3564-3629; 19RT 3750-3773, 3775-3814, 3905-3913; 20RT 4049, 4067.)

1. The murder of Jesus Cervantez and the attempted murder of Steve Romero

Leticia Cervantez was Jesus Cervantez's mother. (17RT 3489.) On either October 8, 1999, or October 9, 1999, Ms. Cervantez heard "a bunch of guys yelling 'Pobre'" near her home, which was located near the intersection of Atlantic Avenue and Lynwood Street. (17RT 3489, 3496.) At 6:30 p.m. on October 10, 1999, Ms. Cervantez heard gunshots, and immediately thereafter heard someone yell, "It's your son." Ms. Cervantez ran outside and saw a person wearing a black hat with a "P" on it driving a car quickly away from the area. Ms. Cervantez discovered her son had been shot, and saw "a big hole in his chest." Ms. Cervantez also saw Steve Romero, who had suffered a gunshot wound to his head. (17RT 3491, 3493-3494.)

That same evening, Michael Fields was in the drive-through lane of the McDonald's restaurant near the intersection of Atlantic Avenue and Lynwood Street. (17RT 3453.) Mr. Fields heard a loud "pop," and saw

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[8] Following appellant's conviction, the initial penalty phase proceedings began on October 23, 2002. (5CT 1292.) On November 5, 2002, the trial court found that the jury was hopelessly deadlocked, and declared a mistrial as to the penalty phase. (5CT 1344.) Penalty phase retrial proceedings began on March 17, 2003. (6CT 1411.) Respondent has not summarized the proceedings that took place between October 23, 2002, and November 5, 2002.

appellant, holding what appeared to be a rifle, shooting at Mr. Cervantez[9] and Mr. Romero. (17RT 3454-3455, 3484, 3529-3531.) Mr. Romero, who appeared "bloodied," approach the drive-through area. Mr. Fields saw appellant get into a car and drive away, at which time he pulled his car out of the drive-through lane, left the area, and notified authorities of what had occurred. (17RT 3475; 3529-3531.)

Similarly, John Kuibus was in his car near the McDonald's restaurant on Atlantic Avenue when he saw appellant with a rifle shooting at Mr. Cervantez and Mr. Romero. Mr. Kuibus saw Mr. Cervantez "face down" on the ground, and Mr. Romero "holding his head with blood all over the place." (17RT 3468-3471, 3477, 3529-3531.) Following the shooting, Mr. Kuibus saw the shooter "jump[] back towards his car." Mr. Kuibus took cover in his own car, and when he looked back up the shooter was gone. (17RT 3472-3473.)

Veronica Segura was Jesus Cervantez's aunt. (17RT 3480.) After Mr. Cervantez was murdered by appellant, a small memorial was created at the place he died. Approximately six months after Mr. Cervantez's death, Ms. Segura saw a small red car pull up to the memorial. Rascal (who was the driver) got out of the car, walked up to the memorial, and kicked over the candles. (17RT 3481-3482, 3485.)

Los Angeles County Sheriff's Deputy Stephen Davis was a homicide investigator assigned to investigate the murder of Mr. Cervantez. An investigation of the shooting scene revealed 13 7.62mm x 39mm shell casings, which are "consistent with those [] fired from an assault rifle." (17RT 3499, 3503.) Deputy Davis also showed a "six pack" photographic

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[9] Jesus Cervantez was a member of a tagging crew called "Just Kicking It," also known as "J.K.I." (17RT 3484.)

lineup to Mr. Romero, who selected Rascal's photograph and indicated that "he might look like the shooter." (17RT 3507.)

Deputy Medical Examiner Juan Carrillo explained the nature of the gunshot wounds inflicted on Mr. Cervantez. (17RT 3439.) Specifically, Dr. Carrillo described the four gunshot wounds suffered by Mr. Cervantez – three of the four being fatal wounds independent of the others – as "characteristic of an assault weapon type of wound." (17RT 3442-3444.)

After appellant confessed to murdering Detective Black and attempting to murder Detective Delfin, he told Detective Lasiter that he was also involved in Mr. Cervantez's murder. Specifically, appellant told Detective Lasiter that he had taken an AK-47 "to shoot some J.K.I. gang members in retaliation for a drive by shooting that they had done against him." (17RT 3528-3529.) Appellant also told Detective Lasiter that after the murder, he took the AK-47 apart, broke it into pieces, and disposed of it. (17RT 3533.)

2. Children's birthday party at Toro's house

Desiree Rodriguez was Toro's "common-law wife." (19RT 3745.) On April 29, 2000, Ms. Rodriguez had a birthday party at her home on the 1900 block of Lime Avenue for her 10-year-old niece. (19RT 3732-3734.) Normally, Ms. Rodriguez had nine children at her house. (19RT 3734.) However, on that day there were approximately 20 children at the house for a slumber party, which was decorated out front with balloons, streamers, and a "happy birthday" sign. (19RT 3737-3738.) That evening, when appellant began shooting, Ms. Rodriguez ordered the children to get down on the floor. (19RT 3740.)

3. Detective Rick Delfin

On April 29, 2000, Detective Delfin was a member of the Gang Enforcement Section of the Long Beach Police Department. (19RT 3818.)

Detective Delfin was partnered that day with Detective Daryle Black, whom he had known for approximately five years. Detective Delfin described Detective Black as "a very dedicated officer, hard working, good family man, former Marine." According to Detective Delfin, his partner "had a good rapport with the public, respected the public, [and was] respected by his fellow officers." (19RT 3824-3825.)

Detective Delfin knew "right away" that he and Detective Black were under attack from an assault weapon. (19RT 3830, 3841.) Detective Delfin described how the bullets impacted his police car (19RT 3831), his head (19RT 3832), his abdomen (19RT 3834), his knee (19RT 3835), and ultimately killed his partner (19RT 3833, 3843). Detective Delfin believed that he was going to die, and called out on his radio for help. He also radioed that he did not want to die without seeing his children again. (19RT 3843-3844, 3916-3918, 3934.)

Detective Delfin also described what it meant to him to be a Long Beach Police officer who could no longer work on the streets because of appellant's actions:[10]

> I think about it every day. It was the world to me, just getting into the car with my partner. And I worked the night shift for 15 years at that time. I - - it was everything. You have to experience it. It's like, I was an adrenalin junkie. I loved my assignment. I loved the guys I worked with. [¶] I kept my badge shiny. My shoes shined. The police car was always shiny. I don't have that anymore.

(19RT 3844.)

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[10] Detective Delfin spent 19 days in the hospital following the shooting, and underwent 10 operations to repair the damage caused by appellant. (19RT 3847.) He received the Medal of Valor and a Purple Heart as a result of the shooting. (19RT 3849.)

Lawrence Dorr was Detective Delfin's orthopedic surgeon.[11] (20RT 4029.) Dr. Dorr described the wounds inflicted by appellant on Detective Delfin and the treatment required to treat the injuries. Specifically, Dr. Dorr described how appellant's bullets had penetrated through Detective Delfin's knee joint and into the bone. (20RT 4029.) According to Dr. Dorr, the bullets fired by appellant "destroyed" Detective Delfin's knee. (20RT 4034.) Dr. Dorr also described the infection that followed the shooting, which was so bad at one point a surgeon recommended amputating Detective Delfin's leg. (20RT 4031.)

4. Debbie Delfin

Debbie Delfin was Detective Delfin's wife. (21RT 4328.) Mrs. Delfin met Detective Delfin when she was 16 years old, and he had recently graduated from high school. Detective Delfin "always ran, worked out numerous times a week," and was "concerned about his physical fitness." (21RT 4329.) On the night of the shooting, Mrs. Delfin received a telephone call from Detective Morales. Mrs. Delfin knew the call meant that Detective Delfin had been injured in some way. (21RT 4334.)

Detective Morales took Mrs. Delfin to the hospital. Detective Delfin was "bandaged up" and "his head was off to one side because it was swollen, extremely, off to the side." (21RT 4336.) When he saw his wife, Detective Delfin's first words were, "I'm sorry I ruined your birthday." (21RT 4337.)

Mrs. Delfin described the emotional and physical problems caused by appellant's actions. Specifically, she stated that her son "has a break down probably at least a few times a month," and explained how her "little one will ask why daddy got shot." (21RT 4338.)

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[11] Dr. Dorr's testimony from the first penalty phase trial was read into the record pursuant to a stipulation between the parties. (20RT 4028.)

5. Fred Cerra

Fred Cerra met Detective Black in 1989 or 1990. Thereafter, the two men became best friends. (20RT 4228.) Detective Black stood as the best man at Mr. Cerra's wedding, and when Mr. Cerra joined the Phoenix Police Department, Detective Black attended the graduation ceremony. (20RT 4227.) After appellant murdered Detective Black, Mr. Cerra felt "it was more like than just a family member had died. It was like a part of [him] had died." (20RT 4230.)

6. Daniel Puls

Daniel Puls served in the Marine Corps with Detective Black. (21RT 4299.) Mr. Puls described Detective Black as a "gentle giant," "always more considerate for the other guys," and someone who "cared about other people." (21RT 4303.) During boot camp Mr. Puls served as Detective Black's squad leader. (21RT 4300.) According to Mr. Puls, Detective Black "was a damn good Marine." (21RT 4308.)

7. Robert Knight

Long Beach Police Officer Robert Knight met Detective Black shortly after he graduated from the Orange County Sheriff's Department academy. While working together at the Orange County Men's Central Jail, Officer Knight and Detective Black became friends. (21RT 4310.) Officer Knight recalled how the Orange County Men's Central Jail inmates who knew Detective Black "had respect for him," and how on occasion Detective Black would talk to gang members "to try to turn their lives around from the gang life." (21RT 4315.) When Officer Knight transferred from the Orange County Sheriff's Department to the Long Beach Police Department, he worked along side Detective Black. (21RT 4320.) According to Officer Knight, Detective Black "lived [and] breathed" the life of a police officer, and "kept preaching how Long Beach [Police Department] was the best

kept secret in Southern California." (21RT 4320.) Detective Black was especially good with kids, and "couldn't pass by a kid without talking to him." (21RT 4323.)

8. Howard Black

Howard Black was Detective Black's oldest brother. Detective Black had two older brothers and two older sisters. (21RT 4341.) Mr. Black described how Detective Black wanted to get married, but that "he was not going to rush into anything. He wanted something that would last and be true, and he wanted kids." (21RT 4348.)

9. Karen Black

Karen Black was Detective Black's sister. (21RT 4351.) Ms. Black, who remained in Grand Rapids (the town where she and Detective Black were raised), said that there were "reminders everywhere" of Detective Black. (21RT 4353.) Coincidentally, Ms. Black and her son (Detective Black's nephew) had planned to be in Southern California on May 4, 2000, for a vacation. Instead, Ms. Black attended her brother's memorial service that day. Two days later, which was Ms. Black's birthday, Detective Black was buried. Since that day, Ms. Black "[has] not celebrated a birthday." (21RT 4353.)

10. Connell Black

Connell Black was Detective Black's brother. Mr. Black remembered his brother as a man who "live[d], breathe[d], and die[d] for his community." (21RT 4367.) Prior to his murder, Detective Black had spoken with his brother about his desire to have his own family and children. According to Mr. Black, Detective Black "talked about having kids...how was it really being around kids full time. [Detective Black] would really get excited about that when [they would] talk about it." (21RT 4367.)

D. Penalty Phase Defense Evidence

1. Francisco Virgin

Francisco Virgin was appellant's first cousin once removed.[12] (21RT 4376.) Mr. Virgin knew appellant for almost his entire life. (21RT 4377.) Mr. Virgin remembered appellant as a "normal boy, like all," and "very close to his mom and dad." (21RT 4378.) In the summer of 1997, at the request of appellant's mother, appellant was sent to Chowchilla to live with Mr. Virgin. When he arrived, appellant was enrolled in school, but a few days later he stopped going to school and began working as a farmhand at a local dairy farm. (21RT 4379.) During the time appellant was with Mr. Virgin, appellant never acted in an aggressive manner. (21RT 4380.)

2. Cruz Perez

Appellant was Cruz Perez's grand nephew. Mr. Perez knew appellant for his entire life. (21RT 4388-4389.) During the first 12 years of his life, appellant "was a good child" who "wanted to study," "did sports," and "worked to help his parents, to be a good citizen." Mr. Perez never saw appellant act aggressively, with disrespect toward his parents, or with anger. (21RT 4390.) Occasionally, Mr. Perez's niece (appellant's mother) would call Mr. Perez to say that appellant was "behaving badly." Mr. Perez volunteered to have appellant live with him in Mira Loma. Appellant told Mr. Perez he would "let [him] know," but never went to Mira Loma. (21RT 4391, 4395.)

3. Isidro Llamas

Isidro Llamas met appellant when appellant was 11 years old. Between the ages of 13 and 15, appellant played on a soccer team coached

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[12] Mr. Virgin was appellant's mother's first cousin. (21RT 4376.) Thus, appellant was not Mr. Virgin's nephew, but rather, the two men were first cousins once removed.

by Mr. Llamas. According to Mr. Llamas, when appellant was 13 to 15 years old he was a "very good athlete," a "very pleasant person," and "not at all" aggressive. (22RT 4416-4417.) During those years, appellant "never" fought or started arguments on the soccer field. (22RT 4418.) During the last season appellant played on the soccer team, appellant's father began an affair with Mr. Llamas's niece, which was a "situation that maybe affected [appellant]." (22RT 4419-4421.)

Once appellant stopped playing soccer, Mr. Llamas saw him infrequently. During those times, appellant was "well dressed, with his hat, his boots, and his Levi pants." According to Mr. Llamas, appellant was "very respectful." (22RT 4422.)

On cross-examination, Mr. Llamas stated that he never say appellant with his fellow gang members. He also stated that he never saw appellant's tattoos or video tapes of how appellant conducted himself from the time he was 16 to 18 years old. (22RT 4422-4423.)

4. Jose Llamas

Jose Llamas was Isidro Llamas's son, and worked as an assistant to his father during the time appellant was on Isidro Llamas's soccer team. (22RT 4426-4427.) According to Jose Llamas, appellant was a "very humble, well spoken, soft spoken, very respectful" child. Jose Llamas described appellant as a "great" soccer player. (22RT 4428.)

Jose Llamas saw appellant approximately six months before appellant was arrested. At that time, he did not notice any gang tattoos on appellant. (22RT 4430.)

5. Maria Quintero

Maria Quintero was appellant's grandmother. (22RT 4436.) Ms. Quintero thought appellant was "a very good person" and "very easy going" when he was a child. (22RT 4438.) In 1995, appellant lived in

Mexico for six months with his grandmother. According to Ms. Quintero, appellant was sent to live with her because "maybe [appellant's] parents knew something." (22RT 4440.) During the time appellant was in Mexico, Ms. Quintero did not have any problems with him or see him act in a violent manner. (22RT 4441-4442.)

6. Maria Ramirez

Maria Ramirez was appellant's aunt. (22RT 4447.) When appellant was nine years old, he and Ms. Ramirez lived in the same house for roughly one year. (22RT 4448-4449.) Ms. Ramirez saw appellant at a party approximately one year before he murdered Detective Black. On that occasion, appellant was respectful and polite. Ms. Ramirez said she "can't believe what's happened," and thought that appellant was "not capable of harming anybody." (22RT 4451.)

On cross-examination, Ms. Ramirez admitted that she was aware that appellant's mother sent him to live in Mexico "to try and get him away from the gangs" and because he "kept hanging around with the gang members." (22RT 4453.) Ms. Ramirez knew and was most familiar with appellant as a nine-year-old boy, not as an adult. (22RT 4454.)

7. Alonso Sandoval

Alonso Sandoval was appellant's cousin. When Alonso Sandoval was seven years old, he lived in an apartment that was next to where appellant lived. (22RT 4458.) During that time, appellant was "a great friend, always smiling, [and] playful." (22RT 4459.) Later, when appellant was older, he told Alonso that "it was really hard for him to stay away [from the gang], that the gang looked for him, they followed him around," and that he "pretty much felt pressured to be there." (22RT 4463-4464.)

8. Reynalda Macias

Reynalda Macias was appellant's aunt. (22RT 4475.) When appellant was 13 years old, he was a "very nice boy." Appellant was never aggressive or violent when he was with Ms. Macias. (22RT 4477.)

In November of 1996, appellant lived in Mexico with Ms. Macias. According to Ms. Macias, her brother (appellant's father) sent him to Mexico "to get him away from the danger he was in" because "[appellant] was going around with the gang members." During his time in Mexico with Ms. Macias, appellant behaved "very well," was "respectful" and "polite." (22RT 4478-4479.)

9. Nancy Sandoval

Nancy Sandoval was appellant's sister. (22RT 4485.) When appellant was 11 years old, he was a "very shy" and "quiet" person. Nancy Sandoval claimed that appellant had never once sworn, been violent, or acted in an aggressive manner while in her presence. (22RT 4490.) According to Nancy Sandoval, after appellant was arrested for murdering Detective Black she loved him "more" because he was "suffering in [jail]." (22RT 4501.)

10. Gregory Boyle[13]

Gregory Boyle was a Jesuit priest and the executive director of a gang intervention program. (22RT 4519.) Father Boyle believed that gangs were "the urban poor's version of teenage suicide." (22RT 4522.) He also felt that young people "may not fully or certainly not fully understand the consequences of the decision to get courted into a gang." (22RT 4524.)

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[13] Pursuant to a stipulation between the parties, Father Boyle's testimony from the first penalty phase trial was read into the record. (22RT 4518.)

Father Boyle stated that a child who lives in a gang neighborhood and avoids joining a gang commits a "heroic" act. (22RT 4526.)

11. Avel Sandoval

Avel Sandoval was appellant's brother. (22RT 4537.) Avel never joined a gang, because appellant kept him from doing so. (22RT 4537.) Specifically, Avel claimed that appellant advised him that gangs were "not for [him]" and said that "if you get into a gang, you ain't going to be able to come out." (22RT 4538, 4551.)

12. Alma Sandoval

Alma Sandoval was appellant's mother. (22RT 4554.) In 1996, when Ms. Sandoval discovered that the area she lived in had a lot of gang activity, she tried to get appellant away from the area. (22RT 4558.) Ms. Sandoval tried to help appellant by sending him to Mexico. (22RT 4562.) In spite of his faults, Ms. Sandoval expressed her love for her son. (22RT 4568.)

ARGUMENT

I. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY NOT HOLDING AN EVIDENTIARY HEARING RELATED TO APPELLANT'S SUPPRESSION MOTION

In Ground One, appellant claims that the trial court erred by failing to conduct a hearing to determine whether material information had been omitted from the affidavit filed in support of the search warrant used to search his home (known as a "*Franks* hearing").[14] (AOB 72-116.) Respondent disagrees. The trial court's rulings were proper.

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[14] *Franks v. Delaware* (1978) 438 U.S. 154 [98 S.Ct. 2674, 57 L.Ed.2d 667].

A. Procedural and Factual Summary

Following the murder of Detective Black, Long Beach Police Department Detective Steven Smith applied for a warrant to search appellant's house. (1CT 106-107.) In support of his application, Detective Smith attached a 12-page affidavit that set forth the underlying facts of his investigation to that point in time. (1CT 108-119.) Some parts of the affidavit contained information obtained from Miguel Camacho, a Barrio Pobre gang member known by the moniker "Rascal." (See 1CT 110-114.) Other parts of the affidavit contained information obtained from other sources. (See 1CT 108-110, 114-118.)

On April 26, 2002, appellant filed a motion pursuant to Penal Code section 1538.5 to suppress evidence seized during the search of his home, including all statements he made to the police following his arrest, all evidence recovered from his home, and all observations made at his home and of his car. (1CT 97-104.) A hearing on the suppression motion was held on September 19, 2002, at which time defense counsel argued that the investigating officers had willfully concealed material facts from the search warrant affidavit. (3RT 308.) As set forth in more detail below, the trial court found there was "no doubt" that probable cause supported the search warrant (3RT 317-318), and that there was no need to hold a *Franks* hearing because appellant's argument was "based on assumptions" and "not based on anything that the police knew" (3RT 319). The trial court then denied appellant's motion. (3RT 319.)

On September 26, 2002, appellant filed a supplemental suppression motion. (1CT 237-241.) At a hearing held that same day, defense counsel argued that the conditions under which Rascal's statements were made rendered them involuntary (1CT 239), and also that a telephone call made by Sergeant Longshore of the Los Angeles County Sheriff's Department to Sergeant Hainly of the Long Beach Police Department gang unit should

have been disclosed to the magistrate in the search warrant affidavit (1CT 240-241). At the hearing, the trial court found that it did not "take anything [Rascal] said" at "face value." The court also found that information about the telephone call from Sergeant Longshore to Sergeant Hainley would have had "no material [effect] at all on the evaluation of probable cause." (3RT 527.) The trial court then denied the renewed suppression motion. (3RT 528.)

B. Applicable Law

A search warrant cannot be issued except upon a finding of probable cause. (U.S. Const., Fourth Amend.; Pen. Code, § 1525.) In determining whether probable cause exists, an issuing magistrate applies a "totality-of-the-circumstances" test. (*Illinois v. Gates* (1983) 462 U.S. 213, 238 [103 S.Ct. 2317, 76 L.Ed.2d 527].) In *Illinois v. Gates*, the Supreme Court stated:

> The task of the issuing magistrate is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, including the "veracity" and "basis of knowledge" of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found at a particular place.

(*Id.* at p. 238.)

"[T]he duty of the reviewing court is simply to ensure that the magistrate had a 'substantial basis for . . . conclud[ing]' that probable cause existed." (*Illinois v. Gates, supra*, 462 U.S. at pp. 238-239.) "'[A]ll conflicts must be resolved in favor of respondent, and all legitimate and reasonable inferences indulged to uphold the findings of the [magistrate] if possible.'" (*People v. Tuadles* (1992) 7 Cal.App.4th 1777, 1784.) "'The possibility of an innocent explanation does not deprive the [magistrate] of the capacity to entertain a reasonable suspicion.'" (*Id.* at p. 1784.) The magistrate may legitimately consider the opinions of an experienced

officer. (*Ibid.*; see also *People v. Stanley* (1999) 72 Cal.App.4th 1547, 1555.) "'Circumstances and conduct which would not excite the suspicion of the man on the street might be highly significant to an officer who had extensive training and experience in the devious and cunning devices used by narcotics offenders to conceal their crimes.'" (*People v. Tuadles, supra*, 7 Cal.App.4th at p. 1784.)

In *Franks v. Delaware, supra*, 438 U.S. at page 154, the Supreme Court held that a criminal defendant could challenge the veracity of an affidavit used to procure a search warrant where a showing is made the affidavit included a deliberate or recklessly made misrepresentation or omission as to material facts. There must be allegations of deliberate falsehood or of reckless disregard for the truth, and those allegations must be accompanied by an offer of proof. (*Id.* at pp. 171-172.) However, "[a]llegations of negligence or innocent mistake are insufficient." (*Ibid.*; *People v. Avalos* (1996) 47 Cal.App.4th 1569, 1581.) As noted above, "the opinions of an experienced officer may legitimately be considered by the magistrate in making a probable cause determination." (*People v. Stanley, supra*, 72 Cal.App.4th at p. 1555; *People v. Tuadles, supra*, 7 Cal.App.4th at p. 1784.)

A defendant may attack a facially sufficient warrant affidavit on the grounds that it is incomplete even when it contains no affirmative falsehoods. (*People v. Kurland* (1980) 28 Cal.3d 376, 384; *People v. McFadin* (1982) 127 Cal.App.3d 751, 761.) An affidavit in support of a search warrant must provide the issuing magistrate with information which allows for a common sense determination as to whether circumstances are probably present that justify a search. (*People v. Kurland, supra*, 28 Cal.3d 24 at p. 384; *People v. McFadin, supra*, 127 Cal.App.3d at p. 761.) "Material" facts must be disclosed if their omission would make the affidavit "substantially misleading." When reviewing a motion for the

alleged suppression of evidence, facts must be deemed material if there is a substantial possibility they would have altered a reasonable magistrate's probable cause determination. (*People v. Kurland, supra*, 28 Cal.3d at p. 385; *People v. McFadin, supra*, 127 Cal.App.3d at p. 761.) The "defendant has the burden of demonstrating recklessness or intent to mislead." (*People v. Kurland, supra*, 28 Cal.3d at p. 390.)

On appeal, "[t]he magistrate's determination of probable cause is entitled to deferential review. [Citation.]" (*People v. Kraft* (2000) 23 Cal.4th 978, 1040-1041.) However, appellate review of the denial of a *Franks* hearing is de novo. (*People v. Panah* (2005) 35 Cal.4th 396, 457.)

C. Discussion

Appellant's primary complaint is that the trial court erred by denying his request for a *Franks* hearing, because probable cause would not have been found by the magistrate who issued the search warrant used to search appellant's house had the following information been disclosed by Detective Smith in his affidavit: (a) "[p]olice originally suspected a member of the Crips gang had shot Detective Black, and they had already obtained, from a different judge, a warrant to search the home of that Crips member"; (b) "police deemed Rascal a suspect, and not a mere witness, because he had been found hiding at the scene, and he had been armed"; (c) "Rascal was a suspect in two other pending homicide investigations"; (d) "Rascal was a member of [Barrio Pobre]"; (e) "police failed to disclose the circumstances that rendered Rascal's statements to them involuntary"; and (f) "officers of the Long Beach Police Department had received information from officers of the Los Angeles County Sheriff's Department regarding Rascal's involvement in a 1999 homicide." (AOB 111-112.) As set forth in more detail below, his claim does not entitle him to relief and should be rejected.

Initially, the affidavit filed with the request for a search warrant established that the affiant had over 17 years of experience as a police officer (including eight years of experience with the Long Beach Police Department's Drug Investigation Section and over two years of experience with the Long Beach Police Department's Homicide Detail). (1CT 108.) The officer's extensive experience is something that the magistrate properly considered in making its probable cause determination. (*People v. Stanley, supra*, 72 Cal.App.4th at p. 1555; *People v. Tuadles, supra*, 7 Cal.App.4th at p. 1784.)

Moreover, none of the evidence to which appellant points amounts to a substantial showing that Detective Smith's failure to include the information in his affidavit constituted a deliberate falsehood or reckless disregard of the truth. Omissions are material "if their [absence] would make the affidavit *substantially misleading*" or if "there is a substantial possibility they would have altered a reasonable magistrate's probable cause determination." (*People v. Kurland, supra*, 28 Cal.3d at p. 385, italics added.) An officer preparing an affidavit in support of a search warrant "need not disclose every imaginable fact however irrelevant. [He] need only furnish the magistrate with information, favorable and adverse, sufficient to permit a reasonable, common sense determination whether circumstances which justify a search are probably present." (*Id.* at p. 384.)

