In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA, **Plaintiff and Respondent,** **v.** **CRAIGEN LEWIS ARMSTRONG,** **Defendant and Appellant.**	**CAPITAL CASE** Case No. S130659

Los Angeles County Superior Court Case No. YA049592
The Honorable William R. Pounders, Judge

RESPONDENT'S BRIEF

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STATEMENT OF THE CASE

In a four-count felony complaint, the Los Angeles County District Attorney alleged in counts 1 and 2 that appellant committed murder, in violation of Penal Code[1] section 187, subdivision (a), and in counts 3 and 4 that appellant committed attempted willful, deliberate, and premeditated murders, in violation of sections 664 and 187, subdivision (a). The complaint alleged gang enhancements under section 186.22, subdivision (b)(1), and firearm enhancements under section 12022.53, subdivisions (b), (c), and (e)(1), as to all four counts. It further alleged under sections 1170.12, subdivisions (a) through (d), and 667, subdivisions (b) through (i), that appellant suffered a prior conviction of a serious or violent felony or juvenile adjudication, and that he was released from custody on bail or on his own recognizance at the time of the commission of the offenses within the meaning of section 12022.1, as to counts 2, 3, and 4. Finally, it was alleged as to counts 1 and 2 as follows: (a) within the meaning of section 190.2, subdivision (a)(22), appellant committed the murders while he was an active participant in a criminal street gang, and the murders were carried out to further the activities of the criminal street gang; (b) within the meaning of section 190.2, subdivision (a)(21), the murders were intentional and perpetrated by means of discharging a firearm from a motor vehicle, intentionally at another person and persons outside the vehicle with the intent to inflict death; (c) within the meaning of sections 12022.53, subdivisions (b) through (e)(1), and 12022.5, subdivision (a)(1), appellant personally and intentionally discharged a firearm; and (d) the murders are a special circumstance within the meaning of section 190.2, subdivision (a)(3). (1CT 5-10.) Following a preliminary hearing, appellant was held to

[1] Unless indicated otherwise, all further statutory references are to the Penal Code.

answer, and he pled not guilty and denied all of the special allegations. (1CT 52-64, 69-80, 88.)

On the People's motion, the complaint was amended by interlineation to add: an additional murder count, in violation of section 187, subdivision (a), as count 5; torture, in violation of section 206, as count 6; second degree robbery, in violation of section 211, as count 7; first degree burglary, in violation of section 459, as count 8; assault with a semiautomatic firearm, in violation of section 245, subdivision (b), as count 9; and false imprisonment, in violation of section 236, as counts 10 and 11. Firearm enhancements under section 12022.53, subdivisions (b) and (e)(1), as well as prior conviction allegations under sections 1170.12 and 667, subdivisions (b) through (i), were alleged as to all amended counts. (1CT 90-100.) Following a preliminary hearing, appellant was held to answer on the amended counts and special allegations, and he pled not guilty and denied all of the special allegations. (1CT 103-105, 110-115, 120, 223-225; 2CT 294-295.)

The same counts and special allegations were charged by information against appellant. (2CT 296-304.) Appellant pled not guilty and denied all of the special allegations. (2CT 321-322.)

Appellant filed a motion to sever requesting that the charges against him be tried in three separate trials. Specifically, appellant requested a trial for count 5, a trial for counts 1 through 4, and a trial for counts 6 through 11. (2CT 340-349.) Appellant also filed a motion to dismiss. (2CT 350-368.) The People opposed both motions (2CT 389-399), and the court denied them (2CT 403). The People subsequently notified appellant that they would seek the death penalty against him. (2CT 405, 412.)

Appellant filed a motion to bifurcate the gang allegations against him. (3CT 814-823.) He also filed a motion to suppress the photographic lineup as suggestive and to prevent in-court identification by witnesses exposed to

the photographic lineup. (3CT 824-835.) The People opposed the motions (4CT 892-902), and the court denied them (4CT 956, 967).

The information was subsequently amended. Special circumstance allegations under section 190.2, subdivisions (a)(3) and (a)(22), previously alleged only as to counts 1 and 2, were alleged as to count 5. A special allegation under section 12022.1, previously alleged only as to counts 2 through 4, was alleged as to counts 1 through 11. (4CT 903-911.) Appellant pled not guilty and denied all of the special allegations. The court also granted appellant's request to bifurcate the prior conviction allegations. (4CT 930.)

The information was amended a second time. The special circumstance allegation under section 190.2, subdivision (a)(22), was removed as to counts 1 and 2. The special allegation under section 12022.1 was removed as to counts 6 through 11. (4CT 996-1003.) Appellant pled not guilty and denied all of the special allegations. (4CT 1005.)

Following a jury trial, the jury announced on August 20, 2004, that it was deadlocked on all counts. (4CT 1015.) The court instructed the jury to continue its deliberations. (4CT 1019.)

On August 23, 2004, Juror No. 5 sent the court a note stating that Juror No. 12 said he realized he was a close friend of appellant's cousin and had been told that appellant was a "cold hearted killer, and an active criminal." (4CT 1020.) Juror No. 5 expressed concern that the information was influencing the deliberations. (4CT 1020.) On the same date, Juror No. 12 sent the court a note requesting an opportunity to speak with the court without the other jurors present. (4CT 1021.) Also on the same date, another juror submitted a note to the court stating that all of the jurors were experiencing difficulty deliberating with Juror No. 5. According to the note, Juror No. 5 refused to participate in deliberations, using her cell phone or reading a book instead. The note further explained that Juror No.

5 refused to explain how the evidence led to her conclusion, told the other jurors to convince her, had a lot of friends who were gangsters, and believed police officers were corrupt. (4CT 1022-1023.) Finally, the note stated that the jurors would remain unable to reach a verdict so long as Juror No. 5 continued her behavior. (4CT 1023.) The note was followed by a jury request form echoing the same concerns. (4CT 1024.)

The court discussed the jury issues with counsel, and an agreement was reached to question Juror Nos. 4, 5, 6, 11, and 12 individually. (4CT 1025.) Following the individual juror interviews, the court decided to excuse Juror Nos. 5 and 12. Appellant objected to the excusal of Juror No. 5, and the court overruled the objection. Two alternate jurors were randomly selected to replace the excused jurors, and deliberations resumed. (4CT 1026.)

At the conclusion of deliberations on August 27, 2004, the jury returned a verdict of guilty as charged, found the special allegations to be true, and found the murders to be in the first degree. (4CT 1049-1067; 13CT 3560-3568.) On September 16, 2004, appellant agreed to waive a trial on his prior convictions and stipulated that he was out on bail at the time the offenses he was convicted of occurred. (13CT 3571-3572.)

Also on September 16, 2004, the penalty phase commenced. (13CT 3572.) Following a trial and deliberations, the jury fixed appellant's penalty at death as to counts 1, 2, and 5 on September 24, 2004. (13CT 3588-3590; 3631-3632.)

Appellant filed a motion for new trial or to modify the verdict of death. (13CT 3644-3677.) On January 5, 2005, the court denied the motion and sentenced appellant as follows: (a) death as to counts 1, 2, and 5; (b) the midterm of three years as to count 7 to run consecutively to one-third the midterm of two years (eight months) as to count 11; (c) a term of life as to count 6 and consecutive terms of life plus 20 years as to counts 3

and 4; and (d) stayed sentences as to counts 8 through 10. (13CT 3682-3687, 3689-3695, 3704-3726.)

This appeal followed.

STATEMENT OF FACTS

I. THE GUILT PHASE

A. The Prosecution Evidence

Brenda Florence was the mother of Christopher, Brian, Torry, and Michael Florence. None of her four sons were gang members. They were unfamiliar with the Darby Dixon Area known as the Bottoms, and none of their friends or acquaintances lived there. (15RT 2307, 2309.)

1. Appellant Murders Christopher Florence

Jacqueline Martinez[2] met Christopher Florence at a party. The two spoke, and Christopher wished to see her again. Martinez asked him if he was a gang member and was satisfied by his answer that he was not. They exchanged phone numbers, and on September 27, 2001, at 8:15 p.m., Martinez called Christopher and gave him directions to her home so the two could meet later the same evening. (12RT 1842, 1845, 1847, 1851.)

Martinez waited outside her home for Christopher. Although Martinez expected him to have arrived by 9 p.m., she was still waiting for him. (12RT 1851.) Suddenly, Martinez heard what she believed to be seven gunshots before seeing Christopher's Honda Civic turn right onto Woodworth and speed and swerve towards Century. (12RT 1852, 1856-1857.) Martinez thought the sound of gunshots came from the direction of

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[2] Martinez was able to identify appellant in court based on a previous encounter she had with him. According to Martinez, a couple of days after Christopher's murder, appellant rode past her on his bicycle and gave her a piece of paper on which he had written "Juvenile" and his telephone number. Martinez discarded the paper. (12RT 1860-1861.)

10th Avenue. (12RT 1852.) She ran back inside her home, waited a couple of minutes, and called Christopher's home to see if he was there because she figured he would have driven away because of the gunshots. (12RT 1853, 1856.) One of Christopher's brothers answered the telephone and told Martinez that Christopher was not home yet. Martinez called again at 10 p.m., and spoke with Christopher's mother Brenda because he still was not home. Martinez then went to sleep. (12RT 1858-1859.)

Vincent Loftin and his wife were driving on Crenshaw when their attention was drawn to the Honda Civic driving on the wrong side of the road. (13RT 2048-2049.) Loftin saw the car crash into a divider and then a tree. Loftin got out of his own car and ran over to the Honda Civic, in which he saw bullet holes. (13RT 2048, 2052, 2055.) Its driver Christopher was wounded, bloody, and leaning over the steering wheel. Loftin told his wife not to touch anything and tried to speak to Christopher, but Christopher did not respond. (13RT 2055.)

Officer Cesar Jurado of the Inglewood Police Department responded to the area of Bardton and 10th Avenue at 9:20 p.m., after receiving a call regarding shots fired. At the scene, Officer Jurado recovered eight 9 mm bullet casings. (12RT 1876-1877.) Just south of where he recovered the casings, Officer Jurado saw what appeared to be broken glass from a car window. (12RT 1894.)

Officer Jose L. Gonzalez and Detective Alcala arrived at the same location. (12RT 1885, 1900-1901.) Along with Officer Jurado, they saw a parked Cadillac. (12RT 1885, 1902.) Inside the Cadillac were Ikenna Ogauha and Darryl Johnson, whom the officers knew to be "Ike" and "Two Face" of the gang Crenshaw Mafia Gangsters. Ogauha was seated in the front passenger seat, which was reclined as far back as it could be. Johnson was laying down in the back seat. (1RT 1885, 1902-1903.) The officers

knew the car to belong to Ogauha. They felt it and determined it was cold to the touch. (12RT 1887, 1904.)

The officers ordered Ogauha and Johnson out of the Cadillac, patted them down for weapons, and placed them in the back seat of a patrol car. (12RT 1887.) Using keys that Ogauha told the officers were in his pocket, the officers were able to search the car. Inside they located many bags containing a substance that resembled marijuana. The officers also smelled the odor of marijuana. They placed Ogauha and Johnson under arrest and performed gunshot residue ("GSR") tests on them. (12RT 1890.) From the tests, several particles consistent with gunshot residue were identified on Ogauha, and some similar particles were also found on Johnson. (13RT 1080-1082.)

Sergeant Martin Sissac of the Inglewood Police Department was on routine patrol with Officer Kevin Lane when he received a call regarding shots fired in the area of Crenshaw Boulevard and 104th Street. (10RT 1582, 1589.) They responded to the scene of the shooting in the Darby Dixon area known as the Bottoms. (10RT 1585, 1590.) Sergeant Sissac learned that bullet casings had been discovered at the intersection of 10th Ave and Bartdon. (10RT 1590.)

He continued on with Officer Lane to Crenshaw Boulevard and 104th Street where a traffic collision had also been reported. They were the first officers on the scene and found Christopher shot inside his Honda Civic, which was straddling the island of Crenshaw Boulevard. (10RT 1591.) Sergeant Sissac found no evidence of gunfire around the Honda Civic other than the gunshot holes in the driver's side and trunk of the car. (10RT 1592-1593.)

Christopher died as a result of a gunshot wound on the left side of his body. Because there was no exit wound, doctors were able to recover a bullet inside him. (10RT 1617, 1621.)

The following day on September 28, 2001, Sergeant Sissac realized the he knew Christopher's brother Michael, who had served as a volunteer Explorer with the Inglewood Police Department. (10RT 1592, 1594.)

Also on September 28, 2001, Brian was sleeping at home in the City of Inglewood. (9RT 1447.) At about 6:30 a.m., Torry entered his room and hit the wall. Brian asked Torry what happened, and Torry informed him that Christopher was dead. Brian got out of bed and saw two detectives next to his mother Brenda, who was crying on the floor. He thought he must be having a nightmare and got back in bed. But he quickly realized it was not a nightmare and went to his mother to comfort her. (9RT 1448.)

