In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA, **Plaintiff and Respondent,** **v.** **ALFRED FLORES, III,** **Defendant and Appellant.**	**CAPITAL CASE** Case No. S116307

San Bernardino County Superior Court Case No. FVA015023
The Honorable Ingrid A. Uhler, Judge

RESPONDENT'S BRIEF

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STATEMENT OF THE CASE

On October 8, 2002, the San Bernardino County District Attorney filed an amended information charging appellant Alfred Flores III with three counts of murder (Pen. Code, § 187, subd. (a)) and alleging the special circumstance that appellant committed multiple murders (Pen. Code, § 190.2, subd. (a)(3)). The information further alleged that appellant personally used a firearm to commit each murder (Pen. Code, § 12022.53, subd. (d)). (3 CT 783-786; see 1 CT 167-170 [original information].)

Appellant pled not guilty and denied the allegations in the original information (1 CT 171), and waived formal arraignment on the amended information (3 CT 787).

Jury selection began on October 15, 2002. (3 CT 789-790.) A jury was sworn on December 6, 2002. (3 CT 834.)

On March 7, 2003, after deliberating for less than 21 hours over a five-day period, the jury convicted appellant of three counts of first degree murder. The jury also found true the multiple murder special circumstance and the personal firearm-use allegations. (4 CT 1199-1200; see also 3 CT 1169-1176.)

The penalty phase began on March 19, 2003. (5 CT 1340.) On April 23, 2003, the jury determined the appropriate penalty to be death. (6 CT 1567, 1570.)

On May 19, 2003, appellant was sentenced to death for each of his three murders. The trial court additionally imposed and stayed under Penal Code section 654 three consecutive terms of 25 years to life, one for each of the firearm-use enhancements. (10 CT 2722-2729A.)

STATEMENT OF FACTS

I. GUILT PHASE

A. March 19-21, 2001 – Three Murder Victims in Less Than 35 Hours

1. Ricardo Torres

After dark on March 19, 2001, a mother and her teenage daughter were passengers in a car traveling up Lytle Creek Road in San Bernardino County when they noticed three or four males standing off the side of the road. A Chevy Astro van with its headlights off was parked nearby. (9 RT 1849-51, 1861, 1873-1876, 1885.) The daughter saw one or two people sitting inside the van, which was illuminated by an interior light. (9 RT 1875-1876, 1881.) The males standing outside appeared to be Hispanic gangsters ("cholitos") who were drinking or "partying." (9 RT 1852, 1857, 1863-1865, 1877, 1885.) One of them wore an oversized white T-shirt with baggy khaki-colored pants. (9 RT 1855-1856.) The mother thought this man was about 40 years old. (9 RT 1862-1863.)

The mother and daughter passed by the area again about 15 minutes later and noticed a body on the ground. (9 RT 1862-1863.) The women recognized the body as that of one of the "boys" they had earlier seen standing near the Chevy van. (9 RT 1855, 1864, 1892.) They drove to a nearby store and called police. (9 RT 1854, 1869-1870, 1880.)

The victim had no identification, but was later identified as 15-year-old Ricardo Torres. (9 RT 1894-1895, 1916, 1940; 18 RT 3661.) Ricardo had been shot seven times at close range. (9 RT 1924; 18 RT 3667-3675.) The presence of several nine-millimeter bullet casings, in addition to pooling blood found under Ricardo's body, indicated Ricardo had been killed at the scene. (9 RT 1921-1922; 1951-1952.)

2. Jason Van Kleef

Just after midnight on March 20, 2001, a truck driver discovered 18-year-old Jason Van Kleef's dead body near the entrance to Shaffer Trucking, an isolated area off South Willow Avenue in Rialto. (9 RT 1979-1982; 10 RT 2009, 2013.) Fresh tire tread marks, apparently from a passenger van or truck, formed an arc near Jason's body. (10 RT 2016.) Jason's body was partially wrapped in a bloody blue sheet and a size XXL Stafford brand white T-shirt. (10 RT 2015, 2018, 2040-2042, 2050.) Investigators concluded Jason had been killed elsewhere and his body dumped at this location. (10 RT 2014, 2033.) Jason had been shot once in the back of the head at very close range; the size of the wound indicated a .38-caliber or nine-millimeter weapon had been used. (17 RT 3392, 3396-3398, 3412, 3437-3438; see also 16 RT 3319-3322 [Jason was a possible contributor of DNA found on the nine-millimeter weapon used to kill appellant's other two victims].)

3. Alex Ayala

Around 6:40 a.m. on March 21, 2001, a woman driving down Lytle Creek Road to take her children to school discovered 17-year-old Alex Ayala's dead body off the side of the road. (10 RT 2063-2066, 2087.) Alex's body was located less than a quarter mile from where Ricardo's body had been discovered. (9 RT 1916; 11 RT 2166.) Despite cold weather, Alex wore only a white tank top with his pants. (11 RT 2169.) Investigators concluded Alex had been murdered around midnight. (11 RT 2168-2169.) A "drag path" ran between a large pool of blood and Alex's body. (11 RT 2169-2170, 2231.) The blood spatter pattern indicated Alex had been either sitting or on his knees, with his hand in a defensive position, when he was shot five times at close range with the same nine-

millimeter pistol used to kill Ricardo. (11 RT 2171, 2235-2237, 2244-2247; 17 RT 3430-3431, 3468.)

B. The Murder Investigation

San Bernardino County Sheriff's Detective Chris Elvert found an identification card in Alex's pocket and contacted Alex's mother. (11 RT 2173.) In addition to identifying her son, Alex's mother was able to identify Ricardo from a Polaroid photograph; Ricardo was a friend of Alex. (10 RT 2089-2090; 11 RT 2173-2174.) Ricardo's identification supported Detective Elvert's suspicion that the murders were related. (11 RT 2168.) After corresponding with Rialto police about Jason's murder, Detective Elvert and his team concluded that all three murders were related. (11 RT 2174; 19 RT 4007-4008.)

Authorities focused their investigation on a Rialto apartment complex at 380 North Linden, where Ricardo had lived with his family. (11 RT 2174-2175; 12 RT 2349; 19 RT 4021-4022.) Carmen Alvarez and Abraham Pasillas Marquez (Pasillas) also lived in the complex with their young daughter and Pasillas's young son. (11 RT 2174-2175; 13 RT 2665, 2695-2696; 15 RT 3039.) Alex had lived nearby, as did Andrew Mosqueda, Alvarez's nephew and Alex's best friend. (10 RT 2089; 11 RT 2135, 2157; 12 RT 2395; 14 RT 2789.) Andrew, Alex, and Ricardo had been friends for several years and had started spending time at Alvarez's apartment when she and Pasillas moved in three or four months earlier; Jason did not live nearby, but knew Andrew from school and sometimes spent time at the apartment. (9 RT 1895; 12 RT 2341, 2345; 13 RT 2744-2745; 14 RT 2791, 2797-2798; 15 RT 2993-2994, 3044-3045.) Alex's brother-in-law thought Alvarez's apartment was a "party spot" for the boys and Andrew testified they sometimes drank alcohol and smoked marijuana while hanging out there. (11 RT 2145; 13 RT 2549; see also 18 RT 3632.)

Appellant was a documented member of the El Monte Trece criminal street gang; he had been "jumped in" to the gang about ten years earlier and was known as "Wizard." (12 RT 2348; 13 RT 2672; 18 RT 3808; 19 RT 4044; see 12 RT 2492 [Alvarez called appellant "Casper"].) Alvarez and Pasillas were also longtime members of El Monte Trece; 39-year-old Pasillas had joined the gang around 1980 and 27-year-old Alvarez had joined around the same time as appellant. (12 RT 2338-2340; 13 RT 2593-2594, 2699; 15 RT 3041.) Pasillas worked long hours and he and Alvarez had since become inactive in the gang, which itself had substantially dwindled in membership. (12 RT 2340; 13 RT 2665, 2771; 15 RT 3046-3047; 19 RT 4036-4037, 4051; but see 14 RT 2816-2817, 2825, 2835, 2865 [Andrew's sister, Jessica, testified she sometimes babysat for Alvarez while Alvarez went to gang meetings with appellant and that she once overheard Alvarez talking about getting Jessica to join the gang; no one ever directly asked Jessica to join]; 16 RT 3167 [photos taken a few months earlier were found in Alvarez's home and depicted her with other gang members].)

Pasillas previously had been married to appellant's cousin. (13 RT 2672, 2702; 16 RT 3159-3160.) Pasillas and Alvarez had known appellant for more than a decade and considered him to be a close friend. (13 RT 2674; 15 RT 3038-3039; 16 RT 3149.) A few months before the murders, appellant often stayed overnight at their apartment; he was eventually given space in the master bedroom closet for his personal belongings and stayed continuously for the final month or so before the murders. (13 RT 2680, 2673-2675, 2770, 2772; 14 RT 2792; 15 RT 3040-3041, 3043-3044.)

Appellant sought to recruit new members for his gang and focused on Andrew and his friends. (12 RT 2425; 13 RT 2679, 2686; 15 RT 3051; 19 RT 3963.) Pasillas told appellant he wanted no part of any recruitment effort and Alvarez informed appellant that Andrew and his friends were not "gang member types." (13 RT 2679; 15 RT 3051.) Appellant nonetheless

successfully recruited Andrew into the gang. A few months before the murders, appellant and Alvarez took Andrew to a park where he was beaten by other gang members, including someone known as "Rigo," during a jumping in ceremony. (12 RT 2335, 2337, 2343-2344, 2474; 13 RT 2539, 2587-2589.) Appellant dubbed Andrew "Apache" and began giving him orders. (12 RT 2339; 13 RT 2590.)

Alex, Jason, and Ricardo were not gang members. (12 RT 2423; 13 RT 2746.) Despite being pressured by appellant to join the gang, Alex declined and repeatedly made clear he had no interest in gang membership. (12 RT 2426; 14 RT 2804, 2849-2850; 17 RT 3592-3593; 18 RT 3714, 3717-3718.) Ricardo had agreed to join the gang but failed to attend his jumping in ceremony, which "disappointed" appellant. (12 RT 2337-2338, 2372; 17 RT 3593.) Appellant later repeatedly asked Andrew when Ricardo would join the gang. (12 RT 2339-2340.) Ricardo became worried that appellant was angry at him for not joining the gang. (17 RT 3594-3595.)

Andrew and Alvarez were both present when appellant shot Ricardo and testified under grants of use immunity. (12 RT 2335, 2370; 15 RT 3027, 3034-3036, 3069; 16 RT 3289.) Andrew had been convicted of two gang-related robberies and attempted murders that took place about two weeks before the murders in the instant case. (12 RT 2424, 2473.) Alvarez was in custody on charges of being an accessory in the instant case. (15 RT 3038; 16 RT 3289.)

On the evening of March 19, 2001, a Monday, appellant was at Alvarez's apartment; Andrew, Jason, Ricardo, Alex, and another friend, Erick Tinoco, were there too. (12 RT 2346-2348, 2349-2350; 15 RT 3050; 17 RT 3585, 3595-3596.) Also present was Andrew's sister, 14-year-old Jessica, who was dating Alex and was good friends with Jason and Ricardo. (14 RT 2788, 2795, 2797-2798.) Ricardo was wearing an oversized "Sur

Streetwear" T-shirt; "Sur" refers to Latino gangs in the Southern California region. (17 RT 3596-3597; 19 RT 3851-3852.) Tinoco heard appellant tell Ricardo he should not be wearing the "Sur" T-shirt. (17 RT 3602-3604.) Tinoco thought appellant seemed angry that evening. (17 RT 3600-3601, 3605.) Tinoco had previously suggested to Ricardo that he stop hanging out with gang members – particularly appellant – and spend more time at home. (17 RT 3590-3591, 3594.) Though Tinoco knew Andrew was also a gang member, he was unconcerned about Andrew because Andrew and Ricardo had been friends for years. (17 RT 3591.)

When Tinoco asked Andrew about his plans for the evening, Andrew mentioned going to Lytle Creek to smoke weed or drink beer, and said something about doing a "jale," which means "job," but didn't elaborate. (13 RT 2543; 17 RT 3599.) At some point outside the presence of the others, appellant gave Andrew a rifle wrapped in a towel and told him to put it in the van; Andrew complied. (12 RT 2355-2358; see also 14 RT 2800 [appellant kept his rifle in Alvarez's closet]; 15 RT 3057 [same].) When appellant later suggested going for a ride in Alvarez's van, Alex and Jason asked Tinoco for a ride home because they did not want to go with the others. (12 RT 2352; 15 RT 3053; 17 RT 3585, 3602, 3605-3606.) Tinoco's car was not running so he tried to get his father to give Jason a ride home, but his father was unavailable. (18 RT 3614.) Even after Alex said he did not want to go on the drive, appellant kept asking him to go. (17 RT 3607.) Tinoco and Alex walked off before the others left in the van. (12 RT 2353-2354; 17 RT 3608; 18 RT 3637.)

Around 7:30 p.m., as Jessica began walking home, she saw Alvarez drive off in her van with Andrew, Ricardo, Jason, and appellant. (14 RT 2807-2809, 2838; 19 RT 3959-3960; see also 12 RT 2361; 15 RT 3056.) Appellant was known to carry a black nine-millimeter pistol in his waistband, but Andrew did not notice whether he had the pistol this time.

(12 RT 2359-2360, 2373, 2408, 2410; 13 RT 2677-2678, 2687; 14 RT 2799-2800; 15 RT 3056, 3155; 19 RT 3963.) Around 7:55 p.m., the group stopped at an "AM/PM" gas station and Alvarez purchased beer. (12 RT 2363-2364; 2453; 15 RT 3061-3064; see Peo. Exh. 103 [AM/PM surveillance video].) Appellant, who was wearing khaki pants and a white shirt, emerged from the van's front passenger seat to check something on the van. (12 RT 2364; 2453-2454; 15 RT 3056, 3062; Peo. Exh. 103; see also 13 RT 2687 [appellant regularly wore an oversized white T-shirt and khaki pants]; 14 RT 2866 [same]; 19 RT 3963 [same].)

The group continued up the winding road toward Lytle Creek before Alvarez made a U-turn and pulled off the road. (12 RT 2366; 15 RT 3063-3066.) Everyone except Alvarez got out of the van and began drinking beer near the back of the van. (12 RT 2367; 15 RT 3068; 16 RT 3259.) Andrew stood chatting with Jason while appellant had a quiet conversation with Ricardo.[1] Andrew initially could not hear the conversation, but eventually heard appellant say to Ricardo, "Hey, don't you trust me." Ricardo put his arm around appellant in what seemed to be a friendly manner. (12 RT 2369-2370, 2421-2422.) Appellant suddenly shot Ricardo in the stomach and continued shooting him after he fell to the ground. (12 RT 2370-2372.)

Alvarez heard the gunshots and asked what happened, but no one answered. (15 RT 3069-3070; 3085-3086.) Appellant returned to the van and calmly told Jason and Andrew to do the same. (12 RT 2375-2377.) Alvarez recalled appellant telling her to "drive." (15 RT 3073, 3075, 3077; see also 20 RT 4019.) Andrew recalled Alvarez driving away with no prompt by appellant. (12 RT 2376.) Andrew and Alvarez were in shock

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[1] Investigators found shoe prints that matched the "Etnies" brand shoe Jason had been wearing immediately next to a cigarette butt containing Andrew's DNA. (9 RT 1933-1934, 1956; 16 RT 3326; 17 RT 3420-3421.)

after appellant shot Ricardo. (12 RT 2376; 15 RT 3075.) Andrew did not recall seeing the gun or where appellant put it after shooting Ricardo; Alvarez said appellant was holding the gun when he returned to the van. (12 RT 2374-2375; 15 RT 3072, 3074.)

After dropping off appellant and Jason at the apartment complex, Alvarez drove Andrew home by 9:00 p.m. (12 RT 2382-2384; 14 RT 2873; 15 RT 3078.) Andrew's mother recalled the time because Andrew often missed his 9:00 p.m. curfew, but on this night he made it home on time. (14 RT 2871, 2873; see also 14 RT 2820; but see 12 RT 2384 [Andrew thought he argued with his mother about his curfew that night].) Alvarez briefly came into the house to drop off a load of laundry and left about ten minutes later. (12 RT 2384; 14 RT 2819-2820, 2822-2823, 2874-2876; 15 RT 3079.) Andrew did not call police because he did not want to be a "rat." (12 RT 2385.)

When Alvarez returned to her apartment, appellant was in the master bedroom and Abraham was asleep. (15 RT 3081, 3087; 16 RT 3222.) Jason was also in the apartment, but left a short time later. (15 RT 3082.) Appellant asked to borrow Alvarez's van and followed Jason out the door. (15 RT 3082-3083; 16 RT 3226.)

When appellant returned to the apartment later that night, he told Alvarez that he had gotten into an argument and that Alvarez's windshield was broken. (15 RT 3088-3089.) Alvarez saw her windshield the next morning and thought it looked like the windshield damage had originated from inside the van. (15 RT 3090-3091.) Andrew also noticed Alvarez's damaged windshield while walking to school. (12 RT 2386-2387.) He thought the damage looked like it was caused by a bullet. (12 RT 2387-2388.) Alvarez told Andrew she thought appellant might have "done something" to Jason. (12 RT 2388; 15 RT 3093.) Alvarez had the windshield repaired the same day. (15 RT 3094.)

Appellant followed Alvarez throughout the day; he threatened to harm her family and told her not to get "weak" on him. (15 RT 3097-3098.) That evening, Andrew borrowed Alvarez's van and went with Alex, Tinoco, and two girls to Redlands. (12 RT 2396-2401; 15 RT 2956-2959, 3102; 18 RT 3619-3620.) Andrew and one of the girls returned to the apartment complex by 10:45 p.m. after dropping off the others at their respective homes. (12 RT 2402-2403; 15 RT 2964-2968.) Andrew returned the van keys to Alvarez and went home. (12 RT 2403-2404; 15 RT 3103; see 15 RT 2969.) Appellant borrowed the van and went somewhere for about an hour. (15 RT 3104-3105.)

Alex's older sister, Ruth Roybal, testified that she arrived home around 11:00 p.m. to find Alex making something to eat. (10 RT 2073-2075.) Alex was dressed in shorts and a tank top and said he was in for the night. (10 RT 2075.) He told Roybal she could sleep in his room that night because he planned to be on the computer for awhile.[2] (10 RT 2076.) This was the last time Roybal saw Alex alive as he was gone when she awoke around 5:00 a.m. the next morning. (10 RT 2078.)

Alex's mother had come home from work around 4:00 a.m. to find the front door unlocked, the television on, and Alex's keys on the couch. (10 RT 2087-2088.) Alex usually turned off the television and locked the front door when he left the house. (10 RT 2076-2077, 2087-2088; 14 RT 2823-2824; 18 RT 3624.)

When Andrew arrived home after going to Redlands, his mother told him that the Rialto police were looking for him and he needed to call the police department. (14 RT 2813, 2879-2881; 17 RT 3482-3483.) Andrew called and left a message for a detective at 11:00 p.m. (14 RT 2881; 17 RT

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[2] Alex's sister was a temporary guest who was sleeping on the couch. (10 RT 2076.)

3484.) Andrew was in his bedroom when his mother went to bed around 12:30 a.m. (14 RT 2881-2882.)

The following afternoon at school, Andrew was interviewed by Rialto police detectives for a couple of hours. (14 RT 2883; 17 RT 3484-3485.) That evening, a friend called Andrew to report that Alex was dead. (12 RT 2405-2406.) Andrew's mother saw him on the telephone looking pale and shocked; then he collapsed. (14 RT 2884.) Andrew later went with his father to visit Ricardo's parents. (12 RT 2406-2407; 13 RT 2743; 14 RT 2885.)

Meanwhile, detectives arrived at the apartment complex to further investigate the murders. (13 RT 2684; 15 RT 3115; 19 RT 3964-3965.) Pasillas was at the pool with his children. (14 RT 2684, 2767-2769; 19 RT 3963-3965.) Alvarez walked out to her van with appellant and noticed patrol cars in the parking lot. (15 RT 3114; 16 RT 1320.) Around 8:15 p.m., Alvarez drove her van to a nearby strip mall to get food, leaving appellant behind. (15 RT 3114-3115; 16 RT 3152, 3365.) Alvarez parked and locked her van while at the mall; when she returned a short time later, the van was gone. (16 RT 3121, 3367-3368, 3370-3371.) Alvarez called police to report the van stolen and called Pasillas to pick her up. (16 RT 3119-3120.) A Rialto police officer responded to the mall around 8:58 p.m. and found no signs of forced entry into the van or witnesses to any theft. (16 RT 3372-3373.) Alvarez did not mention to police who she suspected of taking the van; at trial, she said she thought appellant had stolen her van. (16 RT 3124, 3374.)