1. Detective Smith did not mislead the court by "withholding" information about an avenue of investigation unrelated to appellant

Appellant first claims the affidavit should have declared that "[p]olice originally suspected a member of the Crips gang had shot Detective Black, and they had already obtained, from a different judge, a warrant to search the home of that Crips member." (AOB 111.) A review of the record shows that the information appellant now claims was "withheld" from

Detective Smith's affidavit related to an avenue of investigation that ultimately proved to be fruitless as a result of developments in the ongoing investigation. Appellant cites no law, and respondent is aware of none, that suggests that because information about an alternative motive for a homicide (in this case the alleged Crips gang retaliation) led to a search warrant, the existence of that warrant must be presented in a subsequent search warrant application as evidence pertinent to the magistrate's probable cause determination. (See *People v. Kurland, supra*, 28 Cal.3d at p. 385.) The mere existence of a prior suspect based on an alternative theory is irrelevant to whether a subsequent investigation provided probable cause to search the home of a new suspect. Put another way, given the strength and detail of the information contained in Detective Smith's affidavit, there is no substantial possibility that including information about the existence of the *first* search warrant would have altered the magistrate's probable cause determination for the warrant used to search appellant's house. (*Id.*; *People v. McFadin, supra*, 127 Cal.App.3d at p. 761.)

2. Rascal was not considered a suspect at the time the first search warrant was issued

Contrary to appellant's position (see AOB 111), the record does not support the conclusion that police viewed Mr. Camacho ("Rascal") as a suspect when the first search warrant was issued. Instead, the record shows that at the time the warrant was issued, investigators considered him a potential witness to Detective Black's murder. The following colloquy took place at the September 19, 2000, hearing:

> MR. BISNOW: We are contending that they did conceal material information because, basically, what they are saying is they are going the magistrate and saying, give us a warrant to arrest [appellant] and search him and here's where he's living. [¶] The basis for that, if you cut down to everything, is that Camacho, the co-suspect Camacho, told us it was [appellant] who did the shooting. The co-suspect Camacho was found in

unusual circumstances. He was found hiding in the backyard on Lime Avenue shortly after the homicide.

THE COURT: [At] the time of the search warrant *he's not a co-suspect. He was a witness.*

MR. BISNOW: Whether that characterization is true or not depends on your knowledge of the facts.

THE COURT: Whether or not that characterization is true depends on evidence you have that is contrary to that.

MR. BISNOW: One of the parts of evidence would be he's in the situation hiding. He's got himself a gun. He's armed in the neighborhood without any explanation. He's trying to pin it on somebody else. But if you know this fellow has a record and is wanted for two other homicides, you might think of him as a co-suspect rather than as a witness.

THE COURT: You're making a lot of assumptions. You're assuming that Detective Smith knew all that and materially and deliberately withheld it. Those are assumptions.

MR. BISNOW: That's correct.

THE COURT: Mr. Bisnow, if I'm correct, that's an assumption. That is not sufficient. You have to have evidence.

(3RT 308-309, italics added.)

Nor did the affidavit mislead the magistrate with regard to the nature of Rascal's involvement. After noting that Rascal was detained "after conducting a search for possible suspects," the affidavit stated that Rascal was interviewed "as a witness to the shooting." (1CT 110, italics added.) The affidavit also disclosed that Rascal had been apprehended "in possession of a .45 semi-automatic handgun" (1CT 111), that "it became apparent over a period of time that [Rascal] was not revealing all of the information he possessed regarding the shooting" (1CT 111), and that Rascal's statements were consistent with information provided by other witnesses, including Mr. Falconer and Detective Delfin (1CT 118).

Based on these facts, appellant has failed to carry his burden of demonstrating that Detective Smith recklessly withheld any material information about Rascal, or had any intent whatsoever to mislead the court. (*People v. Kurland, supra*, 28 Cal.3d at p. 390.) Indeed, the record clearly shows that the trial court rejected appellant's argument that Rascal was considered a suspect at the time the warrant was issued. (3RT 317 ["In addition, at the time, contrary to what [counsel for appellant] says, Mr. Camacho was not a suspect, but the police were treating him as a witness at that time. In addition, the magistrate was faced with information that Mr. Camacho was not an innocent citizen informant by any stretch."].)

3. Detective Smith did not withhold information about Rascal's potential involvement in other homicides

Although appellant claims that Detective Smith should have disclosed that Rascal was a suspect in two other homicides (that were being investigated by a different police agency), he has failed to meet his burden of demonstrating either recklessness or an intent to mislead the magistrate. (*People v. Kurland, supra*, 28 Cal.3d at p. 390.) The following colloquy took place below regarding this issue:

> MR. BISNOW: And ask yourself, if someone is coming to you, applying for a warrant to arrest someone and search their home, whether you would like to know, as the magistrate, that the information in which you rely comes from a person who himself is suspected of two homicides, and now you're saying, well, how do you know what Detective Smith knows about that. [¶] I would just say the fact that we have a report, Exhibit B, that shows the sheriff knew about it as a grounds to reasonably suspect and charge the sheriff with that information, would bring that to the magistrate so the attached magistrate can have all the information.
>
> THE COURT: Yes, you're right, it's enough to charge the sheriff, but Detective Smith was Long Beach Police, not the sheriff.

> MR. BISNOW: To charge the sheriff and Long Beach Police. Our offer of proof is that we have shown sufficient evidence through Exhibit B and all -- and if you read all the affidavit, that a reasonable person familiar with the criminal system would suspect that officer, that the affiant, knew all this; had reason to know all this and purposely didn't reveal it. [¶] He can't just reveal to the magistrate those things which are favorable to his search warrant and hide things which are unfavorable, and seems to me, I think we have shown a prima facie case by the exhibits, without any need of declaration.

(3RT 310-311.)

In response, the prosecutor stated that the "whole reason that the Long Beach Police Department found about [one of the homicides] is that their client confessed to the crime." (3RT 313.) Put another way, the information that actually permitted the Long Beach Police Department to connect Rascal with the two homicides appears to have been provided *by appellant* and *after his arrest*: As summarized by the prosecutor:

> That's why they -- their client [appellant] confessed to the crime. He says, "And by the way, on top of this other murder I committed where I killed Daryle Black and shot Delfin and wounded that woman Maria Cervantes, there is also a situation I was involved in about six months ago; it was over at this McDonald's, and I took an AK-47 and I shot up these people and two Hispanic guys on bicycles" And Long Beach Police says, what is he talking about. It's not in their jurisdiction. They don't know.

(3RT 313.) The prosecutor further noted:

> There isn't a bank of information that exists in the law enforcement community which says, you know what, everybody that's a suspect in each homicide all over the place is then put into a database where the police department can go access and find out if this person who claims to be a witness is a suspect somewhere in the State of California. It doesn't exist.

(3RT 314.)

As set forth above, there was nothing presented that suggested the affiant in this case deliberately or recklessly withheld information that Rascal was a suspect in other cases. Nor does the record support the conclusion that appellant made an adequate offer of proof that would have justified an evidentiary hearing in this regard. (See *Franks v. Delaware, supra*, 438 U.S. at pp. 154, 171-172.) Instead, the record strongly suggests that appellant's counsel based his claim on the unfounded assumption that all law enforcement agencies were aware of the status of all ongoing homicide investigations throughout the state, and charged the Long Beach Police Department with that knowledge. (See 3RT 314, 319 ["In fact, as you have stated consistently, these are assumptions you're making based upon your interpretation of what you knew about the case and not based on anything the police knew."].) This sort of showing was completely insufficient to warrant an evidentiary hearing, and accordingly, the trial court properly denied appellant's motion. (See *Franks v. Delaware, supra*, 438 U.S. at p. 171 ["To mandate an evidentiary hearing, the challenger's attack must be more than conclusory and must be supported by more than a mere desire to cross-examine."].)

4. Detective Smith did not withhold information about Rascal's Barrio Pobre gang membership status

Simply stated, appellant's claim that Rascal's membership in the Barrio Pobre gang was not disclosed by Detective Smith (see AOB 111-112) is incorrect. The search warrant affidavit states in relevant part:

> It became apparent over a period of time that Camacho ["Rascal"] was not revealing all of the information he possessed regarding the shooting and ultimately was advised of the fact that Officer Delfin had been one of the victims. Camacho appeared visibly shaken and upon learning of Delfin's condition broke down in tears. After a short period Camacho indicated that the name of the person responsible for the shooing, was a

fellow member of the Compton Barrio Pobre gang, named Ramon Sandoval, also known as "Gumby."

(1CT 111, italics added.)

There is no ambiguity to the italicized portion of the search warrant affidavit shown above, which states that Rascal was a "fellow member" of the "Compton Barrio Pobre gang." (1CT 111.) "Fellow member" is a commonly-used term to describe people who are members of the same gang. (See, e.g., *People v. Ramos* (2004) 121 Cal.App.4th 1194, 1208 ["Additionally, the People's gang expert testified gang members are expected to defend each other and shoot anyone who disrespected a fellow member of the gang."].) Because Rascal's gang membership was in fact disclosed and included as part of the search warrant affidavit, appellant's claim to the contrary (AOB 111-112) is without merit.

5. The circumstances of Rascal's statements were not relevant to a determination of probable cause in appellant's case

Appellant also claims that Detective Smith "failed to disclose the circumstances that rendered Rascal's statements to them involuntary." (AOB 112.) Respondent disagrees. As a threshold issue, Fourth Amendment rights are personal and may not be vicariously asserted. (*Rakas v. Illinois* (1978) 439 U.S. 128, 133-134 [99 S.Ct. 421, 58 L.Ed.2d 387]; *People v. Letner* (2010) 50 Cal.4th 99, 213.) Here, appellant complains that Detective Smith failed to disclose the circumstances leading to *Rascal's* statements, not his own. (AOB 112.) Thus, to the extent that this claim for relief is based on an assertion that *appellant's* Fourth Amendment rights were affected when *Rascal* made statements to the police, it must be rejected as appellant has no standing to make such a challenge. (*Ibid.*)

In any event, as noted in more detail above, a search warrant affidavit must not contain deliberately or recklessly made misrepresentations or omissions about material facts. (*Franks v. Delaware, supra*, 438 U.S. at p. 154.) Here, Detective Smith made no factual misrepresentations, and did not omit any material information from the search warrant affidavit. Detective Smith was not required to disclose "every imaginable fact," but rather only those material facts required for the issuing court to make a "common sense determination as to whether circumstances are probably present which justify a search." (*People v. Kurland, supra*, 28 Cal.3d 24 at p. 384; *People v. McFadin, supra*, 127 Cal.App.3d at p. 761.)

Here, appellant relies on self-serving testimony provided by Rascal at a suppression hearing that took place *well after* the magistrate issued the search warrant. (AOB 97, 100.) There is no showing that at the time Detective Smith drafted his affidavit he agreed with Rascal's subsequent account of the interview. Nor is there any evidence that suggests Detective Smith believed Rascal's statements were involuntary, or that Detective Smith deliberately or recklessly omitted facts about Rascal's interview to mislead the magistrate. As such, appellant's claim does not entitle him to relief. (*Franks v. Delaware, supra*, 438 U.S. at pp. 154, 171-172.)

6. Information regarding Sergeant Longshore's telephone call was not material

In his supplemental motion to suppress evidence (see 1CT 237-241), appellant stated that eight months before Detective Black's murder, Sergeant Longshore from the Los Angeles County Sheriff's Department contacted Sergeant Hainly of the Long Beach Police Department gang unit to inform him that Rascal was a "person of interest" in the earlier homicides, and that he was "arrestable" because he was on parole. (1CT 240.) Appellant claims that this additional information should have been

disclosed to the magistrate in the search warrant affidavit. (AOB 112.) Respondent disagrees, as the information was not material.

Appellant's claim is based on a theory of constructive knowledge. There is nothing in the record that suggests Detective Smith had any actual knowledge of the telephone call that took place between Sergeant Longshore and Sergeant Hainley. As such, there is nothing to suggest that the omission of this evidence was either deliberate or recklessly made. (*Franks v. Delaware, supra*, 438 U.S. at p. 154.) As noted earlier, "[a]llegations of negligence or innocent mistake are insufficient." (*Ibid.*; *People v. Avalos, supra*, 47 Cal.App.4th at p. 1581.)

Regardless, even if this knowledge is deemed to have been in the constructive possession of the entire Long Beach Police Department, its omission from the search warrant affidavit would be problematic only if the information was material. (*Franks v. Delaware, supra*, 438 U.S. at p. 154.) It was not. Indeed, the trial court expressly addressed this issue and determined the complained-of information was not material, and as such had no effect on the probable cause determination. The following exchange occurred:

> THE COURT: I still don't see how that impacts on your *Franks* motion.
>
> [DEFENSE COUNSEL]: Simply to show that of a material omission. We're claiming there's a material omission that Camacho was involved in a double homicide; should have been put in the report. Prosecution's position at the hearing was - - at our previous hearing last week was that it was not. [¶] Could not have been known to the Long Beach affiant, because police departments don't share information, and now we have information from Sergeant Longshore that in fact he called Long Beach and talked to the gang supervisor, Sergeant Hainley, eight months before the crime in this case, alerting them to their desire to question Miguel Camacho, and that should have therefore been attributed to knowledge of the Long Beach Police Department and should have been put in the affidavit.

> THE COURT: Let's say this, that even if we add all that, *it would have no material affect [sic] at all on the evaluation of probable cause*. Even giving you the greatest assumption possible, it would have no affect [sic]. [¶] They had all sorts of information about Camacho's past that he was not a citizen informant and not somebody who would get a gold star as a good citizen. He had a 245. He was a gang member, et cetera. I don't think that's going to add to it. Again, denied.

(3RT 527-528.)

In sum, the magistrate had pertinent information about Rascal. As such, additional information regarding Sergeant Longshore's telephone call to the Long Beach Police Department was neither material nor omitted in a deliberate or reckless fashion. Thus, appellant's claim should be rejected.

7. The trial court did not improperly rely on "extrajudicial" credibility determinations

Appellant also assigns error to the trial court's use of "extrajudicial fact finding." (AOB 114.) Although appellant argues the trial court erred by *not considering* statements made by Rascal at a prior suppression hearing (see AOB 113), he also claims the trial court erred by *considering* its belief that "neither Rascal nor Maria Puente-Porras, Esq. had testified credibly." (AOB 114.) His claim is without merit, as the trial court did not rely on any "extrajudicial fact finding" in this case.

A review of the record shows that the trial court's statements regarding Rascal's credibility were made in the context of the court *declining* defense counsel's request to rely on Rascal's "sworn testimony" from his own suppression hearing. (See 3RT 525-526.) After defense counsel summarized Rascal's "sworn testimony" in support of his belief that statements made by Rascal to police were involuntary and that the circumstances of Rascal's interview should have been disclosed by Detective Smith in the affidavit used to search appellant's house, the trial court made the following observations:

> You made a statement that it wasn't clear that Camacho was not in custody, when in point in fact it was clear he was not in custody. I don't agree with your characterization of what occurred, and I don't agree with Mr. Camacho's statements that he made subsequently during the hearing. [¶] I find to say that he was not credible is to put it mildly to the court. As I listened to his statements, it was clear he was out and out lying. There's no other way to put it. He was not a credible witness. He was clearly not telling the truth. [¶] He kept making comments to the effect they made me say that; they made me do that. Then, as Mr. McCormick continued questioning him, he completely changed and contradicted his statements that he testified to earlier under oath. He was simply not telling the truth. Period. [¶] So for those reasons, *that's why I say what you have outlined is not correct* because you cannot take anything he said at that hearing at face value, and I don't find that it was fruit of the poisonous tree, and your motion is denied.

(3RT 526-527, italics added.)

Simply stated, the trial court was not relying on "extrajudicial" credibility determinations to deny appellant's second request for a *Franks* hearing. Instead, the trial court was properly rebutting appellant's claim that Rascal's testimony supported a finding that material facts about Rascal's interview should have been disclosed by Detective Smith in the affidavit attached to the search warrant used to search appellant's house. (3RT 526-527.) In so doing, the trial court properly determined that for the purposes of appellant's pending motion, Rascal's prior testimony was not credible and therefore did not support appellant's offer of proof. Put another way, the trial court's credibility determination about Rascal's testimony was not "extrajudicial," but rather constituted a finding made during appellant's hearing based in part on the trial court's own knowledge of Rascal's testimony.

For these reasons, appellant's claim should be rejected.

D. Assuming This Court Finds That Material Information Was Omitted From The Search Warrant Affidavit, Remand Is Not Required

Appellant claims that should this Court find material information was omitted from the search warrant affidavit, remand for a new hearing is the appropriate remedy. (AOB 116.) Respondent disagrees. When material information has been intentionally omitted from a search warrant affidavit, the remedy is to restore the omitted information and reevaluate the affidavit for probable cause. (*People v. Sousa* (1993) 18 Cal.App.4th 549, 562-563, citing *Franks v. Delaware, supra*, 438 U.S. at pp. 155-156.) Only when the record is inadequate should a reviewing court remand the matter for an evidentiary hearing. (*People v. Bowers* (2004) 117 Cal.App.4th 1261, 1273 [remanding for additional proceedings because the Court of Appeal lacked an adequate evidentiary record to determine issue].)

Here, even if this Court should determine that some material information was omitted from the search warrant affidavit, remand is not required, as the record permits this Court to evaluate the affidavit and determine whether probable cause still exists when the affidavit is considered in connection with the allegedly omitted information. As set forth in more detail below, Detective Smith's affidavit reasonably set forth the pertinent, applicable facts as they related to the investigation of Detective Black's murder. Thus, even if the search warrant affidavit is re-evaluated including the facts appellant claims were improperly omitted, probable cause still exists. (*Illinois v. Gates, supra*, 462 U.S. at pp. 238-239; *People v. Avalos, supra*, 47 Cal.App.4th at p. 1581.)

Here, the affidavit filed in support of appellant's search warrant included (in part) the following facts: (1) Detectives Black and Delfin were driving a car readily identifiable as a police car (1CT 108); (2) the car was struck by "numerous high powered bullets" (1CT 108); (3) Detective Black

suffered a "massive gunshot wound to the head" (1CT 108); (4) Detective Delfin was wounded (1CT 108); (5) 28 .223 caliber shell casings were recovered from the crime scene (1CT 109); (6) Detective Delfin described two Hispanic male suspects present at the time of the shooting (1CT 109); (7) after the shooting, Miguel Camacho ("Rascal") was found hiding nearby (1CT 110); (8) Miguel Camacho had violated parole, and had been convicted of assault (1CT 110); (9) Miguel Camacho had been "interviewed as a witness to the shooting" (1CT 110); (10) Miguel Camacho had been armed (1CT 111); (11) Miguel Camacho informed officers that appellant was a member of the Barrio Pobre gang and was "responsible for the shooting" (1CT 111); (12) appellant fired an assault rifle into the police car from a distance of approximately six feet (1CT 112); (13) Miguel Camacho identified appellant from a photographic lineup (1CT 113); (14) Miguel Camacho led police officers to appellant's home in Compton (1CT 113); (15) Long Beach Police officers interviewed Jimmy Falconer, who saw a Hispanic male fire a rifle at Detectives Black and Delfin's police car (1CT 115); (16) Long Beach Police officers interviewed Vincent Ramirez, who was a member of E.S.P., a rival street gang (1CT 116); (17) Vincent Ramirez saw a Hispanic male with a shaved head following the shooting (1CT 116); (18) Long Beach Police Detective Richard Conant, a street gang expert, stated there was an "ongoing gang feud" between Barrio Pobre and E.S.P. (1CT 117); and (19) the observations of Detective Delfin, Miguel Camacho, Jimmy Falconer all confirmed that a Hispanic male was seen during and after the shooting (1CT 118). The above evidence provided ample probable cause that appellant was the killer, and this evidence was not undermined by the "omitted" evidence. Simply stated, even had the complained-of information been included, there was more than enough information presented in the affidavit to support the magistrate's decision to issue a

search warrant in this case. Accordingly, appellant's claim should be rejected. (*People v. Kurland, supra*, 28 Cal.3d at p. 386 ["if the affidavit reflects a reasonable attempt at truth, constitutional principles are satisfied...."]; *Theodor v. Superior Court* (1972) 8 Cal.3d 77, 97 ["once it has been determined that the affiant has acted reasonably under the circumstances, little more can be required of him"].)

II. APPELLANT'S CLAIM THAT THE DEATH QUALIFICATION PROCESS IS UNCONSTITUTIONAL WAS NOT PRESERVED FOR APPELLATE REVIEW, AND IN ANY EVENT, THE TRIAL COURT PROPERLY EMPANELLED A "DEATH-QUALIFIED" JURY

In Ground Two, appellant claims that "the death qualification process pursuant to which the trial court excluded prospective jurors in this case violated [his] constitutional rights." (AOB 116-117.) Respondent disagrees. This claim was not preserved for appellate review. Regardless, as appellant concedes (see AOB 116, fn. 81), the United States Supreme Court and this Court have each held that the "death qualification" process is constitutional. Accordingly, appellant's claim does not entitle him to relief.

As a preliminary matter, appellant's claim was not preserved for appellate review.[15] Because no objection was offered on these grounds in the trial court, appellant's claim is forfeited on appeal. (*People v. McKinnon* (2011) 52 Cal.4th 610, 636 ["A fundamental tenet of our system of justice is the well-established principle that a party's failure to assert error or otherwise preserve an issue at trial ordinarily will result in forfeiture of an appeal of that issue."].)

In any event, both the United States Supreme Court and this Court have consistently rejected similar constitutional attacks on death qualifications. (See *Lockhart v. McCree* (1986) 476 U.S. 162, 182-183

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[15] Appellant concedes that no objection was offered below. (AOB 128.)

[106 S.Ct. 1758, 90 L.Ed.2d 137] ["We hold . . . that the Constitution does not prohibit the States from 'death qualifying' juries in capital cases"]; *People v. Mills* (2010) 48 Cal.4th 158, 172-173; *People v. Jackson* (1996) 13 Cal.4th 1164, 1198 ["The exclusion of those categorically opposed to the death penalty at the guilt phase of the trial does not offend either the United States Constitution or the California Constitution"].) Appellant has provided no compelling reason to deviate from these holdings. (AOB 116-127.) Accordingly, assuming the claim was preserved for appellate review, it should be rejected.

III. DEFENSE COUNSEL AFFIRMATIVELY WAIVED READING OF THE INDICTMENT, AND IN ANY EVENT, APPELLANT'S CLAIM DOES NOT ENTITLE HIM TO APPELLATE RELIEF

In Ground Three, appellant claims that "the trial court's failure to read the indictment to the jury and inform the jury that [he] had pled not guilty to the charges in the indictment constitutes reversible error." (AOB 135.) Respondent disagrees. A review of the record shows that defense counsel affirmatively waived reading of the indictment. Regardless, appellant's claim does not entitle him to appellate relief as there was no prejudice.

Initially, appellant's claim should be rejected because defense counsel affirmatively waived reading of the indictment to the jurors and seated jurors. Clearly defense counsel's decision was a permissible one. "Ordinarily, criminal defendants may waive rights that exist for their own benefit." (*Cowan v. Superior Court* (1996) 14 Cal.4th 367, 371.) Indeed,

> "Permitting waiver is consistent with the solicitude shown by modern jurisprudence to the defendant's prerogative to waive the most crucial of rights." (*People v. Robertson* (1989) 48 Cal.3d 18, 61 [listing some basic rights that may be waived].) "An accused may waive any rights in which the public does not have an interest and if waiver of the right is not against public policy." (*People v. Trejo* (1990) 217 Cal.App.3d 1026, 1032.)

(*Cowan v. Superior Court, supra*, 14 Cal.4th at p. 371.)

In his summary of the proceedings, appellant states:

> [A]fter the twelve jurors and four alternates were impaneled and sworn, the court did not cause the indictment to be read to them. Rather, after the twelve jurors were sworn (5RT 1044), and after the four alternates were sworn (5RT 1057-1058), the court gave preliminary instructions to the jury (6RT 1069-1077), and then the parties gave their opening statements. (6RT 1078-1109.) Thus, the trial proceeded without the reading of the indictment to three of the jurors and alternates.

(AOB 131.)

Appellant's summary omits the fact that defense counsel affirmatively waived further reading of the indictment. The following colloquy took place immediately after the trial court swore the four alternate jurors:

> THE COURT: Other than that, have a good weekend. We'll see you Monday at ten a.m. Come directly here.
>
> (The jurors exited the courtroom.)
>
> THE COURT: *I know I stopped reading the indictment.* I believe I did not read it to panel three, which is the alternate. *Therefore, I have to read it on Monday, unless you don't think it's necessary.*
>
> MR. RINGGOLD: *I don't think it's necessary.*
>
> MR. McCORMICK: I don't either.
>
> THE COURT: Fine. Then I won't. That's fine with me. Have a nice weekend.

(5RT 1060, italics added.)

Given the fact that defense counsel affirmatively waived reading of the indictment, appellant's claim should be rejected. (See *People v. Herrera* (1962) 209 Cal.App.2d 748, 752 [counsel may waive reading of information]; *People v. Moonstar* (1961) 197 Cal.App.2d 327, 328 [failure to read information and state defendant's plea not error where no objection raised and defense counsel waived reading].)

Regardless, even if defense counsel had not affirmatively waived reading of the indictment, appellant would not be entitled to appellate relief. The failure to read an indictment and to state a defendant's plea is not error, presuming the record shows that the jury was aware of the nature of the charges and the defendant's response to those charges. (*People v. Sprague* (1879) 53 Cal. 491, 494; *People v. Twiggs* (1963) 223 Cal.App.2d 455, 463-464.) Here, a review of the record clearly shows the jury "must have been aware of the accusation and the defendant's plea thereto." (*People v. Twiggs, supra*, 223 Cal.App.2d at p. 464, citing *People v. Sprague, supra*, 53 Cal. at p. 494.)

For example, prior to the prosecutor's opening statement, the trial court instructed the jury that it "must not be biased against [appellant] because he has been arrested for this offense, charged with a crime, and brought to trial." (6RT 1072.) Thereafter, some of the first words spoken by the prosecutor during his opening statement were, "What I'll do now is tell you what I expect the evidence is going to show you which justifies the charges we brought in this case." (6RT 1077-1078.) Shortly thereafter, the prosecutor stated, "We have charged [appellant] with murdering Detective Black; charged him with attempting to murder Detective Delfin; charged him with shooting Maria Cervantes, and charged him with doing that as part of gang activity." (6RT 1100.) Finally, the prosecutor stated, "I expect the evidence to show he did everything charged beyond any reasonable doubt." (6RT 1101.)

Furthermore, the jury was specifically instructed that appellant was "presumed to be innocent until the contrary is proved, and in the case of a reasonable doubt whether his guilt is satisfactorily shown he is entitled to a verdict of not guilty." (5CT 1212.) The jury was also instructed with the elements of each charged crime. (5CT 1215-1251.) Given the state of the record, the jury was clearly aware of the charges against appellant and the

fact that he had plead not guilty to those charges. In other words, it was obvious to the jury that had appellant entered a guilty plea the prosecution would not need to prove the charges and there would be no presumption of innocence. Accordingly, even if defense counsel had not affirmatively waived reading of the indictment, appellant would not be entitled to relief. (*People v. Twiggs, supra*, 223 Cal.App.2d at p. 464, citing *People v. Sprague, supra*, 53 Cal. at p. 494.)