Torry called Michael and told him to come home. (9RT 1449.) Michael arrived, and the detectives informed him of Christopher's death. (9RT 1450.) He and Brian then went to identify Christopher's body. (9RT 1450.)

Later the same day, Michael called Sergeant Sissac and told him that Christopher had been shot. (10RT 1595.) Sergeant Sissac went to the Florence home to offer his condolences. He spoke with Michael about what Michael had been doing to investigate Christopher's murder. Sergeant Sissac promised Michael he would pass along any information he received, but discouraged Michael from investigating further. Michael gave Sergeant Sissac an envelope that said, "Crenshaw, right one stop Woodworth, 104th right," and "Imperial." (10RT 1596-1597, 1599.)

The following day at 8 a.m., Torry, Michael, and their mother Brenda drove to the area where Christopher was murdered. (9RT 1505.) Michael saw a gathering of gang members and stuck his hand out the car window in the shape of a gun and pointed the simulated gun at them. (9RT 1507-1508.)

Michael also remained in contact with Sergeant Sissac. He provided Sergeant Sissac with the telephone number for Martinez, whom he had spoken with, and said he was going to speak with a woman named Nicole about Christopher's murder. (10RT 1598, 1600, 1606.) Sergeant Sissac contacted Martinez and informed her that Christopher was dead. (12RT 1859.)

Detective Anne Bravo of the Inglewood Police Department searched and photographed Christopher's Honda Civic. (13RT 1972-1973.) The car had damage from gunshots, and Detective Bravo recovered three bullets from inside it. (13RT 1975-1977.) Detective Bravo also processed fingerprints on the car, but retrieved no matching hits. (13RT 1977-1978.) She had no recollection of shattered glass or bullet damage to the car's windows. (13RT 1981.)

On September 28, 2001, Tyiska Webster went to the Bottoms to see appellant. A Crenshaw Mafia Gangster named Shaun Jones, whom Webster knew to use the moniker "KB," told her about the shooting of Christopher, and when Webster saw appellant later, she asked him about it. (11RT 1684, 1696.) Appellant admitted that he shot at the Honda Civic and claimed that he did so because it was traveling the wrong way on a one-way street, which was a known maneuver of members of the rival Crips before they committed a drive by shooting. (11RT 1685; 12RT 1759, 1785.) He also pointed out broken glass in the street that he said was from the shooting. (11RT 1685-1686.)

2. Appellant Attacks Jason Martin Before Murdering Michael And Torry Florence And Attempting To Murder Brian Florence and Floyd Watson

Webster saw appellant again the next evening on September 29, 2001. They went to a store together with Jones and her brother to get something to drink, and appellant received a call on his cellphone. From the call,

appellant found out that his "homegirls" were being "messed with" at a bar. Appellant, Jones, and Webster drove in Webster's car to the bar and when they arrived, appellant and Jones spoke to their homegirls, who were standing by a red Ford Contour. (11RT 1688, 1691.) Appellant and Jones then got back in Webster's car, and Webster drove to the 7-Eleven on Prairie and Arbor Vitae. Once they got there, Jones and appellant exited of Webster's car. Jones asked appellant if he was "heated," which Webster understood to mean armed with a gun, and appellant replied, "What do you think." (11RT 1692.)

Jason Martin had also gone to the same 7-Eleven to meet a friend and purchase a snack after work. He arrived there at 11:50 p.m., and saw appellant by the red Ford Contour. (8RT 1275-1276, 1280.) Martin believed he saw two or three females in the car, including the driver. (8RT 1280, 1301.) Appellant approached Martin and inquired, "Where are you from," which Martin understood to be an attempt to determine if he was affiliated with a gang. (8RT 1276.) Martin heard someone refer to appellant as "Juvenile," and responded that he was not in a gang. Another car pulled into the parking lot, and a man exited and told appellant that Martin lived in the neighborhood. (8RT 1276, 1309.) Appellant, nevertheless, punched Martin in the face. (8RT 1277.) Martin wished to retaliate, but chose not to do so because Martin saw appellant putting his hands in his pocket or near his waistband and feared that his red hooded sweatshirt concealed a firearm. (8RT 1278-1279, 1297.) Webster and her brother witnessed the altercation from her car. (11RT 1692.)

After appellant punched Martin, he got into the back seat of the Ford Contour on its passenger side, and Jones got back in Webster's car. Both cars fled from the parking lot. (11RT 1692-1693.) Jones told Webster to drive back to the Bottoms. On the way there, she and Jones realized that

the Ford Contour had turned onto Century, and they could not find the car. (11RT 1693.)

Martin sped away from the 7-Eleven in his car. (8RT 1279, 1308.) Detective Scott Collins saw Martin's car driving at a high rate of speed with its lights off, followed it, and initiated a traffic stop. (8RT 1308; 14RT 2178-2179.) Detective Collins inquired why Martin was speeding, and Martin replied that an African-American man in a red sweatshirt "hit him up" and punched him even though he told the man he did not "gang bang." (8RT 1308; 14RT 2180-2181.) Martin added that the man was with some women and that they had all been in a red Ford Taurus. (8RT 1308; 14RT 2181.)

On the same evening, many people including Floyd Watson, a friend of the Florence family, came to the Florence home to mourn Christopher's death. (9RT 1363-1364, 1451.) Watson believed Michael was making telephone calls in an effort to acquire information about Christopher's murder. (9RT 1440.) Around midnight, Michael received a call from someone who identified herself as Nicole and claimed she had information about the murder. (9RT 1452.) Michael wanted to meet Nicole to hear the information she had, and Torry was going to go with him. (9RT 1452.) Brian asked if he and Watson could join them. (9RT 1453.) Brian invited Watson to go with them to get something to eat at Burger King, and Watson was aware they would be stopping by a girl's home after eating. (9RT 1365-1366, 1453.)

The group departed in Michael's black Ford Mustang from the Florence home for the Burger King on Century Boulevard. (9RT 1366-1367, 1453.) Brian was seated behind Michael, who was driving, and Watson was seated behind Torry, who was in the front passenger seat. (9RT 1455-1456.) The group stopped at a red light at the intersection of Century and Doty in front of the Hollywood Park casino. While stopped,

Watson heard someone yelling out the window of the car stopped just behind the Ford Mustang on its left side. (9RT 1367, 1369, 1371, 1455.) He turned back towards the origin of the yelling and saw appellant, whom he described as a light-skinned African American male with curly hair and a light mustache, yelling out of a burgundy Ford Contour. (9RT 1367-1368, 1374.) Appellant was seated in the rear passenger seat behind a female in the front passenger seat. Watson also saw a female driving the Ford Contour. (9RT 1373-1374.) He was unable to make out what appellant was yelling, but thought appellant was frustrated and aggressive. (9RT 1372.) Watson said, "The guy looks like he has an attitude." (9RT 1459.) Brian asked Torry if he knew the female driver and front passenger, and Torry answered that it was Randi and her sisters. (9RT 1402, 1457.) Brian also said to Michael, "Watch out, watch out for that guy in the car," the "Dude, he's up to no good." (9RT 1458.)

Watson told Michael that the man in the car next to them was yelling, and Michael began to roll down the driver's side window. In the meantime, appellant pulled out a gun. Watson yelled out that appellant had a gun, and appellant started shooting at the Ford Mustang before Michael could say anything. (9RT 1375, 1401, 1460.) Watson yelled for everyone to duck. Brian laid across the back seat, Torry leaned forward in the front passenger seat, and Michael tried to drive away from the Ford Contour. (9RT 1376-1377, 1461.) But after hearing about five gunshots, Watson and Brian saw that Michael had been shot in the neck and Torry in the back of the head. (9RT 1377-1378, 1467.) Michael was choking on his own blood. (9RT 1487.) The Ford Contour sped away from the scene, and Watson and Brian exited the Ford Mustang. (9RT 1377-1378, 1465, 1467.)

Webster, her brother, and Jones continued to look for the Ford Contour. Webster lowered the volume of her car's radio and heard a gunshot. She drove back to 10th Avenue and found appellant, who got in

her car. (11RT 1694.) Appellant told her and the others that he had "banged on some Crips" or something similar. (11RT 1695.)

Back at the scene of the shooting, Brian steered the Ford Mustang out of the way of traffic and then jumped into a yellow truck that had pulled up to the scene. (9RT 1380-1381, 1467-1468.) He asked Watson to remain at the scene while he got help. (9RT 1468.)

Officer Gary Siddall of the Inglewood Police Department was on patrol when he received a call about shots fired and two victims lying in the street. He responded to the scene of the shooting with his partner, Officer Don Seversin, at 12:05 a.m., on September 30. Officer Siddall saw the black Ford Mustang, and existed his patrol car. He walked over to the Ford Mustang and saw Michael slumped over in the driver's seat. There was blood on Michael's face and seat, and Michael was neither speaking nor moving. (9RT 1352-1353, 1359.) Officer Siddall next saw Torry lying face down on the street on the passenger side of the Ford Mustang. He asked Torry if Torry knew who the shooter was. Although Torry had been shot in the head, he was able to respond, "CMG's," which Officer Siddall believed stood for the Crenshaw Mafia Gangsters. (9RT 1353-1354.) Officer Siddall asked Torry if he recognized anyone involved in the shooting, and Torry identified a female named Randi. (9RT 1354-1355.) The paramedics then arrived, and Officers Siddall and Seversin established a crime scene. (9RT 1355, 1358.) Michael died as a result of his wounds, and a bullet was recovered from his head. (10RT 1625, 1627-1628.) Torry also succumbed to the gunshot wound to his head. (10RT 1632-1633.)

Detective Craig Lawler of the Inglewood Police Department examined the Ford Mustang. He found no evidence that any gunshots had been fired from the inside of the car. (14RT 2246.)

Meanwhile, Mark Skelly was the driver of the yellow truck who had picked up Brian after seeing the Ford Mustang driving in a slow and erratic

manner in front of him. Brian was panicking. He fearfully clutched the truck's steering wheel and forced his leg to the accelerator. Brian said to Skelly, "Go, go." (10RT 1566-1567.) He told Skelly, "They're gonna shoot me . . . ," and ducked down in the truck. (10RT 1568.) Skelly radioed for help while running traffic lights. (10RT 1568.) He stopped at a gas station, and Brian believed that the car behind them was following them. (10RT 1570.) But it was actually Watson, who was following Brian, in a car he had jumped into to flee from the scene. (9RT, 1471.) Skelly had no real plan as to where to go and drove back to where he had initially picked up Brian. (10RT 1571.)

Ron Paul, a supervisor of the forensic services section of the Inglewood Police Department, responded to the scene of the shooting. He collected five expended cartridge casings that he found on the roadway of Century, as well as an additional expended cartridge on the sidewalk of Century. (14RT 2128-2129.)

Watson returned to the scene of the shooting too, and he and Brian reported the incident to the police officers at the scene before being taken separately to the Inglewood Police station. (9RT 1380-1382, 1415-1416, 1475.) Brian told Detective Collins, who had left Martin and responded to the scene of the shooting, that a light-skinned African-American male in a red sweatshirt had shot at the Ford Mustang from a red Ford, he initially believed to be a Taurus, in which females were also seated. (14RT 2182-2183.) Based on the information, Detective Collins thought of the information Martin gave him and believed there might be a connection between Martin's assault and the shooting. (14RT 2183.) On the way to the station, he took Brian to the 7-Eleven on Prairie and Arbor Vitae. Brain remained in the patrol car while Detective Collins went inside and reviewed the store's surveillance video. He then took Brian to the station. (9RT 1475-1476; 14RT 2183-2184.)

Appellant returned to the scene of the shooting as well. He had directed Webster how to get there, and when they arrived they saw the black Ford Mustang surrounded by police tape and police. Appellant looked at the Ford Mustang and said, "I did that." (11RT 1695.) He explained that he had "rolled up" on the car and asked its occupants where they were from before letting "them have it." (11RT 1695.) Webster then drove away from the scene and dropped appellant and Jones off. (11RT 1696.)

Lieutenant Percy Roberts and Officer Jeff Steinhoff of the Inglewood Police Department responded to the call regarding the shooting. They were instructed by Detective Lawler to go to the 7-Eleven to review the store's surveillance video. (8RT 1340-1342; 14RT 2203-2205.) They reviewed the video, and Lieutenant Roberts was able to identify appellant and reported such to Officer Steinhoff. Lieutenant Roberts was able to make the identification because he had numerous prior contacts with appellant, who identified himself as Juvenile from the Crenshaw Mafia Gangsters. (8RT 1343-1344, 1346; 14RT 2206.)