While Andrew and his father were still visiting with Ricardo's parents, Andrew's mother answered her door to find Rigo looking for Andrew. (14 RT 2886-2887; see also 14 RT 2852-2853, 2863.) Andrew's mother had never seen Rigo before and thought he looked too old to be one of Andrew's friends. (14 RT 2887.) She stepped outside and had Jessica

lock the door behind her. (14 RT 2863-2864.) Rigo announced that Andrew was in danger and needed to come with Rigo and his "friend." (14 RT 2887.) When Andrew's mother told Rigo Andrew was away, Rigo persistently tried to ascertain Andrew's exact whereabouts. (14 RT 2888-2889.) Andrew's mother refused to provide Andrew's whereabouts and asked about the "friend" Rigo had mentioned. (14 RT 2890.) Rigo pointed to appellant, who was sitting in the driver's seat of Alvarez's van. (14 RT 2890-2891.) Andrew's mother was unaware of Andrew's gang membership, but recognized appellant from seeing him with Alvarez in the past. (14 RT 2891-2892, 2989.)

Andrew's mother went to the van demanding to know what appellant wanted with her son. (14 RT 2892-2893.) Appellant asked why the police were talking to Andrew. (14 RT 2893.) Andrew's mother said they had asked about Jason's death, which prompted appellant to repeatedly demand to know what Andrew told police. (14 RT 2893-2895.) Andrew's mother gave appellant no further information; she believed appellant and Rigo were threatening her son. (14 RT 2894.)

A short time after Rigo and appellant left the house in Alvarez's van, Alvarez and Pasillas arrived. (16 RT 3122-3123.) While Alvarez was at the house, appellant called three times; Andrew's mother answered each time. The first time appellant asked for Andrew. Andrew's mother said, "No," and hung up. (14 RT 2900-2901.) Appellant spoke to Alvarez the remaining two times. (14 RT 2901; 16 RT 3125.) When Alvarez inquired about her van, appellant said "he had to leave[;] [h]e had to get out." (16 RT 3125.) Appellant told Alvarez to keep her mouth shut and reminded her of what happens to "rats." (16 RT 3125.)

That night, detectives conducted simultaneous searches at Andrew's house and Alvarez's apartment. (19 RT 4021-4022.) Jessica was wearing a necklace with a "Superman" emblem that was similar to one Jason was

known to wear; she testified that Jason had let her wear the necklace before his death. (19 RT 3846-3847.) In Alvarez's apartment, detectives discovered a package of white T-shirts of the same size and brand found with Jason's body. The T-shirts belonged to appellant. (13 RT 2688; 16 RT 3132-3133.) Alvarez later directed detectives to a bag of .22-caliber bullets that belonged to appellant; Alvarez had hidden them in her computer printer to keep them away from the children. (15 RT 3058-3059; 17 RT 3556-3557; 19 RT 3849-3850.)

Detectives interviewed Andrew several more times over the next few days. (14 RT 2896-2897.) Andrew was reluctant and said he was "afraid to talk." (18 RT 3765-3766.) He initially lied, claiming he had last seen Jason and Ricardo walking away together. (12 RT 2410-2411.) Asked who had been in the van (when Ricardo was killed), Andrew insisted he didn't know. (18 RT 3804.) He finally admitted that he, Jason, Ricardo, and "Wizard" had driven to Lytle Creek and that Wizard had shot Ricardo; Andrew did not mention Alvarez because he did not want to get his aunt into trouble. (12 RT 2413, 2417; 18 RT 3768-3769, 3774, 3802-3803.) Andrew said appellant later told him that he had "whacked" Jason too because Jason was going to "spill." (18 RT 3776-3781, 3795-3797; 20 RT 4212; but see 20 RT 4209-4210 [Andrew, months later, said he learned this information through Alvarez].) Andrew worried that he "might be next." (12 RT 2420-2421; 18 RT 3767; see also 20 RT 4237.) Detectives eventually asked Andrew's mother if there was a safe place he could stay for awhile. (14 RT 2897-2898.) Andrew's mother sent him to Arizona to stay with a family member. (13 RT 2574-2575; 14 RT 2898.)

Alvarez and her family went to her mother's house on the same night their apartment was searched. (11 RT 2269; 16 RT 3127.) In talking to her mother, Alvarez expressed fear but would not say why. (11 RT 2271.) They contacted Alvarez's brother, Fontana Police Officer George

Rodriguez. (11 RT 2269-2271; 16 RT 3127.) Officer Rodriguez took Alvarez to be interviewed by the detectives investigating the murders. (16 RT 3127-3128; 19 RT 4011.)

After an initial interview with Alvarez on March 22, 2001, San Bernardino County Sheriff's Sergeant Robert Dean spoke with her on the telephone numerous times over the next few weeks. (19 RT 4011-4012.) Around April 10, 2001, Alvarez told detectives she was moving her family to Mexico. (16 RT 3136-3137; 19 RT 4012.) According to Pasillas, the family moved to Mexico because Alvarez was sick. (13 RT 2669; see 11 RT 2297.) Around April 25, 2001, detectives obtained Alvarez's telephone number in Mexico and continued to communicate with her by telephone during the year that she lived there. (16 RT 3137-3140; 19 RT 4012.) Alvarez was arrested a few months after she returned to the United States. (13 RT 2668-2669; 16 RT 3137-3138.)

After appellant was last seen in Alvarez's van with Rigo, Alvarez's mother, Maria Jackson, received a telephone call from a son who lived in Mexico. The call caused her to fear for her son's safety. (11 RT 2273-2275.) Detectives later learned that appellant was staying with the son, Alvarez's brother, in Tijuana. (11 RT 2178-2179, 2204-2205.) Jackson's son lived with his aunt and cousin. (15 RT 3004.) Jackson wanted to go to Mexico to check on her son, but Alvarez told her the detectives had advised against it. (11 RT 2274.)

On March 24, 2001, detectives went with a Tijuana police detective to the "Rock Canyon" area of Mexico in search of appellant. (11 RT 2177-2178, 2206; 15 RT 2999-3001, 3014; 19 RT 4008-4009.) They did not find appellant, but did see Alvarez's van. The van had no apparent damage. (15 RT 2999-3001, 3009; 19 RT 4010.) On March 28, 2001, detectives returned to Mexico after learning that Alvarez's van had been burned and that the murder weapon might be there. (11 RT 2179-2182; 15 RT 3002;

19 RT 4025.) Jackson accompanied them. (11 RT 2283; 15 RT 3002; 19 RT 4025.)

The group went to the Tijuana police station to pick up the same detective who had accompanied them during their first visit. (11 RT 2180, 2285; 15 RT 3002-3003.) They drove to a tow yard and photographed Alvarez's burned van. (11 RT 2180-2181, 2287; 15 RT 3003, 3013-3014; Peo. Exhs. 61A & 61B.) They also drove to Jackson's nephew's house where they found and confiscated two seats that had been in the van. (11 RT 2184-2185, 2287; 15 RT 3004.) Jackson's nephew informed police that the gun was no longer at his residence, that he could still get it, but that he would have to "repay" for it. (11 RT 2182, 2211, 2288.) One of the detectives asked the nephew to get the gun and tried to give him $100 of preauthorized sheriff's department funds. The nephew was worried the money might be "marked or something," so Jackson gave him $100 of her own money and was reimbursed by the detective. (11 RT 2182, 2205, 2211-2212, 2288; 15 RT 3009.) The nephew left for about five minutes before returning with a plastic bag containing a Bryco-Jennings nine-millimeter semiautomatic handgun, which was later determined to be the murder weapon. (11 RT 2182, 2212-2213, 2288; 15 RT 3004-3005; 17 RT 3468.)

One of the detectives removed the gun from the plastic bag to ensure it was unloaded. (11 RT 2290, 2309; 15 RT 3018.) The Tijuana detective also inspected the gun before returning it to the plastic bag and placing it in Jackson's purse. (11 RT 2290, 2309; 15 RT 3005-3006, 3018-3019.) According to Jackson, the Tijuana detective wiped his fingerprints from the gun with a bed sheet after handling it. (11 RT 2290, 2310.) Detectives returned the Tijuana detective to his station and gave him $100 for his "expenses." (15 RT 3009.) Jackson gave the plastic-wrapped gun to

detectives just before or just after re-entering the United States. (11 RT 2182, 2290-2291; 15 RT 3006-3007.)

C. Appellant's Arrest and Interrogation

On September 6, 2001, a border patrol agent responded to a report that a group of people may be entering the United States illegally and found appellant hiding in a bush near the Tecate port of entry. (17 RT 3524-3527, 3530-3531.) Appellant provided a false name and said he was a United States citizen. (17 RT 3535.) He wore no shirt and had visible tattoos, including a very large tattoo across his stomach that read, "TRECE." (17 RT 3536.) The agent took appellant's fingerprints and discovered appellant's true name and that he was wanted for homicide. (17 RT 3537-3539.) The records check indicated appellant was also known as "Wizard." (17 RT 3537-3538.) When asked whether he was "the Wizard," appellant replied, "You guys got me. You found me out." (17 RT 3538.)

Appellant was interviewed at the San Bernardino County Sheriff's Department by sheriff's detectives, a Rialto police detective, and by a polygraph examiner, Robert Heard, who was identified to the jury as a sheriff's investigator. (See, e.g., 18 RT 3764, 3807; 19 RT 3852-3853, 4015.) The jury viewed a videotape of part of appellant's interview with authorities on the night of his arrest, and heard testimony about the remaining interviews. (See 20 RT 4116-4117; 4 CT 1002-1049.) Appellant made clear that he would not answer certain questions or "give up any names"; accordingly, he was often evasive and repeatedly declined to answer questions posed by the interviewers. (18 RT 3807-3808, 3828; 19 RT 3853, 3855, 3926.) Appellant claimed he had never been to Lytle Creek and denied any involvement in the murders. (18 RT 3814-3815; 19 RT 3896; 4 CT 1029-1030.) At one point during his interview with Heard, appellant admitted he was present when Jason was killed, then quickly retracted his response and said, "I don't want to answer." (18 RT 3815.)

Appellant later declared, "I'll just keep spinning and spinning around and feeding you guys garbage." (19 RT 3927.)

During the interviews, appellant admitted he belonged to the El Monte Trece gang and that his gang names were "Casper" and "Wizard." (18 RT 3808; 4 CT 1025-1026, 1029.) Appellant said he did not know Jason well, but that Alex and Ricardo were "friends." (18 RT 3807; 19 RT 3854.) Appellant was adamant that Ricardo, Jason, and Alex were not gang members. He added that Jason and Alex were not cut out to be gang members. (19 RT 3854, 3856-3857, 3906-3907.) Appellant said Alvarez was also a friend "until she decided to talk on tapes and all that other good shit." (19 RT 3856-3857; see also 4 CT 1013 [appellant denounces Alvarez and Andrew for talking to police].)

During the interviews, it became apparent that respect was very important to appellant. (19 RT 3930.) Appellant maintained that killing was good as long as it was for a "righteous cause." (19 RT 3863.) He said a show of disrespect would constitute a righteous cause necessitating punishment by death, according to gang culture. (19 RT 3863-3864.) Appellant agreed that Ricardo and Alex might have disrespected him. (19 RT 3861, 3931.)

Appellant said he did not believe in American justice; rather, he believed in "street justice" or "gang justice." (19 RT 3864.) Appellant called Andrew a "youngster" and said he had been trying to teach him about street justice. He lamented that Andrew did not learn because he "broke down" and ratted out appellant when questioned by authorities, a violation of one of the main laws of the street. (19 RT 3865-3866.) Appellant was adamant that he would never ask a youngster to commit a murder. (19 RT 3866-3868.)

Appellant admitted driving Alvarez's van to Mexico; he claimed he took the van as collateral for some unexplained debt. (19 RT 3857, 3882-

3883; 4 CT 1017, 1031, 1045.) He suggested there was a predetermined date on which he would take the van if the debt was still unpaid. (4 CT 1045.) He later said he simply decided to steal the van without telling Alvarez. (4 CT 1047.) Appellant claimed he had not seen Andrew, Alex, or Ricardo for "maybe two and [one-]half weeks" before he took the van to Mexico. (4 CT 1036, 1041.) Appellant initially claimed to be in Mexico when the murders took place. (19 RT 3858; 4 CT 1006.) He later admitted he went to Mexico after the murders were committed. (19 RT 3858; 4 CT 1031.)

Appellant admitted torching the van and said he did so because he was "hearing all this and that" about how the van was involved in the murders. (4 CT 1010-1011, 1019, 1035.) He said he did not torch the van seats because the seats had nothing to put him at the murder scenes. (4 CT 1011.) Appellant said he took his .22 rifle to Mexico, not the nine-millimeter pistol. (19 RT 3932; 4 CT 1016, 1034.) Asked why his fingerprints might be on the murder weapon, appellant repeatedly said he touches lots of guns and could have touched the murder weapon at some point. (19 RT 3858; 4 CT 1012, 1037-1038, 1044.) He later specified he had previously touched numerous nine-millimeter guns. (4 CT 1044.) When detectives suggested appellant was the last person to have the murder weapon, appellant replied, "Okay but that doesn't make me a murderer." (4 CT 1022.)

D. Gang Evidence

El Monte Police Detective Marty Penney, who had been investigating gang crimes for 18 years at the time of trial, testified as a gang expert. (19 RT 4031-4034.) He said the El Monte Trece gang had about 70 members and was one of four El Monte gangs back in 1977. (19 RT 4034-4035.) By 2001, the El Monte Trece gang had a minimal presence in El Monte because the El Monte area had been taken over by a larger gang that was

more successful at recruiting new members. Detective Penney explained that recruitment is vital to a gang's existence and that gangsters generally talk to friends and family for recruitment opportunities. (19 RT 4036-4037, 4099.) Moreover, a gang member who is trying to become more active in his gang needs to establish himself as someone who is feared. (19 RT 4053.)

According to Detective Penney, gangsters generally shun United States laws and live by their own set of rules. (19 RT 4050-4051.) Loyalty to the gang is extremely important; the two most common gang rules require members to participate in crimes with their "homeys" and never "pull rat" ("tattletale") on fellow gang members when questioned by authorities. (19 RT 4045-4046.) Someone who "rats" on another gang member faces discipline, including death. (19 RT 4046-4048.) Accordingly, gang members will do all they can not to inculpate another gang member. (19 RT 4097-4098.) Gang rules further allow members to commit murder in response to a show of disrespect. (19 RT 4049-4050.)

Detective Penney testified that appellant is a documented El Monte Trece gang member known by the moniker "Wizard." (19 RT 4044.) Neither Alvarez nor Pasillas had ever been contacted by gang officers. (19 RT 4051.) Detective Penney opined that neither of them were active gang members at the time of the murders. (19 RT 4099-4100.)

Detective Penney explained that 15-year-old Ricardo demonstrated a lack of respect by agreeing to join the gang, then changing his mind and failing to appear for his jumping in ceremony. (19 RT 4054-4055.) The detective opined that Ricardo's murder was driven by anger given that he was shot seven times, that appellant made comments like, "You don't trust me," and, "Don't underestimate me," before pulling the trigger, and that appellant later told Andrew, "He [Ricardo] was weak." (19 RT 4063-4064.) While it is not unusual for gangsters to commit murders in front of

other gangsters, the detective said having witnesses would still be of concern. As to Alvarez, the detective said appellant likely would have stayed near her after the murders, especially if her role in the gang was more of a "party girl" or "motherly figure" for gang members. (19 RT 4056.) The detective said appellant also would be concerned about Andrew possibly reporting the murders, but less so if Andrew had already shown gang loyalty by participating in gang crimes. (19 RT 4056-4057.)

Detective Penney said Jason's presence during the murders was "absolutely" of concern because he was not a gang member. (19 RT 4057.) The detective explained that the single shot to the back of Jason's head indicates the killer simply wanted him dead. Jason's killing did not involve the same anger that surrounded the murder of Ricardo. (19 RT 4058.) Detective Penney believed the murder of Alex, who was on his knees and shot several times, including twice in the head, was a "business"-type murder similar to Jason's; the killer simply assassinated him. (19 RT 4059.)

E. Defense

San Bernardino County Sheriff's Detective Joe Palomino testified that Andrew and Alvarez were untruthful with detectives at the outset of the murder investigation. For example, Andrew and Alvarez initially lied about their gang membership and Andrew initially lied about who was present in Lytle Creek on the night Ricardo was murdered. (20 RT 4183-4188, 4202.) Andrew also failed to mention anything about the rifle or seeing Alvarez's cracked windshield on his way to school until shortly before trial. (20 RT 4193, 4200.) The detective participated in a search of Ricardo's bedroom and found a shoe box containing gang-related cartoon drawings. (20 RT 4230-4232.)

Around 5:00 p.m. on the day Ricardo was murdered, Roman Mendoza saw Andrew and Jason pull up to the pumps at an Arco gas station in

Fontana in a van that matched the description of Alvarez's van. (20 RT 4240-4242.) Andrew emerged from the driver's seat and went inside to pay while Jason came out of the front passenger seat and chatted with Mendoza. (20 RT 4242.) It looked like there were other people in the van, but Mendoza could not see them because the van had tinted windows. (20 RT 4243, 4245.)

II. Penalty Phase

F. Prosecution's Case in Aggravation

1. Appellant Brandished a Firearm in 1997

In January 1997, Richard Torres attended his niece's birthday party with his children in El Monte. (21 RT 4620, 4623.) While outside with several other guests, Torres noticed a primered grey T-top Camaro repeatedly drive back and forth by the house. (21 RT 4621.) On the fourth or fifth pass, someone in the car yelled something and the passenger displayed a handgun. (21 RT 4621-4623.) Everyone ran into the house and someone called the police. (21 RT 4623.) The police quickly responded and pulled over the Camaro. (21 RT 4623, 4655-4656.) Appellant was the passenger and a nine-millimeter pistol sat on the floorboard at his feet. (21 RT 4657-4658.) The gun was loaded with a round in the chamber. (21 RT 4658.)

2. Appellant Assaulted Correctional Counselor Randall Sharenbrock in 1998

In April 1998, Randall Sharenbrock, a correctional counselor at the Karl Holton Youth Correctional Facility, grew concerned when he noticed one of his wards associating with appellant in the outside yard. (21 RT 4522-4525.) Sharenbrock was familiar with appellant and advised the ward to stay away from him. (21 RT 4525-4526.)

About an hour later, Sharenbrock heard his name called while dismissing wards after dinner. (21 RT 4527-4528, 4533.) Sharenbrock turned to see appellant, who said, "[N]obody talks shit about me," and punched him three times in the face, knocking him to the ground. (21 RT 4528-4529.) Sharenbrock tried to defend himself as appellant continued the assault and ultimately stabbed Sharenbrock in the face with a pencil. (21 RT 4529-4530.)

3. Appellant Assaulted Miguel Angulo on September 13, 2000

On September 13, 2000, while appellant was living with his sister and her fiance, Miguel Angulo, appellant stabbed Angulo in the back. (22 RT 4685-4686, 4692, 4703-4704, 4709.) Angulo went to the hospital and the hospital called the Los Angeles County Sheriff's Department to report the incident. (22 RT 4701-4704.) Angulo told a sheriff's deputy he had gone outside to check on his dog when he was confronted by appellant and told to "stop looking at him." Appellant went into the house, returned with an ice pick or "shank," and challenged Angulo to fight. (22 RT 4705.) Angulo agreed to a fist fight, but told appellant to put down the weapon. Appellant did so, but then retrieved the shank and stabbed Angulo in the back as he walked toward a grassy area. (22 RT 4696, 4705-4706; see also 22 RT 4716-4717 [Angulo similarly described the stabbing to appellant's parole agent].)

Angulo told the deputy he wanted appellant to be prosecuted. (22 RT 4704; see also 22 RT 4717.) He also insisted appellant move out of the house and reported the incident to appellant's parole agent. (22 RT 4687, 4692.) Appellant later claimed the incident was a "family misunderstanding" and he was defending his sister. (5 CT 1439-1440.)

At trial, Angulo claimed that he could not recall much of what he told the deputy and insisted appellant barely scraped him. (See, e.g., 22 RT

4690-4694.) Angulo and appellant's sister were still together at the time of trial. (22 RT 4700.)

4. The Shooting of Mary Muro the following day on September 14, 2000

Around the time appellant stabbed Angulo, Mary Muro lived in a townhouse in Azusa with her four children, including teenage daughter Vanessa. (21 RT 4540, 4560.) Muro had met appellant, who she knew only as "Casper," about a month earlier and had engaged in "kind of" a dating relationship with him. (21 RT 4541.) Muro had since broken off the relationship. (21 RT 4543-4544.)