IV. SUFFICIENT EVIDENCE WAS PRESENTED TO SUPPORT APPELLANT'S CONVICTION FOR THE FIRST DEGREE MURDER OF DETECTIVE BLACK

In Ground Four, appellant claims that his murder of Detective Black "was intentional but unplanned," and therefore "not murder of the first degree." (AOB 136.) His specific claim is that insufficient evidence was presented to show premeditation or deliberation, or in the alternative, to support the verdict based on a theory of murder by lying in wait, because the prosecutor based his argument on a theory of "transferred premeditation." (AOB 136-162.) Respondent disagrees. The prosecutor's argument to the jury was not based on a theory of "transferred premeditation." Furthermore, sufficient evidence was presented to support appellant's conviction for the first degree murder of Detective Black under either a theory of premeditation or lying in wait.

On appeal, a court reviews "'the entire record in the light most favorable to the judgment to determine whether it contains substantial evidence – that is, evidence that is reasonable, credible, and of solid value – from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.'" (*People v. Castaneda* (2011) 51 Cal.4th 1292, 1322, quoting *People v. Lindberg* (2008) 45 Cal.4th 1, 27.) "[T]he relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential

elements of the crime beyond a reasonable doubt." (*Jackson v. Virginia* (1979) 443 U.S. 307, 318-319 [99 S.Ct. 2781, 61 L.Ed.2d 560], citing *Johnson v. Louisiana* (1972) 406 U.S. 356, 362 [92 S.Ct. 1620, 32 L.Ed.2d 152]; see also *People v. Staten* (2000) 24 Cal.4th 434, 460 ["An identical standard applies under the California Constitution."].) "[I]t is the jury, not the appellate court that must be convinced of the defendant's guilt beyond a reasonable doubt. [Citation.]" (*People v. Kraft* (2000) 23 Cal.4th 978, 1053-1054.)

Here, the prosecution presented alternate theories of guilt to the jury: first degree premeditated murder, and murder committed by means of lying in wait. As set forth below, sufficient evidence was presented to support a conviction under either theory.

A. The Prosecutor Did Not Rely On A Theory Of "Transferred Premeditation"

Appellant's primary claim of error is that the prosecutor relied on a theory of "transferred premeditation" as his theory of culpability in this case. (AOB 138.) Respondent disagrees. A review of the record shows that the jury was properly provided with two well-established theories of liability, and that sufficient evidence supported each theory.

Contrary to appellant's position, the prosecutor did not argue that premeditation and deliberation as to the original plan to murder Toro was "transferrable" to appellant's murder of Detective Black. A review of the record shows that during his closing argument, the prosecutor argued to the jury that appellant *changed his mind* and decided to kill the officers instead of Toro, not that appellant's antecedent intent to kill Toro transferred to the police officers:

> The things I find particularly meaningful as they relate to this particular defendant, [CALJIC No.] 8.20, which is willful, deliberate, premeditated murder. With this particular defendant, the time will vary on each individual. But this defendant, I think

> the time is extremely short. And there's a particular portion that deals with people just like this defendant. A cold, calculated judgment and decision may have arrived at in a short period of time. *That's exactly what in terms of changing his focus from willful, premeditated killing Toro to now, I'm going to kill these police officers.* This defendant considered what the options were and what the appropriate course of action was, and he chose to kill Daryle Black and try to kill his partner.

(10RT 2032, italics added.) Thus, the record clearly shows that the prosecutor never told the jury that it could or should find appellant guilty based on his previous intent to kill Toro.

In a footnote, appellant cites to portions of the closing argument in which the prosecutor discussed how appellant and his fellow gang members planned to murder Toro long before appellant decided to murder Detective Black. (See AOB 138, fn. 97.) However, evidence of appellant's planning and intent related to the plan to shoot Toro was relevant to place appellant's ultimate act of shooting Detectives Black and Delfin in context; but mentioning appellant came prepared to kill somebody was not the same as arguing that the specific intent to kill Toro could be transferred to prove the requisite intent to kill Detective Black. Put another way, the prosecutor never told the jury to find appellant guilty of premeditated murder simply based on appellant's previous intent to kill Toro.

Indeed, the jury was specifically instructed that in order to find appellant guilty of Detective Black's first degree murder, it must first find that appellant possessed a "clear, deliberate intent" to kill Detective Black. (10RT 2008). It was also instructed that a "union or joint operation of act or conduct" and "a certain specific intent in the mind of the perpetrator" must exist. (10RT 2007.) Thus, because the prosecutor expressly argued to the jury that appellant had "chang[ed] his focus" from killing Toro to killing Detective Black, and because the jury was properly instructed with

premeditated and lying-in-wait murder instructions, appellant's claim should be rejected.

Appellant also claims that the evidence presented was insufficient as a matter of law to establish premeditated murder or murder by means of lying-in-wait. (AOB 154.) As set forth below, substantial evidence supports the jury's verdict.

B. Sufficient Evidence Was Presented To Support Appellant's Conviction For First Degree Premeditated Murder

First degree murder may be found when the prosecution proves beyond a reasonable doubt that the defendant killed with malice aforethought, intent to kill, premeditation, and deliberation. (Pen. Code, §§ 187, 189.) This Court has defined "deliberate" as "formed or arrived at or determined upon as a result of careful thought and weighing of considerations for and against the proposed course of action." (*People v. Memro* (1995) 11 Cal.4th 786, 862-863; *People v. Perez* (1992) 2 Cal.4th 1117, 1123.) "Premeditated" has been defined as "considered beforehand." (*People v. Perez, supra*, 2 Cal.4th at p. 1123.) Premeditation and deliberation can occur in a brief interval, and the test is not time, but reflection, as "'[t]houghts may follow each other with great rapidity and cold, calculated judgment may be arrived at quickly.'" (*People v. Osband* (1996) 13 Cal.4th 622, 697, quoting *People v. Memro, supra*, 11 Cal.4th at pp. 862-863; see also *People v. Bloyd* (1987) 43 Cal.3d 333, 348.)

Where, as here, an appellate court reviews the sufficiency of the evidence to support a jury's finding of first degree murder, the reviewing court need not be convinced beyond a reasonable doubt that the defendant premeditated the murder; the relevant inquiry on appeal is whether *any* rational trier of fact could have been so persuaded. (*People v. Lucero* (1988) 44 Cal.3d 1006, 1020; see also *People v. Wharton* (1991) 53 Cal.3d

522, 546.) In addition, the length of time which must pass before a killing can be described as deliberate and premeditated is a question of fact. (*People v. Wells* (1988) 199 Cal.App.3d 535, 540.)

In *People v. Anderson* (1968) 70 Cal.2d 15, this Court first set forth a tripartite test for analyzing the type of evidence which it had found sufficient to sustain a finding of premeditation and deliberation. There, the court said that such evidence falls into three basic categories: (1) defendant's planning activity prior to the homicide; (2) his motive to kill, as gleaned from his prior relationship with the victim; and (3) the manner of killing, from which it may be inferred that the defendant had a preconceived design to kill. (*Id.* at pp. 26-27.) An appellate court "sustains verdicts of first degree murder typically when there is evidence of all three types." Otherwise, the reviewing court may require "at least extremely strong evidence of (1) or evidence of (2) in conjunction with either (1) or (3)." (*Id.* at p. 27, emphasis added.)

While appellant relies upon *People v. Anderson, supra*, in support of his argument that the evidence is insufficient to support his conviction for first degree murder (see AOB 145-158), this Court has held that "[u]nreflective reliance on *Anderson* for a definition of premeditation is inappropriate." (*People v. Thomas* (1992) 2 Cal.4th 489, 517; see also *People v. Pride* (1992) 3 Cal.4th 195, 247; *People v. Perez, supra*, 2 Cal.4th at p. 1125.) Rather, the *Anderson* analysis was intended as a "framework" to assist reviewing courts in assessing whether the evidence supports an inference that a homicide resulted from preexisting reflection and weighing of considerations; it did not refashion the elements of first degree murder or alter the substantive law of murder in any way. (*People v. Thomas, supra*, 2 Cal.4th at p. 517; see also *People v. Daniels* (1991) 52 Cal.3d 815, 869-870.)

Thus, evidence concerning motive, planning, and manner of killing is pertinent to the determination of premeditation and deliberation, but these factors are not exclusive, nor are they invariably determinative. (*People v. Silva* (2001) 25 Cal.4th 345, 368; see also *People v. Cole* (2004) 33 Cal.4th 1158, 1224 [the factors "are descriptive, not normative"]; *People v. Perez*, supra, 2 Cal.4th at pp. 1125-1126.) In other words,

> "*Anderson* does not require that these factors be present in some special combination or that they be accorded a special weight, nor is the list exhaustive. *Anderson* was simply intended to guide an appellate court's assessment whether the evidence supports an inference that the killing occurred as the result of preexisting reflection rather than unconsidered or rash impulse."

(*People v. Hughes* (2002) 27 Cal.4th 287, 370, quoting *People v. Pride, supra*, 3 Cal.4th at p. 247.) For example, notwithstanding *Anderson*, the method of killing alone can sometimes support a conclusion that the evidence sufficed for a finding of premeditated, deliberate murder. (*People v. Memro, supra*, 11 Cal.4th at pp. 863-864.) Again, as this Court stated in *People v. Thomas, supra*, 2 Cal.4th at p. 516, "comparison with other cases is of limited utility, since each case necessarily depends on its own facts."

Turning to this case, using the *Anderson* analysis as a guide, as this Court suggested in Thomas (see *People v. Thomas, supra*, 2 Cal.4th at p. 517), respondent sets forth below the evidence of premeditation in this case. When viewed in the light most favorable to the judgment, it is clear that the evidence presented at trial supports the reasonable inference that the killing of Detective Black was the result of preexisting reflection rather than an unconsidered or rash impulse.

1. Planning activity

Appellant contends that "no evidence of premeditation or deliberation" was presented to support a first degree murder conviction for killing Detective Black. (AOB 154.) Even though appellant was carrying

an assault rifle and, by his own admission, had "embarked upon a planned, premeditated, and deliberate effort" to kill Toro (see AOB 154), he argues that there was not enough time to form the required mental state to kill Detective Black. According to appellant, "[t]o treat [his] instantaneously conceived notion to shoot and kill the detectives as a mental state of premeditation and deliberation would improperly dispense with the legislatively established distinction between first degree murder and second degree murder." (AOB 156.) He is mistaken. Based on the evidence presented below, the jury could have reasonably drawn the contrary inference, namely, that once Detectives Black and Delfin approached Rascal and it appeared that he would be arrested, appellant decided he would kill both officers in order to protect Rascal.

Evidence of appellant's planning is manifest. Here, when Detectives Black and Delfin approached Toro's house on Lime Avenue, appellant took a position behind a nearby car. (2CT 295.) Detective Delfin stopped the police car in which he and Detective Black were riding, and saw Rascal standing by the rear bumper of a double-parked car. (8RT 1567.) Rascal, who had a "worried" look on his face, made eye contact with Detective Delfin. Thereafter, he began walking across to the street to the east side of Lime Street. (8RT 1568.)

According to appellant's own statement, he was aware that Detectives Delfin and Black were police officers riding inside of a police car. (2CT 294.) Appellant stated that he "jumped off" and "started shooting at the officers" because he wanted to "save Rascal" from "not going to jail" because Rascal "was on parole." (2CT 296.) Appellant claimed that he fired "about fifteen" rounds from his rifle from a distance of "about 10 feet." (2CT 297.)

This evidence clearly permitted the jury to reasonably infer that appellant planned the murder of Detective Black. Although the time

interval may have been brief, the test is not time, but reflection, as "'[t]houghts may follow each other with great rapidity and cold, calculated judgments may be arrived at quickly." (*People v. Osband, supra*, 13 Cal.4th at p. 697, quoting *People v. Memro, supra*, 11 Cal.4th at pp. 862-863.) That is precisely what occurred here. Appellant's plan, although formed quickly, was cold and calculated. From a position of concealment (2CT 298), appellant fired some 28 rounds (6RT 1127, 1133-1135, 1256; 2CT 297) from an assault rifle at two men he knew to be police officers (2CT 297-298, 319) from a distance of approximately ten feet (2CT 297).

Contrary to his claim on appeal (see AOB 158), appellant did not "impetuously" or "reflexively" shoot Detectives Black and Delfin. Indeed, appellant *expressly admitted* that when he saw Detectives Black and Delfin looking at Rascal, he "decided" to "save" Rascal by shooting the officers. The following colloquy took place between appellant, Detective Steven Lasiter, and Detective Steven Prell:

> [DETECTIVE PRELL]: And before you shot, or before you fired the AR-15, you knew that they were policemen; correct?
>
> [APPELLANT]: Yes.
>
> [DETECTIVE PRELL]: Okay.
>
> [DETECTIVE LASITER]: Let me ask you this. You said earlier that you did this to save, uhm - -
>
> [DETECTIVE PRELL]: Your homeboy, correct?
>
> [DETECTIVE LASITER]: Your homeboy?
>
> [APPELLANT]: Yes.
>
> [DETECTIVE LASITER]: Uh, Rascal?
>
> [APPELLANT]: Yes.
>
> [DETECTIVE LASITER]: Okay, when did you decide to save Rascal?

[APPELLANT]: When I -- when I seen the cops looking at him. I knew they were gonna get him.

[DETECTIVE LASITER]: How far away from -- where was the car from you when you saw the cops looking at him?

[APPELLANT]: Like right next to us.

[DETECTIVE LASITER]: Okay. So, they were almost even with your -- with you?

[APPELLANT]: No, a little bit -- just like two cars -- like one car in front.

[DETECTIVE LASITER]: Okay. So, -- and when you say "in front" you mean they were one car north of you --

[APPELLANT]: Yes.

[DETECTIVE LASITER]: -- when you saw the officers looking --

[APPELLANT]: Yes.

[DETECTIVE LASITER]: -- at Rascal?

[APPELLANT]: Yes.

[DETECTIVE LASITER]: *And that's when you decided --*

[APPELLANT]: *To shoot 'em.*

[DETECTIVE LASITER]: To shoot 'em.

[APPELLANT]: Yes.

[DETECTIVE LASITER]: To save Rascal.

[APPELLANT]: Yes.

(2CT 319-320, italics added.)

Simply stated, evidence of appellant's planning activity prior to the homicide was overwhelming. As shown above, appellant had sufficient time to decide whether to kill the officers for the purpose of helping his

fellow gang member avoid arrest. Once appellant had made the decision to murder two police officers who might arrest his "homeboy," he maneuvered himself into a position of advantage, took aim, and fired his assault rifle into the officers' car, killing Detective Black before he even knew appellant was there or had a chance to draw his own weapon to defend himself.

2. Motive

Evidence of appellant's motive is equally compelling. Appellant, by his own admission, knew that Rascal, if arrested, would be incarcerated. The following discussion took place between appellant, Detective Lasiter, and Detective Prell:

> [DETECTIVE LASITER]: All right. And when you say the cop car looking at the Rascal -- or at Rascal, you're talking about the officers in the car?
>
> [APPELLANT]: Yes, sir.
>
> [DETECTIVE LASITER]: Okay. Both of them are looking at Rascal?
>
> [APPELLANT]: Yes.
>
> [DETECTIVE LASITER]: Okay. And you can see that?
>
> [APPELLANT]: Yes.
>
> [DETECTIVE LASITER]: All right. Uhm, what happens next?
>
> [APPELLANT]: Well, I try to save Rascal. So, I jumped off.
>
> [DETECTIVE LASITER]: Okay. You tried to save Rascal from what?
>
> [APPELLANT]: From not going to jail.
>
> [DETECTIVE LASITER]: Why would he go to jail?
>
> [APPELLANT]: Because he was on parole.

[DETECTIVE LASITER]: All right.

[APPELLANT]: He was violating.

[DETECTIVE LASITER]: Okay.

[APPELLANT]: So, I jumped off and I started shooting at the officers.

(2CT 296.)

Appellant clearly believed that Rascal was on parole, and that he would be returned to a correctional institution if police were permitted to apprehend him. The jury could reasonably infer from this evidence that appellant believed that, if the officers contacted or detained Rascal, it was simply a matter of time before the officers would arrest Rascal for violating his parole. The jury could further reasonably infer that, rather than allowing the officers to detain Rascal, appellant decided to kill them in order to "save" Rascal. (See *People v. Vorise* (1999) 72 Cal.App.4th 312, 318-319 [jury could reasonably infer from the evidence presented that defendant's motive in shooting victim was to avoid a lawful arrest].) Indeed, given appellant's statements and the other evidence presented, no other inference seems reasonable.

3. Manner of killing

As mentioned previously, notwithstanding *Anderson*, "the method of killing alone can sometimes support a conclusion that the evidence sufficed for a finding of premeditated, deliberate murder." (People v. Memro, supra, 11 Cal.4th at pp. 863-864.) For example, regarding the manner of the killing, "a close-range gunshot to the face is arguably sufficiently 'particular and exacting' to permit an inference that defendant was acting according to a preconceived design." (*People v. Caro* (1988) 46 Cal.3d 1035, 1050, overruled on another ground *People v. Whitt* (1990) 51 Cal.3d 620, 657 fn. 29; see *People v. Thomas, supra*, 2 Cal.4th at p. 518 [manner

of killings strongly suggested premeditation as "[b]oth victims were killed by single contact shots, to Mary's head and Greg's neck, a method sufficiently 'particular and exacting' to warrant an inference that defendant was acting according to a preconceived plan]; *People v. Bloyd, supra*, 43 Cal.3d at p. 348; *People v. Cruz* (1980) 26 Cal.3d 233, 245 ["Finally, the killings by blows to only the head and by a shotgun blast in his wife's face permit the jury to infer that the manner of the killing was so particular and exacting that defendant must have killed intentionally according to a preconceived design and for a reason."].)

Here, appellant used a high-powered rifle to fire 28 rounds into a car that was approximately 10 feet away and that he knew contained two police officers. (6RT 1126-1135, 1256, 1265, 1365; 7RT 1432-1437; 2CT 297.) One of appellant's bullets struck Detective Black in the head, killing him instantly. (8RT 171-1729, 1732.) Appellant's weapon was a semi-automatic rifle, meaning that appellant pulled the trigger 28 separate times to discharge the 28 rounds he had previously loaded into its magazine. (8RT 1693.)

Based on appellant's deliberate and calculated movements of placing himself in a position of concealment, as well as the manner of the killing – an overwhelming barrage of firepower that left no chance for either victim to react – the jury could reasonably infer that the murder of Detective Black occurred as the result of preexisting reflection rather than unconsidered or rash impulse. The method utilized by appellant to execute Detective Black was, respondent submits, sufficiently "particular and exacting" so as to support the inference that appellant acted according to a preconceived plan when he shot Detective Black in the head. (See *People v. Memro, supra*, 11 Cal.4th at pp. 863-864; *People v. Thomas, supra*, 2 Cal.4th at p. 518; *People v. Caro, supra*, 46 Cal.3d at p. 1050; *People v. Bloyd, supra*, 43 Cal.3d at p. 348; *People v. Cruz, supra*, 26 Cal.3d at p. 245.)

Given the compelling evidence regarding planning, motive, and manner of killing, all of which amply demonstrate premeditation and deliberation, appellant's claim must be rejected.

C. Sufficient Evidence Was Presented To Support Appellant's Conviction For Lying-In-Wait Murder

Sufficient evidence was also presented to support appellant's conviction based on the alternative theory of lying-in-wait. The jury necessarily found this theory applicable, because it returned a true finding on the lying-in-wait special circumstance. (5CT 1279.) Because the special circumstance finding required unanimity, it is plain that all jurors agreed that this theory applied, and warranted a first degree murder verdict.

To prove first degree murder premised on a lying-in-wait theory (Pen. Code, § 189), the prosecution must prove the elements of concealment of purpose together with "a substantial period of watching and waiting for an opportune time to act, and . . . immediately thereafter, a surprise attack on an unsuspecting victim from a position of advantage." (*People v. Stanley, supra*, 10 Cal.4th at pp. 795-796; see also *People v. Gurule* (2002) 28 Cal.4th 557, 630.) Murder by means of lying in wait requires only a wanton and reckless intent to inflict injury likely to cause death, whereas the lying-in-wait special circumstance requires:

> "*an intentional murder*, committed under circumstances which include (1) a concealment of purpose, (2) a substantial period of watching and waiting for an opportune time to attack, and (3) immediately thereafter, a surprise attack on an unsuspecting victim from a position of advantage."

(*People v. Moon* (2005) 37 Cal.4th 1, 24, fn. 1, quoting *People v. Gutierrez* (2002) 28 Cal.4th 1083, 1148-1149.) Furthermore, the lying-in-wait special circumstance requires that the killing take place during the period of concealment and watchful waiting, an aspect of the special circumstance distinguishable from a murder perpetrated by means of lying in wait, or

following premeditation and deliberation. (*People v. Sims* (1993) 5 Cal.4th 405, 434; *People v. Edelbacher* (1989) 47 Cal.3d 983, 1022.) As set forth below, there was substantial evidence to support the jury's verdicts and findings on the lying-in-wait theory of first degree murder and on the lying-in-wait special circumstance.

1. The evidence showed a substantial period of watching and waiting

Initially, there was substantial evidence from which a rational juror could find that appellant spent a substantial time watching Detectives Black and Delfin, waiting for the most opportune moment to launch his fatal attack.

This Court has held that no particular period of time is required to prove this element; rather, the period of time must only be "substantial." (*People v. Moon, supra*, 37 Cal.4th at p. 23.) The precise period of time is not critical. (*Ibid.*; *People v. Ceja, supra*, 4 Cal.4th at p. 1145.) What matters is that the period of time is not insubstantial. (*People v. Moon, supra*, 37 Cal.4th at p. 23; *People v. Edwards, supra*, 54 Cal.3d at p. 823.) Moreover, the defendant need not strike at the first available opportunity, but may (as appellant did here) wait to maximize his position of advantage before taking the victim by surprise. (*People v. Hillhouse* (2002) 27 Cal.4th 469, 501.)

In the instant case, the evidence showed that appellant assumed a position of concealment as soon as he saw the police car containing Detectives Black and Delfin. (2CT 294.) Specifically, appellant admitted that he had already exited his own car and "ducked" behind a nearby car as soon as he saw the "cop car," which was approximately two houses away from his position. (2CT 294-295.) Appellant maintained his position of concealment long enough to ascertain the following: (1) the car that was approaching was a "cop car" (2CT 295); (2) the "cop car" contained two

police officers (2CT 295, 319); (2) the "cop car" was equipped with a computer (2CT 308); (4) the "cop car" was a car from the gang unit (2CT 317); (5) the car was equipped with special spotlights (2CT 318); (6) the two officers inside the car were looking at Rascal (2CT 296, 320); and (7) he had to act in order to "save" Rascal (2CT 319-320).

It is clear that a rational juror could find that from the moment that Detectives Black and Delfin turned onto Lime Avenue until the moment appellant fired his assault rifle into their car, appellant was watching and waiting for an opportune time to attack and kill the officers. Once appellant determined that Detectives Black and Delfin had seen Rascal, it was apparent to appellant that he had to kill the policemen in order to "save" his "homeboy." However, appellant did not panic and immediately open fire on the officers. Instead, he assumed a position of concealment behind a nearby car, waited until the police car was "right next to [him]" (2CT 297), took aim, and fired his assault rifle 28 times at point-blank range.

This period of watching and waiting was "substantial." Appellant first noticed the approaching officers. He then moved to a concealed position. After the officers were in their most vulnerable position, appellant opened fire, striking Detective Black in the head. The jurors were simply not required to find that the entire encounter was, as appellant characterizes it, "instantaneous." (See AOB 156.)

2. The evidence showed concealment of purpose

The element of concealment of purpose is met by showing that the defendant's "'true intent and purpose were concealed by his actions or conduct. It is not required that he be literally concealed from view before he attacks his victim.'" (*People v. Moon, supra*, 37 Cal.4th at p. 22, quoting *People v. Carpenter* (1997) 15 Cal.4th 312, 388, superseded by statute on another ground as noted in *Verdin v. Superior Court* (2008) 43 Cal.4th 1096, 1106; see also *People v. Michaels* (2002) 28 Cal.4th 486,

517.) The concealment element may manifest itself either by an ambush or by the creation of a situation in which the victim is taken unaware, even though he sees his murderer. (*People v. Hillhouse, supra*, 27 Cal.4th at p. 500; *People v. Morales* (1989) 48 Cal.3d 527, 555, disapproved on another ground in *People v. Williams* (2010) 49 Cal.4th 405, 459.) Furthermore, there is no requirement that the prosecution show the defendant "lured" the victim anywhere in order to prove he was lying in wait. (*People v. Superior Court (Jurado)* (1992) 4 Cal.App.4th 1217, 1228-1229.)

Here, the uncontroverted evidence established that appellant concealed himself from Detectives Black and Delfin, and that their first awareness of appellant came when he opened fire on them with his assault rifle. Indeed, appellant managed to conceal his purpose so successfully that he killed Detective Black instantly, and prevented either officer from drawing his own weapon to defend himself.

3. The evidence showed a surprise attack on the unsuspecting detectives from a position of advantage

As noted above, as soon as appellant saw the car containing Detectives Black and Delfin approach the area, he maneuvered himself to a position where he could shoot from a distance of approximately 10 feet. He shot Detective Black in the head, killing him, and severely wounded Detective Delfin before either had an opportunity to defend himself. It is simply unreasonable to suggest that appellant did not attack from a position of advantage or that he did not take the officers by surprise.

In sum, it is clear from their findings that the jury necessarily found appellant guilty of both premeditated, deliberate murder and lying-in-wait murder since it returned three special circumstance findings: that appellant intentionally killed Detective Black for the purpose of avoiding and preventing a lawful arrest, by means of lying-in-wait, and while he was an

active participant in a criminal street gang. (5CT 1278-1280.) Premeditation (i.e., considered beforehand) and deliberation (formed, arrived at, or determined upon as a result of careful thought and weighing of considerations for and against the proposed course of action) can occur in a brief interval, and these other findings plainly signaled that all jurors necessarily found planning activity, motive to kill, and a manner of killing that established first degree murder based upon premeditation and deliberation. (See *People v. Memro, supra*, 11 Cal.4th at pp. 862-863; *People v. Perez, supra*, 2 Cal.4th at p. 1123.)

Based on the arguments set forth above, it is clear that there was substantial evidence from which a rational juror could find appellant guilty of the charged first degree murder. Therefore, appellant's claim should be rejected.

V. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY ADMITTING THE CHALLENGED GANG EXPERT TESTIMONY

In Ground Five, appellant claims that the trial court improperly admitted expert testimony relating to criminal gang activity. (AOB 162-187.) Specifically, he claims that the trial court erred "[b]y admitting Sgt. Valdemar's testimony that [appellant] planned in advance to shoot up any police officers who interrupted B.P.'s assault on Toro...." (AOB 181.) Respondent disagrees. The trial court properly permitted Sergeant Valdemar to answer the prosecutor's hypothetical question. In any event, the alleged error was harmless by any standard.

A. Procedural and Factual Summary

Los Angeles County Sheriff's Deputy Sergeant Richard Valdemar was assigned to supervise the Prison Gang Section of the department's Major Crimes Bureau. (9RT 1863.) After Sergeant Valdemar set forth his qualifications, the prosecutor posed a hypothetical question relating to the murder, which asked in relevant part:

> And I want you to further assume that in this assault, four of the members are in possession of hand guns. And this defendant, Ramon Sandoval, Menace, was in possession of a CAR-15 semi automatic assault rifle with a magazine, if not fully loaded, almost fully loaded with 40 live rounds of .223 ammunition. [¶] Based on that, do you have an opinion on: A, what the objective of the gang retaliation is; and B, the method in which these gangs would carry that particular assault out, given the weapons they chose?