Upon returning to the police station, Officer Steinhoff used his computer to search all the members of the Crenshaw Mafia Gangsters. Nine members' photographs were displayed on his computer screen, and the computer randomly assigned appellant's photograph to position number three. (14RT 2208-2209.) Officer Steinhoff additionally used his computer to search for members of the Crenshaw Mafia Gangsters with the name of Randi. The computer returned the name and photograph of Randi Reddic, and Officer Steinhoff prepared a photographic six-pack with Reddic's photograph in position number four. (14RT 2216-2217.)

At the police station, the police interviewed Brian in a room from where he could see Watson arrive at the station, but he could not speak with Watson. (9RT 1476.) Brian described appellant as a light-skinned African

American with curly hair and a goatee. He noted that appellant was wearing a red hooded sweatshirt with a skeleton on it and identified its manufacturer as Johnny Blaze.[3] (9RT 1466; 14RT 2134-2135.) He further described the female passenger in the front seat of the Ford Contour as an ugly, dark-skinned African American woman with a black scarf on her head and braided hair. He recalled that she was wearing big hoop earrings and a black sleeveless blouse. (9RT 1496, 1500.) Brian then reviewed photographic lineups on Officer Steinhoff's computer. (9RT 1477.) Brian selected appellant, who was in photograph number three, and identified him as the shooter. Officer Steinhoff asked Brian if he wanted to review more photographs, and Brian said that he did. In doing so, Brian stated that the individual in photograph number 23 also looked like the shooter. Brian asked Officer Steinhoff to scroll back to the first set of photographs, and when Brian reviewed appellant's photograph again, he confirmed that he was positive appellant fired the gun.[4] (9RT 1479-1480, 1482-1483; 14RT 2209-2210, 2212-2214.)

Watson similarly informed the police that appellant was wearing a red hooded sweatshirt at the time of the shooting. (9RT 1383-1384.) And at the station, he reviewed a photographic lineup on Officer Steinhoff's computer. Watson immediately identified appellant in photograph number three as the shooter. (9RT 1387; 14RT 2215.) He then stated that the individual in photograph number 23 also looked like the shooter. But Watson reviewed appellant's photograph again and identified him as the shooter.[5] (9RT 1388-1389; 14RT 2215.)

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[3] Webster confirmed that appellant owned a Johnny Blaze hooded sweatshirt. (11RT 1701.)

[4] Brian also identified appellant in court at trial. (9RT 1481.)

[5] At trial, Watson identified appellant as the shooter. (9RT 1386-1387.)

Officer Steinhoff also had the opportunity to review two videotapes from Hollywood Park Casino. In the videos, he saw a car matching the description of the one appellant was in stop short of the limit line, before the Ford Mustang passed it and stopped just ahead of it. The video also showed the traffic signal turn green, the car appellant was in drive away, and the Ford Mustang veer off from its lane. (14RT 2220-2222.)

On October 1, 2001, Detective Lawler showed Martin a six-pack photographic lineup. From the lineup, Martin identified the female in photograph number four as the female in the Ford Contour's front passenger seat. (8RT 1292-1293.) On the same date, he also identified appellant from a photograph on a police computer. (8RT 1294-1295; 14RT 2250.) Subsequently, just weeks before trial, Martin identified appellant from a six-pack photographic lineup. (8RT 1295-1296.)

On October 2, 2001, members of the Downey Police Department were conducting surveillance on appellant's and Derrin's residence. Sergeant Michael Webb of the Culver City Police Department saw a white Ford Escort with the license plate "3XLH001" leave the residence. There were two African-American occupants in the car, and Sergeant Webb put out a call on the radio requesting that other officers monitor it. (13RT 2124-2125.)

At 2:30 p.m., Detective Michael Parino of the Downey Police Department followed the Ford Escort after it exited an El Pollo Loco restaurant on Firestone Boulevard and passed by him.[6] Detective Parino believed a potential suspect in connection with the Florence brothers' murders was in the car and executed a traffic stop. (12RT 1907-1910.) Inside the car were appellant's brother Derrin and Jones. Derrin was the

[6] The Ford Escort was registered to appellant's stepfather, Earl Broady. (12RT 1917.)

driver. (12RT 1911.) Another officer informed Detective Parino that neither man was the subject. Detective Parino, nevertheless, asked Derrin if he could search the Ford Escort, and Derrin consented. (12RT 1912.) During the search, Detective Parino found a loaded firearm with one bullet in its chamber. (12RT 1913-1915, 1920.)

On the same date at 7:13 p.m., Detective Mark Anthony Galindo of the Downey Police Department stopped the Ford Contour, which was registered to Tonesha Washington and had the license plate "4CPH328." Inside the car were Washington and appellant. Appellant was wearing all red apparel, including a hooded sweatshirt. (12RT 1926-1930.) The Ford Contour had no gunshot damage. (14RT 2246.)

On October 3, 2001, the police executed a search warrant on appellant's and Derrin's residence in Downey. During the search, Officer Steinhoff recovered the red Johnny Blaze sweatshirt from appellant's closet. (14RT 2218-2219.)

On October 8, 2001, Detective Lawler went to the Florence home to show Brian printouts of the six-pack lineup and photographs of the Ford Contour because the six-pack could not be printed when Brian was at the police station. Watson happened to be at the home too. (14RT 2251-2252.) Detective Lawler showed Watson a photograph of the Ford Contour. Watson stated that the vehicle in the photograph looked like the one appellant was in during the shooting. (9RT 1374.) Watson also reviewed a six-pack photographic lineup and again identified appellant as the shooter. (9RT 1389-1390; 14RT 2259.) Detective Lawler separately showed Brian the six-pack lineup as well, and Brian also identified appellant. (9RT 1484; 14RT 2252.) And when Brian saw the car in the photograph Detective Lawler had, he stated, "that's the car." (9RT 1491; 14RT 2255, 2257.)

Criminalist Steven Dowell of the Los Angeles County Coroner's Office performed a GSR analysis on appellant's red hooded sweatshirt.

(13RT 1950-1951.) From the analysis, Dowell identified many highly specific particles whose likely source was primer material from a gun cartridge. (13RT 1954-1956.)

Senior Criminalist Dale Higashi of the Los Angeles County Sheriff's Department compared the casings recovered from both of the Florence brothers' shootings, the bullets recovered from Christopher's Honda Civic, a bullet recovered from Christopher's body, and a bullet recovered from Michael's head. (10RT 1621, 1628; 13RT 1984, 1986.) Higashi determined that all of the items had been fired from the same 9 mm pistol that was recovered from the Ford Escort. (13RT 1987, 1992-1993, 1995.) He further determined that Christopher's Honda Civic was struck at least six times by gunfire, including below the driver's side door handle, which was consistent with the fatal gunshot wound Christopher sustained. (13RT 1999-2000, 2012.) Higashi examined the Ford Mustang and identified damage consistent with the fatal gunshot wounds Michael and Torry sustained. His examination also caused him to conclude that the gunfire struck Michael in the head from the rear while Michael was looking in the opposite direction. (13RT 2022, 2030-2031, 2036.)

3. Appellant Orders The Torture Of Tyiska Webster

Detective Frank Bolan of the Los Angeles Police Department met Tyiska Webster on April 13, 2002, in connection with the murder of Shaneeka Foster. (13RT 2092.) Webster had identified Vonya Mason as the murderer, and Detective Bolan relocated Webster to the Beverly Garland Motel as a member of the witness protection program. (13RT 2095-2096.) He gave her his business card and began the process of finding her a more permanent address on Lankershim Boulevard. (13RT 2105.)

On May 1, 2002, Webster, who was seven months pregnant, was at the Beverly Garland Motel with her three-year-old daughter.[7] (11RT 1651, 1664.) At 6:15 p.m., she heard a knock at the door and asked who was there. Webster heard a female voice say, "housekeeping." (11RT 1652.) She opened the door and appellant's brother Derrin,[8] Jamie Evans,[9] Kevion Clark, and a woman named Ebony rushed into the room and pushed her on the bed. (11RT 1652.) Evans stated to the others, "Oh, look, she's pregnant." (11RT 1664.) Derrin held his knee in Webster's back and questioned her about the whereabouts of money she was supposed to send to appellant in jail, as well as whether she was in the witness protection program because she was snitching on appellant. Evans stripped the sheets off the bed and used them to tie Webster up, while her daughter was taken into the bathroom. Webster told Derrin she was not snitching, but he thought she was lying and hit her in the head with an unloaded 9 mm handgun. Derrin asked Webster if she was going to tell the truth and loaded the gun. (11RT 1657-1658.) The group placed a pillow case over Webster's head. Webster could feel them hitting her with the gun, as well as kicking and stomping her. (11RT 1659.)

Webster drifted in and out of consciousness during the beating. She heard Derrin's cell phone ring. Derrin answered it and said to the caller, "We found her" and "What do you want me to do to her" or "do with her."

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[7] Webster was cooperating with the police in a murder case against Mason with whom Webster had an intimate relationship. Despite being ordered not to communicate with Mason while she was in custody, Webster disobeyed the order. (11RT 1716.)

[8] Webster knew Derrin to be a Crenshaw Mafia Gangster with the moniker "Spider." (11RT 1710.)

[9] Webster was previously friends with Evans and had lived with her for a few weeks, but the two parted on bad terms in 2001, after she hit Webster and Webster called the police. (11RT 1720.) Webster's brother remained friends with Evans' brothers. (11RT 1721.)

(11RT 1659.) Derrin also told the caller that he did not find any money and asked if they should "oop" her. (11RT 1660.) Webster understood "oop" to mean to shoot or kill her. (11RT 1660.) Derrin placed the phone next to Webster's ear. The caller said to her "What's up, Blood" and asked why she had not put money on his "books." (11RT 1660.) Webster recognized the voice as belonging to appellant and told him that she would put money on his books if he told Derrin and the others to leave. Appellant then asked her to put Derrin back on the phone. Derrin took the phone from her and walked to the balcony. Webster overheard him say, "Should we shoot her" and the "gun was too loud." (11RT 1660.) Ebony then told Derrin that they should put three or four pillows over Webster's head to muffle the sound. (11RT 1660.) Clark recommended that they kill Webster because she had seen their faces and knew where Derrin and Evans lived. (11RT 1725; 12RT 1756.)

Derrin got off the phone and told the group, "We'll just beat her up some more." (11RT 1661.) Ebony ripped a telephone cord from the wall, and they whipped Webster with it. They also used straws from Webster's daughter's candy, lit them, and burned her at least 140 times on her body and face. (11RT 1661-1662.)

The group ransacked Webster's belongings and took her clothes, as well as items from her wallet, including her and her father's identification cards, 40 to 60 dollars, an envelope on which she had written the address where she was being relocated from the motel, a check cashing card, a nursing card, and a business card from Detective Bolan. (11RT 1662, 1664, 1666, 1696, 1699-1700.) They made Webster hold pillows to her head, and her daughter called out for her and attempted to run from the bathroom, but Evans pushed the child back. (11RT 1662-1663.) Ebony and Evans attempted to choke Webster with the phone cord, but it broke as Webster resisted. (11RT 1663, 1676.) The group told Webster not to tell

anyone about the incident and threatened that they knew where her grandmother lived.[10] They threw soap on the floor and demanded that she clean up the blood on it. Webster attempted to do so. (11RT 1666, 1670.) They then ordered her to change clothes and left, taking her blood-soaked clothes and sheets with them. (11RT 1664.) In total, the torture lasted about two hours. (11RT 1683.)

Webster waited five or ten minutes after the group left her and then went to the motel's front desk where she reported what had occurred. The motel staff called 911, and an ambulance arrived and transported Webster and her daughter to the hospital. (11RT 1683.)

Detective Bolan received a telephone call at 9:20 p.m. He was informed that Webster had been transported to the hospital, and he decided to go to the motel. (13RT 2097.) In Webster's room at the motel, he saw soap on the floor, a clump of hair, plastic straws, some of which were burnt, and a piece of telephone wire cut on both ends. There was blood on the bed and its sheets, as well as the pillowcases. (13RT 2098-2099.) Some of the sheets and pillowcases were missing. (13RT 2099.) Detective Bolan requested that the motel room and its contents be fingerprinted. (13RT 2100.)

Detective Cooper and Officer Steinhoff conducted a tape-recorded interview of Webster. (2CT 513-514; 14RT 2232.) Webster stated that she dated appellant, who was responsible for the murders of the Florence brothers. She identified Derrin as the man leading her torture and believed he did so because she was a potential witness against appellant. (2CT 516-517, 525.) Her belief was based on Derrin's interrogating her during the torture about whether she snitched on appellant, speaking with appellant on

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[10] Derrin had taken Webster to her grandmother's home in the past. (11RT 1705.)

a cell phone during the torture, and saying over the phone, "We found her . . . what do you want us to do with her." (2CT 519, 537-538.) Webster further reported that four members of the Crenshaw Mafia Gangsters, two men and two women, participated in the torture after knocking on her motel door, pushing her into the room, tying her to the bed, forcing her daughter into the bathroom, beating her, and stealing some of her possessions, including the contents of her wallet. (2CT 521, 523, 534.) She was able to identify Evans and Ebony. (2CT 532-533, 539.)