On September 14, 2000, appellant telephoned Muro and told her he was angry that "Mike" (Angulo) had gone to the police. (21 RT 4543, 4545, 4551; see 22 RT 4702.) Muro had earlier gone with her neighbor, Sal, to visit Angulo in the hospital; Angulo was Sal's cousin. (21 RT 4544-4545.) Around 1:00 a.m., Muro was upstairs with Sal cleaning a bedroom and Vanessa was sleeping on the downstairs couch. (21 RT 4542, 4561, 4564.) Vanessa awoke to see the front door open and appellant standing in the doorway. (21 RT 4561-4563.) Appellant began yelling for Muro. (21 RT 4563.) When Sal came downstairs and asked appellant what he wanted, the two engaged in angry conversation. (21 RT 4564-4565.) Appellant said something in Spanish about a gun or a shot and Sal retreated upstairs. (21 RT 4565-4566.) Vanessa started screaming. (21 RT 4546.) Appellant aimed a gun up the stairs and fired, but the gun apparently jammed. (21 RT 4566-4567.) Appellant tried to fix his gun and said, "Kill the mother fucker." (21 RT 4547.) Someone else pointed a gun through the open door and fired into the house. (21 RT 4567-4569.) Two shots went through the ceiling; one hit Muro in the leg. (21 RT 4547-4548, 4577, 4585-4586.) Two .25-caliber expended bullet casings were found in the doorway. (21 RT 4589.)

5. Appellant Shot and Killed Mark Jaimes in 2000

In November 2000, Rick Milam employed a prostitute in the City of Commerce. (22 RT 4817-4819.) While Milam and the prostitute were in a motel room, Milam's car was stolen. (22 RT 4819-4820.) Milam reported the theft the following morning. (22 RT 4822.) On November 17, 2000, he learned the car had been recovered and went with his father to the police tow yard to pick it up. (22 RT 4822-4823.) Later that night, they discovered a dead body inside the trunk. (22 RT 4824.)

Los Angeles County Sheriff's Sergeant Roderick Kusch identified the dead man as Mark Jaimes after learning that Jaimes' family had filed a missing persons report. (22 RT 4831-4834, 4837.) The sergeant further learned the prostitute was appellant's mother, Lillian Perez. (22 RT 4835, 4840.) Jaimes had previously hired Perez as a prostitute. Perez told detectives she was present when appellant shot and killed Jaimes at the Maywood Motel a week earlier. (22 RT 4836, 4840-4841; see 5 CT 1412-1413.) Jaimes' car was recovered near the motel with a .25-caliber semiautomatic handgun inside. (22 RT 4847-4848.) A firearms' expert conclusively established that the Phoenix Arms Raven .25-caliber pistol found in Jaimes' car was the same weapon used to shoot Muro two months earlier. (21 RT 4667-4670.)

Appellant and Perez had moved to a different motel after appellant killed Jaimes. (22 RT 4844.) Detectives searched their motel room and found numerous rounds of .22-caliber and .25-caliber ammunition among appellant's belongings. (22 RT 4845-4847.) They also found a blue sweatshirt with white writing. (22 RT 4842.) Detectives were unable to find appellant. (22 RT 4847.)

After appellant was arrested in September 2001, Sergeant Kusch interviewed him about the circumstances of Jaimes' death. (22 RT 4851.) Appellant said he had been paroled from state prison in April 2000 and was

living with his mother in a motel. (5 CT 1412-1413.) Appellant knew his mother was a prostitute and had asked her not to engage in prostitution in his presence. (5 CT 1430-1431.) Appellant said he arrived at the motel unexpectedly one night and knocked on the door. (5 CT 1436, 1440.) When Perez answered, Jaimes was on the bed in the room. (5 CT 1440-1441.) According to appellant, Jaimes was not wearing shoes and looked like he "thought that was his pad or something." (5 CT 1442; see also 22 RT 4850 [Jaimes wore no shoes and was otherwise fully clothed when found dead in the trunk].) Appellant claimed he simply shook Jaimes' hand and waited for him to leave. (5 CT 1441-1442.) Jaimes began using drugs, which angered appellant. (5 CT 1443-1444.) When Jaimes did not leave, appellant said he took Perez aside and told her to tell Jaimes to leave because appellant felt "disrespected by his presence." (5 CT 1442, 1444.)

Appellant said that Jaimes got "real disrespectful" with Perez and began demanding that she return his money. (5 CT 1444-1445.) Appellant told Jaimes that he was "nobody" and needed to leave. (5 CT 1445.) Appellant said Jaimes would not leave and things "went downhill real quick." (5 CT 1434.) Appellant said Jaimes kept demanding his money and refused to leave. (5 CT 1445-1446.) Appellant also claimed that Jaimes was threatening his mother, but then admitted that Perez had earlier locked herself in the bathroom and that Jaimes was sitting in a chair. (5 CT 1446-1448, 1457.)

Appellant said he pulled out a gun and "blew his fucking head off," then went to buy some plastic and carpet cleaner and "wrapped his ass up, dragged him down the fucking stairs and threw him . . . in the trunk." (5 CT 1434, 1446; see 5 CT 1449-1450.) Appellant said he shot Jaimes three times: "I shot him in the stomach . . . [a]nd then I shot him in the chest, boom and then I shot him in the head, boom. And then that finished him and he was on the floor." (5 CT 1448-1449; see also 5 CT 1459-1460.)

Appellant said he couldn't let Jaimes "slide" and insisted he'd do it again. (5 CT 1451.)

6. Appellant Committed Two Armed Robberies in March 2001

Around 9:30 p.m., on March 7, 2001, appellant, Andrew, and two other El Monte Trece gangsters, Mynor and Pelon, walked into a USA Donut shop in El Monte and committed armed robbery, while Alvarez and Jessica sat waiting in Alvarez's nearby van. (21 RT 4636-4637, 4648; 22 RT 4778-4780, 4789, 4636-4637.) Pursuant to the plan devised by appellant, Andrew and Pelon acted as lookouts near the door while Mynor and appellant confronted two men, the owner and an employee, and demanded money. (21 RT 4636-4637, 4648, 4650-4651; 22 RT 4779-4783, 4784.) Appellant held the men at gunpoint as Mynor went behind the counter to take the cash drawer from the register. (21 RT 4637-4639, 4651; 22 RT 4784-4786.) Once Mynor had the cash drawer, appellant shot the owner and the four gangsters fled to Alvarez's van. (21 RT 4640-4641; 22 RT 4757-4758, 4786, 4788.) Alvarez dropped off Mynor and Pelon in El Monte before driving the rest of the group back to Rialto. (22 RT 4790.)

The employee, who had faced the wall at the outset of the robbery, thought he saw someone near the door holding a jacket that appeared to cover a rifle. (21 RT 4650.) According to Andrew, only appellant had a gun. (22 RT 4786.) Andrew, Pelon, and Mynor stood around five feet six inches tall. (22 RT 4808.) Both victims testified that the gunman was taller than that. (21 RT 4641, 4643, 4649-4650.) Appellant stood about six feet one inch tall. (12 RT 2461; 17 RT 3549; 22 RT 4812.)

Two days later, as Alvarez drove appellant, Pelon, and Andrew in her van, appellant planned a second robbery. (22 RT 4791.) Alvarez dropped the others in front of a Mexican restaurant and drove to a nearby alley to wait. (22 RT 4793.) Andrew stood watch outside while Pelon and

appellant went into the restaurant. (22 RT 4794.) According to Andrew, only appellant had a gun. (22 RT 4793.)

The cash register was located near the door inside the small restaurant. (22 RT 4729-4730.) Pelon walked in and tried to take the register, but the register fell to the floor. (22 RT 4730.) A waitress came over and was shot in the arm by appellant, who was wearing a blue sweater with white writing and standing near the door. (22 RT 4730, 4732, 4746-4748, 4797.) The shooting continued and three more people were struck with bullets. (22 RT 4744, 4747.) Della Marie Lizarraga, who was dining with her family, was shot in both arms. (22 RT 4732.) She thought Pelon also had a gun, but admitted she was already under the table trying to protect her infant daughter once the first shot was fired. (22 RT 4733-4744.) Again, witnesses described the shooter as taller than the person who tried to grab the cash register. (22 RT 4732, 4748.)

Andrew heard five or six shots before Pelon and appellant came running out of the restaurant with no cash register. (22 RT 4795-4796.) Once inside the van, Pelon and appellant told the others that a waitress had tried to grab them and appellant expressed "disappoint[ment]" that they didn't get any money. (22 RT 4796-4797.)

A criminalist for the San Bernardino County Sheriff's Department testified that she examined nine-millimeter cartridge casings and bullets found at each of the robbery locations and determined that they "identified" back to the nine-millimeter Jennings Bryco pistol appellant later used to kill Ricardo, Alex, and possibly Jason. (22 RT 4926-4929; see also 4781, 4793.)

7. Appellant Possessed a Weapon in Prison in 2002

On September 18, 2002, appellant was being held in a high security housing unit at West Valley Detention Center while awaiting trial in the instant case. (21 RT 4602-4603.) When inmates were ordered to return to

their cells for lunch, appellant failed to do so. (21 RT 4605-4606.) Despite repeated orders to return to his cell, appellant remained in the shower area for ten more minutes. (21 RT 4606.) Appellant finally emerged from the shower, fully clothed and with no shower accoutrements. He returned to his cell and the door was closed by automatic control. (21 RT 4607.) Sheriff's deputies handcuffed appellant through an opening in the door and removed him from the cell. (21 RT 4607-4608.) A search of appellant's cell revealed a "slashing type weapon," which consisted of a toothbrush with a razor attached. (21 RT 4608, 4616.)

8. Impact of the Murders on the Victims' Families

Ricardo's sister, Alejandra Torres, testified that her brother was a "very happy boy" and "very smart." (23 RT 4959.) She recalled Ricardo winning a science fair competition that allowed him to attend a county science fair with the other finalists; Ricardo had called Alejandra from the fair to share his pride. (23 RT 4960.) Alejandra missed hearing Ricardo's voice at home and thought of him every night at 10:00 p.m., his curfew. (23 RT 4961.) Ricardo's parents both missed the long talks they used to have with Ricardo. (23 RT 5019-5020, 5023-5024.) His father recalled that Ricardo always put other people before himself. (23 RT 5017.)

Jason's sister, Leslie Van Kleef, testified that Jason loved girls, holidays, talking on the phone, and playing with his infant nephew, Seth. (23 RT 4962-4963.) Seth's first birthday, which was five months after Jason was killed, was especially difficult for Leslie; she discovered that Jason had already purchased a birthday gift for Seth. (23 RT 4964-4965.) Leslie knew when Jason returned home from work each night even though she was usually in bed because she could hear Jason through the baby monitor, tucking in his nephew and kissing him good night. (23 RT 4965.)

Jason's father described his son as "fun-loving" and helpful. (23 RT 4968-4969.) Jason was well-liked by his customers and coworkers at

Walgreens; some customers would only shop on days that Jason was working. (23 RT 4970-4971.) Jason's father still found it difficult to walk by Jason's bedroom and to think about how he would miss seeing Jason fulfill his dream of entering the military and ultimately going to college and becoming a fireman. (23 RT 4971.) Jason's mother recalled how Jason liked to help people and was surprised by the number of people who attended his funeral and expressed grief after he died. (23 RT 4972-4973.) She learned after Jason's death that he had counseled several friends to stay in school and had been named "Student of the Month" in the month he was killed, an award he never knew about. (23 RT 4973, 4979.)

Alex's mother and sisters recalled his perpetual smile and penchant for working on computers. (23 RT 4981, 4983, 4987, 4990-4991.) Alex's sister, Ruth, testified that Alex always encouraged his siblings to check in on their mother and loved playing with his nieces and nephews. (23 RT 4982, 4985.) Ruth found it difficult to see her young children missing their uncle so much. (23 RT 4981, 4985.) Alex's mother said Alex was her "life" and described how he would drop everything to spend time with his family. (23 RT 4991-4992.) Alex's brother often prayed at the site where Alex's body was found and caught himself saying, "Hey brother," just to hear the words again. He said the most difficult day of the year is his son's birthday, which falls on March 22, the day after Alex was killed. (23 RT 5012-5013.)

B. Defense's Case in Mitigation

In mitigation, appellant presented an expert on Hispanic street gangs who testified that most gang members come from broken homes and, according to interviews with appellant's family members, appellant was no exception. (23 RT 5054-5055, 5058, 5060-5061.) The interviews reviewed by the expert also indicated that appellant's mother and uncles had previous gang affiliations and that his parents had convictions for drug-related

offenses. (23 RT 5062-5064.) An expert on prison conditions testified that no one has ever escaped from the type of prison facility in which appellant would be housed if he was given a term of life without the possibility of parole. (23 RT 5032, 5042.)

ARGUMENT

I. THE TRIAL COURT PROPERLY GRANTED THE PROSECUTION'S CHALLENGE FOR CAUSE AS TO PROSPECTIVE JUROR S.M.

Appellant contends the trial court constitutionally erred in granting the prosecution's challenge for cause as to one prospective juror, identified here by his initials, S.M. (AOB 54-78.) Not only did S.M. repeatedly indicate he had a moral objection to the death penalty that would interfere with his ability to consider death as an option during the penalty phase, he also made clear that this objection could affect his ability to be fair to the prosecution during the guilt phase of the trial. These statements conflicted with claims that he could nonetheless be fair and impartial, claims that were tempered by clear assertions of reluctance to vote for a sentence of death. The trial court properly granted the prosecution's challenge for cause as to S.M.

A criminal defendant has a right to an impartial jury, meaning one "that has not been tilted in favor of capital punishment by selective prosecutorial challenges for cause"; on the other hand, "the State has a strong interest in having jurors who are able to apply capital punishment within the framework state law prescribes." (*Uttecht v. Brown* (2007) 551 U.S. 1, 9 [167 L.Ed.2d 1014, 127 S.Ct. 2218].) Accordingly, under federal and state law, a prospective juror may be excused for cause where his views on capital punishment would "'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.'" (*Wainwright v. Witt* (1985) 469 U.S. 412, 424 [105 S.Ct. 844,

83 L.Ed.2d 841]; see *People v. Lancaster* (2007) 41 Cal.4th 50, 78.) "The trial court is in the unique position of assessing demeanor, tone, and credibility firsthand — factors of 'critical importance in assessing the attitude and qualifications of potential jurors.'" (*People v. DePriest* (2007) 42 Cal.4th 1, 21, quoting *Uttecht v. Brown, supra,* 551 U.S. at p. 9.) Trial courts therefore possess broad discretion in determining whether a prospective juror challenged for cause is qualified to serve, and that discretion is rarely disturbed on appeal. (*People v. Horning* (2004) 34 Cal.4th 871, 896.)

Where answers given on voir dire are equivocal or conflicting, the trial court's assessment of the person's state of mind is generally binding on appeal. (*People v. Lewis and Oliver* (2006) 39 Cal.4th 970, 1007.) When a prospective juror has made no conflicting or equivocal statements regarding his or her ability to impose a particular sentence, the court's ruling must still be upheld if supported by substantial evidence. (*People v. Pearson* (2012) 53 Cal.4th 306, 327-328, citing *People v. Horning, supra,* 34 Cal.4th at pp. 896-897.) A trial court may find a prospective juror to be actually biased where the juror evidences a state of mind concerning the issues in the case of the parties that would prevent the individual "'from acting with entire impartiality and without prejudice to the substantial rights of either party.'" (*People v. Horning, supra,* 34 Cal.4th at p. 896, quoting Code Civ. Proc., § 225, subd. (b)(1)(C).)

A. Voir Dire of S.M.

According to his questionnaire, S.M. was a 40-year-old legislative analyst for San Bernardino County who was born and raised in California. (18 CT 4915-4917.) In response to a questionnaire inquiry as to whether he had any "religious, moral, or philosophical feeling that would make it difficult or impossible for [him] to sit in judgment over another person," S.M. wrote, "Only in applying the death penalty, I have reservations." (18

CT 4921.) He added that his religious, moral, and philosophical preferences "greatly" influence his decision-making process. (18 CT 4921.) Asked whether he had any biases that might interfere with his ability to be impartial if selected as a juror, S.M. wrote, "Imposition of the death penalty." (18 CT 4936.)

The questionnaire asked jurors to comment on their understanding that a penalty phase would mean they would have to choose either death or life in prison without the possibility of parole as the only sentencing options. S.M. wrote that the "[d]eath penalty should be applied sparingly, to protect society and only in circumstances where an individual is beyond compunction *and* the crime is serious enough to warrant it." (18 CT 4938, emphasis in original.) Asked for his general feelings about the death penalty, he again wrote that he had "*reservations* about its effectiveness to deter crime, and its fairness." (18 CT 4939, emphasis added.) He said his general feeling was that the sentence of life without the possibility of parole is "more humane." (18 CT 4939.)

S.M. indicated that his feelings about the death penalty would not cause him to "always refuse" to find a defendant guilty of first-degree murder and/or to find the special circumstances true solely to "avoid" having to make a decision on the death penalty. (18 CT 4939.) He checked "yes" when asked whether he was willing to weigh and consider all aggravating and mitigating factors before determining the appropriate penalty. (18 CT 4940.) S.M. later stated that the death penalty was used "too often" and reaffirmed that he had a moral, philosophical, or religious objection to the death penalty. (18 CT 4940-4941.) He added that, if given the option, he would vote to abolish the death penalty. (18 CT 4941.) Although he indicated that he would "weigh the evidence and the circumstances," he made clear that he would be "reluctant" to personally vote for a sentence of death and "reluctant" to personally sign the

accompanying verdict form. (18 CT 4942-4943.) He ultimately indicated he could be fair and impartial and consider both sentencing options in this case, describing himself as someone who had "doubts about the death penalty, but [] would not vote against it in every case." (18 CT 4943-4946.)

On examination by the prosecutor, S.M. reiterated his questionnaire view that he would be reluctant to impose the death penalty. (5 RT 941-942.) He added that he was not fundamentally opposed to the death penalty as a concept, but was "very uncomfortable with being placed with the responsibility of taking someone's life." He believed that serving as a juror on a death penalty case would place him in a "moral dilemma." (5 RT 942.) S.M. admitted that it was "possible" that the looming choice between a life and death sentence would affect his ability to be fair to the prosecution during the guilt phase of the trial. (5 RT 942-943.) Accordingly, he did not believe he would be a good juror in this case. (5 RT 943.)

In response to questioning by defense counsel, S.M. maintained that the death penalty should be preserved for the "most heinous of crimes," but admitted he was still in the process of "soul searching" what he meant by this. (5 RT 943.) When defense counsel described the instant case as involving the murder of three boys on three separate days with a charged special circumstance of multiple victims, S.M. stated he did not believe that "garden variety first degree murder would necessarily qualify for the death penalty" and he would be inclined to vote for life in prison. Asked for clarification, S.M. indicated he might be inclined to ignore the law and instead "look within" to determine whether special circumstances exist:

> I'm trying to decide whether I agree with if something is indeed a special circumstance, you know. I understand the law defines it one way, but I have to look within and decide whether I can

use that factor in determining whether I can take someone's life or vote that someone's life be taken.

(5 RT 945.) He reiterated that he did not know if he could "in good conscience" vote for the death penalty," before ultimately agreeing that he could vote for death in an appropriate case. (5 RT 946.)

Over defense objection, the trial court granted the prosecutor's challenge for cause as to S.M. (5 RT 950-951.)

B. The Trial Court Properly Granted the Prosecutor's Challenge for Cause as to S.M.

The trial court properly excused S.M. as he gave equivocal and conflicting statements about his ability to be fair and impartial in a capital case. Even before being asked specifically about his views on the death penalty, S.M. volunteered in his questionnaire that he would find it difficult to apply the death penalty and that this difficulty might interfere with his ability to be an impartial juror. (18 CT 4921, 4936.) Despite checking "yes," when asked whether he was willing to weigh and consider all aggravating and mitigating factors in determining the appropriate penalty, S.M. reaffirmed his objection to the death penalty throughout his questionnaire. (18 CT 4940-4946.)

S.M.'s conclusion in his questionnaire that he could be fair and impartial, and consider both sentencing options, conflicted with his later admission during questioning by counsel that he doubted that he could be fair and impartial during the guilt phase, let alone the penalty phase. (5 RT 941-943.) S.M.'s claim that he was not "fundamentally opposed to the death penalty as a concept" was not only equivocal, but conflicted with his questionnaire statements of objection to the death penalty. (5 RT 942; 18 CT 4940-4941.) Claims he was willing and able to apply the law conflicted with his assertion indicating he might ignore the law and instead "look within" to determine whether special circumstances exist. (5 RT 945; 18

CT 4940.) By indicating he might "look within" to determine whether special circumstances exist, S.M. demonstrated an inability to set aside his own beliefs in deference to the rule of law. (See *Lockhart v. McCree* (1986) 476 U.S. 162, 176 [106 S.Ct. 1758, 90 L.Ed.2d 137]["those who firmly believe the death penalty is unjust may nevertheless serve as jurors in capital cases so long as they clearly state that they are willing to temporarily set aside their own beliefs in deference to the rule of law"].) Moreover, S.M. demonstrated he would be unable to "conscientiously consider all of the sentencing alternatives" when he admitted that merely serving as a juror in a death penalty case would place him in a "moral dilemma." (See *People v. Cunningham* (2001) 25 Cal.4th 926, 974 ["prospective juror is properly excluded if he or she is unable to conscientiously consider all of the sentencing alternatives"].) Indeed, the only time S.M. was unequivocal regarding his ability to serve as an impartial juror in a capital trial was when he declared he would not make a good juror in this case. (5 RT 943.)