(9RT 1892-1893.)

Defense counsel did not object to this portion of the hypothetical.[16] (See 9RT 1893.) In response to the prosecutor's hypothetical, Sergeant Valdemar answered in relevant part:

> The long arm or rifle would take a position of advantage that would allow him to cover the people with hand guns who would approach the house, possible also acting as lookouts on either end of the street; that the people with the hand guns would attempt to contact the victim, and fire shots killing them or at least seriously wounding them; and that the back up person, the person with the rifle who is stationed strategically and tactically in a position of advantage would protect the shooters, possible engaging the victim if the victim was armed or if there was more than one member of that gang who made their presence known, possibly returning fire or in the event that they should be found out by the police or even a citizen should attempt to interfere, the back up shooter, the long arm, the heavy weapon, would then deploy and shoot at whoever was attempting to stop or interfere with the shooting.

(9RT 1893-1894.) Defense counsel offered no objection to Sergeant Valdemar's response to the hypothetical question. (See 9RT 1894.)

Later, the prosecutor asked the following hypothetical question:

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[16] At an Evidence Code section 402 hearing conducted outside the jury's presence, defense counsel objected on foundational grounds, and claimed that Sergeant Valdemar's proffered testimony was "rank speculation." The trial court overruled the objection. (9RT 1843.)

> I want you to assume for just a minute that the Barrio Pobre gang members that we've been talking about, those five gang members, went over there to kill Toro and their goal was to kill Toro; and that one of the defendants, Miguel Camacho, who is Raskal, is walking up, and he's actually on his way armed with a .45 caliber handgun to knock [on] the house where Toro is; and while that is going on, two gang detectives, Detective Daryle Black and Detective Rick Delfin are driving down the street, and just happen to be going down Lime Street right in the middle when this assault was going to take place. [¶] How would you expect the person with the CAR-15 [assault rifle] to react when he saw the detectives looking at Raskal, and he believed they were going to stop him or arrest him with a handgun?

(9RT 1899-1900.)

Following a defense objection on the grounds now asserted (see 9RT 1901 ["It's far beyond what the offer of proof in which the court permitted. It's allowing this witness to go further, and basically put into the jury's mind the intent of the defendant"]), the trial court ruled at a sidebar conference that Sergeant Valdemar "already said that one of the things was to also back [the gang members] up in case the police arrived. And I think you have that much already in his testimony. *I'm afraid anything more*, I'm just concerned you might be getting into some factual finding. [¶] Okay. [¶] Thank you." (9RT 1907, italics added.) Sergeant Valdemar did not answer the prosecutor's second hypothetical question or comment on appellant's mental state, and his testimony concluded shortly thereafter. (See 9RT 1908.)

B. Discussion

As a preliminary matter, appellant did not object at trial on the ground that the prosecutor's hypothetical question that actually led to the admitted testimony would interfere with the jury's fact-finding duties. (See 9RT 1843, 1893-1894, 1908.) Such a claim thus has been forfeited. (See Evid. Code, § 353; *People v. Waidla* (2000) 22 Cal.4th 690, 717.) However,

even assuming this claim was preserved for appellate review, it does not entitle appellant to relief.

California law permits a person with "special knowledge, skill, experience, training, or education" in a particular field to qualify as an expert witness (Evid. Code, § 720) and to give testimony in the form of an opinion (Evid. Code, § 801). Under Evidence Code section 801, expert opinion testimony is admissible only if the subject matter of the testimony is "sufficiently beyond common experience that the opinion of an expert would assist the trier of fact." (Evid. Code, § 801, subd. (a).) The subject matter of the culture and habits of criminal street gangs meets this criterion. (*People v. Gardeley* (1996) 14 Cal.4th 605, 617.) Thus,

> [g]ang sociology and psychology are proper subjects of expert testimony [citation] as is "the expectations of gang members . . . when confronted with a specific action" (*People v. Killebrew* (2002) 103 Cal.App.4th 644, 648 (*Killebrew*); [citation].) Expert testimony is admissible to establish the existence, composition, culture, habits, and activities of street gangs; a defendant's membership in a gang; gang rivalries; the "motivation for a particular crime, generally retaliation or intimidation"; and "whether and how a crime was committed to benefit or promote a gang." (*Killebrew*, at pp. 656-657.)

(*People v. Hill* (2011) 191 Cal.App.4th 1104, 1120.)

An expert witness may properly "render opinion testimony on the basis of facts given """in a hypothetical question that asks the expert to assume their truth."' [Citations.]" (*People v. Gonzalez* (2006) 38 Cal.4th 932, 946.) Hypothetical questions that form the basis of an expert witness's opinion "must be rooted in facts shown by the evidence." (*People v. Gardeley, supra*, 14 Cal.4th at p. 618; see also *People v. Vang* (2011) 52 Cal.4th 1038, 1045-1046 [hypothetical questions are proper to elicit gang testimony, and such questions must be rooted in the evidence of the case]; *People v. Moore* (2011) 51 Cal.4th 386, 405 [same].) An expert, however, may not testify that an individual had specific knowledge or possessed a

specific intent. (*People v. Garcia* (2007) 153 Cal.App.4th 1499, 1513; see also *People v. Gonzalez, supra*, 38 Cal.4th at pp. 946-947 [expert witness may not offer an opinion as to the defendant's knowledge or intent.)

People v. Ward (2005) 36 Cal.4th 186, is particularly instructive. In that case, the defendant claimed that the prosecution "impermissibly used fact-specific hypothetical questions to elicit testimony from [gang experts] that a gang member going into rival gang territory – like defendant – would do so as a challenge and would protect himself with a weapon." (*Id.* at p. 209.) The defendant further claimed that "the specificity of the hypothetical questions converted the answers by the experts into improper opinions on his state of mind and intent at the time of the shooting." (*Ibid.*) This Court rejected those arguments, holding that the hypothetical questions "did not render an impermissible opinion as to the defendant's actual intent; rather, they properly testified as to [his] motivations for his actions." (*Ibid.*)

Such is the case at bar. Sergeant Valdemar did not render an impermissible opinion as to appellant's intent to kill Detectives Black and Delfin. Indeed, as set forth above, defense counsel's objection on this very ground and subsequent sidebar discussion ensured that Sergeant Valdemar did not offer such an opinion. Rather, after being presented with a hypothetical scenario, Sergeant Valdemar opined as to the role a gang member who was armed with a long gun would play under such circumstances. (9RT 1893-1894.) Thus, the substance of the expert's testimony, as given through his responses to the prosecutor's hypothetical questions, related to appellant's role or objective in a gang-related assault, and given the weapon he chose to carry, the manner in which he would carry out the assault. (9RT 1892-1894.) Put another way, Sergeant Valdemar fully complied with the trial court's sidebar ruling, went no further than the (unobjected) testimony already presented, and never

offered his opinion on appellant's knowledge or mental state. As such, his testimony was not improperly admitted. (See *People v. Gonzalez, supra*, 38 Cal.4th at p. 946 ["[W]e read *Killebrew* as merely 'prohibit[ing] an expert from testifying to his or her opinion of the knowledge or intent of a defendant on trial.'"].)

Assuming, without conceding, that the complained-of testimony should not have been admitted, the alleged error was harmless by any standard. Even without Sergeant Valdemar's testimony, the jury would still have heard appellant's confession (2CT 268-322), and learned that a forensic firearms analysis matched the shell casings found at the murder scene with the rifle recovered from appellant's home (8RT 1667, 1696). Also, as explained previously (see Argument IV, *supra*), overwhelming evidence supported the murder conviction. Furthermore, the jury was specifically instructed that an expert's witness "is only as good as the facts and reasons on which it is based," that it was "not bound by [the expert's] opinion," and that it was free to "disregard any opinion [it found] to be unreasonable." (5CT 1210.) "Jurors are presumed to understand and follow the court's instructions." (*People v. Holt* (1997) 15 Cal.4th 619, 662; see also *People v. Young* (2005) 34 Cal.4th 1149, 1214 [same].) In light of the evidence presented and the court's instructions, it is not reasonably probable that the jury would have reached a different verdict absent the admission of Sergeant Valdemar's testimony.[17] (*People v.*

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[17] Appellant claims that the alleged error was of constitutional magnitude, and that the harmless error analysis should be based on the "beyond a reasonable doubt" standard of *Chapman v. California* (1967) 386 U.S. 18, 24 [87 S.Ct. 824, 17 L.Ed.2d 705]. (AOB 186.) Respondent disagrees. For the reasons set forth above, there was no constitutional violation.

Watson (1956) 46 Cal.2d 818, 836.) Accordingly, appellant's claim should be rejected.

VI. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY ADMITTING RASCAL'S HANDWRITTEN NOTES, AND APPELLANT SUFFERED NO PREJUDICE

In Ground Six, appellant claims that the trial court erred by admitting the handwritten notes (Peo. Exh. 26) made by Rascal prior to the April 29, 2000, Barrio Pobre meeting. (AOB 188-207.) Specifically, he claims that the trial court's actions violated his due process rights. (AOB 190.) Respondent disagrees. The trial court acted well within its wide discretion by admitting the meeting notes, and in any event, appellant suffered no prejudice from the admission of the evidence.

A. Procedural and Factual Summary

Prior to the Barrio Pobre gang meeting of April 29, 2000, Miguel Camacho ("Rascal") made notes of what topics should be discussed at the meeting. (7RT 1398-1399; 9RT 1897.) The topics included items such as "no straps" (guns), "too much hang[ing] out, and not enough dead [motherfuckers]," "homies doing stupid shit and [causing] other homies to pay for it," "everybody put in $5, money goes to Sparks for straps" (guns), and "bragging about another homey's dirt or even talking about it." (9RT 1899-1890.) Defense counsel objected to the admission of this evidence on hearsay grounds. (7RT 1414.) The trial court overruled the objection, finding the evidence admissible as statements made by a co-conspirator in the furtherance of a conspiracy. (7RT 1416.)

B. Discussion

Evidence of a statement made other than by a witness while testifying at trial offered to prove the truth of the matter asserted is hearsay, and is ordinarily inadmissible. (Evid. Code, §1200.) However, there is an exception to the hearsay rule for statements made by co-conspirators:

> Evidence of a statement offered against a party is not made inadmissible by the hearsay rule if: (a) the statement was made by the declarant while participating in a conspiracy to commit a crime or civil wrong and in furtherance of the objective of that conspiracy; (b) the statement was made prior to or during the time that the party was participating in that conspiracy; and (c) the evidence is offered either after admission of evidence sufficient to sustain a finding of the facts specified in subdivisions (a) and (b) or, in the court's discretion as to the order of proof, subject to submission of such evidence.

(Evid. Code, § 1223; see also *People v. Hardy* (1992) 2 Cal.4th 86, 139.)

This Court reviews the trial court's determination as to the admissibility of evidence – including the application of exceptions to the hearsay rule – for abuse of discretion. (*People v. Rowland* (1992) 4 Cal.4th 238, 264; see also *People v. Karis* (1988) 46 Cal.3d 612, 637.) However, questions of whether admission of the evidence was constitutional are reviewed de novo. (*People v. Cromer* (2001) 24 Cal.4th 889, 893-894.)

Here, the trial court properly admitted the meeting notes because the evidence established they were made by Rascal prior to Detective Black's murder while appellant, Rascal, and other members of the Barrio Pobre gang were conspiring to commit various crimes, including murder. Initially, Emily Lara, who was living at the Dairy Street residence where the Barrio Pobre meeting took place, authenticated the notes by testifying that Rascal created the notes prior to the gang meeting. (7RT 1399.) Furthermore, the meeting notes stated that there were "not enough dead [motherfuckers]," and that members of the gang did not have enough "straps" (guns). (9RT 1899-1890; Peo. Exh. 26.) Multiple witnesses testified that appellant was present at the meeting. (See, e.g., 6RT 1227; 7RT 1307, 1405.) Moreover, the evidence clearly established that following the meeting, appellant and others went to "go hit . . . East Side Paramount" in retaliation for an earlier drive-by shooting. Specifically, the men decided to kill Vincent Ramirez (a.k.a. "Toro") from E.S.P. because he

was "the shot-caller from the East Side." (2CT 287-288; 10RT 1968.) The plan was for some of the Barrio Pobre gang members – armed with handguns – to knock on the front door, and as soon as Toro appeared, appellant would use the CAR-15 to kill him. (2CT 289; 10RT 1968.) Of course, when Detectives Black and Delfin came upon this scene, appellant opened fire with his CAR-15 in order to "save" Rascal. (2CT 319-320.)

"While it may not be expressly so agreed, it is obviously tacitly understood by the persons who conspire to commit a criminal offense, and the law is justified in assuming, that the conspiracy includes the evading and resisting of arrest and acts done to that end. [Citing cases.]" (*People v. Davis* (1963) 210 Cal.App.2d 721, 735, quoting Frick on Criminal Law (7th ed.), pp. 123-124; see also *People v. Durham* (1969) 70 Cal.2d 171, 187-188.) Such is the case at bar. The evidence established that appellant conspired with Rascal and others at the April 29, 2000, meeting to kill the enemies of the Barrio Pobre gang, as evidenced by the statement on the meeting notes, "not enough dead [motherfuckers]." (9RT 1899-1890.) Shortly thereafter, appellant and other members of the gang armed themselves and went to kill Toro, a member of a rival street gang. (2CT 287-288; 10RT 1968.) By his own admission, appellant murdered Detective Black and attempted to murder Detective Delfin in order to prevent Rascal's capture and arrest once the officers interrupted the planned Barrio Pobre attack. (2CT 319-320.)

In sum, given this compelling evidence, the meeting notes were properly admitted under Evidence Code section 1223, and appellant's due process rights were not infringed upon by the trial court's ruling. As shown above, the notes were relevant to show appellant, Rascal, and other Barrio Pobre members went to Lime Street to kill a rival gang member. The notes were also relevant to show the mental state of appellant and other members in the Barrio Pobre gang that were not "killing enough" people. The

sequence of events provided a link between the notes and the gang members' conspiracy to kill Toro or somebody else, as the planned assault commenced shortly after the meeting in which the notes were discussed. Since the notes were not only admissible under state law but also relevant to material issues, there was no due process violation. (See, e.g., *People v. Falsetta* (1999) 21 Cal.4th 903, 913 ["The admission of relevant evidence will not offend due process unless the evidence is so prejudicial as to render the defendant's trial fundamentally unfair"].)

In the alternative, appellant's claim should be rejected because he suffered no prejudice from the admission of the meeting notes. The evidence presented against appellant was simply overwhelming. It included, but was not limited to, appellant's confession and explanation for the shooting (2CT 268-322), the murder weapon that was recovered from appellant's house (8RT 1633-1637; 10RT 1961), and forensic evidence left at the murder scene connecting the weapon directly to appellant (6RT 1127, 1133-1135, 1256, 1265). Notably, appellant's own version of events established that he planned to murder Toro, and opened fire on Detectives Black and Delfin when they interrupted his preconceived plans. (2CT 453-455, 458-465, 477-479.) As such, the potential prejudicial impact of the meeting notes was virtually nonexistent, as the jury also learned of the conspiracy to remedy the problem of "not enough dead [motherfuckers]" from appellant himself.

Additionally, the jury was instructed with CALJIC Nos. 2.09 [Evidence Limited as to Purpose] (5CT 1194) and 2.90 [Presumption of Innocence -- Reasonable Doubt -- Burden of Proof] (5CT 1212). The jury was also provided with CALJIC No. 2.70 [Confession and Admission -- Defined] (5CT 1208), which cautioned that the statements made by appellant could not be the sole basis on which to rest a conviction. The jury is presumed to have understood and followed these instructions. (*People v.*

Young, supra, 34 Cal.4th at p. 1214; *People v. Holt, supra*, 15 Cal.4th at p. 662.)

In sum, assuming (without conceding) that the admission of the meeting notes was error, there is no reasonable probability that appellant would have received a more favorable result had the evidence been excluded. (*People v. Watson, supra*, 46 Cal.2d at p. 836.) For the same reasons, appellant's claim fails even under the more stringent federal standard. (See *Chapman v. California, supra*, 386 U.S. at p. 24.)

VII. EVIDENCE THAT ANGELA ESTRADA HAD BEEN THREATENED WAS PROPERLY ADMITTED BY THE TRIAL COURT

In Ground Seven, appellant claims that the trial court committed prejudicial error and rendered his trial fundamentally unfair by admitting evidence that prosecution witness Angela Estrada had been threatened. Here, appellant complains about the lack of evidence connecting him to the threats. (AOB 207-221.) Respondent disagrees. The trial court properly admitted testimony about the threats made against the witness.

A. Procedural and Factual Summary

Angela Estrada was called as a prosecution witness. (See 6RT 1156.) Ms. Estrada, who was a former member of the Barrio Pobre street gang, was present at the April 29, 2000, gang meeting. (6RT 1157-1158.) The following discussion took place during her direct examination:

> [THE PROSECUTOR]: And what did you say about wanting to be here.
>
> [MS. ESTRADA]: I don't want to be here.
>
> [THE PROSECUTOR]: Did you say something about being threatened?
>
> [DEFENSE COUNSEL]: Objection. May we approach the bench, Your Honor?
>
> THE COURT: Overruled.

[THE PROSECUTOR]: Is there a particular reason you don't want to be here?

[MS. ESTRADA]: Because I have nothing to do with this, you know. I don't know. I don't -- I'm not involved with this, so I don't feel like I should be here.

[THE PROSECUTOR]: For a person that has an association with a criminal street gang and knows its gang members, is it a good idea or a bad idea to get caught up on the stand and tell what you know about criminal conduct by gang members?

[DEFENSE COUNSEL]: Objection; assumes facts not in evidence.

THE COURT: Overruled. It's a question.

[MS. ESTRADA]: I don't understand the question.

[THE PROSECUTOR]: Sure. I'll rephrase it. You say you don't want to be here?

THE COURT: The record should reflect that the witness is laughing. Go ahead.

[THE PROSECUTOR]: Have you been threatened with regard to coming in here and telling this jury the truth about what you know?

THE COURT: I'm going to admonish the jury right now. Any questions dealing with threats does not infer or assume that those threats are connected with the defendant in any way, but threats in general may have occurred by people on their own who have no ties or relationship with the defendant, and you're not to assume otherwise. Please go ahead.

[THE PROSECUTOR]: Do you remember the question?

[MS. ESTRADA]: Excuse me?

[THE PROSECUTOR]: Do you remember the question?

[MS. ESTRADA]: Yes. Have I been threatened?

[THE PROSECUTOR]: Yes.

[MS. ESTRADA]: Not in particular. But in general, yes.

[THE PROSECUTOR]: What does that mean?

[MS. ESTRADA]: I've just been told, you know, just to watch what I say.

[THE PROSECUTOR]: Well, what does that mean?

[MS. ESTRADA]: I don't know.

[THE PROSECUTOR]: Was the person with a message that you got a message from someone in Barrio Pobre?

[MS. ESTRADA]: No.

[THE PROSECUTOR]: Did you tell Detective Prell and I when we spoke it was someone in Barrio Pobre?

[MS. ESTRADA]: Look, I don't know what you're trying to get at but - -

THE COURT: Ma'am, just answer the question.

[MS. ESTRADA]: No, it wasn't.

[THE PROSECUTOR]: Did you tell Detective Prell and I, and then Detective Robbins and I, that you were threatened by someone in Barrio Pobre?

[MS. ESTRADA]: Someone told me, you know. They didn't tell me directly. Someone had said, you know, we -- we -- we -- we saw the paperwork, and you said this and you said that. That's all that was said.

(6RT 1159-1162.)

Later, the following exchange occurred:

[THE PROSECUTOR]: You made a comment early on when we started talking here about not being happy to be here, and you said something about paperwork. What paperwork?

[MS. ESTRADA]: Paperwork is what you guys got in front of you.

[THE PROSECUTOR]: You're talking about police reports?

[MS. ESTRADA]: Police reports, you know. Yes.

[THE PROSECUTOR]: So why is that important?

[MS. ESTRADA]: Why is paperwork important? It's your guys's (ph) paperwork. I don't know.

[THE PROSECUTOR]: Well, you said you didn't want to testify, and you didn't want to be here. And you made reference to part of the reason is because someone threatened you, and they had paperwork. What did that mean when you said that?

[MS. ESTRADA]: Obviously, everything that I say, you know, obviously it's getting documented. And I mean, I know you're trying to -- you're trying to make it seem like, if I know what happened or whatever, you know. But that's not the case here.

[THE PROSECUTOR]: Did you understand my question?

[MS. ESTRADA]: Yes.

[THE PROSECUTOR]: And so what was it --

[MS. ESTRADA]: Paperwork. It's like me leaving here and, you know, it being documented that I was here, and this is what I said. That's paperwork.

[THE PROSECUTOR]: If there were paperwork indicating that you had testified being a past member of Barrio Pobre, and you had testified against another member of B.P., would that be looked on favorably or unfavorably by people in the neighborhood?

[MS. ESTRADA]: Unfavorably.

(6RT 1183-1184.)

Additionally, the following discussion took place:

[THE PROSECUTOR]: Did you tell Detective Prell and I, I [have] already been threatened after this incident happened?

[MS. ESTRADA]: Yes.

[THE PROSECUTOR]: Did you tell Detective Prell, some guy came to my house for [sic] another guy and told me not to get involved?

[MS. ESTRADA]: Nobody came to my house. Someone told me. Someone gave me the message.

(6RT 1187.)

B. Discussion

"'[E]vidence of a "third party" threat may bear on the credibility of [a] witness, whether or not the threat is directly linked to the defendant.'" (*People v. Abel* (March 19, 2012) __ Cal.4th __, 138 Cal.Rptr.3d 547, 581, quoting *People v. Mendoza* (2011) 52 Cal.4th 1056, 1084.) This is so because evidence that a witness is either afraid to testify or fears retaliation is relevant to witness credibility. (*People v. Burgener* (2003) 29 Cal.4th 833, 869.) "A witness who testifies despite fear of recrimination of any kind by anyone is more credible because of his or her personal stake in the testimony." (*People v. Olguin* (1994) 31 Cal.App.4th 1355, 1368, emphasis in original.) Evidence that a witness felt fear just from the nature and gravity of their testimony, the fear not being caused by threats or intimidation, is likewise relevant to a jury's assessment of that witness's credibility. (*People v. Avalos* (1984) 37 Cal.3d 216, 232.) The underlying explanation of the basis for a witness's fear is relevant to the witness's credibility, and the admissibility of such evidence is well within the sound discretion of the trial court. (*People v. Burgener, supra*, 29 Cal.4th at p. 869; *People v. Feagin* (1995) 34 Cal.App.4th 1427, 1433.)

Here, Ms. Estrada's testimony concerning the threats she received – or, as she put it, the "message" that "someone" gave her – was not admitted for the truth of the matter asserted. Rather, it was admitted on the material issue of Ms. Estrada's credibility, as opposed to appellant's guilt. Indeed, as noted in more detail above, the trial court *expressly instructed* the jury

that it was not to assume questions about threats were tied in any way to appellant. (6RT 1160-1161.)

Ms. Estrada's express statement that she did not want to be involved in this case (see 6RT 1158) – and the reasons behind her statement – were not only highly probative to her mental state as a witness, but also explained her demeanor on the witness stand. (See *People v. Feagin, supra*, 34 Cal.App.4th at p. 1433.) Put another way, the circumstances of this case required that the jury have an explanation for Ms. Estrada's palpable reluctance to testify in order for the jury to accurately assess her credibility. (*People v. Abel, supra*, 138 Cal.Rptr.3d at p. 581 [noting that the witness's credibility "was a significant issue in [the] case" and therefore "had substantial probative value, justifying its admission" pursuant to Evidence Code section 352]; *People v. Burgerner, supra*, 29 Cal.4th at p. 869 [not necessary to show witness's fear of retaliation is "directly linked" to defendant for threats to be admissible]; *People v. Gutierrez* (1994) 23 Cal.App.4th 1576, 1588-1590 [although not necessary to show that fear of retaliation is directly linked to the defendant for the evidence to be admissible, there was circumstantial evidence which tended to connect the defendant to efforts to tamper with the witness].) Accordingly, there was no error in admitting the challenged evidence.

In any event, the alleged error was harmless. As noted above, the trial court admonished the jury that it was not to infer or assume that threats received by Ms. Estrada were connected to appellant "in any way." The jury is presumed to have followed this instruction. (*People v. Burgener, supra*, 29 Cal.4th at p. 870; *People v. Olguin, supra*, 31 Cal.App.4th at p. 1368.) Moreover, given the strength of the evidence presented – including appellant's own confession – it is not reasonably probable that appellant would have received a more favorable result absent the challenged testimony. (*People v. Sakarias* (2000) 22 Cal.4th 596, 630 [testimony

about a threatening contact between the defendant and the victim was harmless]; *People v. Watson, supra*, 46 Cal.2d at p. 836.)

VIII. THE TRIAL COURT PROPERLY DECLINED TO INSTRUCT THE JURY WITH CALJIC NOS. 2.01 AND 2.02

In Ground Eight, appellant claims that the trial court improperly denied his request to instruct the jury with CALJIC Nos. 2.01 ["Sufficiency of Circumstantial Evidence – Generally"] and 2.02 ["Sufficiency of Circumstantial Evidence to Prove Specific Intent or Mental State"]. (AOB 222-238.) Respondent disagrees. The trial court's ruling was proper, and in any event, the alleged error was harmless by any standard.

As a preliminary matter, CALJIC No. 2.01 and CALJIC No. 2.02 should never be given together. This is because CALJIC No. 2.01 is inclusive of all issues, including mental state and/or specific intent, whereas CALJIC No. 2.02 is limited to just mental state and/or specific intent. (*People v. Honing* (1996) 48 Cal.App.4th 289, 341 ["CALJIC No. 2.02 was designed to be used in place of CALJIC No. 2.01 when the defendant's specific intent or mental state is the only element of the offense that rests substantially or entirely on circumstantial evidence"], italics added; see also *People v. Marshall* (1996) 13 Cal.4th 799, 849 [noting that CALJIC No. 2.01 is a "more inclusive instruction on the sufficiency of circumstantial evidence"].) In this case, the trial court specifically recognized one, but not both, instructions should be given. (10RT 1926, 1931.) Thus, to the extent that appellant's claim is that both CALJIC Nos. 2.01 and 2.02 should have been given, it must be rejected. (*People v. Marshall, supra*, 13 Cal.4th at p. 849; *People v. Honing, supra*, 48 Cal.App.4th at p. 341.)

Appellant's specific claim appears to be the trial court erred by failing to instruct the jury concerning circumstantial evidence as it related to his mental state. (See AOB 222.) In making its ruling, the trial court stated that "[CALJIC No.] 2.01 will be withdrawn" and "[CALJIC No.] 2.02 will

not be given, even through requested by the defense." (10RT 1931.) Thus, assuming this Court construes his argument as one that the trial court improperly denied his request to instruct the jury with CALJIC No. 2.02, the claim should be rejected.