On May 2, 2002, at 3:15 p.m., Detective Galindo notified Officer Mark Haxton of the Downey Police Department that he required assistance stopping a gray Jeep Cherokee with the license plate "4SOY391." Officer Haxton assisted Detective Galindo and stopped the vehicle. Inside it was Derrin. Officer Haxton arrested Derrin, transported him to the police station, and had the vehicle impounded. (12RT 1922-1924.)

Later that day, Detective Barry Telis of the Los Angeles Police Department was sent by Detective Sandefur to Derrin's and appellant's home in Downey to execute a search warrant. (13RT 1944-1945.) Detective Telis searched Derrin's room and found a stocking cap with two eye holes cut in it. In the cap, he recovered items taken from Webster while she was tortured, including her identification and cash cards, a business card for Detective Bolan, and a post-it note with the name Guadalupe Ortega on it. (13RT 1946-1948.)

On the same date at 8 p.m., forensic fingerprint specialist Jimmy Wong of the Los Angeles Police Department lifted 16 fingerprints from the Jeep Cherokee. Some of the fingerprints matched those of Clark. (13RT 2059-2060, 2062-2063.) At 8:55 p.m., Sergeant Raul Lopez of the Los Angeles Police Department searched the impounded Jeep Cherokee with his partner Officer Rafael Lopez. Inside they found two cellphones, the vehicle registration, and a letter. (13RT 1937-1938.)

On May 16, 2002, Detective Lawler executed a search warrant on appellant's jail cell, which was a one-man occupied cell. (14RT 2262.) Inside the cell, Detective Lawler found a receipt from the jail's canteen with the address Detective Bolan was going to relocate Webster to. (14RT 2263.)

4. The Gang Evidence

Detective Kerry Tripp of the Inglewood Police Department's gang intelligence unit was familiar with the Crenshaw Mafia Gangsters. The gang claimed Inglewood as its territory and had about 400 members. (14RT 2136, 2143-2144.) Members typically wore the color red and associated with each other in the Darby Dixon area, particularly in the area south of Bardton on 10th Avenue. (14RT 2144-2146.) If a car drove the wrong way on a one-way street in this territory, Crenshaw Mafia Gangsters would assume that either police or rival gang members were in the car. (14RT 2168.) The gang's primary activities included murder, robbery, rape, gun sale and transportation, drug sale and transportation, assault, and intimidation of witnesses. (14RT 2145.)

Detective Tripp was familiar with appellant and knew him to be a member of the Crenshaw Mafia Gangsters with the moniker "Juvenile." (14RT 2149.) Detective Tripp also knew his brother Derrin to be a member with the moniker "Spider." (14RT 2150.) Jones, Johnson, and Ogauha were members as well. Jones' monikers were "Little Monster" and "Little KB." Johnson's moniker was "Two Face." Ogauha's monikers were "X" or "Ike." (14RT 2151-2152.) Detective Tripp knew appellant to associate with all of them. (14RT 2152.) He also knew Randi Reddic to associate with the Crenshaw Mafia Gangsters. (14RT 2164.)

Detective Tripp was acquainted with Brian and Michael and was aware that Michael had volunteered as an Explorer with the police department. (14RT 2164.) He had no evidence that any of the Florence

brothers were gang members. (14RT 2166.) But Watson had some association with the Queen Street Bloods. (14RT 2169.)

B. The Defense Evidence

Appellant testified in his own behalf. (15RT 2367.)

Appellant admitted he was a member of the Crenshaw Mafia Gangsters. He joined the gang in 1994, and went by the moniker Juvenile. (15RT 2369-2370.)

In September 2001, appellant was supposed to be living with his mother in Downey. He, instead, was living in Inglewood with Victoria Rollen, a close friend. (15RT 2368-2369.)

On September 27, 2001, appellant spent the evening at his mother's home with his son and had nothing to do with Christopher's murder. (15RT 2371, 2421, 2432.) The next day, he had gone to the Bottoms and learned about Christopher's murder, as well as Ogauha's and Johnson's arrest. (15RT 2375-2376.) Appellant never had a conversation with Webster, whom he claimed was only a friend, about the murder and never showed her any shattered glass near the murder scene or discussed rival gang members driving the wrong way on a one-way street. (15RT 2376-2377.)

On September 28 and 29, 2001, appellant was in the Bottoms and armed with the 9 mm handgun. (15RT 2378, 2380.) He had retrieved the unloaded gun from a slot by mailboxes on 10th Avenue, where he kept it, and loaded it. (15RT 2381-2382.) On both days, appellant saw a gray SUV driving around 10th Avenue. Inside he saw two or three people, who looked at him and his gang member friends strangely. One of the SUV's occupants reached out the window as if he had a gun, and appellant thought he might shoot. (15RT 2378-2380.)

On September 29, 2001, at midnight, appellant saw Webster in the Bottoms. Webster said she wanted to get something to drink, so the two

went to a liquor store on Century and then returned to the Bottoms where they hung out with some friends, including Jones. (15RT 2384-2385.) One of appellant's friends, known as "Tweet," received a phone call that some "homegirls" were being harassed at a club. (15RT 2385.) Appellant, armed with the 9 mm handgun and wearing his red Johnny Blaze sweatshirt and gloves[11], got into Webster's car with Webster, Webster's brother, and Jones and drove to the club, which was on Market Street in Osage Legend Crips territory. At the club, appellant got out of Webster's car and saw Washington, Reddic, and Vanessa. (15RT 2386-2388; 16RT 2499.) Appellant found out that some guys, who had already left, had beaten up the girls. (15RT 2387.) Before leaving in Washington's red Ford Contour, appellant told Webster she could go back to the Bottoms and he would meet her there. (15RT 2388-2389.)

Appellant headed back to the Bottoms in the Ford Contour. Washington was driving, Reddic was in the front passenger seat, Vanessa was seated behind Washington, and appellant was seated behind Reddic. (15RT 2389-2390.) They took a shortcut through a 7-Eleven parking lot, and appellant noticed Martin standing in front. Martin was wearing a red belt, which made appellant believe he was a member of the Bloods alone in Osage Legend Crips territory. Appellant asked Washington to park the car so he could alert Martin that he was not safe in the area. (15RT 2390-2392.)

Appellant approached Martin and asked where he was from. Martin replied that he was from the Crenshaw Mafia Gangsters. Being a member of that gang and unfamiliar with Martin, appellant figured that Martin was

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[11] Appellant denied that he was wearing the sweatshirt and gloves to conceal the handgun and prevent his fingers from leaving prints on it. (16RT 2499.)

lying and might be setting him up for an assault. (15RT 2392.) Martin then asked appellant where he was from, and appellant hit him. (15RT 2393.) Martin ran, and appellant went into the 7-Eleven. (15RT 2394.)

Appellant left the 7-Eleven in the Ford Contour and traveled south on Prairie to Century. He and the girls stopped at Century and Doty in the middle lane. (15RT 2395-2396.) Vanessa said that some guys in another car were staring. Appellant looked over at a black Ford Mustang next to the Ford Contour, and saw the driver inside looking "real hard" at him. (15RT 2397, 2400.) He recognized the guy as the same one who had made the gun gesture out the window of the gray SUV in the Bottoms. (15RT 2397.) The driver began to roll down his window. Appellant pulled out the 9 mm handgun from his waistband and put it on his lap. The driver asked if appellant was from the Crenshaw Mafia Gangsters, and pointed a gun at appellant. Appellant became frightened, started shooting at the Ford Mustang, and yelled "get down" to the girls. (15RT 2397-2398.) He claimed that he never stuck his body out the car window during the shooting, but had no explanation for how witnesses could identify the type of sweatshirt he was wearing based on its logo. (16RT 2556.)

Appellant and the girls drove back to the Bottoms. The girls dropped him off at 10th Avenue and Bartdon where Webster was waiting for him. (15RT 2402-2403.) Appellant got in Webster's car and told her he could not believe what had just happened. He asked Webster to drive to the scene of the shooting and directed her how to get there. (15RT 2403.) On the way, he told her that he had to shoot. (15RT 2404.) Once they reached the scene of the shooting, appellant saw the police. He wanted to know if someone had been killed, and told Webster the driver had probably been hit by the gunfire. (15RT 2404-2405.) Appellant never stated that he was armed or acted in self defense. (16RT 2482.)

Webster dropped appellant off on 10th Avenue in the Bottoms. Jones and Derrin picked appellant up in the white Ford Escort. (15RT 2405-2406.) Still armed with the gun, appellant placed it under a seat in the car and returned to his mother's home in Downey. (15RT 2406.)

On October 2, 2001, appellant was arrested. Webster visited him once while he was in custody, and he called Webster a few times between October and February. (15RT 2407.) The two exchanged letters, but appellant stopped writing back after receiving a letter from Webster in which she discussed getting married and having children.[12] (15RT 2409-2410.) Webster also put money on his books in jail even though he did not ask her to do so. (15RT 2408.)

As of April and May 2002, appellant no longer knew where Webster was living. (15RT 2412.) He was unaware that she was in the witness protection program and did not direct anyone to find her. (15RT 2413.) Appellant also did not speak to his brother Derrin or anyone else about harming Webster. (15RT 2413-2414.) Once Derrin was in custody as well, however, he gave appellant an address for Webster on Lankershim. Appellant knew Derrin was in custody for Webster's torture, and Derrin wanted appellant to write Webster and request that she not press charges against him. (15RT 2417-2419.) But appellant never inquired of Derrin why Derrin had tortured Webster even though he thought there was no animosity between Webster and Derrin. (16RT 2486-2487.)

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[12] Appellant denied having any sexual relations with Webster (15RT 2416) or Rollen (15RT 2469) despite the content of the letters from Webster, including a discussion about having children, as well as letters from Rollen in which she told appellant she loved him (16RT 2469, 2471). He also exchanged letters with Laura Perez while he was in custody and wrote that he loved her and requested sexy photos from her. (16RT 2471, 2475-2476.) At the same time, he was telling Carolyn Jackson that she was his girlfriend. (15RT 2420; 16RT 2476.)

Dr. Lawrence Wells was an emergency physician at Providence Saint Joseph Medical Center in Burbank. On May 1, 2002, at 10 p.m., he treated Webster for facial wounds and burns. (15RT 2328-2329.) He asked her what happened. Webster said she had been assaulted. Dr. Wells asked by whom, and Webster said she did not know. She was quiet and reticent to give him any information, and Dr. Wells acknowledged that victims often did not want to identify who assaulted them. (15RT 2329-2330, 2336, 2338.)

II. THE PENALTY PHASE[13]

A. The Prosecution Evidence

1. Appellant's Prior Attempt To Intimidate Witnesses At Hollywood Park Casino

On May 28, 2000, at 3 a.m., Gregory Held was working as the security manager in the security office at Hollywood Park casino. Two men entered the office. One of them was speaking rapidly and reported that his car had been stolen from the parking lot. (19RT 3108-3109.) Held summoned the police to the office to report the incident. The victim stated that his car was equipped with Low-Jack, so the police had it activated and broadcasted a description of the car to other officers. The police learned that other officers pursued the car and took the suspect, appellant's brother Derrin, into custody. (19RT 3110-3111.) They made arrangements for the victim and his friend to be taken individually to a field showup to attempt to identify Derrin. (19RT 3111.)

Held waited outside the casino with the victim. A white compact car drove into the parking lot and stopped directly in front of the casino.

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[13] The parties stipulated that appellant was adjudicated in juvenile court for the crime of robbery and the petition was sustained on June 24, 1988. (19RT 3242-3243.)

(19RT 3111.) Appellant was the driver and got out of the car along with another adult male, Eddie Rollen. Appellant attempted to convince the victim not to press charges against his brother. He urged the victim not to cooperate with the police. (19RT 3112, 3115.) He also promised that he could have any damage to the victim's car fixed. (19RT 3113.) As appellant continued to speak to the victim, he applied an increasing amount of pressure. Specifically, the victim was dressed in blue, and appellant repeatedly asked where he was from. The victim denied being in a gang, and appellant identified himself as a member of the Crenshaw Mafia Gangsters. At that point, Held ordered appellant and his friend to leave the property. (19RT 3113.) The police happened to return to the parking lot with the victim's friend, causing appellant and Rollen to leave. (19RT 3114.)

The victim next headed to the field showup with the police, and his friend remained outside the casino with Held. (19RT 3114.) Appellant returned to the parking lot. He was visibly upset and made the same statements to the victim's friend that he had made to the victim, but in an even more forceful manner. He used profanity, threatened retaliation, and spoke of "blasting" the friend for cooperating with the police. (19RT 3115.) The victim's friend replied, "Well, if you're going to do it, then go ahead and do it." (19RT 3115.) Appellant proceeded to the rear of the car and rummaged through the trunk. Held believed that appellant was retrieving a gun and was going to shoot at him and the victim's friend. He and the victim's friend sought cover, and the police returned to the parking lot with the victim. Held tried to flag down the police, and appellant closed the trunk of the car and fled. (19RT 3116.)