Given S.M. provided equivocal and conflicting voir dire responses, the trial court's excusal for cause is entitled to great deference on appeal. (See *People v. Lewis and Oliver, supra,* 39 Cal.4th at p. 1007.) S.M.'s statements showed not only a willingness to ignore the law, but a state of mind that would have prevented him from "'acting with entire impartiality and without prejudice to the substantial rights of either party.'" (See *People v. Horning, supra,* 34 Cal.4th at p. 896.) Accordingly, substantial evidence supports the court's determination that S.M. should be excused for cause. (See *People v. Pearson, supra,* 53 Cal.4th at pp. 327-328.)

In light of the record and the deferential standard of review, the trial court's implicit finding that S.M. was at least substantially impaired in his ability to remain impartial and consider the death penalty must be upheld.

C. Appellant Fails to Show Any Abuse of Discretion by the Trial Court

Appellant contends the trial court unevenly applied the *Witt* standard by denying three of his challenges for cause thereby subjecting him to a jury "uncommonly willing to condemn a man to die." (AOB 70-78.) Appellant describes three jurors who initially said they would probably impose the death penalty if appellant was found guilty of shooting and killing three teenagers over a three day period, but ultimately indicated they would remain open-minded regarding penalty. (AOB 71-74.) First, given each of the jurors clearly stated a willingness to remain open-minded or not automatically vote for death, the trial court acted well within its broad discretion to assess the jurors and conclude that a challenge for cause was unnecessary. (See *People v. DePriest, supra,* 42 Cal.4th at p. 21.) Second, appellant peremptorily struck each of these prospective jurors, so none of their answers are indicative of whether appellant's jury was "uncommonly willing to condemn a man to die." Third, appellant summarizes select answers provided by members of the final jury panel, but fails to mention whether he sought to excuse for cause any of these members and therefore fails to show any abuse of discretion by the court in applying the *Witt* standard. (See *Wainwright v. Witt, supra,* 469 U.S. at p. 423 [at trial, party wishing to exclude juror bears burden of demonstrating potential juror's impartiality].)

Appellant's challenges to the court's voir dire rulings and to the empanelled jury must be rejected.

II. THE TRIAL COURT PROPERLY ADMITTED AS EVIDENCE THE NINE-MILLIMETER PISTOL RETRIEVED FROM MEXICO

Appellant contends detectives violated his federal constitutional right to due process of law by not following "international protocol" contained in a treaty between Mexico and the United States – the Mutual Legal

Assistance Cooperation Treaty – in obtaining the murder weapon in Mexico. He further contends the detectives destroyed "obvious" exculpatory evidence in bad faith when a Tijuana detective allegedly wiped the gun after touching it. On both grounds, appellant claims the trial court erred in declining to suppress evidence of the gun. (AOB 79-98.) First, the treaty does not establish international protocol for recovering evidence; rather, it facilitates a mutual cooperation between the nations in criminal matters. The treaty also provides no remedy for a claimed violation and expressly does not give private persons "any right to obtain, suppress, or exclude any evidence." Second, appellant fails to show any bad-faith destruction of known exculpatory evidence by the detectives. In short, both of appellant's claims lack merit.

A. The Mutual Legal Assistance Cooperation Treaty Provides No Basis for the Suppression of Evidence

The Mutual Legal Assistance Cooperation Treaty (MLAT), which became effective in 1991, is a bilateral treaty between the United States and Mexico whose purpose is to "counter more effectively trans-border criminal activities." (Mutual Legal Assistance Cooperation Treaty with Mexico, U.S.-Mex., Dec. 9, 1987, S. Treaty Doc. No. 100–13, 1987 WL 890783 at 1.) The MLAT provides that the government of one nation may request the assistance of the other nation on a broad range of matters related to the "prevention, investigation and prosecution of crimes," and in proceedings related to criminal matters. (See *id.* at Art. 1, Clauses 1 & 4.) The MLAT is intended solely for mutual legal assistance between the nation parties. (*Id.* at Art. 1, Clause 5.) It does not supplant other avenues that may enable cooperation between the parties, such as "bilateral or multilateral arrangement[s], agreement[s], or practice[s]." (*Id.* at Art. 15.) It also provides no basis for suppression of evidence or any other remedy on the part of a private party. Indeed, it provides: "The provisions of this Treaty

shall not give rise to a right on the part of any private person to obtain, suppress, or exclude any evidence, or to impede the execution of a request." (*Id.* at Art. 1, Clause 5.)

Here, investigating detectives did not utilize the MLAT. Rather, San Bernardino County Sheriff's Detectives Elvert and Acevedo enlisted the assistance of Trini Cambreros, a Tijuana detective, in searching for appellant after learning he had fled to Mexico in Alvarez's van. (See, e.g., 11 RT 2177-2178, 2206; 15 RT 2999-3001.) In Mexico, the detectives saw the van, but were unable to arrest appellant. (See, e.g., 11 RT 2178; 15 RT 2999-3001.) A few days later, Detectives Elvert and Acevedo returned to Mexico after learning that Alvarez's van had been destroyed and that Maria Jackson's nephew had obtained the murder weapon. (See, e.g., 11 RT 2180-2182.) Jackson accompanied the detectives, who hoped to purchase the gun from the nephew to use as evidence. (11 RT 2179.) The detectives first drove to the Tijuana police station to pick up Detective Cambreros, who again assisted in the criminal investigation. (11 RT 2180, 2285; 15 RT 3002-3003.)

The group drove to Jackson's nephew's home, where the detectives asked the nephew to get the gun and tried to give him $100 of preauthorized sheriff's department funds. The nephew was worried the money might be "marked or something," so Jackson gave him $100 of her own money and was reimbursed by the detective. (11 RT 2182, 2205, 2211-2212, 2288; 15 RT 3009.) The nephew left for about five minutes before returning with a plastic bag containing a Bryco-Jennings nine-millimeter semiautomatic handgun, which was later found to be the murder weapon. (11 RT 2182, 2212-2213, 2288; 15 RT 3004-3005; 17 RT 3468.)

One of the detectives removed the gun from the plastic bag to ensure it was unloaded. (11 RT 2290, 2309; 15 RT 3018.) The Tijuana detective also inspected the gun before returning it to the plastic bag and placing it in

Jackson's purse. (11 RT 2290, 2309; 15 RT 3005-3006, 3018-3019.) According to Jackson, the Tijuana detective used a bed sheet to wipe his fingerprints from the gun after handling it. (11 RT 2290, 2310.) Detectives Elvert and Acevedo both testified that this did not happen. (11 RT 2208; 15 RT 3005, 3008.) Detectives returned the Tijuana detective to his station and gave him $100 for his "expenses." (15 RT 3009.) Jackson gave the plastic-wrapped gun to detectives just before or just after re-entering the United States. (11 RT 2182, 2290-2291; 15 RT 3006-3007.)

After Detective Elvert testified about recovering the murder weapon in Tijuana, appellant claimed the detectives had violated the MLAT, and moved to dismiss the charges against him or suppress evidence of the gun. (4 CT 888-897.) The prosecution filed a written opposition. (4 CT 900-912.) At a hearing on the matter, the court denied the motion on the merits. (12 RT 2435-2445.)

Appellant's reliance on the MLAT to support his claimed due process violation is misplaced. The claim itself rests on the faulty assumption that the MLAT provides the *only* means of recovering evidence of United States criminal activity from Mexico. In fact, the MLAT expressly provides to the contrary. (MLAT, Art. 15.) Moreover, appellant lacks standing to challenge the seizure of the gun on grounds it violated an international treaty as standing to protest such a seizure belongs to the sovereign who is a party to the treaty, not to the individual. (See *United States v. Alvarez-Machain* (1991) 504 U.S. 655, 668-670 [112 S.Ct 2188, 119 L.Ed.2d 441][involving challenge to seizure of defendant under extradition treaty]; *People v. Salcido* (2008) 44 Cal.4th 92, 125[same].) Even assuming standing exists, the MLAT expressly precludes appellant's attempt to suppress evidence or derive a personal due process violation from an alleged violation of the MLAT. (*Id.* at Art. 1, Clause 5; see also *People v. Corona* (2001) 89 Cal.App.4th 1426, 1429-1430 [finding no cases in which

exclusionary rule has been used as remedy for claimed treaty violation when treaty itself does not provide that remedy].)

In any event, the detectives did not violate the MLAT; they simply did not utilize it. Rather, they directly contacted Tijuana authorities to assist them in retrieving the murder weapon. Appellant complains that Detective Acevedo told Jackson not to mention the Tijuana detective's name because he did not wish to be subpoenaed. (AOB 85.) Given that the defense was aware of Cambreros's identity, appellant's complaint hardly establishes a due process violation. Similarly, appellant mentions Jackson's presence (AOB 80), but does not show how it violated appellant's constitutional rights. In short, and as further discussed below, appellant fails to establish that the detectives' retrieval of the murder weapon violated any independent constitutional right of appellant (see *Mapp v. Ohio* (1961) 367 U.S. 643, 659 [81 S.Ct. 1684, 6 L.Ed.2d 1081][principle reason behind exclusionary rule is government's "failure to observe its own laws"]) or any law for that matter (see 4 CT 904-907).

B. Appellant Fails to Show any Bad-Faith Destruction of Known Exculpatory Evidence by the Detectives

Appellant also moved to exclude evidence of the gun based on Jackson's claim the Tijuana detective wiped the gun with a bed sheet. (See 4 CT 893-895.) The State has a duty to preserve material evidence, which is evidence that both possesses "an exculpatory value that was apparent before the evidence was destroyed," and is of "such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means." (*California v. Trombetta* (1984) 467 U.S. 479, 488-489 [104 S.Ct. 2528, 81 L.Ed.2d 413].) The State's duty is further limited when, as here, a criminal defendant challenges "the failure of the State to preserve evidentiary material of which no more can be said than that it could have been subjected to tests, the results of which might

have exonerated the defendant." (*Arizona v. Youngblood* (1988) 488 U.S. 51, 57 [109 S.Ct. 333, 102 L.Ed.2d 281].) In such a case, unless a defendant can show the authorities acted in bad faith, the failure to preserve potentially useful evidence does not constitute a denial of due process. (*Id.* at p. 58.)

Here, the trial court found appellant had established neither materiality nor bad faith by the detectives and denied the motion to suppress evidence of the gun. (12 RT 2435-2440, 2444-2445.) A reviewing court views the evidence in the light most favorable to the trial court's finding to determine whether there was substantial evidence to support its ruling. (*People v. Roybal* (1998) 19 Cal.4th 481, 510, citing *People v. Griffin* (1988) 46 Cal.3d 1011, 1022.) Under that standard, the trial court properly denied appellant's motion to suppress the gun.

Both Detectives Elvert and Acevedo denied that the Tijuana detective had wiped the gun, but even assuming Jackson was truthful in claiming he did, there is no indication the gun had any apparent exculpatory value at the time it was allegedly wiped. The presence of appellant's fingerprints would not have exculpated him. In fact, appellant's fingerprints (and DNA) were absent from the gun, but that didn't exculpate him either as there was ample evidence he was known to carry the very same gun. Moreover, the gun had traveled to Mexico and passed through the hands of numerous people over the eight days following the murders. For these reasons, if there were fingerprints belonging to someone else, appellant still would not have been exonerated. (See 12 RT 2439 [trial court observing that a belief there would be "exculpatory value to fingerprints on that weapon is, I think, somewhat ludicrous based on the exchange of hands that weapon went through"].)

Appellant claims his case would have been stronger had he been able to show (1) his fingerprints were not on the gun, or (2) Andrew's or

Alvarez's fingerprints were on the gun. He adds that evidence that Andrew or Alvarez had handled the gun would have "significantly weakened" the prosecution's case. (AOB 89.) First, wiped or not, appellant's fingerprints were not on the gun. Again, given the number of days and people who possessed the weapon after the murders, this was unsurprising. Second, even if Andrew's fingerprints had been present on the gun, Andrew testified at trial that he had previously touched the gun. (See 12 RT 2408.) Third, given appellant was staying in Alvarez's home and kept his guns there, her fingerprints on the gun would not have exonerated appellant. In any event, any arguable exculpatory value was not apparent at the time the Tijuana detective allegedly wiped the gun.

At best, appellant's claim concerns the failure to preserve evidence "of which no more can be said than that it could have been subjected to tests, the results of which might have exonerated the defendant." (*Arizona v. Youngblood, supra,* 488 U.S. at p. 57.) Accordingly, he must show bad faith on the part of the Tijuana detective in allegedly wiping the gun. (*Id.* at p. 58; see *People v. Roybal, supra,* 19 Cal.4th at p. 510.) "The presence or absence of bad faith by the police for purposes of the due process clause must necessarily turn on the police's knowledge of the exculpatory value of the evidence at the time it was lost or destroyed." (*Arizona v. Youngblood, supra,* 488 U.S. at p. 56, fn.*.) Here, if the Tijuana detective wiped the gun, he did so to remove his own fingerprints. (See 11 RT 2310 [the detective allegedly wiped the gun after Jackson mentioned his fingerprints might be on it].) There is no evidence he knew of other fingerprints on the gun that could form a basis for exonerating appellant but failed to preserve them as part of a conscious effort to suppress exculpatory evidence or to circumvent constitutional discovery obligations. (*California v. Trombetta, supra,* 467 U.S. at p. 488.) The trial court properly declined to suppress evidence of the gun on due process grounds.

III. APPELLANT FORFEITED HIS CLAIMS REGARDING THE TRIAL COURT'S ADMISSION OF GANG EXPERT TESTIMONY; NONETHELESS, THE EVIDENCE WAS PROPERLY ADMITTED AND ANY ERROR AS TO THE ADMISSION OF ONE PORTION WAS HARMLESS

Parsing particular portions of the gang expert's testimony, appellant contends the testimony was irrelevant or substantially more prejudicial than probative under Evidence Code section 352, and lacked evidentiary support. Accordingly, appellant claims the trial court committed an abuse of discretion and violated his rights to due process and to reliable guilt and penalty determinations by admitting the testimony. (AOB 99-122.) Appellant forfeited his contention by failing to timely and specifically object to the testimony he now challenges. In any event, the trial court properly admitted gang expert testimony. Even assuming any error, it was harmless.

Evidence Code section 352 permits the exclusion of relevant evidence where "its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." (Evid. Code, § 352.) Evidence of gang membership in a case not involving a gang enhancement is potentially prejudicial and "should not be admitted if its probative value is minimal." (*People v. Hernandez* (2004) 33 Cal.4th 1040, 1049.) Nevertheless, evidence of gang membership in such cases is often relevant to, and admissible regarding, the charged offense. Indeed,

> evidence of a defendant's gang affiliation—including evidence of the gang's territory, membership, signs, symbols, beliefs and practices, criminal enterprises, rivalries, and the like—can help prove identity, motive, modus operandi, specific intent, means of applying force or fear, or other issues pertinent to guilt of the charged crime. [Citations.]

(*People v. Hernandez, supra,* 33 Cal.4th at p. 1049.) A trial court's order denying a motion to exclude evidence under Evidence Code section 352 is reviewed for abuse of discretion. (*People v. Brown* (2003) 31 Cal.4th 518, 547; *People v. Williams* (1997) 16 Cal.4th 153, 213.)

Here, the prosecution made a pretrial motion to admit evidence addressing appellant's gang membership, including the testimony of a gang expert, Detective Penney. (3 CT 669-692.) In opposing the motion, appellant agreed that gang expert testimony was appropriate as to how "gangs . . . work, their goals, etc.," but asserted that testimony "about tenuous connections between charged and uncharged crimes . . . should be excluded as either irrelevant . . . or unduly prejudicial." (3 CT 710.) During the initial hearing on the matter, the trial court ruled that evidence of appellant's gang affiliation was admissible. The court found the evidence was probative on appellant's motive and intent and observed that the prosecution would likely be able to lay a foundation for the gang-related nature of the murders. (2 RT 262, 264.) The court reserved ruling on the admissibility of the gang expert's testimony. (2 RT 264.)

Before Detective Penney testified near the end of the prosecution's case-in-chief, the trial court revisited the relevance and admissibility of the detective's proposed testimony about such topics as the general structure of appellant's gang and the importance of recruitment and respect in gang culture. (19 RT 3989-3997.) Generally citing Evidence Code section 352 and several constitutional amendments, appellant filed a written motion to "exclude and/or limit gang testimony." (4 CT 959-961.) In his motion and at the hearing on the matter, appellant acknowledged that Detective Penney was qualified as a gang expert on the El Monte Trece gang, but sought to exclude any testimony about specific crimes committed by other El Monte Trece gang members. (19 RT 3996-3997; 4 CT 961.) The trial court agreed to so limit the gang expert's testimony and otherwise ruled the

expert's proposed testimony was relevant and not unduly prejudicial. (19 RT 3995-3997.)

Detective Penney testified that a gangster who is trying to become more active in his gang needs to establish himself as someone who is feared. (19 RT 4053.) He also testified to the importance of respect and recruitment in gang culture. (19 RT 4036-4037, 4049-4050, 4053.) The detective discussed how disrespect could form the basis for a "good murder," i.e., one that would be condoned in gang culture. (19 RT 4049-4050, 4062.) He opined that Ricardo was killed because he had "some information" on appellant and because he demonstrated disrespect by failing to attend his own jumping in ceremony. (19 RT 4054-4055, 4063.) He agreed that comments appellant made to Ricardo just before killing him indicated Ricardo was shot as an example to others. (19 RT 4063.)

Appellant has forfeited his right to challenge the gang expert's opinion testimony on appeal. It is well established that to preserve an issue for appeal, a specific and timely objection must be made in the trial court. (*People v. Demetrulias* (2006) 39 Cal.4th 1, 21-22; Evid. Code, § 353.) While appellant generally objected to the admission of "gang evidence" before trial, the objection did not meet the specificity and timeliness requirements of Evidence Code section 353. Indeed, appellant not only failed to raise the instant issue with specificity before trial, he also completely failed to object during Detective Penney's testimony on grounds even remotely related to those he now raises on appeal. (See *People v. Jennings* (1988) 46 Cal.3d 963, 975, fn. 3 [when in limine ruling admitting evidence has been made, the party seeking exclusion must also object when evidence is actually offered to preserve issue for appeal].) Appellant interposed several objections (mostly based on "speculation")

during the detective's testimony, but failed to object to the testimony he now challenges on the grounds he now advances.[3] (See, e.g., 19 RT 4042, 4054-4057, 4059, 4063-4064.) Regardless, appellant fails to show how any of the evidence he now challenges affected his constitutional rights and the trial court in any event properly admitted Detective Penney's expert testimony.

First, contrary to appellant's contention, with one exception discussed below, the gang expert's opinion testimony was properly rooted in a hypothetical based on the evidence presented at trial. (See *People v. Moore* (2011) 51 Cal.4th 386, 406-407.) Based on evidence that appellant tried to recruit Ricardo into his gang (12 RT 2425, 2429-2430; 15 RT 3051), Ricardo failed to appear for own jumping in ceremony after agreeing to join the gang (12 RT 2337, 2372, 2425), and appellant made comments to Ricardo just before killing him indicating he should have "trust[ed]" appellant and not "underestimate[d]" him (12 RT 2421), Detective Penney opined that appellant perceived Ricardo as demonstrating disrespect and killed Ricardo to make an example of him. (See, e.g., 19 RT 4054-4055, 4063.)

Second, gang expert testimony was probative of appellant's motive for shooting and killing Ricardo, and consequently, Jason and Alex. The prosecution's theory was that appellant killed Ricardo to make him an example after Ricardo demonstrated disrespect by failing to attend his own jumping in ceremony. (2 RT 259-260; 20 RT 4325.) Appellant then executed Jason to get rid of the only non-gangster witness to appellant's murder of Ricardo. (20 RT 4326.) Alex's murder was the result of

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[3] Appellant objected based on "speculation" to an inquiry whether in forming his opinion of a possible motive, the expert considered comments appellant made to Ricardo just before killing him. (See 19 RT 4063.)

appellant's growing paranoia that Andrew may have told his non-gangster best friend about Ricardo's murder. (20 RT 4330-4331.) Significantly, the evidence also showed appellant had unsuccessfully tried to recruit Alex into his gang and viewed the declined invitation as a personal affront. (14 RT 2794-2795, 2849-2850; 19 RT 3861, 3931.) The gang expert's testimony about gang culture was highly relevant to help the jury understand how appellant could have perceived Ricardo's decision not to join the gang as a personal affront, how that perceived disrespect could form the basis for a "good murder," why appellant initially spared Andrew from the fate of the non-gangsters, and why witnesses were reluctant to report appellant's offenses. Accordingly, the trial court properly admitted Detective Penney's testimony.