It is well-settled that a trial court must instruct on the general principles of law relevant to the issues raised by the evidence. (*People v. Martinez* (2010) 47 Cal.4th 911, 953; *People v. Breverman* (1998) 19 Cal.4th 142, 154.) This obligation includes the duty to instruct on the effect to be given circumstantial evidence but only when circumstantial evidence is "'substantially relied upon for proof of guilt.'" (*People v. Wiley* (1976) 18 Cal.3d 162, 175, quoting *People v. Yrigoyen* (1955) 45 Cal.2d 46, 49.) Here, with respect to circumstantial evidence, the trial court instructed the jury in accordance with CALJIC No. 2.00 ["Direct and Circumstantial Evidence – Inferences"], but properly refused to instruct the jury with CALJIC No. 2.02 because the evidence of appellant's intent was direct, not circumstantial. As the trial court recognized, "[t]his is not a circumstantial evidence case by any stretch of the imagination." (10RT 1927.)

When, as here, "circumstantial inference is not the primary means by which the prosecution seeks to establish that the defendant engaged in criminal conduct, [CALJIC No. 2.01] *may confuse and mislead, and thus should not be given.*" (*People v. Anderson* (2001) 25 Cal.4th 543, 582, italics added.) In this case, the prosecution relied heavily on direct evidence – including appellant's own confession – to establish appellant's mental state. (See, e.g., 10RT 2032 ["Remember when he says he sees the police car?], 2034 ["What does the defendant say?"], 2036 ["This defendant specifically with his own words, why did you do it? I did it to prevent him from getting caught"]; see also Statement of Facts, *supra*.) Of course, the introduction of additional circumstantial evidence to corroborate the direct evidence was completely permissible and did not transform the case into a

circumstantial evidence case. As such, the instructions provided by the trial court were proper. (*People v. Anderson, supra*, 25 Cal.4th at p. 582 ["But by introducing circumstantial evidence merely to corroborate an eyewitness, the prosecution did not substantially rely on such evidence. The court's refusal to give CALJIC No. 2.01 was correct."].)

Contrary to appellant's claim (see AOB 236), the record contains substantial direct evidence as to whether he acted with premeditation and deliberation when he murdered Detective Black. Specifically, instead of having to rely on circumstantial evidence to establish appellant's mental state, the prosecution's case was primarily based on the most direct evidence possible – appellant's own statements to the police. As set forth in more detail above (see Argument IV, *supra*), appellant admitted that he "decided" to help Rascal by shooting the police officers who were in a position to "get" him. (2CT 319-320.) Appellant further stated that his motive for shooting the officers was to "save" Rascal from being incarcerated. (2CT 296.) To effectuate his plan, appellant used a high-powered rifle to fire 28 rounds into a police car that was approximately 10 feet away and that he knew contained two police officers. (6RT 1126-1135, 1256, 1265, 1365; 7RT 1432-1437; 2CT 297.) Because appellant's own statements directly and unambiguously established that he acted with premeditation and deliberation when he murdered Detective Black and attempted to murder Detective Delfin, the trial court's ruling was correct. (See *People v. Anderson, supra*, 70 Cal.2d at pp. 26-27.)

In any event, the alleged error was harmless by any standard. The trial court instructed the jury that both direct and circumstantial evidence were acceptable means of proof. (5CT 1193 [CALJIC No. 2.00].) It also explained that appellant was presumed innocent until proved to the contrary "and in case of a reasonable doubt whether his guilt is satisfactorily shown, he is entitled to a verdict of not guilty." (5CT 1212 [CALJIC No. 2.90].)

These instructions fully apprised the jury that the reasonable doubt standard applied to both forms of proof. "Jurors are presumed to understand and follow the court's instructions." (*People v. Holt, supra*, 15 Cal.4th at p. 662.) In addition, appellant's convictions were supported by overwhelming evidence. (See Statement of Facts and Argument IV, supra.) Accordingly, appellant's claim does not entitle him to relief.

IX. THE TRIAL COURT PROPERLY INSTRUCTED THE JURY AS TO THE SPECIAL CIRCUMSTANCE ALLEGATIONS, AND IN ANY EVENT, THE ALLEGED ERROR WAS HARMLESS.

In Ground Nine, appellant claims that the trial court improperly instructed the jury regarding the use of circumstantial evidence to prove the special circumstance allegations. (AOB 239-248.) Specifically, he claims that "the [trial] court's failure to instruct the jury pursuant to CALJIC No. 8.83 and/or 8.83.1 was prejudicially erroneous with respect to the special circumstances found true by the jury." (AOB 239.) Respondent disagrees. The trial court's instructions were proper, and in any event, appellant suffered no prejudice from the alleged error.

Initially, this claim was not preserved for appellate review. A trial court has no sua sponte duty to revise or improve upon an accurate statement of law without a request from counsel. (*People v. Lee* (2011) 51 Cal.4th 620, 638; *People v. Kelly* (1992) 1 Cal.4th 495, 535.) Failure to request clarification of otherwise correct instructions forfeits the claim of error on appeal. (*People v. Lee, supra*, 51 Cal.4th at p. 638; *People v. Mayfield* (1997) 14 Cal.4th 668, 778-779.) As appellant concedes, trial counsel did not request that the jury be instructed with either CALJIC No. 8.83 or 8.83.1. (AOB 241.) Accordingly, he has forfeited this claim.

Assuming appellant's claim is properly before this Court, it should be rejected. Here, the record makes it clear that the trial court was not required to instruct the jury with CALJIC Nos. 8.83 and 8.83.1 because the

prosecution did not rely primarily on circumstantial evidence in support of the allegations. Sua sponte instructions are required only,

> "'on the general principles of law relevant to the issues *raised by the evidence*. [Citations.] The general principles of law governing the case are those principles closely and openly connected with the facts before the court, and which are necessary for the jury's understanding of the case.' [Citation.]"

(*People v. Kimble* (1988) 44 Cal.3d 480, 503, quoting *People v. Wickersham* (1982) 32 Cal.3d 307, 323, 185 Cal.Rptr. 436, 650 P.2d 311, italics added by Court in *People v. Kimble*.) Appellant's jury found four special circumstances to be true: (1) the murder was committed to prevent an arrest (Pen. Code, § 190.2, subd. (a)(5)); (2) the defendant knew the victim was an on-duty police officer (Pen. Code, § 190.2, subd. (a)(7)); (3) the murder was committed by means of lying-in-wait (Pen. Code, § 190.2, subd. (a)(15)); and (4) the murder was committed to further the activities of a criminal street gang (Pen. Code, § 190.2, subd. (a)(22)). (5CT 1277-1280.) As set forth below, substantial *direct* evidence was presented by and relied upon by the prosecution as to each of these special circumstance allegations. As such, the trial court was not required to provide the jury with CALJIC Nos. 8.83 and/or 8.83.1, as circumstantial proof of the special allegations was not an issue raised by the evidence.

1. Murder to prevent arrest (Pen. Code, § 190.2, subd. (a)(5)

With regard to the special circumstance allegation that appellant murdered Detective Black to prevent a lawful arrest, the prosecution presented appellant's own admission that he fired his assault rifle at the offices in an attempt to "save Rascal . . . from not [*sic*] going to jail." (2CT 296-297, 320.) The prosecution also relied on appellant's admission that he murdered Detective Black to prevent Rascal's arrest during closing argument. (See 10RT 2036 ["This defendant specifically with his own

words, why did you do it? I did it to prevent [Rascal] from getting caught. I knew he would get arrested because he was on parole."].) Simply stated, the prosecutor presented and relied upon appellant's confession – i.e., direct evidence – in support of this special circumstance. (See, e.g., *People v. Rogers* (2006) 39 Cal.4th 826, 886 [noting that the only "direct evidence" that the defendant did not kill the victim was his 'denial in his confession."]; *People v. Malone* (1988) 47 Cal.3d 1, 27 [witness's testimony as to defendant's confession was "direct evidence" of the defendant's state of mind].)

2. Intentional murder of a peace officer (Pen. Code, § 190.2, subd. (a)(7))

With regard to the special circumstance allegation that appellant knew that Detective Black was a peace officer murdered while engaged in the performance of his duties, appellant's own admission was the evidence primarily relied upon by the prosecution. Specifically, the prosecution argued: "That the defendant should have known or reasonably should have known that [Detective Black] was a peace officer reasonably engaged. You know that's a fact. *Listen to his statement.*" (10RT 2036-2037, italics added.) As shown above, this confession constituted direct evidence that appellant actually knew Detective Black was a peace officer. (*People v. Rogers, supra*, 39 Cal.4th at p. 886.)

3. Murder committed by means of lying in wait (Pen. Code, § 190.2, subd. (a)(5))

With regard to the special circumstance allegation that appellant committed the murder while lying in wait, the prosecution relied primarily on appellant's own admission to establish this allegation. During argument, the prosecutor stated:

> There's murder by lying in wait. And the lying in wait instruction is fairly self-explanatory and has to do with this defendant's conduct once he got out of that red car. Once he got

> out of the red car, the term lying in wait is defined as waiting and watching for an opportune time to act. What the defendant did when he got out of the car is, he looked and saw the police car coming and concealed himself with a concealment by ambush or some other secret design to attack the person by surprise. [¶] Remember what all the testimony is here. [¶] Jimmy Falconer, the defendant, and Rick Delfiin. [¶]Jimmy Falconer said it was like shooting fish in a barrel They never gave them a chance. [¶] What does Rick Delfin tell you? [¶] I never saw him. I didn't think he'd ever stop shooting. I was sitting in a police car looking at this other guy planning to go talk to this guy, Camacho, when this ambush assault occurred. [¶] *What does the defendant say?* [¶] They never looked at me. [¶] Why did you hide behind the car? [¶] *They never seen me.* [¶] What did you do when you popped up? [¶] *I shot them when they weren't looking.*

(10RT 2034-2035, italics added.) Thus, appellant's confession constituted direct (and the most compelling) evidence that he actually committed the murder by means of lying in wait. (*People v. Rogers, supra*, 39 Cal.4th at p. 886.)

4. Murder committed while the defendant is an active participant in a criminal street gang (Pen. Code, § 190.2, subd. (a)(22))

With regard to the special circumstance allegation that appellant committed the crime while an active participant in a criminal street gang, once again direct evidence – provided by appellant himself – established this allegation. For example, appellant affirmatively stated he was a member of the Barrio Pobre gang with the street name "Menace." (2CT 277.) Appellant further confessed that he and his fellow gang members "went looking" for Toro, a "shot caller" from the E.S.P. gang. (2CT 278, 287.) Later, appellant stated that the purpose of shooting Detectives Black and Delfin – not Toro – was "try to save Rascal, " a fellow member of Barrio Pobre, from "not going to jail." (2CT 296.) Appellant also claimed that he fired at the officers to "save" Rascal because "when [he saw] the

cops looking at him" he "knew they were gonna get him." (2CT 319-320.) Additional direct evidence of appellant's participation in a criminal street gang at the time of the murder was presented by appellant's expression of disappointment with Rascal. He stated, "I feel that I did something stupid, 'cause it wasn't even worth it. I mean, I really thought [Rascal] was a homeboy. But there ain't no real homeboys...." (2CT 321.) Accordingly, this confession constituted direct evidence that appellant actually committed the murder as an active participant in a criminal street gang and to further the activities of his gang. (*People v. Rogers, supra*, 39 Cal.4th at p. 886.)

Appellant's claim that "no direct evidence was adduced that [his] shooting of Detective Black advance[d] or promoted [Barrio Pobre]'s activities" (AOB 247) is incorrect. In his confession, appellant expressly stated that he shot Detectives Black and Delfin because he wanted to "try to save Rascal," a member of the Barrio Pobre gang, from "not going to jail." (2CT 296.) Whether the shooting was ultimately counterproductive to the interests of Barrio Pobre because the Mexican Mafia had not "sanctioned" the murder (see AOB 247) is irrelevant to appellant's subjective intent at the time he murdered Detective Black.

In sum, as to each special circumstance, the prosecution relied primarily on direct, not circumstantial, evidence in support of the allegation. The fact that the prosecution may *also* have introduced strong circumstantial evidence to corroborate the direct evidence does not mean that the trial court had an obligation to instruct the jury with either CALJIC No. 8.83 or 8.83.1. (See *People v. McKinnon* (2011) 52 Cal.4th 610, 676 [noting that the trial court was not required to instruct the jury with CALJIC No. 2.01 simply because "strong circumstantial evidence bolsters, corroborates, or supports the direct evidence of guilt"]; *People v. Anderson, supra*, 25 Cal.4th at p. 582 ["But by introducing circumstantial evidence

merely to corroborate an eyewitness, the prosecution did not substantially rely on such evidence. The court's refusal to give CALJIC No. 2.01 was correct"]; see also *People v. Vines* (2011) 51 Cal.4th 830, 885, fn. 26 [noting that CALJIC No. 2.01 is "virtually identical" to CALJIC No. 8.83.].)

In any event, the alleged error was harmless by any standard. The trial court instructed the jury that both direct and circumstantial evidence were acceptable means of proof. (5CT 1193 [CALJIC No. 2.00].) It also explained that appellant was presumed innocent until proved to the contrary "and in case of a reasonable doubt whether his guilt is satisfactorily shown, he is entitled to a verdict of not guilty." (5CT 1212 [CALJIC No. 2.90].) These instructions fully apprised the jury that the reasonable doubt standard applied to both forms of proof. "Jurors are presumed to understand and follow the court's instructions." (*People v. Holt, supra*, 15 Cal.4th at p. 662.)

Moreover, overwhelming evidence was presented in support of the special allegations. (See Statement of Facts, *supra*.) Appellant's claims that (1) "reasonable inferences" could be drawn that it did not appear that officers were going to arrest Rascal; (2) that appellant did not know whether the detectives were engaged in the performance of their duties; (3) that appellant did not watch the detectives for a "substantial" period of time; and (4) that appellant's actions did not further the goals of Barrio Pobre (see AOB 247) are conclusory, self-serving, and unsupported by the record. Indeed, as noted in more detail above, appellant's own statements show that he believed the officers were going to arrest Rascal, that he knew the detectives were on-duty peace officers, that he waited for a substantial period of time before attacking the officers, and that he acted to aid a member of Barrio Pobre. (2CT 295, 308, 317-320.) For these reasons, appellant's claim does not entitle him to relief.

X. SUFFICIENT EVIDENCE WAS PRESENTED TO SUPPORT THE JURY'S LYING-IN-WAIT SPECIAL CIRCUMSTANCE FINDING

In Ground Ten, appellant claims that insufficient evidence supports the jury's lying-in-wait special circumstance finding. (AOB 249-259.) His specific claim is that because the evidence was insufficient to support his first degree murder conviction (see Argument IV, *supra*), it was also insufficient to support the lying-in-wait special circumstance finding. (AOB 252.) Appellant further claims that, regardless of whether sufficient evidence supported the first degree murder conviction, there was insufficient evidence to support the special circumstance finding because (1) the fatal shooting did not occur while he was lying-in-wait for the detectives (as opposed to Toro), and (2) the shooting was not preceeded by a substantial period of watching and waiting. (AOB 253-258.) Respondent disagrees. Substantial, credible evidence was presented to support the jury's finding.

On appeal, a reviewing court reviews "'the entire record in the light most favorable to the judgment to determine whether it contains substantial evidence – that is, evidence that is reasonable, credible, and of solid value – from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.'" (*People v. Castaneda, supra*, 51 Cal.4th at p. 1322, quoting *People v. Lindberg, supra*, 45 Cal.4th at p. 27.) "[T]he relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." (*Jackson v. Virginia, supra*, 443 U.S. at pp. 318-319, citing *Johnson v. Louisiana, supra*, 406 U.S. at p. 362.) As set forth below, sufficient evidence was presented to support the jury's lying-in-wait special circumstance finding.

The lying-in-wait special circumstance requires an intentional murder, committed under circumstances which include the following elements: (1)

concealment of purpose, (2) a substantial period of watching and waiting for an opportune time to act, and (3) immediately thereafter, a surprise attack on an unsuspecting victim from a position of advantage . . . ." (*People v. Mendoza, supra*, 52 Cal.4th at p. 1073, quoting *People v. Moon* (2005) 37 Cal.4th 1, 22.) In *People v. Mendoza*, this Court stated:

> We have explained the elements of the lying-in-wait special circumstance as follows. "'"The element of concealment is satisfied by a showing '"that a defendant's true intent and purpose were concealed by his actions or conduct. It is not required that he be literally concealed from view before he attacks the victim."'" [Citation.]'" (*People v. Moon, supra*, 37 Cal.4th at p. 22, 32 Cal.Rptr.3d 894, 117 P.3d 591.) As for the watching and waiting element, the purpose of this requirement "is to distinguish those cases in which a defendant acts insidiously from those in which he acts out of rash impulse. [Citation.] This period need not continue for any particular length '"of time provided that its duration is such as to show a state of mind equivalent to premeditation or deliberation."' [Citation.]" (*People v. Stevens* (2007) 41 Cal.4th 182, 202, 59 Cal.Rptr.3d 196, 158 P.3d 763, fn. omitted.) [FN 6.] "The factors of concealing murderous intent, and striking from a position of advantage and surprise, 'are the hallmark of a murder by lying in wait.' [Citation.]" (*Stevens*, at p. 202, 59 Cal.Rptr.3d 196, 158 P.3d 763.)
>
> [FN 6]: In *People v. Stevens, supra*, 41 Cal.4th 182, 59 Cal.Rptr.3d 196, 158 P.3d 763, we made clear that, although the first degree murder formulation refers to "by means of" lying in wait and the pre–2000 definition of the special circumstance referred to "while" lying in wait, such difference did not change "the principle that for a murder conviction and for a special circumstance finding the lying in wait need not continue for any particular period of time provided that its duration is such as to show a state of mind equivalent to premeditation or deliberation." (*Id.* at p. 202, fn. 11, 59 Cal.Rptr.3d 196, 158 P.3d 763.)

(*People v. Mendoza, supra*, 52 Cal.4th at p. 1073.)

For many of the same reasons set forth in greater detail above (see Argument IV, *supra*), the evidence presented here sufficiently established

the elements of the lying-in-wait special circumstance finding.[18] Regarding the first element (substantial period of watching and waiting), there was substantial evidence from which a rational juror could find that appellant spent a substantial time watching Detectives Black and Delfin, waiting for the most opportune moment to launch his fatal attack. There is not a particular period of time required to establish that a defendant watched and waited to commit his crime. Instead, the period of time must only be "substantial" (People v. Moon, supra, 37 Cal.4th at p. 23), meaning that its duration is such as to "show a state of mind equivalent to premeditation or deliberation" (*People v. Mendoza, supra*, 52 Cal.4th at p. 1073, fn. 6). Moreover, the defendant need not strike at the very first available opportunity, but may (as appellant did here) wait to maximize his position of advantage before taking the victim by surprise. (*People v. Hillhouse, supra*, 27 Cal.4th at p. 501.)

Here, the evidence established that appellant assumed a position of concealment as soon as he saw the police car containing Detectives Black and Delfin. (2CT 294.) Appellant had already exited his own car and "ducked" behind a nearby car as soon as he saw the "cop car," which was approximately two houses away from his position. (2CT 294-295.) During the intervening period, appellant maintained a position of concealment long enough to determine that the car contained two officers, was equipped with a computer, had special lights, and that the two officers inside were looking at "Rascal." (2CT 295, 308, 317-320.) This evidence established a

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[18] Appellant notes that on March 8, 2000, Penal Code section 190.2, subdivision (a)(15) was changed from "while lying-in-wait" to "by means of lying in wait," and that the jury was instructed with the former, more stringent version. (AOB 249; see *People v. Lewis* (2008) 43 Cal.4th 415, 511-512.) As explained herein, under either version there was sufficient evidence to support the jury's finding.

"substantial" period of watching and waiting. Appellant waited until the officers were in their most vulnerable position, then opened fire. Contrary to appellant's position (see AOB 254), sufficient evidence was presented to support the jury's finding as to the watch-and-wait element.

The second element (concealment of purpose) is met by showing that the defendant's true intent and purpose were concealed by his actions or conduct. It is not required that he be literally concealed from view before he attacks his victim. (*People v. Mendoza, supra*, 52 Cal.4th at p. 1073, citing *People v. Moon, supra*, 37 Cal.4th at p. 22.) Here, the uncontroverted evidence established that appellant concealed himself from the sight of Detectives Black and Delfin. Their first awareness of appellant came when appellant opened fire on the unsuspecting officers with his assault rifle. Indeed, appellant managed to conceal his purpose so skillfully that he killed Detective Black instantly, and prevented either officer from drawing a weapon in self-defense. (See Statement of Facts and Argument IV, *supra.*) As such, appellant's claim that the jury's special circumstance finding is unsupported by the evidence is meritless.

Finally, with regard to the third element (surprise attack from a position of advantage), the evidence established that at the moment he saw the police car approach the area, appellant maneuvered himself to a position where he could shoot from a distance of approximately 10 feet. He shot Detective Black in the head, killing him instantly and severely wounding Detective Delfin before he had an opportunity to draw his weapon to defend himself. (7RT 1364; 8RT 1570-1576, 1582-1583; 9RT 1763-1764, 1768; 2CT 296.) Simply stated, the record precludes reaching the conclusion that appellant did not attack from a position of advantage or that he did not take the officers by surprise.

Appellant's claim that in order to uphold the jury's special circumstance finding, Penal Code section 120.2, subdivision (a)(15), would

need to be construed in such a manner as to ignore its "constitutionally required narrowing function. . ." (AOB 250-251, 257-258) was rejected by this Court in *People v. Stevens* (2007) 41 Cal.4th 182. In *Stevens*, this Court stated:

> In distinction with premeditated first degree murder, the lying-in-wait special circumstance requires a physical concealment or concealment of purpose and a surprise attack on an unsuspecting victim from a position of advantage. [Citations.] Thus, any overlap between the premeditation element of first degree murder and the durational element of the lying in wait special circumstance does not undermine the narrowing function of the special circumstance. [Citation.] Moreover . . . concealment of purpose inhibits detection, defeats self-defense, and may betray at least some level of trust, making it more blameworthy than premeditated murder that does not involve surprise. [Citations.]

(*Id.* at pp. 203-204.) Here, as explained above, the prosecution presented sufficient evidence to prove the special circumstance within the meaning set forth by this Court's jurisprudence. Nothing else was required to satisfy the "narrowing function" requirement. (*Ibid.*; see also *People v. Sims* (1993) 5 Cal.4th 405, 434 [rejecting claim that lying-in-wait special circumstance does not provide a meaningful basis for narrowing the class of murders for which the death penalty may be imposed]; *People v. Edwards* (1991) 54 Cal.3d 787, 824 [noting that the lying-in-wait special circumstance "has specific and clear requirements which sufficiently distinguish [it] from other first degree murders to justify treating it as a special circumstance"]; *People v. Edelbacher* (1989) 47 Cal.3d 983, 1023 ["We are satisfied that the lying-in-wait special circumstance provides a 'principled way to distinguish this case' from other first degree murders and thus comports with the Eighth Amendment"].)

In sum, sufficient evidence supported the lying-in-wait special circumstance finding, in accordance with this Court's precedent and the trial court's instructions. Accordingly, appellant is not entitled to relief.

XI. APPELLANT'S ABSENCE FROM PROCEEDINGS OUTSIDE THE JURY'S PRESENCE REGARDING A QUESTION OF LAW DID NOT IMPLICATE HIS CONSTITUTIONAL RIGHTS, AND IN ANY EVENT, THE ALLEGED ERROR WAS HARMLESS

In Ground Eleven, appellant claims that the trial court violated his constitutional and statutory rights by conducting proceedings outside his presence. (AOB 259-261.) Specifically, he claims that the trial court committed constitutional error by responding in his absence to a question from the jury because "he had not *personally* waived – orally or in writing – his right to be present during proceedings involving the formulation of responses to questions from the jury beyond mere requests for read-backs." (AOB 260.) Respondent disagrees. Appellant's absence from proceedings that took place outside the jury's presence did not implicate his constitutional rights. Regardless, because he suffered no prejudice from the trial court's actions, appellant's claim should be rejected.

A. Procedural and Factual Summary

Following the presentation of guilt phase evidence, the following colloquy took place:

> THE COURT: Counsel, there's a few things we have to discuss. [¶] Number one, the presence of read back. If you all want to confer either in person or on the telephone if there's a jury request for readback, are you willing to waive your presence and the defendant's presence and that we'll let readback occur in the jury room instead of the courtroom?
>
> MR. RINGGOLD: Yes.
>
> [THE PROSECUTOR]: That's agreeable with me.
>
> THE COURT: Can you take a waiver from [appellant]?
>
> [THE PROSECUTOR]: Mr. Sandoval, you're entitled to be present at all critical stages of these proceedings. It's my understanding from what your counsel just told me that you'd prefer not to be brought back if there's readback. You're entitled to have it in open court, and the readback would happen

with the reporter and all the jurors being present. [¶] What's being offered as an alternative is, the court reporter, if there's a request for readback, that section of readback will be determined by the attorneys, and the court reporters will be permitted to go into the jury room and read the portion which the jury is suggesting. [¶] Is that agreeable to you?

[APPELLANT]: Yes, sir.

[THE PROSECUTOR]: Counsel join?

MR. RINGGOLD: Yes.

THE COURT: Thank you. [¶] The next thing we have to talk about is, where is everybody going to be at all stages during the deliberations? [¶] If there's a question and if the jury is brought in for an explanation or for an answer, do both of you, the attorneys, want to be present or only one?

MR. BISNOW: Your Honor, I believe Mr. Ringgold wants to be present. [¶] I would like to be excused from being present until and unless there was a penalty phase starting. And I believe Mr. Sandoval would waive my presence. And I will be available to talk on the phone if there's questions and to confer with Mr. Ringgold if there's questions on matters of law or readback.

THE COURT: All right. [¶] Again, Mr. McCormick, if you would take a waiver from [appellant] that only Mr. Ringgold needs to be present during either the verdict, questions that are asked or any clarification that's given to the jury or any other proceedings that involve [the jury].

[THE PROSECUTOR]: Mr. Sandoval, you're also, likewise, entitled to have both your attorneys present at all the stages during these proceedings. Mr. Bisnow has stated in open court his desire not to be present if there are questions by the jury or if there are verdicts from the jury. But Mr. Ringgold will be present. Mr. Bisnow is requesting not to be. [¶] Is that all right with you?

[APPELLANT]: Yes, sir.

[THE PROSECUTOR]: You understand you're entitled to have both of them present during all proceedings?

[APPELLANT]: Yes, sir.

[THE PROSECUTOR]: You're willing to waive that right?

[APPELLANT]: Yes, sir.

[THE PROSECUTOR]: Counsel join?

MR. BISNOW: Yes.

(10RT 2070-2072.)

After the jury began its deliberations, it sent a question to the court. (10RT 2081.) After the trial court and the parties conferred via telephone, an answer to the question was agreed upon and provided to the jury. (10RT 2081.) Appellant assigns no error to this portion of the jury's deliberations. (See AOB 259-261.)