Held told the police that appellant and Rollen might be armed. The police stopped them, conducted a field identification, and allowed them to leave. (19RT 3119.)

2. Appellant Beats A Man Because The Man Was Gay

On June 13, 2000, at 12:20 a.m., Alexis Moore was at a club called The Annex in Inglewood. (19RT 3126-3127.) Appellant and another man approached Moore and asked him if he was gay and a gang member. Moore said that he was not and headed to his car. Appellant approached Moore again and accused Moore of being gay. Moore admitted he was gay, and appellant snatched the chain from around Moore's neck and hit him. The two began to fight, and Moore was able to get appellant on the ground. Appellant's friend then began kicking and hitting Moore in the head. Appellant joined in, also kicking Moore and calling him a "fag." (19RT 3127-3129, 3133, 3135-3136.) Appellant and his friend also stole Moore's pager, money, and pocket knife. (19RT 3129.)

Jerry Dickerson, a bartender at The Annex, heard the fight outside the club and went to see what was transpiring. When he got outside, he saw appellant and another man beating Moore and yelling, "All faggots should be killed." (19RT 3129, 3137-3139.) Dickerson helped Moore back inside the club, and the police arrived and detained appellant and his friend. (19RT 3129, 3139-3140.)

The parties stipulated that he pled guilty to a civil rights violation in connection with the beating of Moore on October 31, 2001, and was out on bail for such violation in September 2001. (19RT 3242-3243.)

3. Appellant Stabs A Fellow Inmate While In Custody For The Florence Brothers' Murders

On October 5, 2003, at 2:25 p.m., Los Angeles County Sheriff's Deputy Brandon Love was escorting Cedric Hood out of a shower cell and back to his own cell at the Men's Central Jail. (19RT 3144-3145.) As they passed appellant's cell, appellant reached out and grabbed Hood, whose hands were cuffed behind his back. (19RT 3145, 3173.) Appellant slashed

Hood's shoulder with a shank he had in his right hand. Deputy Love grabbed appellant as he attempted to slash Hood again. Deputy Love heard a pop, and appellant's arm went limp. Another deputy grabbed the shank from appellant. (19RT 3146.)

Following the stabbing, Sergeant Timothy Louis interviewed Hood. (19RT 3181.) Hood explained that a month before the stabbing he had an argument with Derrin. Derrin threatened Hood that he would shoot a "kite" (a note) to appellant. (19RT 3175, 3182, 3208.) Sergeant Louis reported that Hood, in fact, saw the kite sent to appellant. (19RT 3183.)

4. Appellant Smashes A Car Window

A couple of weeks before appellant shot Christopher, Jacqueline Martinez witnessed appellant approach a car and throw a brick through the passenger side window of a car occupied by people. (19RT 3165, 3170.)

5. The Florence Brothers' Family

Barbara Bondoc was Michael's fiancée. She described Michael as having a big heart and said that a part of her died with him when he was murdered. (19RT 3163.)

Shandala Thomas was Torry's fiancée. The two had a daughter, who was three years old at the time of Torry's murder. (19RT 3190-3191.) As a result of the murder, their daughter screamed and cried often. She would regularly ask if her father could come back and became extremely emotionally attached to Thomas, fearing that Thomas would leave. (19RT 3193.) Torry had also raised Thomas' children from a previous relationship and treated them as his own. (19RT 3194.) In addition to his parenting duties, Torry usually held down two jobs. (19RT 3196-3197.) Thomas and Torry were to marry the day after Torry was murdered. (19RT 3200.)

Brenda Florence got home from work just before Christopher left to see Martinez on the evening of his murder. Christopher was watching

television and shared some cookies with Brenda that he had brought home for her. (19RT 3211-3212, 3215.) Christopher told Brenda he was going out, but would not be late. (19RT 3216.) Shortly thereafter, he received a phone call from Martinez and left. (19RT 3217.) Brian came home later, and Torry arrived after work. Brenda then went to bed. (19RT 3219-3221.)

The following morning, Torry told Brenda that some men were at the door. It was Detective Lawler and Officer Steinhoff, who informed Brenda that Christopher had been shot and killed. (19RT 3222-3223.) Torry called Michael to tell him, and Christopher thought he was having a bad dream. Michael later arrived at the home. (19RT 3223.)

Brenda was also home when Michael, Torry, Brian, and Watson left before the second shooting. (19RT 3323.) She heard gunfire and called Michael's and Torry's cell phones, but was unable to reach either of them. (19RT 3234.)

Since the murders, Brian lost 40 pounds from not eating. He also developed acid reflux. Brenda had sought counseling for him. (19RT 3235-3236.)

B. The Defense Evidence

Appellant's mother, Jennifer Armstrong, experienced complications during appellant's birth. He suffered no lasting effects from them. (20RT 3250-3251.)

Jennifer was married to appellant's father, Leslie Armstrong, Jr., at the time of both appellant's and Derrin's births. (20RT 3252, 3263.) Leslie used to get high and beat Jennifer, at times in front of appellant and Derrin. The beatings left her with black eyes and a broken jaw. When Leslie beat Jennifer, appellant would run and hide. The beatings frightened him and caused him to wet the bed. (20RT 3263-3265, 3273.)

Jennifer's brother, Eric Jackson, babysat appellant and witnessed the beatings and Leslie's drug use in front of the children. (20RT 3285-3286, 3288-3290.) He once saw Leslie pull a gun on Jennifer. (20RT 3292.) Jennifer's and Jackson's mother, Betty George, also witnessed the gun incident and saw Leslie beat Jennifer while she was pregnant. (20RT 3299, 3301.)

During a final incident between Jennifer and Leslie, Jennifer stabbed Leslie. Appellant, who was six or seven years old at the time, was present. (20RT 3267-3268.) The police arrived, but Leslie did not want to press charges. Jennifer wanted to leave, and the police told her that one child should stay with Leslie and one should go with her. The children were allowed to decide, and appellant stayed with Leslie while Derrin went with Jennifer. (20RT 3268-3269.)

Jennifer separated permanently from Leslie, but visited appellant every weekend. (20RT 3265, 3269.) Leslie would tell appellant that Jennifer left appellant. Appellant continued to live with Leslie for a year until Leslie met another woman. At that point, appellant went to live with Jennifer. (20RT 3270.) Leslie then began seeing appellant every other weekend, and the two remained close. (20RT 3271.) But appellant continued to wet the bed when he was eight or nine years old and was hurt that he could not be with Leslie. (20RT 3271.)

One day when appellant was 13 or 14 years old, Leslie was supposed to pick up appellant and Derrin. He failed to show up and, instead, called and said he had to go out of town and would be moving. He left a telephone number, but when Jennifer and the boys tried to call it, it was disconnected. (20RT 3272-3273.) Leslie never contacted them again. (20RT 3273.)

Appellant's demeanor began to change. Jennifer noticed paraphernalia relating to gangs around the home. She also saw appellant

hanging out with an older man in the neighborhood, who was a gang member. (20RT 3274.) Jennifer eventually learned that appellant was a gang member and carried weapons. Appellant began to get in trouble. Jennifer spoke with him about his behavior, but never sought counseling. (20RT 3266, 3275.)

Jackson, who was a pastor, also tried to speak with appellant about his behavior. (20RT 3285, 3293.) But appellant stopped going to his church in middle school. (20RT 3287.)

ARGUMENT

I. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY DENYING APPELLANT'S MOTION TO SEVER THE CHRISTOPHER FLORENCE MURDER AND TYISKA WEBSTER TORTURE FROM THE MICHAEL AND TORRY FLORENCE MURDERS AND BRIAN FLORENCE AND FLOYD WATSON ATTEMPTED MURDER CHARGES

In his first argument on appeal, appellant contends that the trial court abused its discretion by denying his motion to sever. He claims that the trial court should have conducted three separate trials: Christopher's murder, the charges related to Webster's torture, and the murders of Michael and Torry with the attempted murders of Brian and Watson. (AOB 55-78.) He is incorrect. The trial court acted well within its discretion when it denied his motion because the evidence of the crimes was cross-admissible and relevant to prove identity, motive, opportunity, and planning. Additionally, none of the evidence was particularly inflammatory when compared to the other, and appellant suffered no prejudice as a result of the denial of his motion.

A. The Relevant Trial Court Proceedings

On December 20, 2002, the trial court heard appellant's motion to sever. (2RT 26.) The prosecution argued in opposition to the motion that a

strong presumption existed that the cases should be tried together. The prosecution added that the evidence significantly overlapped between the murders, attempted murders, and torture, including that the same gun was used for the murders and attempted murders, which all occurred within a period of 72 hours. According to the prosecution, appellant could not establish that any prejudice supported the granting of his motion because if the counts were severed, each jury would hear the same evidence of the gun and how it was linked to him. (2RT 28.)

The trial court expressed a serious concern about the trauma Webster would suffer should she be forced to testify multiple times in separate trials. And the court chose to exercise its discretion in favor of having witnesses testify in only one proceeding. (2RT 29.)

B. All Of The Pertinent Factors Supported The Denial Of Appellant's Severance Motion

The trial court acted well within its discretion when it denied appellant's motion to sever. Section 954 governs the issue of joinder of counts. It provides, in part, as follows:

> An accusatory pleading may charge two or more different offenses connected together in their commission, . . . or two or more different offenses of the same class of crimes or offenses, under separate counts, . . . provided, that the court in which a case is triable, in the interests of justice and for good cause shown, may in its discretion order that the different offenses or counts set forth in the accusatory pleading be tried separately or divided into two or more groups and each of said groups tried separately.

(Pen. Code, § 954.) Here, there is no dispute that the offenses appellant was charged with, all of which were assaultive in nature and involved a firearm, were of the same class of crimes within the meaning of section 954. (See *People v. Jenkins* (2000) 22 Cal.4th 900, 947; see also *People v. Kemp* (1961) 55 Cal.2d 458, 476 [under section 954, "the same class of

crimes or offenses" means offenses "possessing common characteristics or attributes"].) The statutory requirements for joinder thus being satisfied, appellant "'can predicate error in denying the motion only on a clear showing of potential prejudice. [Citation.] [An appellate court] review[s] the trial court's ruling on the severance motion for abuse of discretion.' [Citations.]" (*People v. Vines* (2011) 51 Cal.4th 830, 855.) Appellant has not made this showing.[14]

The law favors the joinder of counts because such a course of action promotes efficiency. (*Alcala v. Superior Court* (2008) 43 Cal.4th 1205, 1220.) In assessing a claimed abuse of discretion, an appellate court assesses the trial court's ruling by considering the record then before the trial court. (*People v. Soper* (2009) 45 Cal.4th 759, 774; *People v. Avila* (2006) 38 Cal.4th 491, 575.) This Court has held that a trial court's refusal to sever may constitute an abuse of discretion where:

> "(1) evidence on the crimes to be jointly tried would not be cross-admissible in separate trials; (2) certain of the charges are unusually likely to inflame the jury against the defendant; (3) a 'weak' case has been joined with a 'strong' case, or with another 'weak' case, so that the 'spillover' effect of aggregate evidence on several charges might well alter the outcome of some or all of the charges; and (4) any one of the charges carries the death penalty or joinder of them turns the matter into a capital case." [Citations.]

(*People v. Bradford* (1997) 15 Cal.4th 1229, 1315.)

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[14] Appellant correctly points out (AOB 69) that, because the present matter is "one in which the joinder itself gave rise to the special circumstance allegation (multiple murder, § 190.2, subd. (a)(3)), . . . a higher degree of scrutiny [must] be given the issue of joinder." (*Bradford, supra*, 15 Cal.4th at p. 1318.) But the trial court here heard counsel's extensive argument on the issue and carefully scrutinized the evidence. (See *People v. McKinnon* (2011) 52 Cal.4th 610, 616.)

Contrary to appellant's contention (AOB 60-67), the evidence as to the murder of Christopher, the murders of Michael and Torry, the attempted murders of Brian and Watson, and the torture of Webster was cross-admissible. If the evidence underlying each of the joined charges would have been cross-admissible under Evidence Code section 1101 had they been prosecuted in separate trials, "that factor alone is normally sufficient to dispel any suggestion of prejudice and to justify a trial court's refusal to sever properly joined charges." (*Soper*, *supra*, 45 Cal.4th at p. 775; see also *Vines*, *supra*, 51 Cal.4th at p. 855.) Here, the evidence was cross-admissible to establish appellant's identity, intent, motive, opportunity, and plan in connection with each of the charged offenses.