Appellant correctly points out that the prosecutor's query whether Ricardo could have been killed because he had "some other information," apparently has no basis in the evidence. (See AOB 101-104.) The single reference to "other information," however, could not have affected the verdict, especially where the expert repeatedly grounded his opinion testimony on disrespect and the need to make an example out of someone who shows disrespect. In a case involving considerable properly admitted gang evidence, the senseless murder of three teenagers over less than 35 hours, appellant's brazen confrontation of Andrew's mother about Andrew's whereabouts, appellant's flight to Mexico in, and destruction of, the vehicle present at all three murders, and appellant's own statements to police once apprehended, none of the gang expert's testimony could be considered unduly prejudicial. Indeed, through his statements to police, appellant not only communicated his anger toward Andrew and Alvarez for talking to police, he also demonstrated his extreme disdain for disrespect, as well as his belief that a show of disrespect provides a "righteous" reason

to kill and that Ricardo and Alex had showed disrespect. (See, e.g., 19 RT 3861, 3863-3866, 3930-3931; 4 CT 1013.)

Appellant claims the alleged evidentiary errors rose to constitutional violations and should therefore be analyzed under the harmless error standard articulated in *Chapman v. California* (1967) 386 U.S. 18, 24 [87 S.Ct. 824, 17 L.Ed.2d 705]. Accordingly, he asserts that the admission of gang expert testimony rendered his trial "fundamentally unfair" by providing the only evidence that the murders were gang-related. (AOB 114-122.) As shown above, the prosecutor's isolated reference to "other evidence" did not violate the federal constitution. Consequently, the proper standard of review is that announced in *People v. Watson* (1956) 46 Cal.2d 818, 836, and not the stricter beyond-a-reasonable-doubt standard reserved for errors of constitutional dimension set forth in *Chapman.* (See *People v. Fudge* (1994) 7 Cal.4th 1075, 1103; accord *People v. Crew* (2003) 31 Cal.4th 822, 839 [prosecutor's brief misstatement referring to inadmissible evidence harmless under *Watson* standard.] Under *Watson,* reversal is required only when "it is reasonably probable the verdict would have been more favorable to the defendant absent the error." (*People v. Watson, supra,* 46 Cal.2d at p. 836.)

As discussed, the expert's testimony was grounded in ample evidence supporting a gang motive. In addition to appellant's own statements to police and just before shooting Ricardo multiple times, which were indicative of the importance of respect in gang culture, Andrew told detectives that Ricardo and Alex were murdered because they failed to jump into the gang. (12 RT 2427.) Given the evidence, it is not reasonably probable that the jury would have reached a different verdict in the guilt phase absent any erroneous admission of a brief reference to "other evidence." (*People v. Watson, supra,* 46 Cal.2d at p. 836.) Nor is it reasonably probable the jury's penalty choice turned on the fleeting

reference to "other evidence." (*People v. Ashmus* (1991) 54 Cal.3d 932, 983–984.) For these same reasons, a reversal would not be warranted even if *Chapman* were the applicable harmless error standard.

IV. APPELLANT FORFEITED HIS CLAIM OF PROSECUTORIAL MISCONDUCT BY FAILING TO TIMELY OBJECT; REGARDLESS, APPELLANT FAILS TO ESTABLISH ANY MISCONDUCT

Appellant alleges the prosecutor committed misconduct during her opening statement by misstating what the evidence would show, and later by eliciting inadmissible hearsay. (AOB 123-137.) Appellant forfeited his claim of opening statement misconduct by failing to timely object and request an admonition at trial. He forfeited his remaining claim by failing to request an admonition that would have cured any harm. Even assuming prosecutorial error, appellant is not entitled to relief.

A prosecutor's conduct violates the federal Constitution when it comprises a pattern so egregious that it infects the trial with such 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 that does not constitute such fundamental unfairness is misconduct under state law only if it involves the use of deceptive or reprehensible methods to persuade either the court or the jury, and a result more favorable to the defendant without the misconduct was reasonably probable. (*People v. Martinez* (2010) 47 Cal.4th 911, 955–956.) "In order to preserve a claim of misconduct, a defendant must make a timely objection and request an admonition; only if an admonition would not have cured the harm is the claim of misconduct preserved for review." (*People v. Alfaro* (2007) 41 Cal.4th 1277, 1328.)

Appellant complains of two instances of alleged prosecutorial misconduct. First, appellant contends that the prosecutor erroneously stated

during opening remarks that appellant had admitted possessing the murder weapon in Mexico. Second, appellant claims the prosecutor elicited from Maria Jackson an inadmissible hearsay identification of appellant as the man who brought the murder weapon to Mexico. Appellant claims he lodged objections in both instances (AOB 123), but the record shows he objected only in the latter instance without requesting an assignment of misconduct or asking that the jury be admonished to disregard the question and answer. (9 RT 1822; 11 RT 2289.) Absent futility, "'"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."'" (*People v. Fuiava* (2012) 53 Cal.4th 622, 679-680.) By failing to specifically object and request an admonition when any harm would have been cured by a brief admonition, appellant failed to preserve his claims of prosecutorial misconduct for appeal. (See, e.g., *ibid.*; *People v. Friend* (2009) 47 Cal.4th 1, 29.) In any event, both of appellant's allegations of prosecutorial misconduct lack merit.

In discussing appellant's statements to interviewing officers during opening remarks, the prosecutor said appellant had admitted taking a rifle and the nine-millimeter pistol to Mexico. (9 RT 1822.) Detective Loveless later testified that appellant had admitted ownership of the nine-millimeter pistol after being told his fingerprints might be on it. (19 RT 3857-3858.) According to the detective, appellant said, "Just because my fingerprints are on that gun, doesn't mean I killed anybody," and that was the "gist" of the detective's conversation with appellant on the matter. (19 RT 3858; see also 4 CT 1022 [appellant concedes he may have been the last person to touch the gun].) On cross-examination, defense counsel asked about whether appellant had admitted taking the nine-millimeter pistol to Mexico and the detective made clear: Appellant had admitted to transporting a 22-

caliber rifle to Tijuana, but not the nine-millimeter pistol. (19 RT 3932.) During closing argument, defense counsel reminded the jury that appellant had admitted only to taking the rifle to Mexico and suggested other possibilities for how the pistol might have ended up in the van appellant drove to Mexico. (20 RT 4378-4379.)

The prosecutor's brief remark during opening argument did not amount to misconduct as it was neither deceptive nor reprehensible, and did not so infect the trial with unfairness that it amounted to a denial of due process. (See *Darden v. Wainwright, supra,* 477 U.S. at p. 181; *People v. Martinez, supra,* 47 Cal.4th at pp. 955–956.) It was merely a summary of what the prosecutor expected the evidence would show. Even if the comment could be construed as prosecutorial error, appellant fails to show the requisite prejudice to support his claim of prosecutorial misconduct. (See *People v. Wrest* (1992) 3 Cal.4th 1088, 1109.) Indeed, the challenged remark was rebutted by Detective Loveless's testimony on cross-examination that appellant said he brought only the rifle to Mexico. (19 RT 3932.) In light of this clarifying testimony, it cannot be said the jury applied the statement in an improper or erroneous manner. (See *People v. Frye* (1998) 18 Cal.4th 894, 970, overruled on other grounds by *People v. Doolin* (2009) 45 Cal.4th 390, 421 & fn. 22; see also *People v. Milner* (1988) 45 Cal.3d 227, 245 [no reversal for prosecutorial error where it is not reasonably probable a result more favorable to defendant would have occurred absent the challenged remark].) Moreover, the trial court's instructions before opening statement and again before closing argument that the attorneys' statements were not evidence would have dispelled any conceivable remaining prejudice. (See 9 RT 1806; 20 RT 4290; *People v. Wrest, supra,* 3 Cal.4th at pp. 1109–1110.)

Appellant's claim that the prosecutor "deliberately elicited inadmissible hearsay" during her direct examination of Maria Jackson is

similarly without merit. Jackson accompanied officers to Mexico and assisted with the recovery of the murder weapon by giving her nephew, Juan Louis Miranda, $100 to retrieve the gun. (11 RT 2182, 2287-2288.) After ascertaining that Jackson was then asked by detectives to show her nephew a flier depicting appellant, the prosecutor asked, "And what did Juan Louis do in response when you showed him the flier?" (11 RT 2288-2289.) Jackson replied, "He said, 'Yeah, that's the man that was here.'" Defense counsel objected on hearsay grounds and the trial court sustained the objection. (11 RT 2289.) The court later granted appellant's motion to strike Jackson's reply; the motion was made and granted outside the presence of the jury. (12 RT 2326.)

First, the prosecutor's inquiry regarding what the nephew *did* in response to seeing the flier did not call for a hearsay answer; accordingly, appellant's contention that the prosecutor asked a question "designed to elicit inadmissible evidence" is unsupported by the record. (See, e.g., AOB 131; 11 RT 2298.) Second, appellant attempts to turn Jackson's nephew's comment indicating appellant had been to his home into something with more evidentiary value than it had by claiming the comment involved the murder weapon. (See e.g., AOB 128-129, 135-136.) In context, the nephew's comment had nothing to do with the gun or how it came to be in Mexico. Third, the jury was well-aware appellant had gone to Mexico and the evidence showed he had spent time at the home of Jackson's nephew. Appellant admitted driving Alvarez's van to Mexico and hiding in Tijuana. (4 CT 1011, 1018.) He further admitted torching the van and said that he *personally* removed the seats before doing so. (4 CT 1010-1011, 1018, 1035.) Detectives found the van seats in Mexico at Jackson's nephew's home a day or so after the van was torched. (11 RT 2184-2185, 2287; 15 RT 3004; see also 15 RT 3000-3002 [detectives had seen the van, which was still intact, near the nephew's residence a day or two before it was

torched].) Based on this other evidence, any reasonable fact finder would know appellant had been to the nephew's house.

In short, appellant cannot show prejudice stemming from a comment indicating appellant had been to the nephew's house, a comment that merely reiterated what the jury already knew and that, in any event, garnered a sustained hearsay objection and was stricken from the record. Although defense counsel requested the comment be stricken from the record outside the presence of the jury, no prejudice ensued because the jury was twice instructed not to consider any evidence that was rejected (9 RT 1806; 20 RT 4290), a sustained objection logically fell within this instruction, and it is presumed the jury followed its instructions (*Richardson v. Marsh* (1987) 481 U.S. 200, 206-207 [107 S.Ct. 1702, 95 L.Ed.2d 176]; *People v. Harris* (1994) 9 Cal.4th 407, 426). To the extent it would have further clarified the jury's understanding of its duty to also hear that the comment had been stricken from the record, appellant forfeited his right to his prosecutorial misconduct claim by failing to request the jury be so admonished. (See *People v. Alfaro, supra,* 41 Cal.4th at p. 1328.)

Appellant claims his right to confrontation was violated by the admission of the "testimonial" statement made by the nephew. (AOB 131-134.) The court sustained appellant's hearsay objection, however, so the statement was not admitted and this claim is groundless.

Appellant fails to show prosecutorial misconduct resulting in prejudice as the two isolated instances of alleged misconduct appellant highlights hardly constituted a pattern of conduct so egregious that it rendered the trial fundamentally unfair in denial of appellant's right to due process of law. (See *People v. Samayoa* (1997) 15 Cal.4th 795, 841.) Nor did either instance involve the use of deceptive or reprehensible methods by the prosecutor to persuade the jury. (See *People v. Martinez, supra,* 47 Cal.4th at pp. 955-956.) If there was error, it was harmless beyond a

reasonable doubt as the opening remark was clarified during trial and the hearsay statement provided no evidence the jury did not already know. (See *People v. Cook* (2006) 39 Cal.4th 466, 608.) Because appellant fails to show misconduct under either federal or state law, his fourth claim on appeal should be rejected.

V. APPELLANT FAILS TO SHOW ANY VIOLATION OF HIS FEDERAL CONSTITUTIONAL RIGHT TO CONFRONTATION

Appellant claims the trial court "forced" him to "sacrifice" his federal constitutional right to confrontation by ruling that the prosecution could show a videotape of the polygraph examination if appellant cross-examined the polygraph examiner on whether appellant admitted being present when Jason Van Kleef was shot. (AOB 138-143.) Appellant cross-examined Heard on whether appellant said he was present when Jason was shot. He fails to show how he might have altered that cross-examination in the absence of the court's ruling. Moreover, appellant overstates the court's ruling. First, the court actually ruled the prosecution could *not* play the videotape, but provided for further litigation on the matter following the polygraph examiner's testimony. Second, the court conditioned any playing of the tape on the prosecution's ability to redact the videotape to remove any indication the interview was a polygraph examination. In short, the ruling in no way limited appellant's right to cross-examine a witness and appellant in fact had ample opportunity to cross-examine Heard. Accordingly, appellant fails to show a violation of his right to confrontation.

The "main and essential purpose" of the Sixth Amendment Confrontation Clause is to secure a defendant's right to cross-examine witnesses. (See *Davis v. Alaska* (1974) 415 U.S. 308, 315-316 [94 S.Ct. 1105, 39 L.Ed.2d 347].)

> [A] criminal defendant states a violation of the Confrontation Clause by showing that he was prohibited from engaging in otherwise appropriate cross-examination designed to show a prototypical form of bias on the part of the witness, and thereby, 'to expose to the jury the facts from which jurors ... could appropriately draw inferences relating to the reliability of the witness.'

(*Delaware v. Van Arsdall* (1986) 475 U.S. 673, 680 [106 S.Ct. 1431, 89 L.Ed.2d 674], quoting *Davis v. Alaska, supra,* 415 U.S. at p. 318.)

After being arrested appellant agreed to take a polygraph examination, which was administered by Robert Heard.[4] (2 RT 221.) About one month before trial, the prosecutor informed defense counsel she intended to introduce evidence that appellant had admitted being "present" at Jason's murder through Heard's testimony, rather than through the videotape of the examination. (4 RT 590.) Defense counsel said she might also want the jury to see the videotape of the examination and represented to the trial court that it was not apparent from the videotape that Heard's interview of appellant was a polygraph examination. (4 RT 592.) The trial court agreed the defense was entitled to present the videotape with proper redaction. (4 RT 593-597.)

Before Heard testified, defense counsel alleged appellant's statement to Heard admitting he was "present" at Jason's murder was "inaudible" in an audiotape and thus moved to exclude Heard's anticipated testimony regarding this portion of the interview. (18 RT 3733-3734.) The trial court said it had listened to this portion of the interview about 30 times, including initially with no available transcript, and, based on the "totality of the

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[4] To stay within the confines of Evidence Code section 351.1, which permits statements made during a polygraph examination to be introduced into evidence while excluding any reference to polygraph examinations, Heard was identified at trial as a "sheriff's investigator." (18 RT 3764.)

interview process," concluded appellant had indeed responded, "I was present," when asked about his presence at Jason's murder. (18 RT 3734.) The court added that if counsel wished to dispute this portion of Heard's testimony, it was inclined to let the prosecutor present the videotape of the interview, which had audio that was "more clear" and showed appellant nodding his head during his answer. (18 RT 3734-3735.) In contrast to her earlier representation, defense counsel contended the videotape "basically shows it's a polygraph room" and said she did not want the jury to see it. (18 RT 3735.) The court ultimately ruled the videotape would not be shown to the jury, but the parties could revisit the issue after Heard's testimony. The court also conditioned any showing of the videotape on sufficient redaction to remove any indication Heard's interview of appellant was a polygraph examination. (18 RT 3736.)

Heard testified at trial that appellant refused to answer several questions during the interview, including whether he was present at any of the murders. (18 RT 3807-3809.) At some point, appellant indicated he might have been present at one or more of the murders – "I'll tell you if I was present or not, all right? Does that sound fair." (18 RT 3809, 3812.) Heard wrote out three options for appellant's consideration: "(A) I shot 1, 2 or all 3[;] (B) I was there (present) when 1, 2 or all 3 were shot[;] (C) I told someone to shoot 1, 2 or all 3." (4 CT 980; see 18 RT 3810-3811.) Appellant said options A and C were incorrect, but indicated option B was correct. (18 RT 3812-3813.) Appellant denied being present at the murders of Ricardo and Alex, but said, "I was present," when asked about Jason's murder. (18 RT 3814-3815.) Heard said he tried to confirm appellant's statement by saying, "So you were only present when Jason Van Kleef was shot?" But appellant retracted his statement and refused to answer any more questions. (18 RT 3815.)

Defense counsel cross-examined Heard about the way he phrased his questions and appellant's responses, often reading directly from the transcript of the interview. (19 RT 3821-3828, 3832-3834.) For example, counsel elicited testimony that Heard told appellant to choose one of the options as he would in a "multiple choice" test at school. (19 RT 3821-3822.) Counsel also elicited testimony that before admitting his presence at Jason's murder, appellant wanted to know why Heard was asking about appellant's presence and at one point stated, "If I tell you I was present right there when all that happened, that's telling you I'm guilty." (19 RT 3823-3824.) Heard was further queried on appellant's specific response regarding Jason's murder:

> Q: [defense counsel]: [Y]ou said, 'Were you present when Jason Van Kleef was shot?' This is page 43 line 22.
>
> A: [Heard]: Correct.
>
> Q: And there's no audible response. And then you say, 'Yes? Is that a yes?'
>
> A: Correct.
>
> Q: Okay. And then he said, 'I was present.'
>
> A: That's correct.
>
> Q: Then you went on, 'Okay. Were you present when Alex Ayala was shot?' And he said, 'I wasn't present?'
>
> A: That's correct.
>
> Q: So after you asked him these questions, then you went back and you said, 'Okay. Now, if [B] is correct, I was there present [*sic*] when one, two or all three were shot, you were only present when Jason Van Kleef was shot. Is that what you're saying? Here's the three names they gave me. Ricardo Torres, Jason Van Kleef, Alex Ayala.' ¶ And at that point you got no response?
>
> A: Correct. I think there was quite a bit of a pause.

> Q: And then you said, 'Okay. So you were only present when Jason Van Kleef was shot.' And that's when Mr. Flores said, 'This question . . .' and pointed to your paper. And you said, 'No. B.' And he said, 'I don't answer it.'
>
> A: I'm not sure if this is where he pointed, but he did point with his left hand at No. B.

(19 RT 3826-3827.) Heard added that appellant thereafter refused to answer any more questions. (19 RT 3827-3838.)

Appellant claims he was forced to sacrifice his right to cross-examination on whether he admitted being present at Jason's murder to preserve his "constitutional" right to exclude evidence of his polygraph examination. The above exchange, however, shows appellant cross-examined Heard on that very matter and appellant fails to suggest additional inquiries counsel might have made in the absence of the ruling appellant claims forced the sacrifice. Moreover, the court's ruling allowing for further litigation of whether the prosecution would be permitted to play the videotape did not address or affect the permissible scope of cross-examination. Significantly, the court repeatedly made clear that any playing of the videotape would be conditioned upon the parties' ability to redact material indicative of a polygraph examination. (See 4 RT 591-593; 18 RT 3736.) Appellant's suggestion that there is no reason to believe the tape could have been so redacted is belied by defense counsel's own earlier remarks that the tape did not clearly show the nature of the interview and could be redacted. (See 4 RT 592; AOB 142.) Detective Loveless's brief reference to a "polygraph unit" (discussed *infra*) was made after Heard's testimony and had no effect on whether appellant was forced to "choose" between two constitutional rights (the second of which is unclear) during Heard's testimony.

Appellant fails to show a violation of his right to confrontation.

VI. THE TRIAL COURT ACTED WITHIN ITS DISCRETION IN DETERMINING THAT ITS TIMELY ADMONITION TO THE JURY FOLLOWING A DETECTIVE'S REFERENCE TO "POLYGRAPH UNIT" CURED ANY PREJUDICE STEMMING FROM THE BRIEF COMMENT

Appellant contends a comment by Detective Loveless that appellant was "taken to the polygraph unit" necessitated a mistrial, and otherwise made the trial unfair and violated appellant's right to due process. (AOB 144-153.) Appellant demonstrates neither an abuse of discretion nor a constitutional violation as any prejudice stemming from the inadvertent comment was cured by the trial court's timely admonition to the jury.

Evidence Code section 351.1, subdivision (a) prohibits the admission into evidence of "the results of a polygraph exam," including "any reference to an offer to take, the failure to take, or the taking of a polygraph examination," unless all parties stipulate to the admission of such results. A denial of a motion for mistrial is reviewed under the deferential abuse of discretion standard. (*People v. Cunningham* (2001) 25 Cal.4th 926, 984; *People v. Price* (1991) 1 Cal.4th 324, 428.) Accordingly, a motion for mistrial is directed to the sound discretion of the trial court and should be granted where any prejudice is incurable by admonition or instruction. However, "'[w]hether 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. Jenkins* (2000) 22 Cal.4th 900, 985-986, quoting *People v. Haskett* (1982) 30 Cal.3d 841, 854.)