That same afternoon, the jury asked a second question. (10RT 2082.) The following conversation took place in open court:

> THE COURT: Let's go on the record. [¶] This is *People v. Sandoval*. Did you want the defendant up?
>
> MR. RINGGOLD: No. I'll waive his presence.
>
> THE COURT: This is *People v. Sandoval*. The defendant is not present. Mr. Ringgold waives his presence. Mr. McCormick is here. [¶] We have a second question from the jury: "If we find the person guilty of count two attempted murder, but find the attempt not to be premeditated, is this person still guilty of the crime? Section 8.76, pages 56 and 57, read it over and over again exclamation point." [¶] Mr. McCormick?
>
> MR. McCORMICK: I think the answer to the jury should be "yes." He is guilty of the crime. The finding of willful, deliberate, premeditated is a special finding you must also find or consider. [¶] The guilt of count two does not rely upon the finding contained in the willful, deliberate, premeditated finding.
>
> THE COURT: You're correct. That is the law. [¶] Mr. Ringgold?
>
> MR. RINGGOLD: After conferring with my appellate expert - -

THE COURT: You mean Mr. Bisnow?

MR. RINGGOLD: I agree with the court's analysis that the answer would be "yes."

THE COURT: Do you just want "yes" or what? Just "yes"? [¶] The question, "is this person still guilty of the crime," and the answer is "yes"?

MR. RINGGOLD: The answer is "yes."

MR. McCORMICK: Yes.

THE COURT: Anything else?

MR. RINGGOLD: No.

THE COURT: You wanted to see the other question?

MR. RINGGOLD: Yes.

THE COURT: Please send this back into the jury and bring out the first question, please.

(10RT 2082-2083.)

B. Discussion

"A criminal defendant charged with a felony has a due process right under the Fifth and Fourteenth Amendments to the United States Constitution, as well as a right to confrontation under the Sixth Amendment, to be present at all critical stages of the trial." (*People v. Romero* (2008) 44 Cal.4th 386, 418.) A defendant also has a statutory right to be present under Penal Code section 977. (*People v. Hines* (1997) 15 Cal.4th 997, 1038-1039.) The right to be present, however, is not absolute. For example, a disruptive defendant can be removed from the courtroom without violating his right to be present. (*Illinois v. Allen* (1970) 397 U.S. 337 [90 S.Ct. 1057, 25 L.Ed.2d 353]; *People v. Welch* (1999) 20 Cal.4th 701, 773.)

Here, appellant's absence from the discussion regarding the trial court's response to the question asked by the jury did not violate his right to be personally present. Although a trial court's response to a jury question is a critical stage (*People v. Romero, supra*, 44 Cal.4th at pp. 417–419), the trial court did not address the jury in open court. Instead, the record clearly shows that the trial court received a written question from the jury, and that the court's written response was delivered to the jury in the deliberation room. (10RT 2083.) As explained below, appellant's presence was not required under such circumstances.

A criminal defendant is not entitled "to be personally present 'either in chambers or at bench discussions that occur outside of the jury's presence on questions of law. . . .'" (*People v. Waidla* (2000) 22 Cal.4th 690, 742; see also *People v. Bradford* (1997) 15 Cal.4th 1229, 1357 ["This court repeatedly has held that a defendant is not entitled to be personally present either in chambers or at bench discussions that occur outside of the jury's presence on questions of law or other matters as to which the defendant's presence does not bear a reasonably substantial relation to the fullness of his opportunity to defend against the charge"], quoting *People v. Bittaker* (1989) 48 Cal.3d 1046, 1080.) Here, the jury submitted a written question to the court (see 5CT 1179) regarding a legal issue: if it found appellant guilty of the attempted murder charged in count two, and also found that the attempted murder was not premeditated, would appellant still be guilty? After conferring with the prosecutor and defense counsel, all parties agreed that the answer was "yes." (10RT 2083.) The entire response provided to the jury was the word "yes," which was written on the jury's original question form. (5CT 1179.) At no time was the jury brought out from the room in which it was deliberating. (10RT 2083 [noting the court's request that the written answer be sent back into the jury room].) Given that appellant was not entitled to participate or be present

during a discussion that took place outside the jury's presence regarding a question of law (*People v. Waidla, supra*, 22 Cal.4th at p. 742; *People v. Bradford, supra*, 15 Cal.4th at p. 1357), he cannot claim that his constitutional rights were violated because such a conversation took place while the jury deliberated in another room.

Nor were appellant's statutory rights prejudicially affected. Penal Code section 977 gives a criminal defendant who has been charged with a felony the right to be present during the proceedings, unless a written waiver is taken. (Pen. Code, § 977, subd. (b)(1)-(2).) Although the record strongly suggests that appellant did not wish to be present during the jury's deliberation period (see 10RT 1070-1072), respondent acknowledges that no waiver was obtained that complied with the specific requirements of Penal Code section 977. However, a violation of Penal Code section 977 does not constitute automatic error. (*People v. Garrison* (1989) 47 Cal.3d 746, 782-783 ["Defendant's absence, even without waiver, may be declared nonprejudicial in situations where his presence does not bear a 'reasonably substantial relation to the fullness of his opportunity to defend against the charge'"], quoting *People v. Bloyd* (1987) 43 Cal.3d 333, 359-360.) "The burden is on [appellant] to demonstrate that his absence prejudiced his case or denied him a fair trial." (*People v. Garrison, supra*, 47 Cal.3d at p. 783; *People v. Bloyd, supra*, 43 Cal.3d at p. 360.) Reversal is required only if it is reasonably probable that a result more favorable to appellant would have been reached in the absence of the error. (*People v. Davis* (2005) 36 Cal.4th 510, 532-533 [noting that error under Penal Code section 977 is "state law error only"]; *People v. Watson, supra*, 46 Cal.2d at p. 836.)

Appellant has failed to demonstrate any prejudice caused by his absence from the conference about the jury's question. As noted above, both of appellant's attorneys were present during the brief exchange with the court and the prosecutor. Clearly neither of appellant's attorneys

believed his presence was required, and the record shows that appellant himself had no desire to be present during proceedings that took place during deliberations such as the reading of testimony. All parties involved – defense counsel, the prosecutor, and the trial court – quickly agreed on the legal answer to the jury's question and the appropriate written response. (10RT 2082-2083.) Finally, there is no showing that appellant would have objected to the answer if present, or that the written answer was incorrect. Given these facts, appellant has failed to establish prejudice under any standard. Accordingly, his claim should be rejected.

XII. APPELLANT'S PENALTY PHASE RETRIAL WAS PROPER

In Ground Twelve, appellant contends that his penalty retrial violated various constitutional rights, especially his Eighth Amendment right against cruel and unusual punishment, because California is one of a minority of states that permits a penalty retrial when a first jury cannot reach a unanimous decision. (AOB 262-269.) He aptly concedes this Court has already rejected a similar contention. (AOB 262, citing *People v. Taylor* (2010) 48 Cal.4th 574, 633-634; see also *Sattazahn v. Pennsylvania* (2003) 537 U.S. 101, 106-110 [123 S.Ct. 732, 154 L.Ed.2d 588]; *People v. Gurule* (2002) 28 Cal.4th 557, 645-646.) Appellant provides no valid reason for this Court to reconsider its precedent, which is consistent with the death penalty statute. Indeed, under state law, the trial court had no discretion to do anything other than select a new jury for a new penalty phase. (*People v. Thompson* (1990) 50 Cal.3d 134, 176-177, citing Pen. Code, § 190.4, subd. (b).) Since a defendant may be held for a retrial without violating double-jeopardy principles, it is inconceivable that the fact of retrial alone – which has nothing to do with punishment – could be considered cruel or unusual. Accordingly, appellant's arguments should be rejected.

XIII. THE TRIAL COURT PROPERLY EXCUSED PROSPECTIVE JUROR D.M. FOR CAUSE DURING JURY SELECTION FOR THE PENALTY PHASE RETRIAL

In Ground Thirteen, appellant claims that the trial court improperly granted the prosecution's motion to excuse prospective juror D.M.[19] for cause. (AOB 269-318.) Respondent disagrees, and submits that substantial evidence supported the trial court's finding that prospective juror D.M. held views that substantially impaired his ability to perform his duties as a juror.

A. Procedural and Factual Summary

Like all other penalty phase jurors, prospective juror D.M. was provided with a juror questionnaire. (See 49 Supp. CT 14127-14163.) In relevant part, prospective juror D.M. indicated that he understood one of the choices available to the jurors was the imposition of the death penalty, and the only other choice was a sentence of life without the possibility of parole. Prospective juror D.M. stated that he was "for [the death penalty] in some cases." (49 Supp. CT 14152.) He did not believe the death penalty was used too much, "except maybe in Texas," and also believed it was not used too seldom. Prospective juror D.M. did not belong to any groups that supported or opposed the death penalty, and held no views about the death penalty that were based on religious conviction. (49 Supp. CT 14153.)

During voir dire (see 15RT 2992-2999), prospective juror D.M. stated that he believed in the death penalty "in some cases," depending on "the issues of the crime." (15RT 2992-2993.) When the prosecutor asked prospective juror D.M. if he could return a death verdict if it was

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[19] Prospective juror "D.M." is referred to as prospective juror number 4070 in the reporter's transcript. (See 49 Supp. CT 14129; 15RT 2992.) For consistency and ease of reference, respondent will refer to this person as "prospective juror D.M." throughout this argument. Such references are to prospective juror number 4070.

appropriate, prospective juror D.M. said, "I think so. I really don't know until I face that situation." (15RT 2993.) Thereafter, prospective juror D.M. stated, "I thought about it. And I honestly couldn't answer you. I've never been in that situation before." (15RT 2993.) When defense counsel asked prospective juror D.M. if he could vote for either life without the possibility of parole or death, prospective juror D.M. replied, "To be honest, I'm not sure." When defense counsel asked prospective juror D.M. what he was unsure about, prospective juror D.M. replied, "I think, whether, perhaps, I should even have the ability or the power to decide life or death." (15RT 2995.)

Following questioning, the prosecutor made a motion to dismiss prospective juror D.M. for cause "based on his ambivalence." The trial court agreed, stating:

> I think so too. I think he's too ambivalent one way or another. I don't think he can make any decision. And his answer was in accordance with that ambivalence. In fact, I believe he didn't even answer the question on life without the possibility of parole. I believe he left that one blank.

(15RT 2998.) The trial court also noted that prospective juror D.M. "had a problem with just this kind of decision, that this isn't the kind of decision that one should be forced to even make." Thereafter, the trial court excused prospective juror D.M. for cause. (15RT 2999.)

B. Substantial Evidence Supports The Trial Court's Excusal Of Prospective Juror D.M. For Cause

In *Wainwright v. Witt* (1985) 469 U.S. 412 [105 S.Ct. 844, 83 L.Ed.2d 841], the Supreme Court held that a prospective juror could be excused because of his views against the death penalty if those views would "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." (*Id.* at p. 424; accord, *Morgan v. Illinois* (1992) 504 U.S. 719, 728 [112 S.Ct. 2222, 119 L.Ed.2d

492].) This Court first adopted the Witt standard in *People v. Ghent* (1987) 43 Cal.3d 739, 767.

The *Witt* test repeatedly has been described as a "clarification" of the test earlier articulated in *Witherspoon v. Illinois* (1968) 391 U.S. 510 [88 S.Ct. 1770, 20 L.Ed.2d 776]. In *Witherspoon*,

> the United States Supreme Court implied that a prospective juror could not be excused for cause without violating a defendant's federal constitutional right to an impartial jury unless, as relevant here, he made it "unmistakably clear" that he would "automatically vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial of the case [before the juror]. . . ."

(*People v. Mickey* (1991) 54 Cal.3d 612, 679, quoting *Witherspoon, supra*, 391 U.S. at p. 522, fn. 21, italics in *Witherspoon*.)

Witt went on to clarify that:

> [T]his standard likewise does not require that a juror's bias be proved with "unmistakable clarity." This is because determinations of juror bias cannot be reduced to question-and-answer sessions which obtain results in the manner of a catechism. What common sense should have realized experience has proved: many veniremen simply cannot be asked enough questions to reach the point where their bias has been made "unmistakably clear"; these veniremen may not know how they will react when faced with imposing the death sentence, or may be unable to articulate, or may wish to hide their true feelings. [Fn. omitted.] Despite this lack of clarity in the printed record, however, there will be situations where the trial judge is left with the definite impression that a prospective juror would be unable to faithfully and impartially apply the law. . . . [T]his is why deference must be paid to the trial judge who sees and hears the juror.

(*Wainwright v. Witt, supra*, 469 U.S. at pp. 424-425.)

Thus, a finding on the potential effect of a prospective juror's views relating to capital punishment is reviewed for substantial evidence. (*People v. Griffin* (2004) 33 Cal.4th 536, 558; *People v. Memro* (1995) 11 Cal.4th

786, 817-818.) Further, if the prospective juror's answers are equivocal, conflicting, or confusing, the trial court's overall determination about the state of mind which produced them is binding.[20] (*People v. Griffin, supra*, 33 Cal.4th at p. 558; *People v. Millwee* (1998) 18 Cal.4th 96, 146; *People v. Bradford* (1997) 15 Cal.4th 1229, 1318-1319; *People v. Cain* (1995) 10 Cal.4th 1, 60; *People v. Mason* (1991) 52 Cal.3d 909, 953-954; *People v. Kaurish* (1990) 52 Cal.3d 648, 698-699.)

Contrary to appellant's claim (see AOB 296, 301-317), the trial court did not employ an erroneous legal standard that would not be entitled to deference on review. A review of the record shows that the trial court did not excuse prospective juror D.M. simply because his responses were equivocal. Instead, the record establishes that the trial court excused the prospective juror because he was unable to make life versus death decisions due to his views. Indeed, prospective juror D.M. stated that he did not believe he should "even have the ability or the power to decide life or death." (15RT 2995.) After listening to prospective juror D.M.'s responses to the questions posed by counsel, the trial court determined that, in its opinion, the prospective juror could not "make any decision." (15RT 2998.) Thus, the trial court's decision was properly made and is entitled to deference. (*People v. Pearson* (2012) 53 Cal.4th 306, 327 [deference accorded to trial court's ruling regarding a prospective juror's state of mind if it is "fairly supported by the record"]; *People v. Griffin, supra*, 33 Cal.4th at p. 558; *People v. Millwee, supra*, 18 Cal.4th at p. 146 ["We generally

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[20] A good explanation of the ultimate reason for this rule appears in *People v. Fudge* (1994) 7 Cal.4th 1075, 1094: "In many cases, a prospective juror's responses to questions on voir dire will be halting, equivocal, or even conflicting. Given the juror's probable unfamiliarity with the complexity of the law, coupled with the stress of being a prospective juror in a capital case, such equivocation should be expected."

defer to the trial court's assessment of the juror's state of mind on appeal, particularly where conflicting or ambiguous answers were given on voir dire"].)

People v. Pearson, supra, is distinguishable from the instant case. In Pearson, prospective juror C.O. was dismissed by the trial court "because of her 'equivocal views on capital punishment.'" (*People v. Pearson, supra*, 53 Cal.4th at p. 331.) In *Pearson*, this Court held that "[t]o the extent the trial court excused [the prospective juror] because of what the court characterized as 'equivocal' views on the merits of the death penalty itself, the court rested its ruling on an erroneous view of the law." (*Ibid.*) Here, by contrast, prospective juror D.M.'s equivocal or ambiguous answers involved his ability to render a decision about punishment, as opposed to his views on capital punishment. Ultimately, the trial court excused prospective juror D.M. because it believed that the prospective juror could make no decision whatsoever about the appropriate punishment in this case. (15RT 2998.) This ruling was supported by substantial evidence. Indeed, in response to defense counsel's inquiry whether he could make decisions in his life ("even tough ones or not"), prospective juror D.M. replied, "Not very well." Thus, *People v. Pearson* is easily distinguishable and does not advance appellant's claim.

Here, the trial court's findings that prospective juror D.M. held views of the death penalty which would have prevented or substantially impaired him from performing his duties are supported by substantial evidence. Prospective juror D.M. expressed serious concern about "whether, perhaps, [he] should even have the ability or power to decide life or death," and stated that he would only know if he could vote for death once he "was at that actual point." (15RT 2995-2996.) When asked by defense counsel if he was able to make decisions in his life, prospective juror D.M. stated, "Not very well." (15RT 2997.) Thus, even acknowledging that prospective

juror D.M. ultimately told the court he would listen to the evidence and "decide one way or the other based upon [his] conscience," the majority of his responses were equivocal about his ability to even make a life or death decision. As such, substantial evidence demonstrated that prospective juror D.M.'s personal views would substantially impair him from performing his duties as a juror. (See *People v. Barnett* (1998) 17 Cal.4th 1044, 1114-1115 [while some answers showed willingness to follow the law and the court's instruction, other answers furnished substantial evidence of prospective juror's inability to consider a death verdict]; see also *People v. Thomas, supra*, 53 Cal.4th at p. 790 ["Even if the prospective juror has not expressed his or her views with absolute clarity, the juror may be excused if 'the trial judge is left with the definite impression that a prospective juror would be unable to faithfully and impartially apply the law'"], quoting *Wainwright v. Witt, supra*, 469 U.S. at p. 425.)

In sum, no error occurred in the exclusion of prospective juror D.M. Accordingly, appellant is not entitled to relief.

XIV. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY DENYING DEFENSE COUNSEL'S MOTION FOR A MISTRIAL AFTER DETECTIVE DELFIN CALLED APPELLANT A "SON OF A BITCH"

In Ground Fourteen, appellant claims that the trial court abused its discretion by denying defense counsel's motion for a mistrial after Detective Delfin, during the penalty phase testimony, called appellant a "son of a bitch." (AOB 319-324.) Respondent disagrees. The trial court acted well within its broad discretion by denying the mistrial motion.

A. Procedural and Factual Summary

Detective Delfin was called as a prosecution witness during the penalty phase of appellant's trial. (19RT 3817.) The following exchange took place during Detective Delfin's direct examination:

[THE PROSECUTOR]: Does the injury which was caused by this person who chose to fire an assault weapon into your vehicle, has it altered your ability to pursue your career as a gang detective?

[DETECTIVE DELFIN]: Yes.

[THE PROSECUTOR]: In what way?

[DETECTIVE DELFIN]: I'm no longer to work the streets. The citizens of Long Beach no longer have an officer who cares as much as I do because this son of a bitch shot me, man.

THE COURT: Excuse me. [¶] I'm going to ask you to go into the jury room for a minute, all of you.

(At which time the jury exited the courtroom and the following proceedings were held:)

THE COURT: We're going to take a recess. [¶] I'll ask all of you to leave the courtroom please.

(At which time the jury exited the courtroom and the following proceedings were held:)

THE COURT: Let's go back on the record. [¶] The jury is not present. [¶] Mr. Bisnow and Mr. Ringgold wanted to make a record.

MR. RINGGOLD: Yes. [¶] Why don't we do it at side bar.

(The following proceedings were held at the side bar:)

MR. BISNOW: Your Honor, there would be a motion to dismiss the penalty phase on due process grounds on the grounds that this witness is an official of the government. And he's saying, this son of a bitch shot me. And the People are going for the death penalty. They certainly have a right to do that. But the government witnesses do not have a right to, in front of the jury, try to inflame them into giving the death penalty. And I know the court uses that famous quote by Justice [Brandeis] that when the government becomes a lawbreaker, it breeds contempt for the law. [¶] And for those reasons, we'd ask for the court to dismiss the penalty phase at this time.

THE COURT: It's denied for this reason: [¶] The determination of guilt has already been made, so that's not an issue. And his statement, I agree, was dramatic. He was emotional. The jury was quickly escorted out of the room. And the fact that he accused the defendant of having shot him is an issue that's already been decided.

MR. BISNOW: Well, he called [appellant] an inflammatory name, Your Honor.

THE COURT: Well, that's true. He did do that. But I don't think that's a violation of due process.

MR. BISNOW: Alternatively, we'd ask for a mistrial.

THE COURT: Anything else? [¶] That motion is denied as well because I believe a jury instruction is sufficient, if any is necessary.

[THE PROSECUTOR]: That is where I was going. [¶] His response was actually responsive to the question I asked him. I asked him what the reason was that he could no longer function as a police officer as a gang detective. And his response wasn't what I expected, but it certainly is accurate that he sustained these injuries as a result of this man shooting him. While he used colorful language to describe it, there's nothing unresponsive or inappropriate with the exception of using a colorful term for the defendant.

THE COURT: And if you wish, I'll tell the jury to disregard the colorful term.

MR. RINGGOLD: That's the next issue.

MR. BISNOW: I think the court's admonition should be much stronger. The court should instruct the jury that the government witness has absolutely no right to call a criminal defendant in a death penalty case names or use profanity, and they should disregard it.

THE COURT: No witness should use profanity, period, no matter what their status. [¶] I'll be happy to tell them to disregard the colloquial expression that was used or the profanity used, but that's all I'm going to say.

[THE PROSECUTOR]: You're going to strike the term, son of a bitch; is that correct?

THE COURT: That's it. And I'll tell them to disregard it.

MR. RINGGOLD: What do you mean, your going to strike it from the record?

THE COURT: Do you want it in the record?

MR. RINGGOLD: It should stay in the record.

THE COURT: Well, then I won't strike it. You can't have it both ways.

MR. BISNOW: I think the court should tell them more than profanity. It's not just profanity, it's expressing an opinion by a government witness of hatred for a defendant. And that's what's totally inappropriate. It's, son of a bitch is saying the man on trial before you is, in my opinion, the devil. And although a witness can say that, a government witness should never be allowed to express an opinion like that. No one should, but especially a government witness.

(19RT 3835-3839.)

After conferring (see 19RT 3840), appellant's attorneys requested that the court strike Detective Delfin's statement, and also admonish the jury to disregard it. Once the jury returned, the trial court stated, "The jury is ordered to disregard the profanity that was used in characterizing the defendant by this witness." (19RT 3840.)

B. Discussion

A mistrial should be granted if the court learns of prejudice that is incurable by admonition or instruction. (*People v. Alexander* (2010) 49 Cal.4th 846, 915.) Whether a particular incident is "incurable" is a speculative matter, and accordingly, a trial court is vested with broad discretion in ruling on mistrial motions. (*Ibid.*, see also *People v. Haskett* (1982) 30 Cal.3d 841, 854.) Accordingly, a reviewing court will not

reverse a trial court's denial of such a motion unless it constitutes an abuse of the lower court's discretion. (*People v. Wallace* (2008) 44 Cal.4th 1032, 1068.)

Initially, there is nothing so inherently prejudicial about Detective Delfin's use of the term "son of a bitch" that the trial court was required to declare a mistrial. This is true even though Detective Delfin was a police officer, rather than a civilian. In *People v. Cunningham* (2001) 25 Cal.4th 926, the prosecutor (a government actor) introduced a family photograph album of the defendant and commented that the defendant's label on one photograph of himself, "We are protecting one sick son-of-a-bitch," was an "accurate description" of the defendant. (*Id.* at p. 1021.) This Court ruled that "[a] timely objection and admonition would have cured any harm caused by the prosecutor's action in seeking to introduce this evidence and commenting in that fashion." (*Ibid.*)

Such is the case at bar. More accurately, the instant facts are far less serious than those in *People v. Cunningham, supra.* Here, it was a witness – not the prosecutor – who used the term "son of a bitch" to describe appellant. Given the fact that appellant attempted to murder this particular witness (and successfully murdered his partner), it is simply impossible to believe that the jury believed Detective Delfin held any feelings other than anger toward appellant. In this regard the fact that Detective Delfin called appellant a "son of a bitch" is rather unsurprising.

Moreover, the trial court quickly ushered the jury out of the courtroom, and upon their return, immediately ordered the jury to "disregard the profanity that was used in characterizing the defendant by this witness." (19RT 3840.) The trial court's timely admonition "cured any harm" that may have been caused by Detective Delfin's statement. (*People v. Cunningham, supra*, 25 Cal.4th at p. 1021.) Indeed, this Court presumes the jury followed the trial court's admonition. (*People v.*

Alexander (2010) 49 Cal.4th 846, 915; *People v. Williams* (1995) 40 Cal.App.4th 446, 456; *People v. Allen* (1978) 77 Cal.App.3d 924, 934.)

Respondent further notes that this Court has found that other similar epithets – offered by government actors – are not error. For example, in *People v. Garcia* (2011) 52 Cal.4th 706, the prosecutor referred to the defendant several times as an "animal," called him a "predator," and stated that he had "sadistic passions." (*Id.* at p. 759.) The trial court overruled two defense objections on misconduct grounds. (*Ibid.*) On automatic appeal, this Court found that the defendant's claims "lacked merit," and stated that "[w]here they are so supported, [the Court has] condoned a wide range of epithets to describe the egregious nature of the defendant's conduct." (*Ibid.*) By contrast, the complained-of epithet here was not offered by the prosecutor – the government actor who was actually representing the state – but rather by one of appellant's victims, who happened to be employed as a police officer. Contrary to appellant's claim (AOB 319), it cannot be said that Detective Delfin's statement – which the jury was ordered to disregard – so infected the penalty phase that the jury's penalty determination was either unfair or unreliable. (See, e.g., *People v. Friend* (2009) 47 Cal.4th 1, 84 [defendant is an "'insidious little bastard,' with 'no redeeming social value,' and being 'without feeling'" or "'sensitivity'"]; *People v. Farnam* (2002) 28 Cal.4th 107, 199-200 [defendant is a "'monster,' an 'extremely violent creature,' and the 'beast who walks upright'"]; *People v. Zambrano* (2001) 41 Cal.4th 1082, 1172 [defendant is "'evil,' a liar, and a 'sociopath'"], overruled on another point in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.)

XV. THE TRIAL COURT PROPERLY DETERMINED THERE WAS NO JUROR MISCONDUCT, AND IN ANY EVENT, THE ALLEGED MISCONDUCT WAS NOT PREJUDICIAL

In Ground Fifteen, appellant claims that reversal of the penalty phase is required because "presumptively prejudicial juror misconduct, including possible pre-deliberation juror balloting" took place. (AOB 324-333.) Specifically, he claims that reversal is required because several jurors overheard two of the alternate jurors discussing the case. (AOB 325-326.) Respondent disagrees. The trial court properly determined there was no juror misconduct, and in any event, the alleged misconduct was not prejudicial.

A. Procedural and Factual Summary

On April 3, 2003, the following discussion took place:

> THE COURT: Juror number 11 said that he heard two alternates discussing the case when they took a break in the jury room.
>
> [DEFENSE COUNSEL]: He said what?
>
> THE COURT: He heard two of the alternates discussing the case when they took a break in the jury room. [¶] Did he say which two alternates?
>
> THE CLERK: The two male alternates.
>
> THE COURT: There's a female and two male alternates.
>
> [DEFENSE COUNSEL]: So perhaps we should have a short hearing on that.
>
> THE COURT: Oh, yes. Definitely.
>
> THE CLERK: I asked them to come back at 10:00.
>
> THE COURT: Yes. That would be alternates three and four. [¶] [Names redacted.]

(19RT 3854.)