This Court has ruled that,

> "[o]ther-crimes evidence is admissible to prove the defendant's identity as the perpetrator of another alleged offense on the basis of similarity 'when the marks common to the charged and uncharged offenses, considered singly or in combination, logically operate to set the charged and uncharged offenses apart from other crimes of the same general variety and, in so doing, tend to suggest that the perpetrator of the uncharged offenses was the perpetrator of the charged offenses.' [Citation.]" [Citation.] The inference of identity, moreover, need not depend on one or more unique or nearly unique common features; features of substantial but lesser distinctiveness may yield a distinctive combination when considered together.

(*People v. Miller* (1990) 50 Cal.3d 954, 987.)

Appellant is incorrect in his argument that the similarities in the crimes were insufficient to establish identity. (AOB 62-65.) Although there may be nothing particularly distinctive about the shootings and torture, per se, in this case certain common features of the crimes before the trial court at the time it made its ruling suffice to demonstrate appellant's identity as the perpetrator. These factors included: (1) targeting brothers from the same family on two separate occasions while they were seated in

cars; (2) committing the shootings within less than a three-day period in the same vicinity (10RT 1582-1583); (3) using the same firearm and caliber ammunition to commit both shootings (13RT 1992-1993, 1995); (4) finding the firearm in the exact car appellant admitted he left it in (15RT 2406); and (4) using torture to dissuade a witness to whom appellant had admitted both shootings to from testifying against him (11RT 1657-1658, 1684-1685, 1695; 14RT 2263). In the aggregate, these common features support a reasonable inference that appellant was responsible for both shootings and the torture. (See *People v. Hovarter* (2008) 44 Cal.4th 983, 1004.)

Not only was the evidence cross-admissible to prove identity, it also was cross-admissible to prove that appellant acted according to a certain plan or with a particular motive. Evidence of other crimes can be admitted to prove the offender acted according to a certain plan, or acted with a particular motive, if a degree of similarity exists between the past and present crimes so as to permit a reasonable inference that the offender must have entertained the same intent in both instances. (*People v. Ewoldt* (1994) 7 Cal.4th 380, 403.)

Here, the murder of Christopher established appellant's intent, motive, and plan to murder Christopher's other brothers, who were investigating Christopher's murder, and torture Webster, who knew appellant was responsible for both shootings. Indeed, the evidence showed that it was not just a coincidence that appellant happened to shoot Christopher's brothers less than three days after shooting Christopher. Rather taking the evidence together, it was reasonably inferable that appellant knew the Florence brothers were investigating Chrisopher's murder and driving around the murder scene and that appellant had concocted the plan and created the opportunity by using the ruse of a woman named Nicole, who allegedly had information about Christopher's killing. (9RT 1366, 1452.) This ruse helped get Torry, Michael, and Brian to be in a place where appellant knew

he could find them. And having accomplished his plan of shooting all the Florence brothers, all appellant had left to do was to try to avoid being arrested and convicted by ordering the torture of Webster, whom he believed was going to testify against him because he admitted the shootings to her. (2CT 525, 537; 11RT 1657-1658, 1684-1685, 1695; 14RT 2263.) The second shooting and torture, therefore, were connected to the first shooting and were integral components to appellant's plan to avoid being apprehended. (See *People v. Valdez* (2004) 32 Cal.4th 73, 119 ["Although the murder itself occurred almost two years prior to defendant's escape, the offenses were nonetheless connected because the escape occurred as defendant was being returned to 'lock-up' following his arraignment on the murder charge. The apparent motive for the escape was to avoid prosecution for the murder."]; *People v. Ghent* (1987) 43 Cal.3d 739, 758-759 [consolidation proper where thwarted attempt at sexual assault was cross-admissible to show defendant's motive for subsequently attacking second victim].) As a result, the evidence as to all three sets of crimes was cross-admissible. (*People v. Zambrano* (2007) 41 Cal.4th 1082, 1129 ["it is enough that the assaults were admissible in the murder case; 'two-way' cross-admissibility is not required"], disapproved of on another ground by *People v. Doolin* (2009) 45 Cal.4th 390, 421 & fn. 22; *People v. Cunningham* (2001) 25 Cal.4th 926, 985 ["complete cross-admissibility is not necessary to justify the joinder of counts"].)

Despite the above, appellant contends that the trial court still should have granted his severance motion because the evidence of the Webster torture was unusually likely to inflame the jury against him. (AOB 67.) Evidence that appellant directed others to beat Webster can hardly be said to be more inflammatory than evidence that appellant personally shot at a total of five innocent people, killing three, including by striking two in the head. The shootings and the torture all involved great violence against

innocent people. All of the offenses exposed the jury to a great deal of inflammatory evidence, and no one in particular was more egregious than the other. (See, e.g., *Soper*, *supra*, 45 Cal.4th at p. 780 [consolidation proper where "[t]he homicides at issue in the [separate] cases are similar in nature and equally egregious—hence neither, when compared to the other, was likely to unduly inflame a jury against defendant"].) Where a defendant has "not shown that one of the offenses was significantly more likely to inflame the jury against defendant[s]," he has "failed to establish prejudice." (*Bradford*, *supra*, 15 Cal.4th at p. 1317.)

Appellant's contention that the trial court should have granted his severance motion because the evidence against him as to the second shooting was substantially stronger than that on the first shooting or the Webster torture is equally without merit. (AOB 67-69.) Although multiple eyewitnesses tied appellant to the second shooting, it cannot be overlooked that a witness and firearm tied him to the first shooting, and a witness as well as items found in his cell tied him to the Webster torture. Moreover, even if the evidence in one case might be considered stronger than the other, "[a] mere imbalance in the evidence . . . will not indicate a risk of prejudicial 'spillover effect,' militating against the benefits of joinder and warranting severance of properly joined charges." (*Soper*, *supra*, 45 Cal.4th at p. 781.)

Appellant, nevertheless, relies on *Bean v. Calderon* (9th Cir. 1988) 163 F.3d 1073, in support of his contention that the evidence of the second shooting was used to bolster the weaker cases of the first shooting and Webster torture. (AOB 74-76.) In *Bean*, however, the Ninth Circuit Court of Appeals found erroneous the joinder of two murder charges because the evidence on one murder charge was much stronger and was not cross-admissible, but the prosecutor and jury instructions led the jury to believe otherwise. (*Bean*, *supra*, 163 F.3d at pp. 1075-1076.) As shown above,

neither of those concerns were present here because the evidence was cross-admissible and also overwhelming as to the shootings and torture. (See also Statement of Facts, *ante*.) Appellant's reliance on *Bean*, therefore, is misplaced.

Additionally, the benefits of joinder are not outweighed, and severance is not required, merely because properly joined charges might make it more difficult for a defendant to avoid conviction compared with his chances were the charges to be separately tried. (E.g., *Zafiro v. United States* (1993) 506 U.S. 534, 540 [113 S.Ct. 933, 122 L.Ed.2d 317] ["[D]efendants are not entitled to severance merely because they may have a better chance of acquittal in separate trials"].) As the trial court noted (2RT 29), the greatest advantage and benefit of joinder will often be that stemming from the avoidance of duplication of evidence, as where at least some of the same testimony, or testimony from the same witnesses, would be heard in each of the hypothetical separate trials. (See *Alcala*, *supra*, 43 Cal.4th at p. 1218 [""""joinder prevents repetition of evidence and saves time and expense to the state as well as to the defendant""""].) In these cases, joint trials may serve not only the interests of the state, but those of third persons, most obviously by sparing one or more citizen witnesses from having to testify more than once. Here, Webster and several police officers were spared from having to testify at three separate trials. And even if such case-specific economies did not exist here, this Court has also been cognizant of the savings in costs otherwise incurred by the state in separate trials and appeals. (*Soper*, *supra*, 45 Cal.4th at p. 782.) The public benefits of joinder, including administrative savings, should not be minimized and further support the court's exercising its discretion to deny appellant's motion. (*Id.* at pp. 781-782.)

From the above it is apparent that the trial court did not abuse its discretion when it denied appellant's motion. "Even if the court abused its

discretion in refusing to sever, reversal is unwarranted unless, to a reasonable probability, defendant would have received a more favorable result in a separate trial. [Citation.]" (*Avila, supra*, 38 Cal.4th at p. 575.) Appellant has failed to make this showing, even assuming arguendo none of the evidence was cross-admissible.

Had the trial court severed the two shootings and Webster torture into three separate trials, overwhelming evidence still would have supported findings that he was guilty of all of the charged offenses. Beginning with the murder of Christopher, the jury would still have learned of how the gun used in the killing was tied to appellant even without mentioning the second shooting. The jury would have also heard Webster's testimony that appellant admitted to the killing. (2CT 525; 11RT 1684-1685.)

Turning to the murders of Torry and Michael, as well as the attempted murders of Brian and Watson, the jury would have heard Martin's identification of appellant and the red hooded sweatshirt, as well as his ability to tie appellant to the Ford Contour. (8RT 1279, 1294-1295, 1297, 1309.) The jury would have heard further identifications by Lieutenant Roberts (8RT 1343), Watson (9RT 1383-1384, 1386-1390), and Brian (9RT 1466, 1477, 1479-1484, 1490-1491). Torry's statement that the shooter was a Crenshaw Mafia Gangster would have come before the jury. (9RT 1354.) And the GSR analysis, which showed the presence of particles whose likely source was primer material of a gun cartridge on appellant's sweatshirt, would have been admitted. (14RT 1954-1955.) The jury would have also heard Webster's testimony that appellant admitted to this shooting as well. (2CT 525; 11RT 1684, 1695.) More importantly, the jury would have received the evidence that refuted any claim that appellant was defending himself during the shooting. (14RT 2036, 2246.)

And with respect to the Webster torture, the jury would have heard Webster's testimony that it was appellant on Derrin's cell phone in the

motel room. The jury would have also heard that Derrin asked appellant what he wanted done with Webster, and that evidence of Webster's future address was found in appellant's cell. (2CT 537-538; 11RT 1659, 1660-1661.) The jury would have also learned of appellant's motive to torture Webster to intimidate the only witness he had confessed to following the shootings. In sum, the evidence overwhelmingly supported the verdicts, even if the shootings and Webster torture were separated into three trials.

In light of the foregoing, appellant has not shown that the evidence presented at trial would not be cross-admissible in separate trials, that any of the offenses was unusually inflammatory, or that any of the offenses was so weak when compared to another to risk a spillover effect. He, thus, has not established an abuse of discretion. Nor has he shown a probability that there was a spillover effect from the offenses being tried together. Appellant, therefore, has not shown gross unfairness, a due process violation, or even a reasonable probability of a more favorable result in separate trials. (*Avila*, *supra*, 38 Cal.4th at p. 575.) As a result, this Court should reject appellant's claim.

II. THE TRIAL COURT DID NOT ERR BY DISMISSING JUROR NO. 5 BECAUSE GOOD CAUSE SUPPORTED THE DISMISSAL

In his second argument on appeal, appellant contends that the trial court erroneously dismissed Juror No. 5 and, in doing so, violated his Fifth, Sixth, Eighth, and Fourteenth Amendment rights, as well as his related rights under the California Constitution. (AOB 78-140.) His argument is without merit because a sufficient showing of good cause supported the trial court's excusing Juror No. 5, who refused to deliberate, failed to follow the court's instructions, and concealed a significant bias.

A. The Relevant Trial Court Proceedings[15]

On August 20, 2004, the court received a note from the jury that it was deadlocked. The court was astonished by the note given that the jury had deliberated for less than two days despite needing to consider the testimony of 38 witnesses as well as 130 items received into evidence. (18RT 2909, 2911.) According to the court, no juror could have fairly evaluated all of that evidence in such a short period of time. Although the court was concerned about how seriously the jury was deliberating, it also did not want to take any action that would even appear to coerce the jury into reaching a verdict. (18RT 2910.) Nevertheless, the court believed the jury's claim that it was deadlocked was an "absolute travesty" and surmised that the deliberations might have been affected by the length of the trial exceeding the time estimate. (18RT 2913-2914.)

The court summoned the jury to the courtroom and advised the jurors as to the options available to assist them in in the deliberations, such as readback of testimony, further explanation of law, and reargument on any issue. (18RT 2917-2919.) The jury resumed deliberations. (18RT 2919.)

The court received a subsequent note from Juror No. 12. In the note, Juror No. 12 stated that he wished to speak privately with the court without counsel or the other jurors present. The clerk explained to Juror No. 12 that no juror could speak with the court absent the parties' counsel. (18RT 2921; 4CT 1021.)

The court next received a note from Juror No. 5. The note stated that Juror No. 12 told Juror Nos. 5 and 6 that he saw appellant's mother and family while he was out shopping and realized that he was a close friend of appellant's cousin. The note added that appellant's cousin told Juror No.

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[15] This summary of trial court proceedings is relevant to Arguments II, III, and IV.

12 that appellant was a "cold heartless killer" and "active criminal." (18RT 2921; 4CT 1020.) Finally, the note explained that Juror No. 5 believed the relationship might be affecting Juror No. 12's opinion of the case. (18RT 2921; 4CT 1020.)