This Court has held in the context of erroneously offered polygraph evidence, that a trial court's timely admonition, which the jury is presumed to have followed, cures prejudice resulting from the admission of such evidence. (See *People v. Cox* (2003) 30 Cal.4th 916, 953, overruled on other grounds in *People v. Doolin, supra,* 45 Cal.4th at p. 421, fn. 22.) For

example, in *People v. Price, supra,* 1 Cal.4th 324, a prosecution witness testified nonresponsively on cross-examination that he took lie detector tests. Defense counsel did not object, but later moved for a mistrial claiming the information gave the witness "a false aura of credibility." This Court disagreed:

> The mention of polygraphs in [the witness's] testimony was brief and nonresponsive. He did not state what questions he was asked or what the examiner concluded about his truthfulness. The admonition the court gave was thorough and forceful; it was sufficient to prevent any prejudice to defendant.

(*Id.* at p. 428; see also *People v. Morris* (1991) 53 Cal.3d 152, 193-194 [same conclusion under similar facts]; *People v. Carpenter* (1979) 99 Cal.App.3d 527, 532-533 [prosecutor's single remark in opening statement that a "polygraph operator" was called in was cured by defense counsel's prompt objection and trial court's strong admonition to the jury].)

Here, Detective Loveless testified after Heard. On cross-examination, counsel essentially read through a transcript of the detective's interrogation of appellant. (See, e.g., 19 RT 3875-3911.) Counsel eventually asked, "And actually you then – there was a break, I think, and Mr. Flores went and spoke to Mr. Heard?" Detective Loveless replied, "At that point we concluded the interview, and he was escorted over to the polygraph unit." The trial court immediately called a recess and indicated it was time for a switch (presumably of court reporters). (19 RT 3911.)

Outside the presence of the jury, the trial court asked the parties how the reference to the polygraph unit should be cured. (19 RT 3911.) Noting the detective had been on the witness stand for "hours at a time," repeatedly "going over a bunch of statements," the court found the detective's reference was inadvertent. (19 RT 3912-3913.) The court also found the comment prejudicial, but curable by admonition. (19 RT 3913-3915.)

Accordingly, the court denied appellant's motions to strike Heard's entire testimony and for a mistrial with prejudice. (19 RT 3914, 3918-3919.)

At defense counsel's suggestion, the trial court ultimately instructed the jury as follows:

> Before the break Detective Loveless mentioned the fact that the defendant was taken to a polygraph unit. I want to make something very clear to you. Mr. Alfred Flores was never offered nor ever submitted himself to a polygraph examination. The reason he said that is because Mr. Robert Heard's office is near the polygraph units so he actually was physically transported to that area only because that's where Mr. Heard's office is.

(19 RT 3917-3921.) The court ascertained that the jury understood its admonition and cross-examination resumed. (19 RT 3921.)

The trial court acted within its discretion in declining to strike Heard's testimony and in denying appellant's motion for mistrial. As in *Price*, the polygraph reference was "brief and nonresponsive." Unlike *Price,* where the testimony suggested a witness had passed a polygraph and was thus credible, and *Cox,* where the prosecutor's question suggested a witness had failed a polygraph and was thus not credible, the instant case did not involve the actual taking, passing, or failing of a polygraph test at all. In fact, Detective Loveless's inadvertent comment indicated appellant had been taken to the polygraph "unit," and made no mention of anyone taking a polygraph "exam." Accordingly, the trial court was able to simply instruct the jury that Heard's office was located in that particular area of the building and that appellant had not been offered, or taken, a polygraph examination. Given this clear and strong admonition to the jury and the presumption that juries follow the court's instructions, the court's determination that any prejudice was curable by admonition was neither arbitrary nor capricious.

Appellant's reliance on *People v. Basuta* (2001) 94 Cal.App.4th 370, does not compel a contrary result. There, the prosecutor, in trying to rehabilitate the lone witness and bolster her credibility, violated a preexisting court order not to mention that the witness had taken a polygraph test. Apparently, an objection by defense counsel was not sustained and the court never instructed the jury to disregard the comment. (See *id.* at p. 389.) The court held that this error, in combination with another more serious error by the trial court (excluding evidence that the baby's mother was physically violent to the baby, which might have been the proximate cause of the baby's death) was prejudicial. (*Id.* at pp. 390-391.) The instant case is distinguishable. First, there was no additional error here that was inextricably interwoven with the polygraph comment. Second, the reference to "polygraph" in the instant case did not patently inform the jury whether appellant took, or agreed to take, a polygraph exam; it merely referenced the polygraph unit. Third, the trial court in the instant case essentially instructed the jury to disregard the comment by telling it that appellant was never offered and never took a polygraph exam.

Appellant fails to demonstrate any constitutional violation as the trial court's admonition to the jury was sufficient to cure any prejudice stemming from the detective's brief comment regarding the "polygraph unit."

VII. ANY ERROR IN ADMITTING A STATEMENT BY ONE VICTIM INDICATING CONCERN THAT APPELLANT MIGHT BE MAD AT HIM WAS HARMLESS

Appellant contends the trial court violated his rights to due process and a reliable guilt determination by admitting hearsay testimony by Erick Tinoco that Ricardo was afraid of appellant. (AOB 154-159.) Appellant's claim is properly limited to one portion of Tinoco's testimony that garnered an overruled objection; he either failed to object or successfully objected to

the remaining testimony cited in support of his contention, and thus forfeited or lacks grounds to challenge that remaining testimony. Appellant fails to show a constitutional violation stemming from the trial court's admission of this one statement and any error in admitting the evidence was harmless under the applicable state harmless error standard articulated in *People v. Watson, supra,* 46 Cal.2d 818.

"'Hearsay evidence' is evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated." (Evid. Code, § 1200, subd. (a).) Under Evidence Code section 1200, subdivision (b), except as provided by law, hearsay evidence is inadmissible. Evidence Code section 1250 creates an exception to the hearsay rule that permits the admission of

> evidence of a statement of the declarant's then existing state of mind, emotion, or physical sensation (including a statement of intent, plan, motive, design, mental feeling, pain, or bodily health) ... when: [¶] (1) The evidence is offered to prove the declarant's state of mind, emotion, or physical sensation at that time or any other time when it is itself an issue in the action; or [¶] (2) The evidence is offered to prove or explain acts or conduct of the declarant.

(Evid. Code, § 1250, subd. (a).) A victim's out-of-court statements of fear of an accused have been held to be admissible under section 1250 only when the victim's conduct in conformity with that fear is in dispute"; otherwise they are irrelevant. (*People v. Ruiz* (1988) 44 Cal.3d 589, 608; see also *People v. Hernandez* (2003) 30 Cal.4th 835, 872 [declarant's mental state or conduct must be factually relevant].) Recently, this Court concluded that evidence of the decedent's state of mind, offered under Evidence Code section 1250, can be relevant to a defendant's motive if there is independent, admissible evidence that the defendant was aware of the decedent's state of mind before the crime and may have been motivated by it. (*People v. Riccardi* (2012) 54 Cal.4th 758, 818-820.)

Here, Tinoco testified that he had advised his younger friend, Ricardo, against joining appellant's gang. (17 RT 3588-3590.) Tinoco specifically wanted to encourage Ricardo to stay away from appellant. (17 RT 3591.) Ricardo later told Tinoco he was happy he did not get jumped in to the gang. (17 RT 3593-3594.) Asked whether Ricardo had ever mentioned feeling that "he might be in trouble because he didn't show up" to his jumping in ceremony, Tinoco said, "Yes." Defense counsel did not object. Counsel did object to the prosecutor's next question regarding the contents of that conversation. (17 RT 3594.) The trial court observed that the testimony "goes to the state of mind of Ricardo Torres" and overruled the objection. Tinoco testified that Ricardo had mentioned being unsure about continuing to hang out at Alvarez's apartment; he said he was "afraid that Wizard [appellant] was going to get mad at him" for failing to attend his jumping in ceremony. (17 RT 3594-3595.)

Tinoco later testified that on the day Ricardo was murdered, Jason had mentioned that appellant was angry at Ricardo. Defense counsel's hearsay objection was sustained and the testimony was stricken from the record. (17 RT 3601-3602.) Tinoco also recalled appellant commenting on Ricardo's gang-style T-shirt, telling him he shouldn't be wearing it. (17 RT 3596-3597, 3602-3604; 19 RT 3851-3852.) On cross-examination, Tinoco explained that even after Ricardo had mentioned being concerned that appellant might be "mad," Ricardo (as well as Alex and Tinoco) had continued to visit Alvarez's apartment. (18 RT 3629-3630.)

Preliminarily, appellant cites several portions of Tinoco's testimony in apparent support of his claim of evidentiary error, but received an overruled objection to only one portion of that testimony. As shown above, he either failed to object or successfully objected to the remaining testimony. Thus, to the extent his general argument subsumes any of that remaining testimony, the claim is forfeited or lacks grounds. It is well-settled that

questions regarding the admissibility of evidence generally will not be reviewed on appeal absent a timely and specific objection before the trial court on the same ground sought to be urged on appeal. (Evid. Code, § 353; *People v. Partida* (2005) 37 Cal.4th 428, 433-434; *People v. Rogers* (1978) 21 Cal.3d 542, 547 548.) A contrary rule would deprive the prosecution of the opportunity to cure the defect at trial and would allow a defendant to gamble on a favorable verdict at trial knowing that his conviction would be reversed on appeal. (*People v. Rogers, supra,* 21 Cal.3d at pp. 547-548.) It would be "wholly inappropriate to reverse a superior court's judgment for error it did not commit that was never called to its attention." (*People v. Lilienthal* (1978) 22 Cal.3d 891, 896; see also *People v. Zapien* (1993) 4 Cal.4th 929, 979-980 [specifically grounded objection prevents error by allowing the trial court to consider excluding the evidence or limiting its admission to avoid possible prejudice and allows proponent of the evidence to lay additional foundation, modify the offer of proof, or take other steps to minimize possibility of reversal].)

As to the statement that garnered an overruled objection, any error in admitting the evidence was harmless. A verdict or finding shall not be set aside, nor shall the judgment or decision based thereon be reversed, by reason of the erroneous admission of evidence unless the error complained of resulted in a miscarriage of justice. (Evid. Code, § 353; see also Cal. Const, art. VI, § 13.) Thus, if it is not reasonably probable that a result more favorable to appellant would have occurred absent the alleged error, the judgment will not be disturbed on appeal. (*People v. Welch* (1999) 20 Cal.4th 701, 749-750; see *People v. Riccardi, supra,* 54 Cal.4th at pp. 55-56 [finding erroneous admission of hearsay evidence harmless under *People v. Watson, supra,* 46 Cal.2d 836]; *People v. Reed* (1996) 13 Cal.4th 217, 231 [same].)

Here, the challenged statement was brief and not overly inflammatory as nothing in the statement indicated Ricardo feared for his safety; rather, the statement merely suggested Ricardo was worried that appellant might be "mad" at him. In other words, Ricardo's statement indicated he was concerned about whether appellant still liked him, not about his personal safety. Moreover, by repeatedly going back to Alvarez's apartment after making the statement, Ricardo behaved in a manner inconsistent with fear of harm by appellant. Given the evidence in this case, including three victims, eyewitness testimony as to Ricardo's murder, appellant's connection to the murder weapon, and incriminating statements by appellant to police that he fled to Mexico and burned the van associated with all three murders, this case certainly did not hinge on Ricardo's single insipid statement. In any event, the jury was told to consider the statement only as to Ricardo's state of mind, not to prove the truth of the matter asserted. (17 RT 3594.) At the close of trial, the court reminded the jury not to consider the statement for any purpose other than the limited purpose for which it was admitted. (4 CT 1103.) Thus, even if the statement could be construed as an indication Ricardo was actually in fear of appellant, it is reasonable to assume the jury realized that it should not draw any inference that such fear was justified.

Appellant claims the evidentiary error affected his constitutional rights, but cites no applicable authority to support his claim that a standard more stringent than *People v. Watson* applies where hearsay evidence is improperly admitted. Indeed, none of the three United States Supreme Court cases relied upon by appellant involved an alleged erroneous admission of a single hearsay statement. (See *Beck v. Alabama* (1980) 447 U.S. 625, 630-638 [100 S.Ct. 2382, 65 L.Ed.2d 392][state prohibition on lesser included offense instructions in capital cases held to violate the Eighth Amendment]; *Johnson v. Mississippi* (1988) 486 U.S. 578, 585-586

[108 S.Ct. 1981, 100 L.Ed.2d 575][reliance on an invalid conviction as an aggravating circumstance]; *Manson v. Braithwaite* (1977) 432 U.S. 98, 107-108 [97 S.Ct. 2243, 53 L.Ed.2d 140][suggestive photographic identification process held to violate due process where photograph is sole evidence tying defendant to drug crime].) Under the applicable *Watson* standard of review, it is not reasonably probable appellant could have obtained a more favorable result absent the admission of a single hearsay statement by one of three victims. For the same reasons articulated above, a reversal would not be warranted even if *Chapman* were the applicable harmless error standard.

VIII. SUBSTANTIAL CIRCUMSTANTIAL EVIDENCE SUPPORTS APPELLANT'S CONVICTIONS FOR THE MURDERS OF ALEX AYALA AND JASON VAN KLEEF

Appellant challenges the sufficiency of the evidence to support his convictions for the murders of Alex Ayala and Jason Van Kleef. Specifically, appellant claims there is a "complete lack of evidence" connecting him to these murders and that the jury's verdict as to these murders was thus "likely [] based on speculation and suppositions" and cannot be upheld. (AOB 155-169.) Appellant's claim disregards substantial circumstantial evidence supporting his convictions for the murders of both Alex and Jason.

In determining an insufficiency of evidence claim, the reviewing court reviews the whole record in the light most favorable to the judgment to determine whether there is any substantial evidence – 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. (*Jackson v. Virginia* (1979) 443 U.S. 307, 319 [99 S.Ct. 2781, 61 L.Ed.2d 560]; *People v. Elliot* (2005) 37 Cal.4th 453, 466.) The reviewing court resolves neither credibility nor evidentiary conflicts as such determinations are within the

exclusive province of the jury. (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206.) The standard of review is the same in cases in which the prosecution relies mainly on circumstantial evidence. (*People v. Bean* (1988) 46 Cal.3d 919, 932.) Thus, "[a]n appellate court must accept logical inferences that the jury might have drawn from the circumstantial evidence." (*People v. Maury* (2003) 30 Cal.4th 342, 396; see also *People v. Crittenden* (1994) 9 Cal.4th 83, 139.) If the circumstances reasonably justify the jury's findings, the opinion of the reviewing court that those circumstances might also reasonably support a contrary finding does not warrant reversal. (*People v. Thomas* (1992) 2 Cal.4th 489, 514; see also *People v. Crittenden, supra,* 9 Cal.4th at p. 139 [test is whether substantial evidence supports the conclusion of the trier of fact, not whether the appellate panel is persuaded defendant is guilty beyond a reasonable doubt].)

The evidence amply supports appellant's convictions for the murders of Alex and Jason. Jason was murdered just hours after witnessing appellant murder Ricardo. When Jason left Alvarez's apartment less than three hours before his body was discovered three or four miles away, appellant took Alvarez's van keys and followed him out the door. (See, e.g., 15 RT 3082-3083.) Appellant was the last person seen with Jason and had the opportunity to kill him. Appellant borrowed the van and there was physical evidence to show Jason was shot in or near the van, including the close range shot to Jason's head (17 RT 3392, 3396-3398; see also 10 RT 2045-2047 [blood stains indicated Jason was upright when shot, then laid on his back]) and ensuing windshield damage to the van (12 RT 2386-2388; 15 RT 3088-3091), then dumped from the van at the isolated location where his body was found, including fresh tire marks consistent with a vehicle like Alvarez's van (10 RT 2016) and the blue sheet – normally kept in the van – that was found near Jason's body (10 RT 2040-2041; 16 RT

3130-3131, 3134). Moreover, it appeared Jason's bloody head had been wrapped in a white T-shirt of the same brand and size regularly worn by appellant. (10 RT 2017-2018, 2041-2042.) Police discovered an open package of these T-shirts in Alvarez's apartment; the evidence showed the T-shirts belonged to appellant, who kept his belongings at the apartment. (13 RT 2675, 2688; 16 RT 3132-3134.) Finally, the size of Jason's gunshot wound was consistent with being caused by a nine-millimeter pistol and Jason was a possible contributor to DNA found on the nine-millimeter pistol police determined was also used to kill both Ricardo and Alex. (16 RT 3319-3322; 17 RT 3412, 3437-3438.)

Appellant also had a motive for killing Jason as Jason was the only non-gangster eyewitness to appellant's murder of Ricardo. (See *People v. Roldan* (2005) 35 Cal.4th 646, 707, overruled on other grounds in *People v. Doolin, supra,* 45 Cal.4th at p. 421 [motive is not an element of murder but evidence of motive is material in that it tends to refute or support the presumption of innocence].) Indeed, appellant told Andrew and/or Alvarez he had "whacked" Jason to ensure he would not report Ricardo's murder. (18 RT 3776-3781, 3795-3797; 20 RT 4209-4212.) He also did not deny that he was driving the van when Jason was killed; appellant said something like "maybe so, maybe not." (19 RT 3859.) Appellant further told police he did not know Jason as well as he knew Alex and Ricardo and admitted being "present" when Jason was killed. (18 RT 3815; 19 RT 3854.) That Jason was killed with an execution-style gunshot to the back of the head indicated the killer held no real contempt for Jason, but merely wanted him dead. (See 19 RT 4058.) In other words, the manner in which Jason was murdered is consistent with appellant's own statements about Jason and his motive for killing him.

Appellant had similar opportunity to kill Alex. He was again out in Alvarez's van at the time Alex was murdered. Andrew returned Alvarez's

van keys around 10:45 p.m. after dropping Alex at home. (12 RT 2402-2403; 15 RT 2964-2968.) Appellant then borrowed the van and was gone for about an hour. (15 RT 3104-3105.) Appellant knew where Alex lived. (12 RT 2468.) Meanwhile, Alex was home for the night and told his sister he planned to use the computer. (10 RT 2073-2076.) Despite these plans, sometime after 11:00 p.m., Alex left the house, apparently through the front door and in a hasty manner (contrary to his custom, he left on the television and failed to take his keys or lock the door; his clothing was also inappropriate for the cold night weather and not the type of clothing he normally wore outside the house). (10 RT 2076-2077, 2079, 2087-2088.) Alex was ultimately forced to his knees and shot multiple times around midnight just a quarter of a mile from where appellant had killed Ricardo less than 35 hours earlier. (9 RT 1916; 11 RT 2166, 2168-2169, 2171, 2235-2237, 2244-2247.) Not only did appellant choose similar locations for his first and third murders, ballistics evidence showed he also used the same nine-millimeter pistol for the murders. (17 RT 3430-3431, 3468.) Significantly, appellant was known to carry a black nine-millimeter pistol and Andrew testified the murder weapon was the same pistol. (12 RT 2408, 2410; 13 RT 2677-2678, 2687; 14 RT 2799-2800; 15 RT 3056; 19 RT 3963.)

Appellant was also the only person with a motive to kill Alex. Similar to Jason, Alex was not a member of appellant's gang and could not be relied upon to keep secret appellant's murder of Ricardo (and now, of Jason). Given that Alex was Andrew's best friend and appellant believed that "youngsters," like Alex and Andrew, were "foolish" and "did not take care of business" (see 19 RT 3866), the evidence reasonably supported the inference that appellant grew concerned that Andrew might have told Alex about Ricardo's murder while they were out together.

There was further evidence Alex had rebuffed appellant's repeated attempts to get him to join the gang, which a reasonable fact finder could conclude was construed by appellant as disrespectful. (12 RT 2426; 14 RT 2804, 2849-2850; 17 RT 3592-3593; 18 RT 3714, 3717.) Indeed, appellant agreed during interviews with police that Alex might have disrespected him and made clear that a show of disrespect would constitute a "righteous" reason to kill someone. (19 RT 3861, 3863-3864, 3931.) That Alex was killed for showing disrespect was reasonably supported not only by appellant's statements, but by the violent manner in which Alex was murdered. In spite of this further motive, however, appellant's visit to Andrew's house and brazen attempt to elicit information from Andrew's mother about his whereabouts and statements to police, logically supports the conclusion that appellant's main purpose in killing Jason and Alex was to silence potential witnesses. Indeed, had appellant's mother told appellant where to find her son, Andrew might have been the next victim.

As to the murders of both Alex and Jason, appellant had no alibi and sufficient time to commit each murder. Appellant used the same nine-millimeter pistol to kill both Ricardo and Alex, and Jason's gunshot wound was consistent with the same caliber pistol. Appellant was known to carry the nine-millimeter pistol used in the murders. The tire marks found near Jason's body were consistent with Alvarez's van, which was in appellant's possession during the murders of both Jason and Alex and used in all three murders.