The next morning, the trial court held a hearing, during which Juror No. 11 notified the court that while the jurors were in the jury room, two alternate jurors "were talking about the case and how it was going." (19RT 3859.) The following exchange occurred:

> THE COURT: When did this happen? Yesterday?
>
> JUROR NO. 11: Yes, ma'am.
>
> THE COURT: What did you hear?
>
> J: I heard one ask the other - - and they were whispering really low. I was close enough to them. I heard one ask the other, "What did the officer say?" And the response was the curse word. [¶] And they went on to say that, "I can't believe this is happening. I think that it's not even. The consensus is probably seven to five still. I don't know what these people are thinking." Something of that nature.

(19RT 3858-3859.)

Upon further examination, Juror No. 11 stated that the jurors were not discussing the facts of the case, but rather a comment made by Detective Delfin. Juror No. 11 also stated that he never heard anyone talking about voting in a particular manner. (19RT 3862.) Later, Juror No. 11 stated that he heard the "numerical division" of "seven to five" for the first time in the jury room, and not from any news source. Juror No. 11 "assumed what they were talking about was who was going this way and who was going that way, one or the other. *** In other words, who was gonna vote for this penalty and who was gonna vote for that penalty." (19RT 3884.)

The trial court inquired further into this matter. The following information was provided by the jurors in response to questions from the court and counsel:

1. **Juror No. 1**

Juror No. 8 did not hear anything. (19RT 3889.)

2. **Juror No. 2**

Juror No. 2 did not hear anything. (19RT 3890.)

3. **Juror No. 3**

Juror No. 3 did not hear anything. (19RT 3891.)

4. **Juror No. 4**

Juror No. 4 heard a comment "that said everybody was quiet," but recalled nothing else. (19RT 3891-3892.)

5. **Juror No. 5**

Juror No. 5 did not hear anything. (19RT 3892.)

6. **Juror No. 6**

Juror No. 6 stated that "nobody said a word really the whole time we were in there." (19RT 3893.)

7. **Juror No. 7**

Juror No. 7 "heard mumbling" and "little things going on." Juror No. 7 "knew they were talking about the case" but recalled only that the alternates "were talking about like how the detective was very upset," and the fact that "the detective broke down." (19RT 3868-3871.)

8. **Juror No. 8**

Juror No. 8 did not hear anything. (19RT 3866.)

9. **Juror No. 9**

Juror No. 9 did not hear anything. (19RT 3894.)

10. **Juror No. 10**

Juror No. 10 did not hear anything. (19RT 3894.)

11. **Juror No. 12**

Juror No. 12 could hear the alternate jurors speaking to each other, but did not hear anything they said. (19RT 3874.)

12. **Alternate Juror No. 2**

Alternate Juror No. 2 did not hear anything. (19RT 3895.)

13. **Alternate Juror No. 3**

Alternate Juror No. 3 claimed that he did not talk to anybody, and also that nobody spoke with him. (19RT 3875.) After further inquiry, he stated that it "seems like" someone might have commented about Detective Delfin calling appellant a "son of a bitch." (19RT 3876.) However, Alternate Juror No. 3 stated he did not discuss the facts of the case, or his opinions of the case, with anyone. (19RT 3877.)

14. **Alternate Juror No. 4**

Alternate Juror No. 4 stated that "absolutely no one spoke" inside the jury room, and specifically denied speaking with Alternate Juror No. 3. (19RT 3880.) According to Alternate Juror No. 4, "there was absolute silence." (19RT 3881.)

Thereafter, defense counsel moved for a dismissal of the penalty phase, a mistrial, and/or the dismissal of the two alternate jurors (Alternate Juror Nos. 3 and 4) who had spoken. (19RT 3885.) The prosecutor opposed, stating in part:

> The only thing you can state with any clarity, based on what this hearing exposed, is when Detective Delfin made the comment about son of a bitch, and everybody was escorted into the jury room, that [Alternate] Juror Number 3 or [Alternate] Juror Number 4 inquired of one or the other what the word was that was said between from Detective Delfin in reference to the defendant. [¶] Apparently, it was son of a bitch. So he clarified what it was that was said. That is far from discussing the case in terms of what their duty as a juror is. [¶] Secondarily, it has such little meaning to either one of those people in terms of what's happening in this courtroom, that one doesn't remember. I don't think that's uncommon.

(19RT 3886-3887.)

At the conclusion of the hearing, the trial court denied appellant's motion for a mistrial. (19RT 3895-3896.) The trial court also made a finding that what took place did not rise to the level of juror misconduct,

stating that many of the statements had nothing to do with the evidence in the case, and "I don't think that what I have heard rises to the level of misconduct on the part of the jurors." (19RT 3896-3897.)

B. Discussion

When a defendant seeks a mistrial on the basis of juror misconduct, the trial court has broad discretion in resolving the motion. (*People v. Jenkins* (2000) 22 Cal.4th 900, 985-986.) To prevail on a motion alleging juror misconduct, a defendant must establish both misconduct and prejudice. (See *In re Hitchings* (1993) 6 Cal.4th 97, 110-111, 118.) If the reviewing court finds juror misconduct has occurred, a rebuttable presumption of prejudice arises. (*People v. Danks* (2004) 32 Cal.4th 269, 303.) Juror misconduct warrants reversal only if it creates a substantial likelihood that the defendant suffered harm from the misconduct. (Ibid.; see *In re Carpenter* (1995) 9 Cal.4th 634, 654-655; *People v Hardy* (1992) 2 Cal.4th 86, 174-175.) "[I]t is an impossible standard to require...the jury to be a laboratory, completely sterilized and freed from any external factors." (*Rideau v. Louisiana* (1963) 373 U.S. 723, 733 [83 S.Ct. 1417, 10 L.Ed.2d 663] (dis. opn. of Clark, J.), quoted in *People v. Marshall* (1990) 50 Cal.3d 907, 950.)

In determining whether misconduct occurred, a reviewing court accepts the trial court's credibility determinations and findings on questions of historical fact if supported by substantial evidence. (*People v. Nesler* (1997) 16 Cal.4th 561, 582.) However, whether prejudice arose from juror misconduct is a mixed question of law and fact subject to this Court's independent determination. (*Ibid.*)

Initially, the trial court expressly found that there was no jury misconduct. (19RT 3896-3897.) The trial court's ruling was correct. Juror misconduct occurs when there is a direct violation of the oaths, duties, or admonitions imposed on jurors, such as when a juror conceals bias on voir

dire, consciously receives outside information about the case, discusses the case with nonjurors, or shares improper information with other jurors. (*In re Hamilton* (1999) 20 Cal.4th 273, 294.) "Grounds for investigation or discharge of a juror may be established by his [or her] statements or conduct, including events which occur during jury deliberations and are reported by fellow panelists." (*People v. Keenan* (1988) 46 Cal.3d 478, 532.) As is particularly relevant to appellant's claim, jurors may not discuss the case until all the evidence is in, the court has given its instructions, and the entire jury has retired to deliberate. (*People v. Wilson* (2008) 44 Cal.4th 758, 838.)

Here, no juror or alternate juror received any outside information about the case, discussed the case with any nonjuror, or shared improper information with any other juror or alternate juror. Instead, as noted by the trial court, "If anything...one juror didn't hear what Detective Delfin said." (19RT 3895.) The trial court further found that Juror No. 11 heard Alternate Juror No. 3 say, "What did the police officer say? And the response was the curse word." (19RT 3896.) Put another way, it appears that (at most) one alternate juror asked another alternate juror what Detective Delfin had said, and was provided with a factually accurate response. The trial court also found that the other statements "had nothing to do with this case." (19RT 3896.) These factual findings should be accepted by this Court, as they are supported by substantial evidence. (*People v. Nesler, supra*, 16 Cal.4th at p. 582.)

Contrary to appellant's characterization of this issue (see AOB 332), the alternate jurors were not "discussing" the case. Appellant cites no law, and respondent is aware of none, that supports the conclusion that one alternate juror asking another alternate juror to repeat what a witness said moments ago constitutes misconduct. Similarly, appellant's argument that the statement reported by Juror No. 11 regarding the "numerical division"

of "seven to five" (see 19RT 3884) may possibly have been made in reference to the seated jurors and therefore constituted misconduct (AOB 332) is completely speculative. Indeed, as appellant concedes, "It is unclear whether the referenced numerical division pertained to the jury in the original penalty phase trial or the jury in the retrial." (AOB 332.) Put another way, appellant's speculation in this regard appears to be based on nothing more than an ambiguous statement arguably overheard by one juror that was denied by the alternate jurors allegedly involved in the discussion. (19RT 3875-3877, 3880-3881, 3884.) Since there was no showing of pre-deliberation by the jurors, the trial court's finding that no misconduct occurred was correct.

Regardless, assuming (without conceding) that juror misconduct did occur, respondent acknowledges that it would have created a rebuttable presumption of prejudice. (See *People v. Leonard* (2007) 40 Cal.4th 1370, 1425.) However, as set forth below, the prosecution established at the hearing that there is no substantial likelihood that appellant suffered actual harm. (*Ibid.*)

In *People v. Avila* (2009) 46 Cal.4th 680, this Court found no prejudicial misconduct where some members of the jury commented during the penalty phase of a capital trial on the defendant's failure to testify. (*Id.* at p. 725.) In rejecting the claim, this Court held that while the comments created the presumption of prejudice, the discussion "was not of any length or significance." (*Id.* at p. 727.) This Court further stated, "'Transitory comments of wonderment and curiosity' about a defendant's failure to testify, although technically misconduct, 'are normally innocuous, particularly when a comment stands alone without any further discussion.'" (*Ibid*, citing *People v. Hord* (1993) 15 Cal.App.4th 711, 727-728.)

Such is the case at bar. If misconduct in fact occurred, the presumption of prejudice was easily rebutted by the evidence deduced at

the hearing, which established the alternate juror's comments were brief and "not of any length or significance." (*People v. Avila, supra*, 46 Cal.4th at p. 727.) Simply stated, the brief exchange between the alternate jurors was not the type of "discussion" that would support a finding of prejudice. (Cf. *People v. Pierce* (1979) 24 Cal.3d 199, 206-207 [prejudicial misconduct for juror to discuss the case with a police officer who was a "good friend and neighbor" and who later testified in the case]; *People v. Honeycutt* (1977) 20 Cal.3d 150, 157 [prejudicial misconduct for juror to contact outside attorney for advice during deliberations]; *People v. Brown* (1976) 61 Cal.App.3d 476, 479 [juror misconduct found where one juror told another juror, before the prosecution had completed its case, that the defendant was guilty and there was "'"no doubt about it,"'" and then "'moved his hand in an abrupt jester [sic] of finality.'") Furthermore, the alleged misconduct took place between two alternate jurors, neither of which ultimately participated in deliberations.

For these reasons, the trial court's determination that no juror misconduct existed was correct. Assuming this Court finds otherwise, the evidence presented during the hearing soundly rebutted the presumption of prejudice from the alleged misconduct. Accordingly, appellant's claim should be rejected.

XVI. APPELLANT'S CLAIM OF PROSECUTORIAL MISCONDUCT WAS NOT PRESERVED FOR APPELLATE REVIEW AND IS MERITLESS; FURTHERMORE, THERE WAS NO INEFFECTIVE ASSISTANCE OF COUNSEL

In Ground Sixteen, appellant claims that the prosecutor committed an act of misconduct by providing the jury with an unredacted copy of the transcript from his confession. Concurrently, appellant claims that defense counsel was ineffective for failing to move for a mistrial as a result of the prosecutor's actions. (AOB 334-341.) Respondent disagrees. There was no prosecutorial misconduct, and defense counsel was not ineffective for

relying on the actions taken by the trial court in response to the jury's brief exposure to the complained-of portion of appellant's confession.

A. Procedural and Factual Summary

Following his arrest, appellant admitted to officers that he had used the assault rifle recovered from his home to shoot other people. Defense counsel moved to have this evidence excluded. The following exchange took place during the guilt phase of the trial:

> [DEFENSE COUNSEL]: The bottom of page 39, question by Detective Lassiter, have you ever shot anyone else with it? [¶] And that's referring to the AR-15. [¶] And the answer by Ramon Sandoval is, yes, I have. [¶] Now, they don't go into what that means. But they don't say at that point -- they don't say, who else have you shot with it? [¶] But we'd ask to exclude that question and answer as irrelevant and more prejudicial than probative. It seems to be evidence of other crimes. They're not saying, have you shot with it, which would be different. [¶] It's, have you shot anyone else with it?
>
> THE COURT: Mr. McCormick, my tendency is to grant the motion.
>
> [THE PROSECUTOR]: You know, that's fine. It's just something I wish was brought to my attention a long time ago because redactions were made.
>
> THE COURT: Absolutely.
>
> [THE PROSECUTOR]: I will redact it from each of the 24 transcripts that have been made for the jury. We can play the tape up to that point, stop the tape, and excuse the jury.
>
> THE COURT: All right. [¶] That's fine.

(9RT 1845-1846.) In accordance with the court's ruling, the prosecutor prepared a "corrected and redacted" transcript of appellant's confession that did not mention appellant's prior use of the rifle. (See 2CT 268 ["Corrected and Amended Guilt Phase Transcript"].)

Thereafter, during the penalty phase of the trial, a recording of appellant's confession was played to the jury. (See 21RT 4287; Peo. Exh. 76.) The jury was provided with a transcript of the recording (Peo. Exh. 76-A) in which the information about the rifle or its use was not redacted.[21] The following discussion took place at sidebar:

> [DEFENSE COUNSEL]: Can we approach a second?
>
> THE COURT: Yes.
>
> (The following proceedings were held at the bench:)
>
> [DEFENSE COUNSEL]: The bottom of page 39, I though that was redacted, the last two lines.
>
> [THE PROSECUTOR]: Honestly, I didn't recall. I can tell you, when I read it, it was being played, it occurred to me it probably should not be in there. What's he's talking about is, "Have you ever shot anyone else with it," and the answer was, "Yes, sir, I have."
>
> THE COURT: I saw that.
>
> [DEFENSE COUNSEL]: I think we redacted that in the last case.
>
> THE COURT: I can instruct them to disregard it.
>
> [THE PROSECUTOR]: I think the way to do it is, there's no evidence that he's ever -- there is no evidence connecting him to shooting anybody else with that weapon.
>
> THE COURT: I'll do that right now.
>
> [DEFENSE COUNSEL]: Can we cross that out on there?
>
> THE COURT: They won't keep it.

---

[21] It appears from the transcript that the audio tape did not contain the complained-of statement. (See 21RT 4288 [defense counsel noting that "the last two lines" of page 39 of the transcript should have been redacted and the court remarking, "I saw that."].)

[THE PROSECUTOR]: I'll delete it from the original which is the exhibit.

THE COURT: Which will go in.

(The following proceedings were held in open court:)

THE COURT: Going back to page 39, lines 21 and 22, there is absolutely no evidence the defendant ever shot anyone else with the CAR-15, and you're ordered to disregard the statements to that effect. That will be deleted from the transcript. Thank you.

(21RT 4288-4289.)

B. Discussion

1. Appellant's claim of prosecutorial misconduct was forfeited and is meritless

Appellant's claim that the prosecutor committed misconduct was not preserved for appellate review, and in any event is without merit. "As a general rule a defendant may not complain on appeal of prosecutorial misconduct unless in a timely fashion — and on the same ground — the defendant made an assignment of misconduct and requested that the jury be admonished to disregard the impropriety. [Citation]." (*People v. Hill* (1998) 17 Cal.4th 800, 820, citing *People v. Berryman* (1993) 6 Cal.4th 1048, 1072, overruled on another point in *People v. Hill* (1998) 17 Cal.4th 800, 823, fn. 1; see also *People v. Riggs* (2008) 44 Cal.4th 248, 300.) A defendant's failure to object and to request an admonition is excused only when "an objection would have been futile or an admonition ineffective." (*People v. Arias* (1996) 13 Cal.4th 92, 159.)

Here, the record establishes that no objection was made on prosecutorial misconduct grounds. (See 21RT 4288.) Nor can appellant claim that an admonition would have been futile, especially given that the trial court and the prosecutor agreed that the transcript should have been redacted and that the jury should be admonished, and also that defense

counsel requested that the trial court "cross out" the complained-of statements on the transcript that would be sent back into the jury room. (21RT 4289.) Because there was no objection raised on prosecutorial misconduct grounds, this claim was not preserved for appellate review. (*People v. Riggs, supra*, 44 Cal.4th at p. 300; *People v. Hill, supra*, 17 Cal.4th at p. 820; *People v. Arias, supra*, 13 Cal.4th at p. 159; *People v. Berryman, supra,* 6 Cal.4th at p. 1072.)

Assuming arguendo this claim is properly before the Court, it is without merit. Under the federal Constitution, to be reversible, a prosecutor's misconduct must "'so infect[ ] the trial with unfairness as to make the resulting conviction a denial of due process.'" (*Darden v. Wainwright* (1986) 477 U.S. 168, 181 [106 S.Ct. 2464, 91 L.Ed.2d 144]; *Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 643 [94 S.Ct. 1868, 40 L.Ed.2d 431].) Conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury. (*People v. Thomas* (2012) 53 Cal.4th 771, 821-822; *People v. Cunningham* (2001) 25 Cal.4th 983, 1000; *People v. Earp* (1999) 20 Cal.4th 826, 858.)

People v. Davis (2009) 45 Cal.4th 539 is instructive. In Davis, the trial court made a pretrial ruling excluding evidence that the defendant had burglarized an animal shelter and stolen some weapons. (*Id.* at p. 613.) When the prosecutor elicited a reference to the investigation, and asked a witness (who was a police officer) if he had questioned the defendant about the burglary, the defendant offered no objection. (*Ibid.*) After ruling that the issue was not preserved for appellate review, this Court also found that the prosecutor's question "was not a deceptive or misleading tactic and did not constitute prosecutorial misconduct." (*Ibid.*)

Such is the case at bar. Here, the record clearly shows that the jury was inadvertently provided with an unredacted copy of the transcript, as opposed to the agreed-upon (redacted) version. Most importantly, the record shows that the prosecutor's actions were neither deceptive nor reprehensible. Indeed, the record makes it very clear that the prosecutor had no issue with redacting information about appellant's prior use of the assault rifle. (9RT 1845-1846.) It further shows that, once the excluded statement was accidentally given to the jury during the penalty phase, it was the prosecutor who suggested the language of the very strong admonition that was given to the jury. (21RT 4288-4289.) For all these reasons, the prosecutor did not engage in an act of misconduct.

2. Defense counsel was not ineffective for "failing" to move for a mistrial

Appellant concurrently claims that defense counsel was ineffective for failing to move for a mistrial, claiming that "[h]ad defense counsel moved for a mistrial when the evidence was presented, the trial court would have been obliged to grant the motion." (AOB 340-341.) He is mistaken.

When a convicted defendant complains that his trial counsel was ineffective, he must show that the legal representation provided fell below an objective standard of reasonableness. (*Strickland v. Washington* (1984) 466 U.S. 668, 688 [104 S.Ct. 2052, 80 L.Ed.2d 674]; *People v. Farnam* (2002) 28 Cal.4th 107, 201; *In re Marquez* (1992) 1 Cal.4th 584, 602.) Indeed,

> [t]he Sixth Amendment . . . relies . . . on the legal profession's maintenance of standards sufficient to justify the law's presumption that counsel will fulfill the role in the adversary process that the Amendment envisions. The proper measure of attorney performance remains simply reasonableness under prevailing professional norms.

(*Strickland v. Washington, supra*, 466 U.S. at 688, citation omitted.)

A reviewing court defers to "reasonable tactical decisions in examining a claim of ineffective assistance of counsel," and entertains a "'strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance.'" (*People v. Lucas* (1995) 12 Cal.4th 415, 436-437, quoting *Strickland v. Washington, supra*, 466 U.S. at p. 689.) A reviewing court accords "great deference" to an attorney's tactical decisions. (*People v. Frye* (1998) 18 Cal.4th 894, 979, disapproved on other grounds in *People v. Doolin, supra*, 45 Cal.4th at p. 421, fn. 22.) Indeed, *Strickland v. Washington* imposes a "highly demanding" standard upon the defendant to prove "gross incompetence." (*Kimmelman v. Morrison* (1986) 477 U.S. 365, 382 [106 S.Ct. 2574, 91 L.Ed.2d 305].)

The defendant also bears the burden to show "'a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" (*Strickland v. Washington, supra*, 446 U.S. at p. 694, citations omitted.) In order to determine whether there is a reasonable probability that particular unprofessional errors would have produced a different result, the reviewing court should look at the totality of the evidence before the trial court, taking as given any findings not affected by the contended errors, and taking due account of the effect of the errors on the remaining findings, to decide whether absent the specified unprofessional error it is reasonably probable there would have been a different result. (*Strickland v. Washington, supra*, 466 U.S. at pp. 695-696.)

Notably, the reviewing court need not consider both whether there was unprofessional error and prejudice. It is entirely appropriate to first address the question of whether there is a lack of sufficient prejudice to the appellant and thus avoid unnecessary burdens on defense counsel. The *Strickland* Court stated that "[i]f it is easier to dispose of an effectiveness claim on the ground of lack of sufficient prejudice, which we expect will

often be so, that course should be followed." (*Strickland v. Washington, supra*, 446 U.S. at p. 697.)

A claim of ineffective assistance of counsel must be rejected if the record on appeal sheds no light on why counsel acted or failed to act in the manner challenged, unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation. (*People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266; *People v. Wilson* (1992) 3 Cal.4th 926, 936.)

Here, appellant has failed to establish that defense counsel's performance fell below an objective level of reasonableness. His claim of ineffective assistance of counsel is based entirely on his belief that the trial court would have been "obliged" to grant a mistrial had it been requested. (AOB 340-341.) He is mistaken.

In *People v. Hines* (1997) 15 Cal.4th 997, this Court stated:

> "A mistrial should be granted if the court is apprised of prejudice that it judges incurable by admonition or instruction. (*People v. Woodberry* (1970) 10 Cal.App.3d 695, 708.) Whether a particular incident is incurably prejudicial is by its nature a speculative matter, and the trial court is vested with considerable discretion in ruling on mistrial motions." (*People v. Haskett* (1982) 30 Cal.3d 841, 854; see also *People v. Stansbury* (1993) 4 Cal.4th 1017, 1060; *People v. Cooper* (1991) 53 Cal.3d 771, 838-839; *People v. Wharton* (1991) 53 Cal.3d 522, 565.)

(*Id.* at p. 1038.)

Here, the record shows that the trial court, the prosecutor, and defense counsel all agreed that the transcript should be redacted, and also that defense counsel concurred with the suggestion made by the trial court and prosecutor regarding an admonition. (21RT 4288-4289.) As set forth in more detail above, when the trial court stated that it would instruct the jury to disregard the unredacted lines, defense counsel's response was, "Can we cross that out on there?" (21RT 4289.) The fact that defense counsel did

not object to the proposed solution strongly suggests that counsel had no issue with the solution. "Generally, failure to object is a matter of trial tactics as to which we will not exercise judicial hindsight." (*People v. Kelly* (1992) 1 Cal.4th 495, 520; *People v. Bunyard* (1988) 45 Cal.3d 1189, 1215 [deference is shown to counsel's tactical choices].) Viewed in context, the record here shows that defense counsel likely did not raise a misconduct claim or ask for a mistrial because it was apparent the unredacted transcript was simply an unexpected, accidental occurrence that was adequately addressed by the trial court's admonition.

Moreover, there is nothing here that suggests the trial court's admonition was inadequate to prevent the jury from speculating about the excluded testimony. Indeed, absent evidence to the contrary, a jury is *presumed* to follow an admonition to disregard improper evidence.[22] (*People v. Alexander* (2010) 49 Cal.4th 846, 915; *People v. Cox* (2003) 30 Cal.4th 916, 961; *People v. Williams* (1995) 40 Cal.App.4th 446, 456; *People v. Allen* (1978) 77 Cal.App.3d 924, 934.) Here appellant makes no showing of prejudice beyond his assertion that the jury "cannot be expected to follow an admonition from the trial court to disregard such blockbuster evidence." (AOB 339.) Furthermore, the complained-of evidence was hardly inflammatory when compared to the charged crimes and other crimes presented during the penalty phase. Under such circumstances, it would not have been an abuse of discretion for a trial court to deny a motion for mistrial. (*People v. Hines, supra*, 15 Cal.4th at p. 1038.) Accordingly, there was no error, as counsel was not required to make frivolous motions or to engage in patently futile actions in order to guard

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[22] Notably, when a witness volunteers the fact that the defendant has a criminal record, courts presume that an admonition is sufficient to cure any prejudice. (See, e.g., *People v. Curtis* (1965) 232 Cal.App.2d 859, 867-868.)

against a later claim of ineffective assistance of counsel. (*People v. Frye, supra*, 18 Cal.4th at p. 985; *People v. Memro, supra*, 11 Cal.4th at p. 834; *People v. Torrez* (1995) 31 Cal.App.4th 1084, 1091.)

3. Appellant suffered no prejudice

Appellant's claims fail for the independent reason that he has failed to establish that he was prejudiced by either the alleged prosecutorial misconduct, or in the alternative, defense counsel's "failure" to move for a mistrial. Regarding appellant's claim of prosecutorial misconduct, he has failed to show a reasonable probability that he would have achieved a more favorable result had the redacted version of the transcript been provided to the jury. The jury's exposure to the complained-of portion of the transcript was brief and isolated, and discussed an issue far less serious than the crimes for which appellant had already been convicted. Moreover, as set forth above, appellant has failed to establish that the timely admonition provided by the trial court did not cure any harm. Also, the evidence of appellant's guilt was overwhelming, appellant's murderous conduct was cold-blooded and callous, and the jury further knew that appellant had murdered Cervantez and shot Romero. Thus, the alleged error was harmless by any standard. (See *People v. Harris* (1989) 47 Cal.3d 1047, 1083 [prosecutorial misconduct that infringes upon a defendant's constitutional rights mandates reversal unless error is harmless beyond a reasonable doubt as contemplated in *Chapman v. California, supra*, 386 U.S. at p. 18]; *People v. Herring* (1993) 20 Cal.App.4th 1066, 1077 [prosecutorial misconduct that violates state law examined for prejudice under test in *People v. Watson, supra*, 46 Cal.2d at p. 836]; see also *People v. Booker* (2011) 51 Cal.4th 141, 186 [prosecutorial misconduct did not cause prejudice under *Chapman* or *Watson* when among other things "the evidence of defendant's guilt (notably, his own confession) was overwhelming"].)

Likewise, appellant has not shown he was prejudiced by defense counsel's "failure" to move for a mistrial. Where the record does not establish that the defendant suffered prejudice, an ineffective assistance of counsel claim may be rejected on this ground alone. (*Strickland v. Washington, supra*, 446 U.S. at p. 697; see also *People v. Boyette* (2002) 29 Cal.4th 381, 430-431 [appellate court need not determine whether counsel's performance was deficient if there was no prejudice].) For the same reasons set forth above, defense counsel's "failure" to move for a mistrial did not affect the outcome of the penalty phase of appellant's trial. Because such a motion would most certainly have been denied, appellant cannot reasonably claim he was prejudiced by counsel's actions or omissions. Furthermore, as noted throughout this brief, the evidence presented against appellant was overpowering. For all these reasons, appellant's claim of ineffective assistance of counsel should also be rejected.