The jury's foreperson, Juror No. 4, sent the court a note as well. In the note, Juror No. 4 represented that a majority of the jurors believed that one of the jurors was not fulfilling her obligation to consider the evidence objectively and wondered whether she had been honest and made a full disclosure of her experiences, associations, and biases regarding gang members and the police. (18RT 2922; 4CT 1024.)

Finally, the court received a note from an anonymous juror, later identified as Juror No. 12. This note specifically identified Juror No. 5 and stated that she refused to listen to other jurors and would use her cellphone or read a book instead. The note continued that Juror No. 5 would not explain how the evidence led her to her conclusions. She would tell the other jurors to convince her, but when they asked her how, she would respond that she was not psychic. The anonymous juror wrote that Juror No. 5's behavior was the reason the jury was deadlocked because the other jurors were giving up due to it. The note closed with a claim that Juror No. 5 informed the other jurors that she used to live close to the Bottoms and had friends who were gang members. She also believed the police were corrupt. (18RT 2922-2924; 4CT 1022-1023.)

Based on the above, the court explained to counsel that its preference was to bring the foreperson into the court to discuss his concerns and then separately do the same with Juror Nos. 5 and 12. It would then consider whether it needed to speak with the other jurors. Counsel did not object to this proposed procedure. (18RT 2925-2926.)

The foreperson, Juror No. 4, then entered the courtroom. He explained that during deliberations, the other jurors noticed that they were

not getting input from Juror No. 5. They would try to get her involved, but she seemed that she was not open-minded. She also seemed unable to weigh the evidence objectively and unwilling to make "big decisions." (18RT 2927-2928, 2931.) Juror No. 4 stated that Juror No. 5 stopped participating in deliberations. She would just sit in the jury room and check text messages on her cellphone and read a book. Juror No. 4 even saw her checking her cellphone during closing arguments. (18RT 2929, 2932.) The other jurors were frustrated with Juror No. 5 and believed she had brought in a lot of preconceptions and biases. Specifically, Juror No. 5 represented that she associated with gang members and made a comment that appeared to come out of nowhere suggesting the police were corrupt. As a result, the other jurors encouraged Juror No. 4 to speak with the court. (18RT 2930-2932.)

Juror No. 12 was the next juror to enter the courtroom after Juror No. 4 left. He admitted that his friend was appellant's cousin. He explained that he was unaware of the relationship when the trial began and then saw his friend in the courtroom. (18RT 2937.) Juror No. 12 spoke with the friend after seeing him in court, and the friend explained he was there because appellant was his cousin. (18RT 2938.) Juror No. 12 added that while with the cousin, he saw appellant's mother and family in a store. He did not speak to them and told appellant's cousin that he had to leave because of their relationship to the case. (18RT 2940-2942.) He subsequently spoke to appellant's cousin once during trial when appellant's cousin called him. (18RT 2942.) Despite the friendship, Juror No. 12 had not formed any opinion that appellant was a killer or criminal. The friendship had no effect on his ability to be fair and impartial. (18RT 2940, 2943.)

Juror No. 6 entered the courtroom after Juror No. 12 left. Juror No. 6 confirmed that he and Juror No. 5 were the only ones present in the hallway

before deliberations began when Juror No. 12 discussed his friendship with appellant's cousins. (18RT 2945-2946.) According to Juror No. 6, Juror No. 12 also told them that he did not know his friend was appellant's cousin before the trial, and the friendship would not affect his deliberations. (18RT 2946.) Juror No. 6 further confirmed that during deliberations Juror No. 5 was looking at a book and cellphone on one or two occasions for a few minutes each time and that she said she was acquainted with some gang members and believed all police were not trustworthy. (18RT 2947, 2951.) More specifically, Juror No. 5 claimed she knew the thought processes of gang members and used to live in the area where the shootings occurred. (18RT 2948.) Juror No. 6 believed that Juror No. 5 had reached a verdict and would not listen to anything the other jurors had to say. (18RT 2951.)

The court then spoke with Juror No. 5. According to her, Juror No. 12 told her and Juror No. 6 that he was shopping when he saw two close friends and told them that he was on jury duty and noticed appellant's mother in the store. One of the friends then told him that he was appellant's cousin and that appellant was a criminal and "coldblooded killer." (18RT 2952-2953.) Juror No. 5 stated that Juror No. 12 told her and Juror No. 6 that appellant must be guilty if his own cousin felt that way about him. (18RT 2953.) Juror No. 12 allegedly said that, because appellant was a gang member, he could be certain that appellant had committed other crimes and that appellant could not have been scared when he encountered Michael and Torry. (18RT 2959.) Juror No. 5 waited a week after hearing this information from Juror No. 12 to report any of it to the court because it "slipped" her mind. (18RT 2971.)

Juror No. 5 admitted that she had a book and cellphone with her. She denied reading her book during deliberations, and claimed that if she looked at her cellphone, it was to check the time. (18RT 2955.) Juror No.

5 represented that she never heard the court instruct the jurors to turn off their cell phones during deliberations. (18RT 2955.)

Juror No. 5 admitted that she lived on 104th and Crenshaw, but claimed she never went to or near the Bottoms. (18RT 2955.) She also claimed that she never associated with anyone from the Bottoms and had no biases about police or gang members. Juror No. 5 admitted that she had heard about appellant's gang, but denied ever having contact with any of its members. (18RT 2956.)

Juror No. 5 represented that she had not reached any conclusions about the case that were causing her not to speak with the other jurors about the evidence. She felt that she was freely discussing and analyzing the evidence. (18RT 2957.)

Juror No. 11 was the next juror to speak with the court. According to him, Juror No. 5 expressed a distrust or suspicion of the police and stated that she associated or had friendships with gang members. Juror No. 5 also said that police had the ability to coach witnesses, put ideas in their heads, and manufacture or tamper with evidence and crime scenes. (18RT 2961.) For example, Juror No. 5 claimed that Brian and Watson gave consistent testimony because of coaching by the police. (18RT 2964-2965.) Juror No. 11 believed that Juror No. 5 was biased in favor of gang members, which shaped her opinion as to how a gang member would perceive a threat. (18RT 2962.)

Having heard from the selected jurors and receiving no requests from counsel to interview any additional jurors, the court addressed the above-summarized issues. The court reminded counsel that it had specifically instructed the jurors that they were not permitted to use their cellphones in the jury room and were to turn them off. (18RT 2973-2974.) The court added that jurors were required to at least listen to each other during deliberations. (18RT 2977.)

Turning to the individually interviewed jurors, the court noted that from its own observations during trial it saw that Juror Nos. 5 and 6 were friendly. Despite their friendship, even Juror No. 6 felt that Juror No. 5 refused to participate in deliberations. And Juror No. 6's account of Juror No. 5's behavior during deliberations was consistent with Juror No. 4's account of it. From these accounts, the court was concerned that Juror No. 5 was not deliberating and was concealing a bias in favor of gang members and against police. (18RT 2977.)

With respect to Juror No. 12, the court noted that both the defense and prosecution wanted him removed from the jury. (18RT 2978, 2982.) The court felt that his friendship with appellant's cousin presented a significant concern and should have been immediately disclosed to the court. Although the court believed Juror No. 12's representation that the friendship was not affecting him, the court also believed the friendship was a sufficient reason to discharge him from the jury. Such a friendship carried with it an implied bias. (18RT 2979-2980, 2982-2983.) The court further noted that Juror No. 6 did not remember any alleged statement by the cousin about appellant being a criminal or killer. Juror No. 5, thus, was the only juror who heard the alleged statement, and there was no evidence that the statement reached the other jurors or in any way affected deliberations. (18RT 2980.)

As to Juror No. 5, the court concluded as follows:

> Juror No. 5 has already reached a conclusion and is not deliberating further, and that is, as I said, corroborated by the report from Juror No. 4 that she has on a couple of occasions at least looked at the textbook and checked text messages, leaving her cellphone on, which is in direct contravention of the court's instruction.

(18RT 2980.) And based on Juror No. 11's statement that Juror No. 5 said she had friends who were gang members, the court also found that the

evidence tended to show that Juror No. 5 was biased in favor of gang members. (19RT 2980.) More importantly, the court found that Juror No. 5's statements denying the accusations the other jurors made about her lacked credibility. Simply put, the court stated that it did not believe her. (18RT 2981, 2985.)

The defense objected to the court excusing Juror No. 5 and requested a mistrial in connection with Juror No. 12, arguing that he passed along the statements appellant's cousin made to him to the remainder of the jury, thereby infecting the entire panel. (18RT 2985, 2989.)

The court denied the request for a mistrial. It found that the defense was merely speculating that Juror No. 12 shared any of the purported statements from appellant's cousin with the other jurors. The court added that it did not believe Juror No. 12 made any comments that would rise to a level greater than "general comments about gang members as opposed to something specific from his background or something like that where he's trying to persuade others." (18RT 2990.) Those types of general comments would have reached the jury anyway based on the evidence supporting the gang enhancements, including appellant's own admissions. (18RT 2990.) Furthermore, the court reminded the defense that it could only explore the jurors' conduct during deliberations rather than the content of the deliberations. (18RT 2992.) Based on its findings, the court excused Juror Nos. 5 and 12, and replaced them with alternates. (18RT 2994-2995.)

B. Good Cause Supported The Removal Of Juror No. 5 Because She Refused To Deliberate, Failed To Follow The Court's Instructions, And Concealed Her Bias

The trial court's removal of Juror No. 5 was within its discretion because her refusal to deliberate, failure to follow the court's instructions, and concealment of her bias constituted good cause. Section 1089 provides for removal of a juror and replacement with an alternate for "good cause

shown," including death, illness, or that the juror is "unable to perform [her] duty." An appellate court reviews a trial court's removal of a juror for abuse of discretion. (*People v. Cleveland* (2001) 25 Cal.4th 466, 474.) That discretion is "at most a limited discretion to determine that the facts show an inability to perform the functions of a juror, and that inability must appear in the record as a demonstrable reality." (*People v. Compton* (1971) 6 Cal.3d 55, 60 [reversal where trial court expressly found juror's remarks did not show he "'would be unable to serve,'" but nevertheless dismissed him "'out of an abundance of caution'"].) "Grounds for investigation or discharge of a juror may be established by his statements or conduct, including events which occur during jury deliberations and are reported by fellow panelists. [Citations.]" (*People v. Keenan* (1988) 46 Cal.3d 478, 532.)

This Court in *Cleveland* cautioned that "a trial court's inquiry into possible grounds for discharge of a deliberating juror should be as limited in scope as possible, to avoid intruding unnecessarily upon the sanctity of the jury's deliberations." (*Cleveland, supra*, 25 Cal.4th at p. 485.) This Court has further explained,

> The mental processes of deliberating jurors are protected . . . because "[j]urors may be particularly reluctant to express themselves freely in the jury room if their mental processes are subject to immediate judicial scrutiny. The very act of questioning deliberating jurors about the content of their deliberations could affect those deliberations."

(*People v. Engelman* (2002) 28 Cal.4th 436, 442-443.)

The secrecy of deliberations, however, is not "absolute and impenetrable" (*Engelman, supra*, 28 Cal.4th at p. 443), for the trial court retains "a duty to conduct reasonable inquiry into allegations of juror misconduct or incapacity" and "the decision whether (and how) to investigate rests within the sound discretion of the court" (*id.* at p. 442).

(See also *Cleveland, supra*, 25 Cal.4th at p. 476 ["The need to protect the sanctity of jury deliberations . . . does not preclude reasonable inquiry by the court into allegations of misconduct during deliberations"].) For example, the trial court may remove a juror who "actually refuses" (*Engelman, supra*, 28 Cal.4th at p. 442) to deliberate (but see *Cleveland, supra*, 25 Cal.4th at p. 486 [trial court erroneously concluded juror was "'not functionally deliberating'"]), and may also discharge a juror "who proposes to reach a verdict without respect to the law or the evidence" (*Engelman*, 28 Cal.4th at p. 442, citing *People v. Williams* (2001) 25 Cal.4th 441, 463).

In *Cleveland*, this Court reviewed a record that did "not establish 'as a demonstrable reality'" the dismissed juror refused to deliberate. (*Cleveland, supra*, 25 Cal.4th at p. 485.) There, "[a]lthough the jury's initial note to the trial court asserted that Juror No. 1 'does not show a willingness to apply the law,' it became apparent under questioning that the juror simply viewed the evidence differently from the way the rest of the jury viewed it." (*Id.* at pp. 485-486.) This Court explained,

> The circumstance that a juror does not deliberate well or relies upon faulty logic or analysis does not constitute a refusal to deliberate and is not a ground for discharge. Similarly, the circumstance that a juror disagrees with the majority of the jury as to what the evidence shows, or how the law should be applied to the facts, or the manner in which deliberations should be conducted does not constitute a refusal to deliberate and is not a ground for discharge.