Significantly, once appellant confirmed through Andrew's mother that Andrew was talking to police, he fled to Mexico. Within days, he had burned the van. Despite having six months for reflection before being arrested and interrogated by police, appellant provided inconsistent statements about even minor details (he completely refused to answer questions directly related to the murders). He claimed he took Alvarez's

van as collateral for some unexplained debt before admitting he simply stole the van and drove it to Mexico. He initially claimed he was in Mexico at the time of the murders, but eventually admitted he actually left for Mexico after the murders. He claimed he had not seen Andrew or any of the victims for up to two weeks before the murders. But this claim (as well as his initial claim he was in Mexico at the time of the murders) was refuted by several witnesses, including Ricardo's brother and Andrew's sister. Appellant was evasive and uncooperative throughout his interviews and the few statements he did make demonstrated an attempt to conceal the truth.

Appellant contends the *only* evidence connecting him to the murders of Jason and Alex was the gang expert's testimony that it was "possible" Ricardo had been killed for refusing to join the gang. (AOB 164-165.) Appellant suggests this testimony somehow determined the jury's verdict. In context, the expert was merely expanding on his opinion that Ricardo was killed because he disrespected appellant, an opinion the expert formed based on several factors, including Ricardo's youth and the anger with which appellant killed him. Moreover, appellant acknowledges that this testimony was tempered by the expert's further testimony that he had never heard of refusal to join a gang as being the basis for a murder in his 25 years as a law enforcement officer. Accordingly, it's difficult to see how this limited testimony could have influenced the jury. In any event, the expert provided no similar testimony as to Jason. Moreover, as shown above, there was substantial circumstantial evidence, in addition to motive, to support appellant's convictions for the murders of Jason and Alex. Given the jury instruction that motive is insufficient to prove murder, the jury necessarily relied on evidence other than the gang expert's testimony to convict appellant in the instant case. (See *People v. Livingston* (2012) 53 Cal.4th 1145, 1168.)

Appellant contends the instant case is similar to "those cases in which appellate courts have struck down murder convictions on the basis of insufficient evidence." Appellant cites only *People v. Blakeslee* (1969) 2 Cal.App.3d 831, to support this contention. (AOB 166.) In *People v. Blakeslee*, the evidence established only that the defendant and her brother had both quarreled with the victim, who was their mother (the brother having done so on the night of the killing), that both had access to a rifle (belonging to the brother), and that the defendant had offered police a false account of her movements (intended, she testified, to protect the brother). The evidence was not only minimal, it was more consistent with the brother's guilt than with the defendant's. (See *People v. Blakeslee, supra,* 2 Cal.App.3d at pp. 837-840.) Here, appellant had a unique combination of motive and opportunity to kill both Jason and Alex and was connected to the killings by other circumstantial evidence (his statements, the murder weapon, and ownership of the T-shirt used to wrap Jason's bloody head, as well as his flight to Mexico and destruction of the van) to the crimes. Appellant attempts to blame Andrew, Alvarez, or Pasillas for the instant offenses. Given the lack of evidence connecting these individuals to the murders, the jury rightly rejected his similar attempt at trial and appellant provides no further argument on appeal to compel a different result.

IX. APPELLANT'S STATEMENTS REGARDING THE JAIMES HOMICIDE WERE OBTAINED IN ACCORDANCE WITH *MIRANDA V. ARIZONA* AND THUS PROPERLY ADMITTED BY THE TRIAL COURT

Appellant contends his in-custody statements to Los Angeles County Sheriff's Sergeant Roderick Kusch regarding the Jaimes homicide were obtained in violation of his *Miranda*[5] rights and thus improperly admitted

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

during the penalty phase of his trial. (AOB 160-201.) The record makes clear that appellant's statements to Sergeant Kusch were voluntary and followed a valid *Miranda* waiver, and that appellant never expressly invoked his right to remain silent. Accordingly, appellant's confession was properly obtained by police and properly admitted by the trial court.

The voluntariness of a confession depends on a consideration of the totality of the circumstances, including the particular background, experience, and conduct of the accused. (See *North Carolina v. Butler* (1979) 441 U.S. 369, 374-376 [99 S.Ct. 1755, 60 L.Ed.2d 286]; see *People v. Weaver* (2001) 26 Cal.4th 876, 920.) The interrogation of a suspect who has voluntarily waived his *Miranda* right to remain silent must stop if the suspect unambiguously and unequivocally indicates he wishes to remain silent. (*Berghuis v. Thompkins* (2010) __U.S.__ [130 S.Ct. 2250, 2259-2260, 2263-2264, 176 L.Ed.2d 1098]; see *Davis v. United States* (1994) 512 U.S. 452, 459 [114 S.Ct. 2350, 129 L.Ed.2d 362]; *Miranda v Arizona, supra,* 384 U.S. at pp. 473-474.) Faced with an ambiguous or equivocal statement, however, law enforcement officers are not required to ask clarifying questions or to cease questioning altogether. (*Davis v. United States, supra,* 512 U.S. at pp. 459-462.) The law does not distinguish between the guilt and penalty phases of a capital murder trial as far as the Fifth Amendment privilege against self-incrimination is concerned. (*Estelle v. Smith* (1981) 451 U.S. 454, 462-463 [101 S.Ct. 1866, 68 L.Ed.2d 359].)

In reviewing alleged *Miranda* violations, the reviewing court must defer to the trial court's credibility determinations and express or implied factual findings that are supported by substantial evidence. The reviewing court, however, independently determines from undisputed facts and those found by the trial court whether the challenged statement was illegally obtained. (*People v. Smith* (2007) 40 Cal.4th 483, 502.)

A. Underlying Facts

Around 9:00 p.m. on September 6, 2001, San Bernardino County Sheriff's Detective Chris Elvert took custody of appellant at a border checkpoint north of San Diego following appellant's arrest by border patrol agents earlier in the day. (2 RT 194-195, 198.) Detective Elvert and two other officers transported appellant back to San Bernardino. (2 RT 195.) During the audio-taped drive, Detective Elvert informed appellant of the Los Angeles and San Bernardino murder investigations and made sure appellant knew why he had been arrested. (2 RT 195, 199-200.)

Detective Elvert advised appellant of his *Miranda* rights around 10:55 p.m. in a sheriff's station interview room. Appellant said he understood and waived his rights. (2 RT 196-197, 200; 4 CT 1002-1003.) Detective Elvert interviewed appellant for about an hour. (2 RT 197, 200-201, 208; 4 CT 1002-1049.) Appellant denied killing Alex, Jason, and Ricardo, and generally selectively responded to questioning by the detective. (See, e.g., 4 CT 1006, 1008, 1017, 1028, 1040, 1045, 1049.)

Late the following morning, Detective Elvert escorted appellant from the central jail across the street to the sheriff's station so Sergeant Kusch could interview him about Jaimes's Los Angeles murder. (2 RT 204, 214.) Before the interview, Detective Elvert informed the sergeant that appellant had waived his *Miranda* rights the prior night. (2 RT 204.) Sergeant Kusch nonetheless reread appellant his *Miranda* rights, stopping after each right to ascertain appellant's understanding. Appellant reiterated his understanding and the following exchange occurred:

> RK: [Sergeant Rod Kusch]: Basically what I'd like to do is talk about the [] case that we investigated that we got called out on back on November 17, 2000. Uh I'll tell you how we got called out on it in a minute but uh do you want to take a few minutes to talk a little bit about that?
>
> AF: [Appellant]: No.

RK: Well essentially what I want to do is take a minute and kind of explain to you what uh what we got called out on and what the investigation entailed and what not. Of course you know whether you choose to answer the questions is completely up to you um but obviously you know I just wanted to at least give you the thumbnail sketch of what we investigated, what we [] did and talk a little bit about that. Again you know you don't have to answer any questions. We're just sitting here, if you don't want to answer certain questions you don't have to answer them, if you want to answer other questions you can answer those. So you know . . . for example some of the stuff I want to talk to you about is what's your name and birth date and stuff like that which are pretty simple questions. So. Do you want to take a few minutes and talk to me about that stuff?

AF: Oh yeah, well whatever.

(5 CT 1411.)

Sergeant Kusch briefly queried appellant about his name and birthday, before asking appellant questions about where he lived "[w]hen this happened" (referring to the Jaimes murder). (5 CT 1411-1412.) Appellant replied that he lived with his mother, Lillian, in a motel in Maywood. (5 CT 1412.) Appellant continued to discuss his living arrangements saying he had been paroled from prison in April 2000 and intermittently stayed with different relatives. (5 CT 1413-1414.) Sergeant Kusch finally said, "[L]et me ask you this, what do you know about what we're investigating?" Appellant replied, "I don't know nothing, that's what I hoped you'd tell me." Appellant added, "I mean what did you guys get, what was I coming out on TV. What have you guys got?" Asked how he first heard about anything that happened in Los Angeles, appellant said he had heard on the TV news that a body had been found in a trunk. (5 CT 1414.) Appellant continued to answer all of the sergeant's questions with no indication he wished to remain silent.

Asked why he thought his name would pop up on the television news, appellant claimed he had no idea, "I don't know that's what I wanted to ask

you." Sergeant Kusch said, "Oh please. Give me a break man," and reminded appellant of what he admittedly knew: Police had spoken to appellant's mother about the murder and her statements led to appellant. (5 CT 1420-1421, 1424.) Appellant continued to answer questions with no indication he wished to remain silent and pressed for information about what evidence police had collected. (See, e.g., 5 CT 1421-1422, 1426, 1428, 1430.) At one point, appellant asked Sergeant Kusch to opine whether the homicide was "right" or "wrong" based on what the sergeant knew of the circumstances surrounding it. (5 CT 1426.) Appellant eventually said, "All right. I'm gonna tell you something. I'm gonna tell you what happened." (5 CT 1430.) Appellant added that he would tell the sergeant what happened not because he had to and not because he wanted to, but essentially because he felt that what he did was justified. (5 CT 1430; see 5 CT 1432 [characterizing Jaimes's murder as "righteous"].) With few interruptions by Sergeant Kusch, appellant detailed his killing of Jaimes. (5 CT 1430-1434.) Appellant then answered numerous clarifying questions about the murder. (5 CT 1434-1471.)

The interview lasted about an hour and a half and was monitored by San Bernardino County Sheriff's Sergeant Robert Dean. (2 RT 208-209.) Sergeant Dean thought Sergeant Kusch's question whether appellant wanted to talk "about that" referred to the Jaimes homicide and his own subjective interpretation of appellant's reply of "no" was that appellant was invoking his right to remain silent. (2 RT 210-211.) Sergeant Dean also thought that appellant understood and thereafter voluntarily waived his *Miranda* rights, and that he was "very cooperative" during the interview with Sergeant Kusch. (2 RT 209-211.) A short time later, Detective Loveless interviewed appellant. Prior to the interview, the detective asked appellant whether he had been advised of his *Miranda* rights by Detective Elvert and Sergeant Kusch; appellant said he had and that he understood his

rights. (2 RT 220.) Appellant continued to deny any involvement in the instant murders. (See 2 RT 212.)

Before trial, appellant claimed in a written motion that all statements he made to law enforcement officers were involuntary and should therefore be suppressed under *Miranda v. Arizona, supra,* 384 U.S. 436 (2 CT 547-556), and the prosecution opposed the motion (3 CT 657-663). Three San Bernardino County sheriff's detectives testified at the suppression hearing. (2 RT 193-231.) Appellant later filed a supplemental motion to suppress his statements to Sergeant Kusch claiming he had invoked his right to remain silent at the outset of the interview when he said "[n]o" in response to whether he wanted to talk "about that." (3 CT 726-729; see 5 CT 1411.) Before ruling on the suppression motions, the trial court considered tapes and transcripts from all of appellant's interviews, as well as an audiotape of appellant being transported from the border to the sheriff's station after being arrested. (2 RT 230, 237, 290, 293.) The court denied the suppression motions on all grounds. (2 RT 290-294.) First, the trial court found the record lacked any indication of coercion or inducement by any of the officers and that appellant's willingness to speak with interrogating officers was "readily apparent." Accordingly, the court ruled that all of appellant's statements to officers were voluntary. (2 RT 293-294.) Second, as to appellant's claims regarding his interview with Sergeant Kusch, the court found appellant had not expressly invoked his right to remain silent. Considering the sergeant's question whether appellant wanted to talk "about that" and the subsequent colloquy, the court found appellant's "[n]o" reply was "ambiguous at best." (2 RT 290-291.)

B. Appellant's Statements were Voluntary and Made Pursuant to a Valid *Miranda* Waiver

Appellant waived his *Miranda* rights when he was interviewed by Detective Elvert less than a day before being interviewed by Sergeant

Kusch. On appeal, appellant does not challenge his valid waiver with Detective Elvert. Instead, he claims he invoked his right to remain silent when Sergeant Kusch re-advised him of his rights the next morning. Appellant's argument is premised on the faulty presumption that he unambiguously stated he wished to remain silent. In context, appellant replied "[n]o" to a question that itself required clarification. As the trial court observed, it was unclear whether appellant did not wish to hear how police got called out to investigate the scene or whether he did not want to talk at all. (2 RT 290.) Accordingly, Sergeant Kusch clarified the purpose of the interview and, although he was not required to clear up any ambiguity in light of appellant's previous waiver and current statement of understanding of his *Miranda* rights (see *Davis v. United States, supra,* 512 at pp. 459-462), he did so anyway by reminding appellant of his right to remain silent as to any portion of the interview. Appellant readily agreed to talk to Sergeant Kusch.

Appellant emphasizes Sergeant Dean's subjective interpretation of Sergeant Kusch's question and appellant's answer, but whether a suspect invoked his right to silence is to be objectively interpreted. (See *People v. Stitely* (2005) 35 Cal.4th 514, 525-536.) In any event, Sergeant Kusch's response to appellant's reply of "no" makes clear he was trying to ascertain the meaning of the reply. Sergeant Kusch did not immediately begin his interview; rather, he clarified the purpose of the interview and again asked appellant if he wanted to talk. Appellant unambiguously agreed to talk. Any remaining ambiguity about appellant's wishes was clarified by his obvious willingness to speak with Sergeant Kusch throughout the interview. Indeed, appellant used the interview to boast about the murder (see, e.g., 22 RT 1432 [characterizing Jaimes's murder as "righteous" and stating he "enjoyed doing it"], 1434 [appellant described disposing of the body saying he got some plastic and "wrapped his ass up, dragged him

down the fucking stairs and threw him in the . . . trunk"], 1446 ["And so I pulled out my gun and I blew his fucking head off ay. That's it. And I don't regret that ay."], 1453 [after the murder, appellant went "out for a cruise" in the victim's car]) and asked nearly as many questions of Sergeant Kusch as the sergeant did of appellant. Moreover, appellant had chosen not to answer numerous questions during his earlier interview with Detective Elvert, which shows he was well-aware of how to invoke his right to silence if he wished to do so. The trial court properly denied appellant's motion to suppress his statements about the Jaimes murder because the circumstances objectively show appellant did not unambiguously invoke his right to silence.

Appellant also claims his *Miranda* waiver and later confession were involuntary and coerced. (AOB 193-197.) In support of his claim, appellant relies on cases involving threats by interrogating officers (see AOB 195-196) and one case where an interviewing officer "pressed on" during an interview despite the accused's invocation of his right to silence and *nine* clear invocations of his right counsel. (See *People v. Neal* (2003) 31 Cal.4th 63, 78-84.) All of these cases involve circumstances that are distinguishable from those in the present case. Appellant further cites a few out-of-context statements made by Sergeant Kusch during the interview. (AOB 197.) To determine whether a statement was voluntary or coerced, a reviewing court examines the totality of the circumstances. (*People v. Bradford* (1997) 14 Cal.4th 1005, 1039-1040, citing *Moran v. Burbine* (1986) 475 U.S. 412, 421 [106 S.Ct. 1135, 89 L.Ed.2d 410].) Under the totality of the circumstances in the instant case, the interview lacked coercion and appellant's statements were voluntary.

Appellant suggests Sergeant Kusch made promises of leniency during the interview. (AOB 197.) Again, throughout the interview appellant relentlessly sought to learn exactly what police knew regarding the Jaimes

homicide. Sergeant Kusch informed appellant that his mother had provided an audiotaped "lengthy account" of the events surrounding Jaimes's murder. When appellant said he wanted to hear it, Sergeant Kusch understandably asked that appellant provide his own account of what happened before listening to the audiotape of his mother's account so that appellant's memory would not be tainted. (See, e.g., 5 CT 1426-1428.) Sergeant Kusch candidly described his investigation to appellant telling him how police consider evidence and witness statements in trying to solve crimes. The sergeant explained that while appellant's mother had given a statement that seemed to match the evidence, appellant's recollection of events could, as appellant himself interjected, "[s]hed some light on the subject." (See 5 CT 1427-1428.) None of these statements amounted to promises of leniency and there is no indication appellant thought they did.

Appellant further claims Sergeant Kusch threatened him with charges of murder. (AOB 197.) The record is to the contrary. Indeed, it was appellant who broached whether he would be charged with murder when he asked, "What is your department charging me with? Murder right?" (5 CT 1428-1429.) Sergeant Kusch was candid in agreeing that murder was the likely charge in light of the facts as he currently understood them. (5 CT 1429.) First, Sergeant Kusch's candid (and truthful) discussion with appellant about the evidence and potential charge could hardly be considered coercive, especially because appellant himself sought the information. Second, considering appellant's familiarity with the criminal justice system, his clear understanding of his *Miranda* rights, his boastful comments in describing the murder, and the polite and uncoercive tone of the interview, appellant's waiver and confession were clearly voluntary. (See *North Carolina v. Butler, supra,* 441 U.S. at pp. 374-376; *People v. Weaver, supra,* 26 Cal.4th at p. 920.) Appellant's *Miranda* claim must be rejected.

X. APPELLANT FAILS TO SHOW PROSECUTORIAL MISCONDUCT

Appellant claims the prosecutor committed prejudicial misconduct by eliciting an inadmissible hearsay statement during the penalty phase of trial. (AOB 202-206.) Appellant failed to preserve his claim because he neither made an assignment of misconduct nor requested that the jury be admonished to ignore any impropriety. In any event, he fails to show any prejudice stemmed from the alleged misconduct.

Again, a prosecutor's conduct violates the federal Constitution when it comprises a pattern so egregious that it infects the trial with such unfairness as to make the resulting conviction a denial of due process. (*Darden v. Wainwright, supra,* 477 U.S. at p. 181.) Conduct that does not constitute such fundamental unfairness is misconduct under state law only if it involves the use of deceptive or reprehensible methods to persuade either the court or the jury, and a result more favorable to the defendant without the misconduct was reasonably probable. (*People v. Martinez, supra,* 47 Cal.4th at pp. 955-956.) Under either standard, a showing of prejudice is necessary. (See *People v. Bolton* (1979) 23 Cal.3d 208, 214.)

Here, appellant claims the prosecutor committed misconduct by eliciting inadmissible hearsay during her direct examination of Sergeant Kusch regarding the Jaimes murder. (AOB 202.) The prosecutor asked, "Now, did you at some point – well basically Lillian Perez told you basically her son is the one who shot Mr. Jaimes, correct?" The sergeant replied, "In short, yes." Appellant objected on hearsay grounds and requested the testimony be struck from the record. The trial court sustained the objection and struck the testimony. (22 RT 4843.)

Appellant forfeited his claim of prosecutorial misconduct by failing to specifically object and request an admonition. (*People v. Fuiava, supra,* 53 Cal.4th at pp. 679-680 [defendant must make an assignment of misconduct

and request the jury be admonished to preserve prosecutorial misconduct claim for appeal].) There is no reason why it would have been futile to object on prosecutorial misconduct grounds and request an admonition – especially as the trial court sustained defense counsel's hearsay objection – or why it would not have cured any harm. In any event, appellant does not demonstrate prejudicial prosecutorial misconduct.

The prosecutor's inquiry may have been an error in phrasing, but that error did not rise to the level of prosecutorial misconduct and, in any event, was cured when the trial court sustained appellant's objection. The jury was also instructed that the attorneys' questions are not evidence, and that they should ignore any question to which an objection was sustained. (23 RT 5112-5113; see CALCRIM No. 222.) Moreover, the jury would have gleaned through other testimony that appellant's mother had told authorities about appellant killing Jaimes as Sergeant Kusch testified, without objection, that police sought appellant for the murder after talking to his mother. (See 22 RT 4840, 4843; see also 5 CT 1420-1421, 1424 [appellant admitted knowing his arrest followed statements his mother had made about the murder].) Significantly, the fleeting hearsay statement appellant challenges here paled in comparison to appellant's graphic description of how he killed Jaimes and disposed of his body, which the jury heard just minutes later in a recording. (22 RT 4854; Peo. Exhs. 222, 232; see, e.g., 5 CT 1430-1460.)

There is no possibility appellant was prejudiced by a single hearsay statement that garnered a sustained hearsay objection. Furthermore, in light of appellant's failure to show prosecutorial misconduct at the guilt phase (see Argument IV), his allegation that the prosecutor engaged in a "pattern of misconduct" lacks any basis. Appellant's claim should be rejected.