XVII. THE PROSECUTOR DID NOT COMMIT MISCONDUCT DURING CLOSING ARGUMENT

In Ground Seventeen, appellant claims that the prosecutor committed a prejudicial act of misconduct. Specifically, he claims that the prosecutor made "specious, unfair arguments" during the penalty phase that rose to the level of prejudicial misconduct. (AOB 342-351.) Respondent disagrees. There was no misconduct, and in any event, appellant has not shown that he was prejudiced.

A. Procedural and Factual Summary

During the penalty phase of appellant's trial, the prosecutor made two statements to which appellant now assigns error. During closing argument, the following colloquy took place:

> [THE PROSECUTOR]: We're here because of choices the defendant made. His conduct, his criminality, his lifestyle, those are the reasons we're here. [¶] When you think about his lifestyle, those are the reasons we're here. [¶] When you think

about his lifestyle, when you think about his choices, watch the videotape. You remember the video tape of him in an alley? Does he look like an unwilling participant or somebody out there having kicks with his friends? [¶] Because that's the person that went to Mac Donalds; not the guy that started growing his hair out two months ago to deceive you, because that's why he did it. [¶] He doesn't have his hair this way, and it won't be this way for 15 minutes after your verdict.

[DEFENSE COUNSEL]: I object. That's improper argument.

THE COURT: Overruled.

[THE PROSECUTOR]: He began growing his hair out to deceive you. He began doing it when he knew this case was coming to trial. That's why he did it.

[DEFENSE COUNSEL]: There's no evidence of this, Your Honor.

THE COURT: Counsel may argue inferences from the evidence. Overruled.

(23RT 4605-4606.)

A short time later, the following exchange occurred:

[THE PROSECUTOR]: So when we talk about somebody that distinguishes themselves as a murderer, I submit to you, somebody that commits multiple crimes of murder, killing a police officer in anticipation of going to a location to kill a rival gang member in a home he knows is occupied by participants of a child's birthday party, that tells you what you need to know about this defendant and his mind and how he works. [¶] They will also argue a 10-20 life argument. That argument goes something like this. Ladies and gentlemen of the jury, you can send him away for life without possibility of parole, knowing full well that ten years from now he'll remain in prison; 20 years from now he'll still be away in prison, away from you, safe from the community. Thirty years from now he still would be in prison. Thirty years from now he would still have access to all the quality of life that exists within the prison community; watching television.

[DEFENSE COUNSEL]: Objection. There's no evidence of this, Your Honor.

THE COURT: Again, counsel may argue inferences.

(23 RT 4609-4610.)

B. Discussion

Under the federal Constitution, to be reversible, a prosecutor's improper comments must "'so infect[ ] the trial with unfairness as to make the resulting conviction a denial of due process.'" (*Darden v. Wainwright, supra*, 477 U.S. at p. 181; *Donnelly v. DeChristoforo, supra*, 416 U.S. at p. 643; *People v. Frye, supra*, 18 Cal.4th at p. 969.) Under state law, the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury constitutes prosecutorial misconduct. (*People v. Cunningham, supra*, 25 Cal.4th at p. 1000; *People v. Earp, supra*, 20 Cal.4th at p. 858.)

"'It is settled that a prosecutor is given wide latitude during argument. The argument may be vigorous as long as it amounts to fair comment on the evidence, which can include reasonable inferences, or deductions to be drawn therefrom. [Citations.]'" (*People v. Thomas, supra*, 53 Cal.4th at p. 822, quoting *People v. Wharton, supra*, 53 Cal.3d at p. 567.) Applying these principles, it is clear that the complained-of portions of the prosecutor's penalty phase closing argument do not constitute misconduct.

1. Prosecutor's argument re: appellant's hair

The prosecutor's argument that appellant had permitted his hair to grow to "deceive" the jury (see 23RT 4605-4606) was clearly based on reasonable inferences drawn from the evidence. Specifically, evidence presented during the proceedings included images of appellant taken prior to the day he murdered Detective Black, many of which showed gang-related settings and depicted appellant with extremely short hair. (See, e.g.,

Peo. Exhs. 8, 25, 45, 68 [videotape], 81; see also victim impact Power Point presentation.) Appellant's appearance during trial was obviously in contrast to his appearance before the trial. Thus, as recognized by the trial court, it was reasonable for the prosecutor to infer that appellant had permitted his hair to grow in an effort to change his appearance for the trial. (*People v. Thomas, supra*, 53 Cal.4th at p. 822; *People v. Wharton, supra*, 53 Cal.3d at p. 567.)

Nor does the fact that the prosecutor argued that appellant was trying to "deceive" the jury suggest that an act of misconduct occurred. "Referring to the testimony and out-of-court statements of a defendant as 'lies' is an acceptable practice so long as the prosecutor argues inferences based on evidence rather than the prosecutor's personal belief resulting from personal experience or from evidence outside the record." (*People v. Mayfield* (1997) 14 Cal.4th 668, 782, quoting *People v. Edelbacher* (1989) 47 Cal.3d 983, 1030; see also *People v. Reyes* (1974) 12 Cal.3d 486, 505.) In this case, the prosecutor's comments about appellant's hair were based on the evidence presented – which showed that appellant wore his hair in a different manner while out of custody than he did during trial – and the reasonable inferences drawn therefrom. As such, the prosecutor's argument was completely proper because it was "based on the evidence and amounted to no more than vigorous but fair argument." (*People v. Edelbacher, supra*, 47 Cal.3d at p. 1030.)

People v. Foster (2010) 50 Cal.4th 1301 is instructive. In that case, the prosecutor questioned a witness about changes to the defendant's appearance between his attack on a victim and the preliminary hearing. (*Id.* at p. 1355.) This Court held:

> [i]t is not improper for a prosecutor to suggest that a defendant deliberately altered his or her appearance to raise doubt concerning the defendant's identity as the perpetrator, unless the prosecutor knows that the change in appearance was motivated

solely by a reason unrelated to the reason suggested by the prosecutor.

(*Ibid.*)

Although there is no doubt here that appellant was the perpetrator of Detective Black's murder (see 2CT 268-322), by parity of reasoning it was not improper for the prosecutor to suggest that appellant deliberately altered his appearance to present a physical image of himself to the jury that was very different from the image established by the evidence presented at trial. Moreover, there is nothing in the record that suggests that the prosecutor "was aware of a separate and exclusive motivation for the change in [appellant's] appearance." (*People v. Foster, supra*, 50 Cal.4th at p. 1356.) Accordingly, this claim should be rejected.

2. Prosecutor's argument re: potential defense arguments

The prosecutor's statements regarding potential defense arguments were likewise proper. Contrary to appellant's assertion (see AOB 350), nothing the prosecutor argued was "based on supposed facts outside the record." A review of what the prosecutor actually said unambiguously shows that his comments were limited to "some of the arguments you're *likely to hear* from defense counsel" (23RT 4608, emphasis added), not facts outside the record.

Regardless, it is settled that a prosecutor is permitted to comment on an anticipated argument by defense counsel. (*People v. Bemore* (2000) 22 Cal.4th 809, 846.) For example, in *People v. Thompson* (1988) 45 Cal.3d 86, the prosecutor argued that "the defendant's inconsistent stories contained lies which *defense counsel would not try to justify*," and "predicted that, to draw the jury's attention away from those inconsistencies, the defense would have to attack the credibility of the prosecution's informant witnesses." (*Id.* at p. 113, emphasis added.) This

Court found that such an argument, "did not, when read in context, depart from comment on the state of the evidence or legitimate argument on how the case should be viewed." (*Ibid.*)

Such is the case at bar. In context, the prosecutor's penalty phase closing argument anticipated commonly-made defense arguments regarding alternatives to the imposition of the death penalty. Moreover, a prosecutor enjoys wide latitude in describing the deficiencies in opposing counsel's arguments. (See *People v. Frye, supra*, 18 Cal.4th at pp. 977-978 [no misconduct where prosecutor accused counsel of making an "irresponsible" third party culpability claim]; *People v. Medina* (1995) 11 Cal.4th 694, 759 [no misconduct where prosecutor said counsel can "twist [and] poke [and] try to draw some speculation, try to get you to buy something"].) That the prosecutor's comments here were directed at deficiencies with anticipated defense arguments makes no difference, especially given that the prosecutor never stated or implied that defense counsel would make any improper or unethical arguments. Rather, the prosecutor's comments were directed at topics the prosecutor reasonably believed would be discussed by defense counsel. This did not constitute misconduct. (Cf. *People v. Bell* (1989) 49 Cal.3d 502, 538 [argument that suggests defense counsel has an obligation or is permitted to present a dishonest defense would be improper].)

Finally, appellant's claim should be rejected because he was not prejudiced by the prosecutor's statements. As set forth above, the prosecutor based his arguments on photographic evidence regarding appellant's appearance prior to his arrest, and on defense arguments he reasonably believed might be raised. Moreover, the comments were neither inflammatory nor significant, especially when compared to the evidence of appellant's murderous conduct that was presented at trial. Thus, assuming (without conceding) that some misconduct may have occurred, there is no

reasonable possibility that a jury would have reached a different result without the misconduct. (*People v. Cunningham, supra*, 25 Cal.4th at p. 1019 [to be prejudicial, "prosecutorial misconduct must bear a reasonable possibility of influencing the penalty verdict"].)

XVIII. THE VICTIM IMPACT PRESENTATION WAS PROPER AND DID NOT VIOLATE APPELLANT'S DUE PROCESS RIGHTS IN ANY WAY

In Ground Eighteen, appellant claims that the prosecutor's use of a Power Point presentation was improper. (AOB 351-358.) Specifically, he argues that the trial court improperly permitted the prosecutor "to present an emotional audio-visual montage to the jury during the prosecution's argument in the penalty phase retrial." (AOB 351-352.) Respondent disagrees. The prosecutor's presentation was proper.

A. Procedural and Factual Summary

During the penalty phase, the prosecutor presented – over defense objection – a Power Point presentation to the jury that displayed a summary of Detective Black's life, from his birth to his murder. Images from Detective Black's funeral were also included.[23] (23RT 4637, 4639.) The presentation also included photographs of Detective Delfin before and after appellant's attempt to murder him. Finally, the presentation contained images of appellant in various gang-related settings.

B. Discussion

> In a capital trial, evidence showing the direct impact of the defendant's acts on the victims' friends and family is not barred by the Eighth or Fourteenth Amendments to the federal Constitution. [Citation.] Under California law, victim impact evidence is admissible at the penalty phase under section 190.3, factor (a), as a circumstance of the crime, provided the evidence

[23] This presentation is part of the record on appeal.

> is not so inflammatory as to elicit from the jury an irrational or emotional response untethered to the facts of the case.

(*People v. Dykes* (2009) 46 Cal.4th 731, 781, quoting *People v. Pollock* (2004) 32 Cal.4th 1153, 1180; see also *Payne v. Tennessee* (1991) 501 U.S. 808, 825 [111 S.Ct. 2597, 115 L.Ed.2d 720] [the "specific harm caused by the crime" is a relevant consideration for sentencing].)

Indeed, "[a] State may legitimately 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." (*Payne v. Tennesse, supra*, 501 U.S. at p. 827.) Only when the evidence introduced is so prejudicial that it renders the trial fundamentally unfair is the due process clause offended. (Id. at p. 825; see also *People v. Lewis and Oliver* (2006) 39 Cal.4th 970, 1056-1057 [unless it invites a purely irrational response from the jury, the devastating effect of a capital crime on loved ones and the community is relevant and admissible as a circumstance of the crime under Penal Code section 190.3, factor (a)].)

Appellant's claim that the prosecutor's use of a Power Point presentation deprived him of his "right to a reliable and fundamentally fair penalty phase trial" (AOB 358) is without merit. In *People v. Zamudio* (2008) 43 Cal.4th 327, the prosecution used a photo montage narrated by one of the victim's daughters during the penalty phase of a capital trial. (*Id.* at p. 365.) On appeal, the defendant claimed that the montage "exceeded permissible limits on victim impact testimony, and 'was clearly prejudicial.'" (*Ibid.*) This Court rejected the claim. (*Id.* at 366-367.) In so ruling, the Court relied on its decision in *People v. Kelly* (2007) 42 Cal.4th 763, 797:

> In *People v. Kelly* (2007) 42 Cal.4th 763, 68 Cal.Rptr.3d 531, 171 P.3d 548 (Kelly), we recently considered and rejected nearly identical arguments based on similar facts. There, during the penalty phase of a capital trial, the prosecution played an

> approximately 20-minute videotape that "consist[ed] of a montage of still photographs and video clips of [the murder victim's] life, from her infancy until shortly before she was killed at the age of 19, narrated calmly and unemotionally by her mother." (*Id.* at p. 796, 68 Cal.Rptr.3d 531, 171 P.3d 548.) "[G]enerally soft" music "play[ed] in the background" for "much of the video." The videotape "concern[ed] [the victim's] life, not her death. It show[ed] scenes of her swimming, horseback riding, at school and social functions, and spending time with her family and friends." (*Id.* at pp. 796–797, 68 Cal.Rptr.3d 531, 171 P.3d 548.) It "end[ed] with a brief view of [the victim's] unassuming grave marker followed by a video clip of people riding horseback in Alberta, Canada, over which the mother sa[id] this was where [the victim] came from and was the 'kind of heaven' in which she belonged." (*Id.* at p. 797, 68 Cal.Rptr.3d 531, 171 P.3d 548.)

(*People v. Zamudio, supra*, 43 Cal.4th at p. 135.)

The instant facts are nearly identical to those in *People v. Zamudio* and *People v. Kelly*. The presentation from appellant's penalty phase consisted of a montage of still photographs presented in a slide show format. The photographs depicted scenes from Detective Black's life and death, Detective Delfin's life before and after appellant attempted to murder him, and appellant in various gang-related settings. The video was less than six minutes in length, and was accompanied by classical music. Like the 20-minute video presentation approved by *People v. Kelley*, the much shorter Power Point presentation here "humanized [Detective Black], as victim impact evidence is designed to do," and "helped the jury to understand 'the loss to the victim's family and to society which ha[d] resulted from the defendant's homicide.' [Citation.]" (*People v. Kelly, supra*, 42 Cal.4th at p. 797.) As such, it was properly presented during the penalty phase of appellant's trial.

In sum, the prosecution had a right to present evidence of the direct impact of appellant's acts on the community and the families of his victims. (Pen. Code, § 190.3, factor (a).) Given its brief length and factual nature,

the Power Point presentation used by the prosecution did not invite a purely irrational response from the jury or render appellant's trial fundamentally unfair. (*Payne v. Tennesse, supra*, 501 U.S. at p. 825; *People v. Lewis and Oliver, supra*, 39 Cal.4th at pp. 1056-1057.) Accordingly, appellant's claim should be rejected.

XIX. APPELLANT HAS FORFEITED HIS CLAIM THAT THE TRIAL COURT IMPROPERLY INFORMED THE JURY THAT IT WAS TO "ASSUME" A LIFE-WITHOUT-PAROLE SENTENCE WOULD RESULT IN APPELLANT SPENDING THE REMAINDER OF HIS LIFE IN PRISON

In Ground Nineteen, appellant claims that the trial court violated his right to a fair penalty determination by informing the jury that it was not allowed to accept defense counsel's representation that a sentence of life without the possibility of parole would result in appellant spending the rest of his life in prison. (AOB 358-379.) Specifically, he claims that by "erroneously 'correcting' defense counsel's argument that an LWOP sentence would actually result in imprisonment for life, the trial court violated [appellant's] right to a scrupulously fair and reliable penalty determination . . . ." (AOB 359.) Respondent disagrees. As an initial matter, this claim was not preserved for appellate review. In any event, the trial court's admonition to the jury accurately conveyed the law and in no way infringed upon appellant's right to a reliable penalty determination.

A. Procedural and Factual Summary

During appellant's penalty phase closing argument, the following exchange took place:

> [DEFENSE COUNSEL]: Now, what is L.W.O.P.? [¶] You hear us using those words. That means life without parole. [¶] And I'm always amazed when I talk to jurors that they think, well, that means he'll do seven years, and then he'll be released. Well, that's not true. [¶] And they always go back to the Charles Manson example. Charles Manson and Sirhan [Sirhan], if you remember those cases. They were convicted back in the late

60's of murders, and they were all sentenced to the death penalty. [¶] And then in 1972, the Supreme Court of the United States overturned the death penalty in all the states in the United States because of the way the law was written. So then after that, each state, the ones that chose to have a death penalty, reenacted a new death penalty law. And California did that in 1978, in which they provide for the two sentences, either the death sentence or life without parole. [¶] And life without parole means just what it sounds like. And if you don't believe me, if you're thinking I'm trying to pull the wool over your eyes, you can ask the court. And the court will explain it to you. It means that [appellant] will never get out.

[THE PROSECUTOR]: Object. [¶] Well, can we approach?

THE COURT: Yes.

(The following proceedings were held at the side bar, outside the presence of the jury:)

THE COURT: I think the correct statement of the law is that you are to assume that it means that.

[THE PROSECUTOR]: Exactly. [¶] The case law does not allow you to argue an inaccurate statement, which is you can commute the sentence, which is a lie.

[DEFENSE COUNSEL]: *I would ask you to admonish them now.*

THE COURT: I will tell them that now.

[THE PROSECUTOR]: Yes.

(The following proceedings were held in open court in the presence of the jury:)

THE COURT: Life without the possibility of parole, that sentence, you are to assume that it means that. That is the statement of the law. You are to assume life without the possibility of parole means life without the possibility of parole.

[DEFENSE COUNSEL]: If anyone has any questions on that, the court will explain it further. [¶] But you are to assume that that's what it means because that's what it does mean. It means

> that [appellant] will spend the rest of his life in a California maximum security prison.
>
> THE COURT: Excuse me. [¶] The jury is not allowed to accept the statement that life without the possibility of parole means exactly what it is. You're to assume that that's what it means. [¶] Thank you.
>
> [DEFENSE COUNSEL]: Well, okay. You're to assume that [appellant] will spend the rest of his life in a California maximum security prison. Even if he lives to be 100-years old, you're to assume that's where he's going to die. In 10 years, 20 years from now, whenever your children graduate from college or graduate from high school, [appellant] will still be in a California maximum security prison.

(23RT 4676-4679, italics added.)

B. Discussion

Appellant has forfeited his claim that the trial court's admonition was improper. Indeed, a review of the record shows that *appellant's counsel requested* the very admonition appellant now asserts was error. As set forth in detail above, while at sidebar the trial court informed defense counsel that "the correct statement of the law is that you are to assume that it means that." In response, defense counsel stated, "I would ask [the court] to admonish them now." (23RT 4678.) Moments later, when defense counsel repeated his argument that the jury was to assume appellant would spend the rest of his life in prison "because that's what [LWOP] does mean," the trial court repeated the admonition *requested at sidebar by defense counsel.* (23RT 4678.) Because defense counsel agreed with (and in fact requested) the trial court's admonition, appellant has forfeited this claim on appeal. (*People v. Boyette* (2002) 29 Cal.4th 381, 430 [holding that the defendant, who failed to object to the trial court's decision not to respond to the juror's note, "failed to preserve the issue for appeal, and, indeed, may be held to have given tacit approval of the trial court's decision"].)

Assuming arguendo that appellant's claim is properly before this Court, it fails on the merits. In *People v. Musselwhite* (1988) 17 Cal.4th 1216, the defendant claimed the trial court's refusal to instruct the jury "that a sentence of life in prison without possibility of parole would mean that he would never be paroled" violated his Fifth, Eighth, and Fourteenth Amendment rights. (*Id.* at p. 1271.) This Court rejected the claim, holding that the trial court did not err and stating: "Indeed, as we noted in *People v. Gordon* (1990) 50 Cal.3d 1223, "'It is . . . incorrect to tell the jury the penalty of . . . life without parole will inexorably be carried out.'" [Citation.]" (*Ibid.*)

Most recently, in *People v. Abel* (2012) __ Cal.4th __, 138 Cal.Rptr.3d 547, this Court rejected a similar claim in the context of an allegation of judicial misconduct. In *Abel*, the trial court made the following statement to the jurors during voir dire:

> Previously I told you that for purposes of your decision, you have to assume that the government will keep the man locked up for his entire life and he'll die in prison. That's the assumption you have to make. We're not telling you and guaranteeing to you that that's true. We're simply trying to impose upon you the gravity of your responsibility as jurors.

(*Id.* at p. 578.) This Court found that the trial court's comments were proper, and "not made in a context that would convey to the prospective jurors that defendant might be released if the jury did not impose a verdict of death." (*Ibid.*)

Appellant offers no reasons to depart from the reasoning of the cases set forth above. Because the trial court's admonition was (1) initially requested by appellant and (2) an accurate statement of the law, his claims should be rejected. (See *People v. Thompson* (1988) 45 Cal.3d 86, 130 ["It is as incorrect to tell the jury the penalty of death or life without possibility of parole will inexorably be carried out as it is to suggest they need not take

their responsibility as seriously because the ultimate determination of penalty rests elsewhere."].)

XX. THE TRIAL COURT PROPERLY DENIED APPELLANT'S REQUEST TO INSTRUCT THE JURY THAT INDIVIDUAL JURORS NEED NOT AGREE WHETHER MITIGATING CIRCUMSTANCES WERE PRESENT

In Ground Twenty, appellant claims that the trial court committed reversible error by denying defense counsel's request to instruct the jury that individual jurors need not agree "whether mitigating circumstances were present in order to consider and give effect to those mitigating circumstances." (AOB 375-379.) Respondent disagrees. The trial court was under no obligation to instruct the jury as appellant claims, and accordingly, no error occurred.

A. Procedural and Factual Summary

During the penalty phase, defense counsel requested that the jury be instructed that it need not unanimously agree whether mitigating circumstances were present in order to rely on such circumstances. As requested, the instruction stated:

> A mitigating circumstance does not have to be proved beyond a reasonable doubt to exist. The jurors need not unanimously agree on whether a particular mitigating circumstance is present. Each juror, in his or her own individual assessment of the evidence, may find that a mitigating factor exists if [he] or she finds there is any substantial evidence to support it.

(6CT 1489; 23RT 4584.) Following a discussion with counsel from both sides, the trial court denied the request. (23RT 4583-4585.)

B. Discussion

Here, the trial court declined to give the requested instruction because it was redundant of the standard instructions – including CALJIC No. 8.87 – given in this case. (23RT 4585.) The trial court's decision was correct. This Court has repeatedly held that a penalty phase jury need not be

instructed as appellant now claims. For example, in *People v. Bunyard* (2009) 45 Cal.4th 836, this Court stated:

> Defendant also claims the trial court committed reversible error under the Fourteenth Amendment and other unspecified constitutional provisions by refusing a defense instruction that would have instructed the jury there was no requirement that jurors unanimously agree on mitigating circumstances and that jurors should individually weigh and consider such circumstances. We have held that such instruction is unnecessary and that the standard instruction, which was delivered in the present case, was constitutionally sufficient. (*People v. Weaver* (2001) 26 Cal.4th 876, 988.)

(*Id.* at p. 858.) This Court concluded by declining to revisit the issue. (*Ibid.*; see also *People v. Lee* (2011) 51 Cal.4th 620, 655 ["We repeatedly have held the trial court does not have to instruct the penalty phase jury...there is no requirement that all jurors agree on any factor in mitigation"].)

Appellant suggests that the refusal to give the instruction violates the United States Supreme Court precedent set forth in *McKoy v. North Carolina* (1990) 494 U.S. 433 [110 S.CT. 1227, 108 L.Ed.2d 369] and *Mills v. Maryland* (1988) 486 U.S. 367 [108 S.Ct. 1860, 100 L.Ed.2d 384]. (AOB 376.) He is mistaken. In those cases, the United States Supreme Court found error when there was an implicit requirement that the jury must unanimously find a mitigating factor to be present before any juror could consider it as mitigation in determining penalty. (See *People v. Weaver, supra*, 26 Cal.4th at p. 988.) In *Weaver*, as previously held in *People v. Breaux* (1991) 1 Cal.4th 281, 314, this Court found that the standard penalty phase instructions did not run afoul of the "*Mills-McKoy*" rule. Nothing has changed in the interval between *Breaux*, *Weaver*, and this case.

Because appellant offers no meritorious reason for this Court to reconsider its long-standing position, his claim should be rejected.

XXI. HARMLESS ERROR REVIEW OF ALLEGED PENALTY PHASE ERRORS IS CONSTITUTIONAL AND APPROPRIATE

In Ground Twenty-One, appellant claims that "no reviewing court" can determine whether an alleged penalty phase error was harmless, and argues that this Court should "abandon harmless error review of penalty phase errors as disingenuous and intellectually dishonest." (AOB 380-382.) Respondent disagrees.

Appellant's position is completely contrary to the position and actions consistently taken by this Court. (See, e.g., *People v. Fuiavia* (2012) 53 Cal.4th 622, 719 ["Under the test applied to state law errors occurring at the penalty phase, 'we will affirm the judgment unless we conclude there is a reasonable (i.e., realistic) possibility that the jury would have rendered a different verdict had the error or errors not occurred.'"]; *People v. Gonzales* (2011) 52 Cal.4th 254, 331 [applying harmless error review to alleged penalty phase errors]; *People v. Brown* (1988) 46 Cal.3d 432, 463 (conc. opn. of Mosk, J.) ["I concur in the opinion of the court and especially in its reaffirmation of the so-called 'reasonable-possibility' test as the appropriate standard of review for errors in the penalty phase of a capital case."].) Appellant's position would convert all penalty phase errors, no matter how insignificant, into "structural" errors not subject to review for prejudice. There is no precedent for this expansive view.

Simply stated, appellant offers no compelling reason to abandon harmless error review of alleged penalty phase errors. Nor does he explain why this Court is not capable of conducting such a review in an intellectually honest manner. Accordingly, his claim should be rejected.

XXII. CALIFORNIA'S DEATH PENALTY IS CONSTITUTIONAL

In Ground Twenty-Two, appellant makes the general claim that "the death penalty is unconstitutional," and maintains that many features of the death penalty law violate the federal Constitution. (AOB 382-384.)

However, as he himself concedes (AOB 384), these claims have been raised and rejected in prior capital appeals before this Court. Very recently, this Court restated its long-held view that California's death penalty does not violate either the Eighth Amendment or international law. (*People v. Abel, supra,* 138 Cal.Rptr.3d at pp. 594-595; see also *People v. Moore* (2011) 51 Cal.4th 386, 417; *People v. Brasure* (2008) 42 Cal.4th 1037, 1071-1072.) Because appellant fails to raise anything new or significant which would cause this Court to depart from its earlier holdings, his claim should be rejected.

CONCLUSION

For the reasons stated above, respondent respectfully requests that the judgment and sentence of the trial court be affirmed in all respects.

Dated: April 16, 2012

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached Respondent's Brief uses a 13-point Times New Roman font and contains 42,063 words. This certification is based upon information provided by the word count feature of the computer program used to prepare this brief.

Dated: April 16, 2012

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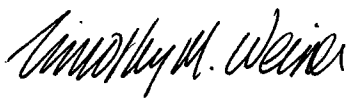

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DECLARATION OF SERVICE BY U.S. MAIL

Case Name: ***The People of the State of California v. Ramon Sandoval, Jr.***
No.: **S115872**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter.

I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business.

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I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on April 16, 2012, at Los Angeles, California.

C. Esparza
Declarant

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