XI. IN INSTRUCTING THE JURY, THE TRIAL COURT HAD NO DUTY TO DELETE NONAPPLICABLE MITIGATING FACTORS OR TELL THE JURY THAT THE ABSENCE OF A MITIGATING FACTOR IS NOT ITSELF AGGRAVATING

Appellant contends the trial court constitutionally erred by instructing the jury on mitigating factors that were unsupported by the evidence and by failing to instruct the jury that the absence of mitigating factors is not an aggravating factor. (AOB 207-215.) This Court has previously rejected these claims and should do so again.

At the conclusion of the penalty phase, the jury was instructed to consider "if applicable," each of the statutory mitigating and aggravating factors listed in Penal Code section 190.3. (23 RT 5092-5094; 5 CT 1485-1486; see CALJIC No. 8.85.) Appellant maintains the trial court had the duty to delete, sua sponte, any irrelevant mitigating factors.

As this Court observed in *People v. Miranda* (1987) 44 Cal.3d 57, when it rejected an identical claim, "the jury's knowledge of the full range of factors provides a framework for the exercise of its discretion and can assist the jury in placing the particular defendant's conduct in perspective." (*Id.* at pp. 104-105, citing *Gregg v. Georgia* (1976) 428 U.S. 153, 192 [96 S.Ct. 2909, 49 L.Ed.2d 859]; see also *People v. Williams* (2013) 56 Cal.4th 165, 201.) This Court has further observed that the "deletion of any potentially mitigating factors from the statutory list could substantially prejudice the defendant." (*People v. Ghent* (1987) 43 Cal.3d 739, 776-777.) Here, for example, appellant contends that factor (h), which allows a jury to consider the affects of intoxication as a potential mitigating circumstance, was inapplicable to his case. (AOB 208.) The evidence, however, shows that appellant was drinking or "partying" on the night he shot Ricardo. (See 9 RT 1852; 12 RT 2367.) Thus, factor (h) was arguably applicable in this case. Given examples like this, it is unsurprising that this Court has determined that "the jury is capable of deciding for itself which

factors are 'applicable' in a particular case." (*People v. Ghent, supra,* 43 Cal.3d at p. 777.) The court properly read the complete list of statutory factors to the jury. (*People v. Williams, supra,* 56 Cal.4th at p. 201; see also *People v. Marshall* (1990) 50 Cal.3d 907, 932 [court is not obligated to instruct on all statutory penalty factors, but it is the "better practice" to do so].)

Appellant's claim that the trial court erred in failing to instruct the jury that the absence of mitigating factors is not an aggravating factor has also been rejected by this Court. Absent a contrary suggestion, "a jury properly advised about the broad scope of its sentencing discretion is unlikely to conclude that the *absence* of [various mitigating factors] is entitled to significant aggravating weight." (*People v. Livaditis* (1992) 2 Cal.4th 759, 784-785, citing *People v. Melton* (1988) 44 Cal.3d 713, 769; see also *People v. Jackson* (2009) 45 Cal.4th 662, 695.) As in *Melton,* the jury in the instant case was instructed on the broad scope of its sentencing discretion. (See 23 RT 5093-5094; Pen. Code, § 190.3, subd. (k).) As in *Livaditis,* there was no suggestion in the instant case that the mere absence of a mitigating factor was aggravating. Accordingly, the court had no duty to instruct the jury to the contrary and appellant's claim should be rejected.

XII. CALIFORNIA'S DEATH PENALTY SCHEME IS CONSTITUTIONAL

Appellant contends that California's death penalty statute violates the United States Constitution because (1) it is impermissibly broad and (2) it lacks sufficient procedural safeguards. (AOB 216-252.) This Court has repeatedly rejected challenges to California's death penalty statute on grounds of being impermissibly broad, and should do so again. Moreover, appellant fails to demonstrate a lack of sufficient procedural safeguards rising to the level of a Constitutional violation.

A. California's Death Penalty Scheme Appropriately Narrows the Class of Death-Eligible Offenders

Contrary to appellant's claim (AOB 218-220), "[s]ection 190.2, which sets forth the circumstances in which the penalty of death may be imposed, is not impermissibly broad in violation of the Eighth Amendment." (*People v. Farley* (2009) 46 Cal.4th 1053, 1133.) Appellant's claim that California's death penalty statutes are unconstitutional because they fail to sufficiently narrow the class of persons eligible for the death penalty has been repeatedly rejected. (*Pully v. Harris* (1984) 465 U.S. 37, 51-53 [104 S.Ct. 871, 79 L.Ed.2d 29]; *Brown v. Sanders* (2006) 546 U.S. 212, 224 [126 S.Ct. 8854, 163 L.Ed.2d 723]; *Mayfield v. Woodford* (9th Cir. 2004) 270 F.3d 915, 924; *Karis v. Calderon* (9th Cir. 2002) 283 F.3d 1117, 1141, fn. 11; *People v. Homick* (2012) 55 Cal.4th 816, 903; *People v. Virgil* (2011) 51 Cal.4th 1210, 1288; *People v. Verdugo* (2010) 50 Cal.4th 263, 304; *People v. Schmeck* (2005) 37 Cal.4th 240, 304; *People v. Arias* (1996) 13 Cal.4th 92, 187.) This Court should again reject the claim.

B. Appellant Fails to Show a Lack of Sufficient Procedural Safeguards Rising to the Level of Unconstitutionality

Appellant acknowledges that this Court has considered and rejected each of the "defects" he identifies in support of his claim that California's death penalty scheme is unsupported by sufficient procedural safeguards. (AOB 216-217.) Nonetheless, he contends that, cumulatively, they create an unconstitutional scheme, and urges the Court to reconsider its views. Considered collectively, however, the procedures do not cause the scheme to be unconstitutional for the same reasons none of the procedures separately do so.

Appellant contends the death penalty statute is unconstitutional because it does not require the jury to make findings beyond a reasonable

doubt that an aggravating circumstance has been proved. (AOB 224-238.) This Court has repeatedly held, however, that no such findings are constitutionally required. (*People v. Homick, supra,* 55 Cal.4th at p. 902; *People v. Lynch* (2010) 50 Cal.4th 693, 766; *People v. Lewis* (2009) 46 Cal.4th 1255, 1319.) The statutory factor that renders a defendant found guilty of first degree murder eligible for the death penalty is the special circumstance. The special circumstance thus operates as the functional equivalent of an element of the greater offense of capital murder. The jury's finding beyond a reasonable doubt of the truth of a special circumstance satisfies the requirement of the Sixth Amendment that a jury find facts that increase a penalty of a crime beyond the statutory minimum. (*People v. Lewis* (2008) 43 Cal.4th 415, 521.) As this Court recently made clear in *People v. McDowell* (2012) 54 Cal.4th 395, 444, nothing in *Cunningham v. California* (2007) 549 U.S. 270 [127 S.Ct. 856, 166 L.Ed.2d 856], *Blakely v. Washington* (2004) 542 U.S. 296 [124 S.Ct. 2531, 159 L.Ed.2d 403], *Ring v. Arizona* (2002) 536 U.S. 584 [122 S.Ct. 2428, 153 L.Ed.2d 556], or *Apprendi v. New Jersey* (2000) 530 U.S. 466 [120 S.Ct. 2348, 147 L.Ed.2d 435], affects this conclusion. (See also *People v. Thomas* (2011) 51 Cal.4th 449, 506; *People v. Smith* (2007) 40 Cal.4th 483, 526.)

Appellant contends that California law violates the federal Constitution because the jury is not required to keep written findings regarding aggravating factors. (AOB 238-241.) This Court has repeatedly rejected this claim and should do so again. (*People v. McDowell, supra,* 54 Cal.4th at p. 444; *People v. Parson* (2008) 44 Cal.4th 332, 370.)

Appellant's cursory claim that unanimity as to aggravating factors is also constitutionally required should also be rejected. (See AOB 224, 233-234.) This Court has repeatedly held that neither state nor federal law requires that the jury unanimously agree on the aggravating circumstances

that support a penalty of death on the rationale that aggravating circumstances are not elements of any offense. (*People v. Jackson* (2009) 45 Cal.4th 662, 701; *People v. Hoyos* (2007) 41 Cal.4th 872, 926; *People v. Stanley* (2006) 39 Cal.4th 913, 963; *People v. Bolin* (1998) 19 Cal.4th 297, 335-336.) Accordingly, appellant's claim fails.

Appellant contends that the lack of intercase proportionality review in California's death penalty statute results in capital proceedings being conducted in an arbitrary, capricious, or unreliable manner. (AOB 241-244.) Again, this Court has repeatedly rejected this claim and should do so again here. (*People v. Clark* (1993) 5 Cal.4th 950, 1039, overruled on other grounds, *People v. Doolin, supra,* 45 Cal.4th at p. 421, fn. 22 [regarding conflict-free counsel].) Neither the federal nor the state Constitution requires intercase proportionality review (*Pulley v. Harris* (1984) 465 U.S. 37, 43-54 [104 S.Ct. 871, 79 L.Ed.2d 29]; *People v. McDowell, supra,* 54 Cal.4th at p. 444), and this Court has specifically held it is not required for purposes of due process, equal protection, the prohibition against cruel and unusual punishment, or the guarantee to a fair trial. (*People v. Murtishaw* (2011) 51 Cal.4th 574, 597; *People v. Foster* (2010) 50 Cal.4th 1301, 1368; *People v. Hoyos, supra,* 41 Cal.4th at p. 927.) Accordingly, this Court has consistently declined to undertake it. (*People v. Gonzales* (2011) 51 Cal.4th 894, 957; *People v. Lindberg* (2008) 45 Cal.4th 1, 54; *People v. Cook* (2007) 40 Cal.4th 1334, 1368.)

Furthermore, contrary to appellant's claim that the use of restrictive adjectives in the list of mitigating factors acted as a barrier to the jury's consideration of those factors (AOB 244), this Court has made clear that the use of restrictive adjectives, such as "extreme" and "substantial" in the list of mitigating factors (Pen. Code, § 190.3), "does not act unconstitutionally as a barrier to the consideration of mitigation." (*People v. Hoyos, supra,* 41 Cal.4th at p. 927.)

Appellant contends that the prefatory language "whether or not" introducing the mitigating factors (d), (e), (f), (g), (h), and (j) in Penal Code section 190.3, invited the jury to convert a mitigating factor into an aggravating circumstance. (AOB 244-245.) Again, this Court has repeatedly held to the contrary and should do so again. (See, e.g., *People v. Morrison* (2004) 34 Cal.4th 698, 730; *People v. Frye* (1998) 18 Cal.4th 894, 1027; *People v. Carpenter* (1997) 15 Cal.4th 312, 420.)

Moreover, contrary to appellant's equal protection challenge to California's death penalty scheme (AOB 246-249), equal protection principles do not require that capital defendants be given the same sentence review that is afforded other felons under the determinate sentencing law. (*People v. Scott* (2011) 52 Cal.4th 452, 497; *People v. Nelson* (2011) 51 Cal.4th 198, 227; *People v. Cox, supra,* 30 Cal.4th at p. 970.)

Finally, appellant challenges California's death penalty scheme as violating international law. (AOB 249-252.) This Court has repeatedly held that a sentence of death that complies with state and federal Constitutional and statutory requirements does not violate international law. (*People v. Nelson, supra,* 51 Cal.4th at p. 227; *People v. Lewis, supra,* 43 Cal.4th at p. 539; *People v. Prince* (2007) 40 Cal.4th 1179, 1299, and cases cited therein.) This Court should so hold here.

XIII. APPELLANT'S PRIOR VIOLENT CONDUCT COMMITTED WHILE HE WAS A JUVENILE WAS PROPERLY ADMITTED DURING THE PENALTY PHASE OF TRIAL

During the penalty phase, the trial court admitted as a potential aggravating factor under Penal Code section 190.3, evidence that appellant had brandished a firearm when he was 17 years old. Relying on *Roper v. Simmons* (2005) 543 U.S. 551 [125 S.Ct. 1183, 161 L.Ed.2d 1], which held that the execution of minors who commit murder is unconstitutional, appellant contends that premising an aggravating circumstance on an

offense he committed as a juvenile violated the Eighth and Fourteenth Amendments and necessitates a reversal of his conviction. (AOB 253-257.) Reliance on *Roper* is misplaced given the obvious difference between executing a juvenile and considering juvenile conduct in determining whether an adult deserves the death penalty. Indeed, appellant is not being punished for his juvenile misconduct; he is being punished for three murders he committed as an adult.

Penal Code section 190.3, factor (b), provides that in determining whether to impose the death penalty or life imprisonment without possibility of parole, the jury may consider "[t]he presence or absence of criminal activity by the defendant which involved the use or attempted use of force or violence or the express or implied threat to use force or violence." Here, in addition to appellant's two assaults, shooting of Muro and murder of Jaimes, two recent armed robberies, and possession of a weapon in prison, the prosecution presented evidence that appellant had brandished a firearm when he was 17 years old in 1997. (See, e.g., 21 RT 4620-4658; see also 21 RT 4493-4495; 5 CT 1330 [appellant apparently objected to the evidence].)

This Court has long held that the jury may consider evidence of juvenile violent criminal misconduct as an aggravating factor in determining a convicted defendant's penalty under Penal Code section 190.3, factor (b). (*People v. McKinnon* (2011) 52 Cal.4th 610, 697, citing *People v. Roldan, supra,* 35 Cal.4th at p. 737; *People v. Lucky* (1988) 45 Cal.3d 259, 296.) Nonetheless, appellant maintains that "California can no longer use juvenile criminal activity as an aggravating factor" in the wake of *Roper v. Simmons, supra,* 543 U.S. 551. (AOB 256.) The United States Supreme Court in *Roper* held that the Eighth Amendment's prohibition against cruel and unusual punishment precludes execution of an individual who committed capital crimes while under the age of 18 years. (*Roper v.*

Simmons, supra, 543 U.S. at p. 574.) There is an obvious difference between executing a juvenile and considering juvenile misconduct in determining whether an adult deserves the death penalty. As this Court in *People v. Bivert* (2011) 52 Cal.4th 96 explained, the holding in *Roper* "says nothing about the propriety of permitting a capital sentencing jury, trying an adult defendant, to consider the defendant's prior violent conduct committed as a juvenile." (*Id.* at p. 122, citing *People v. Lee* (2011) 51 Cal.4th 620, 648-649; *People v. Taylor* (2010) 48 Cal.4th 574, 653-654; *People v. Bramit* (2009) 46 Cal.4th 1221, 1239.)

Appellant received the death penalty because, as an adult, he murdered three teenagers. Evidence appellant brandished a firearm when he was 17 years old was introduced in aggravation to "enable the jury to make an individualized assessment of the character and history of ... defendant to determine the nature of the punishment to be imposed." (*People v. Grant* (1988) 45 Cal.3d 829, 851.) Appellant's challenge "is to the admissibility of evidence, not the imposition of punishment." (See *People v. Bramit, supra,* 46 Cal.4th at p. 1239.) The jury properly considered evidence of appellant's prior brandishing offense in determining the appropriate punishment for his current murders.

XIV. THE TRIAL COURT PROPERLY ADMITTED VICTIM-IMPACT TESTIMONY

Appellant generally contends that the trial court's admission of victim-impact testimony violated his federal Constitutional rights to due process and a reliable penalty determination. (AOB 258-261.) Controlling authority demonstrates that appellant's claim is meritless.

Victim-impact evidence is admissible during the penalty phase of a capital trial because Eighth Amendment principles do not prevent the sentencing authority from considering evidence of "the specific harm caused by the crime in question." (*Payne v. Tennessee* (1991) 501 U.S.

808, 825, 829 [111 S.Ct. 2597, 115 L.Ed.2d 720].) Under state law, Penal Code section 190.3, subdivision (a), permits the prosecution to establish aggravation by the circumstances of the crime. The word "circumstances" does not mean merely immediate temporal and spatial circumstances, but also extends to those which surround the crime "materially, morally, or logically." (*People v. Hamilton* (2009) 45 Cal.4th 863, 926.) Unless the evidence "invites a purely irrational response," factor (a) allows evidence and argument on the specific harm caused by the defendant, including the psychological and emotional impact on the victim's loved ones and the larger community. (*People v. Scott* (2011) 52 Cal.4th 452, 494; *People v. Brady* (2010) 50 Cal.4th 547, 574; *People v. Burney* (2009) 47 Cal.4th 203, 258; *People v. Bramit, supra,* 46 Cal.4th at p. 1240; see also *People v. Hamilton, supra,* 45 Cal.4th at p. 927 [observing that "[t]he federal Constitution bars victim impact evidence only if it is 'so unduly prejudicial' as to render the trial 'fundamentally unfair'"].) Indeed, the prosecution has a "legitimate interest" in rebutting defense mitigating evidence "by introducing aggravating evidence of the harm caused by the crime" to remind the jury that "'just as the murderer should be considered as an individual, so too the victim is an individual whose death represents a unique loss to society and in particular to his family.'" (*People v. Prince, supra,* 40 Cal.4th at p. 1286, quoting *Payne v. Tennessee, supra,* 501 U.S. at p. 825.)

With no specificity or citation to the record, appellant contends the testimony of a non-family member who was not present when appellant committed his crimes extends beyond the parameters of victim-impact testimony permitted by the United States Supreme Court. (AOB 258.) However, this Court has held that victim impact evidence is commonly provided by several family members, colleagues, or friends with no requirement that these individuals be present at the murder[s]. (*People v.*

Scott, supra, 52 Cal.4th at p. 495; *People v. Ervine* (2009) 47 Cal.4th 745, 792; *People v. Huggins* (2006) 38 Cal.4th 175, 222.) For example, in *People v. Brady, supra,* 50 Cal.4th 547, four of the slain officer's sisters, his fiancée, two fellow officers, and his police chief testified. (*Id.* at p. 573.) Appellant provides no basis for this Court to reconsider prior decisions rejecting his contention.

Appellant further asserts that victim-impact evidence should be limited to facts or circumstances properly adduced from the evidence or known to appellant when he committed his capital offenses. (AOB 259-260.) This Court has rejected similar claims that the law disallows "'evidence of the victim's characteristics that were unknown to his killer at the time of the crime.'" (*People v. Prince, supra,* 40 Cal.4th at p. 1287, fn. 28.) Victim-impact testimony is not limited to circumstances known or reasonably foreseeable to the defendant. (*People v. Blacksher* (2011) 52 Cal.4th 769, 841.)

XV. CALIFORNIA'S DEATH PENALTY DOES NOT VIOLATE THE EIGHTH AMENDMENT

Appellant contends the death penalty constitutes cruel and unusual punishment under the Eighth Amendment to the United States Constitution. (AOB 262.) This Court has specifically held to the contrary (*People v. Fairbank* (1997) 16 Cal.4th 1223, 1255, citing *Gregg v. Georgia, supra,* 428 U.S. at p. 169 (lead opn. of Stewart, Powell, and Stevens, JJ.); *Tuilaepa v. California* (1994) 512 U.S. 967, 980 [114 S.Ct. 2630, 2639, 129 L.Ed.2d 750][affirming death sentences in cases involving California law]), and appellant's general contention provides no basis for reconsideration.

XVI. AS THERE ARE NO ERRORS TO CUMULATE, APPELLANT'S CUMULATIVE-ERROR CLAIM FAILS

Appellant contends that the cumulative effect of errors at trial resulted in prejudice warranting a reversal of the death judgment. (AOB 263-268.) No error occurred, and even in the few instances where error may have occurred, appellant has failed to show prejudice. (See *People v. Alfaro* (2007) 41 Cal.4th 1277, 1316; *People v. Abilez* (2007) 41 Cal.4th 472, 523.) Appellant's claim should be rejected.

CONCLUSION

For the foregoing reasons, respondent respectfully requests that the judgment of the trial court be affirmed in its entirety.

Dated: May 15, 2013

Respectfully submitted,

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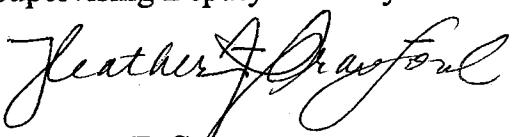

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CERTIFICATE OF COMPLIANCE

I certify that the attached **RESPONDENT'S BRIEF** uses a 13 point Times New Roman font and contains 29,288 words.

Dated: May 15, 2013

KAMALA D. HARRIS
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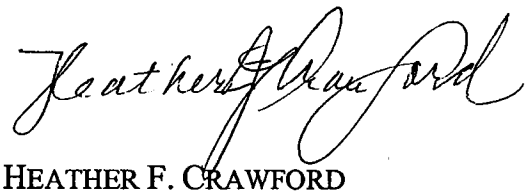

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DECLARATION OF SERVICE BY U.S. MAIL

Case Name: ***People v. Flores***
No.: **S116307**

I declare:

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

On **May 15, 2013**, I served the attached **RESPONDENT'S BRIEF** by placing a true copy thereof enclosed in a sealed envelope in the internal mail collection system at the Office of the Attorney General at 110 West A Street, Suite 1100, P.O. Box 85266, San Diego, CA 92186-5266, addressed as follows:

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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 **May 15, 2013**, at San Diego, California.

S. McBrearty
Declarant

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Signature

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