(*Id.* at p. 485.)

Unlike the juror at issue in *Cleveland*, the record here clearly established that Juror No. 5 committed misconduct by refusing to deliberate rather than simply relying on faulty logic or disagreeing with the majority. The court was made aware by note that a *majority* of the jury believed that Juror No. 5 was not willing to consider objectively the evidence. (18RT

2922.) The court then learned from a separate note that Juror No. 5 refused to listen to the other jurors and explain how she reached her conclusions and, instead, used her cellphone and read a book. (See *People v. Lomax* (2010) 49 Cal.4th 530, 589 ["'A refusal to deliberate consists of a juror's unwillingness to engage in the deliberative process; that is, he or she will not participate in discussions with fellow jurors by listening to their views and by expressing his or her own views.' [Citation.]"].) The note added that Juror No. 5 told the other jurors that it was their job to convince her, but when they asked how they could persuade her, she would only reply that she was not a psychic. (18RT 2923; see *People v. Alexander* (2010) 49 Cal.4th 846, 926 ["A juror who expresses a fixed conclusion at the start of deliberations and rebuffs attempts to engage him or her in the discussion of other points of view raised by other jurors has refused to deliberate, and properly may be discharged"].) Having received both notes, the court separately interviewed several jurors. From these interviews, the court confirmed that Juror No. 5 was unable to weigh the evidence in an objective way and learned that she was unwilling to make "big decisions" and to listen to the other jurors. (18RT 2928, 2951.) The court also confirmed from a juror whom the court noted appeared to be friendly with her, that Juror No. 5 would not participate in the deliberations and would separate herself from the other jurors by checking her text messages on her cellphone or reading a book. (18RT 2929-2932, 1977; see *People v. Leonard* (2007) 40 Cal.4th 1370, 1410-1411.) Of course, Juror No. 5 denied that she was refusing to deliberate despite admitting to having a book and cellphone in the jury room. (18RT 2954-2955.) The court, however, expressly found that Juror No. 5 completely lacked credibility. (18RT 2981, 2985, 2992.) Moreover, it found that she was not deliberating. (18RT 2980.) Under this Court's holdings in both *Engelman*

and *Cleveland*, the trial court had good cause for removing Juror No. 5 based on these facts.

Not only did the record show that Juror No. 5 committed misconduct justifying her removal by refusing to deliberate, but also it showed additional misconduct in her failure to abide by the court's express instructions. An inability to follow the court's instructions, if apparent in the record as a demonstrable reality, is similarly proper grounds for dismissal. (See *Williams*, *supra*, 25 Cal.4th at p. 449 [recognizing trial court's authority to discharge a juror unwilling or "unable . . . to follow the court's instructions"].) A trial court may reasonably conclude that a juror who has already violated the court's instructions cannot be counted on to follow the instructions in the future. (See *People v. Daniels* (1991) 52 Cal.3d 815, 865.) Here, the record showed that Juror No. 5 totally disregarded the court's explicit instruction about having her cellphone on in the jury room during deliberations. (18RT 2980.) Her failure to follow this particular instruction was extremely significant given that she used both her cellphone and book to separate herself from the other jurors and refuse to deliberate. Furthermore, her willful exposure to outside materials made her vulnerable to influence by sources other than the evidence at trial.

Concerns about her exposure to outside influences were of particular import given her bias in favor of gang members and against police that she concealed from the court. This concealed bias also justified her discharge.

When the trial court discovers during trial that a juror misrepresented or concealed material information on voir dire tending to show bias, the trial court may discharge the juror if, after examination of the juror, the record discloses reasonable grounds for inferring bias as a "demonstrable reality," even though the juror continues to deny bias. [Citations.]

(*People v. Price* (1991) 1 Cal.4th 324, 400.) A juror need not admit a bias for the court to find that it exists. This Court has observed that trial

courts are frequently confronted with conflicting evidence on the question whether a deliberating juror has exhibited a disqualifying bias. (*People v. Barnwell* (2007) 41 Cal.4th 1038, 1053.) "Often, the identified juror will deny it and other jurors will testify to examples of how he or she has revealed it." (*Ibid.*) In such circumstances, the trial court must weigh the credibility of those testifying and draw upon its own observations of the jurors throughout the proceedings. This Court defers to factual determinations based on these assessments. (*Ibid.*)

Here, the court initially learned by note that a majority of jurors were concerned that Juror No. 5 was dishonest about her experiences, associations, and biases regarding gang members and the police. (18RT 2922.) And the court learned by separate note that Juror No. 5 stated that she used to live near the Bottoms, the very area at issue in the shootings and associated with the Crenshaw Mafia Gangsters, and that she had friends who were gangsters and believed police officers were corrupt. (18RT 2923.) The court's separate interviews of multiple jurors confirmed the information in the notes. (18RT 2930-2931, 2947.) The interviews provided additional information that Juror No. 5 believed that the police could coach witnesses and manufacture or tamper with evidence and crime scenes, as well as that her association with gang members permitted her to understand how a gang member would perceive a threat. (18RT 2961-2962.) And as stated above, the court was permitted to reject and, in fact, rejected Juror No. 5's claim that she had no such bias, finding that she lacked credibility. (18RT 2955-2956, 2981, 2985, 2992.) The record, therefore, sufficiently established that Juror No. 5 concealed a bias that necessitated her removal.

Despite the strong showing of good cause supporting the excusal of Juror No. 5, appellant relies on *United States v. Symington* (9th Cir. 1999) 195 F.3d 1080, in support of his claim that the trial court should have

allowed Juror No. 5 to continue to deliberate or should have declared a mistrial. (AOB 120-121.) Unlike in *Symington*, the record herein does not support appellant's assertion that the court excused Juror No. 5 because of her views on the merits of the case. Rather the record plainly shows that the other jurors' and court's concerns with Juror No. 5 had nothing to do with her views on the evidence and, instead, had to do with her refusal to deliberate and concealed bias. The trial court, therefore, had no reason to send the jury back to continue to deliberate with Juror No. 5 or to declare a mistrial as the Ninth Circuit proscribed in *Symington*. (*Symington*, *supra*, 195 F.3d at p. 1087.) And regardless, this Court has expressly rejected the rule promulgated in several lower federal cases, including *Symington*, that precludes the dismissal of a juror for being unwilling to deliberate whenever there is a reasonable probability that the impetus for the dismissal stems from the juror's views on the merits of the case. (*People v. Thompson* (2010) 49 Cal.4th 79, 137-138.) *Symington*, thus, in totally inapplicable to this matter.

Appellant's reliance on *People v. Bowers* (2001) 87 Cal.App.4th 722, is equally misplaced. (AOB 121-124.) There, the trial court did not face a juror who refused to deliberate. It, instead, excused a juror who quickly reached a conclusion based on the evidence and refused to change her mind after willingly and ably listening to the evidence, the court's instructions, and the deliberations of her fellow jurors. (*Bowers*, *supra*, 87 Cal.App.4th at pp. 734-735.) Contrary to the juror in *Bowers*, Juror No. 5 did not even remember the court's instruction about cellphones in the jury room, let alone follow the instruction, did not follow the instruction to disclose her bias, and did not willingly and ably listen to the deliberations of her fellow jurors. Juror No. 5, therefore, engaged in serious and willful misconduct, far beyond the conduct at issue in *Bowers*.

In light of the above, the trial court did not abuse its discretion in discharging Juror No. 5. Because the trial court's finding of good cause to dismiss Juror No. 5 was supported by a demonstrable reality, there was no violation of appellant's statutory or constitutional rights. (*Leonard*, *supra*, 40 Cal.4th at p. 1410.) As such, this Court should reject appellant's claim.

III. THE TRIAL COURT CONDUCTED A SUFFICIENT INQUIRY REGARDING THE RELATIONSHIP JUROR NO. 12 HAD WITH APPELLANT'S COUSIN AND ANY RELATED DISCUSSIONS, AS WELL AS HIS OPINION ABOUT GANG MEMBERS

Appellant's third argument on appeal is that the trial court failed to conduct a sufficient inquiry (i.e., an evidentiary hearing as to all the remaining jurors) regarding the relationship Juror No. 12 had with appellant's cousin and any related discussions, as well as his opinion about gang members. (AOB 140-152.) The trial court, however, engaged in an appropriate inquiry regarding Juror No. 12.

When a trial court learns of the possibility of a juror's misconduct, and particularly possible misconduct occurring during the jury's deliberations, the court is placed on a course fraught with the risk of reversible error at each fork in the road. (See *Barnwell*, *supra*, 41 Cal.4th at p. 1052.) The court must first decide whether the information before the court warrants any investigation into the matter. (See *Compton*, *supra*, 6 Cal.3d at p. 60 [trial court abused its discretion by failing to investigate possible misconduct and simply discharging the juror "'out of an abundance of caution'"].) If some inquiry is called for, the trial court must take care not to conduct an investigation that is too cursory (see *People v. Burgener* (1986) 41 Cal.3d 505, 520-521 [trial court abused its discretion by questioning only the jury foreman regarding the possible misconduct of another juror, and by not questioning the juror at issue]), but the court also must not intrude too deeply into the jury's deliberative process to avoid

invading the sanctity of the deliberations or creating a coercive effect on those deliberations (see *Cleveland, supra*, 25 Cal.4th at pp. 475-476). A trial court should promptly investigate the purported misconduct, but it possesses considerable discretion in deciding how to investigate the matter. This discretion includes the discretion to select the procedures to employ. (*People v. Prieto* (2003) 30 Cal.4th 226, 274; accord, *People v. Virgil* (2011) 51 Cal.4th 1210, 1284.)

Here, the trial court acted well within its discretion in its method of inquiry regarding Juror No. 12, and appropriately limited its inquiry in accord with this Court's direction in *Cleveland*. (*Cleveland, supra*, 25 Cal.4th at p. 485.) The court received a note that specified that Juror No. 12 told Juror Nos. 5 and 6 that he knew appellant's cousin. (18RT 2921.) Having been made aware of the issue, the court separately interviewed all of the jurors allegedly involved. In doing so, the court aptly began with Juror No. 12, who admitted the relationship. (18RT 2937-2943.) Knowing that the relationship, in fact, existed, the court then interviewed Juror Nos. 5 and 6, both of whom confirmed that Juror No. 12 informed them of the relationship. More importantly, Juror Nos. 5 and 6 both stated that they were the only jurors present during the conversation with Juror No. 12, and neither stated that the conversation affected their ability to be fair and impartial. (18RT 2945-2946, 2952-2953.) The court thus found that no evidence existed that Juror No. 12's relationship with appellant's cousin affected the other jurors or the deliberations in general. (18RT 2980.) Similarly, the court found that no evidence showed Juror No. 12 ever made any statement about gang members, other than Juror No. 5's recollection of the statement. (18RT 2980.) And armed with the information from its inquiry, the trial court correctly ceased any further investigation, which not only may have invaded the content of the deliberations unnecessarily, but

also may have informed other jurors, who did not know of the relationship, that said relationship existed.

Appellant, however, argued at trial that a mistrial was necessary (18RT 2989), and now complains that the court's inquiry was too narrow in that it did not include interviews of every juror. But appellant did not ask the court to conduct any further inquiry as to Juror No. 12, did not request that other jurors be questioned, and did not object to the scope of the inquiry. In addition, the court did not express any unwillingness to ask further questions of Juror Nos. 5, 6, or 12 or to question other jurors. Under these circumstances, appellant has forfeited the instant challenge to the scope or nature of the trial court's inquiry about Juror No. 12 and his statements about appellant's cousin or gang members. (See, e.g., *People v. Holloway* (2004) 33 Cal.4th 96, 126-127.)

In any event, the trial court acted well within its considerable discretion in deciding that no further inquiry was necessary. (*Virgil*, *supra*, 51 Cal.4th at p. 1284.) There was no conflict in the information provided by the interviewed jurors. Nothing suggested that Juror No. 12 spoke with any other jurors about his relationship with appellant's cousin or his opinion of gang members. Additionally, nothing suggested that Juror Nos. 5 and 6 told any other jurors about the relationship. Appellant's concern that Juror No. 12 may have infected the entire jury was entirely unsubstantiated and, as the trial court found, was speculative. (18RT 2989.) This Court should reach the same result because appellant is not entitled to conduct a """"fishing expedition""" for possible misconduct. (*Avila*, *supra*, 38 Cal.4th at p. 604.) Mere speculation does not require the court to conduct further inquiry. (*People v. Davis* (1995) 10 Cal.4th 463, 547-548; *People v. Espinoza* (1992) 3 Cal.4th 806, 821.) Appellant's failure to request a further hearing, including the inquiry of the remaining jurors (21RT 3477), also supports the conclusion that the trial court acted

appropriately. (*People v. Bradford* (1997) 15 Cal.4th 1229, 1349.) Appellant, therefore, has failed to show that the court abused its discretion or violated his constitutional rights. (See *People v. Pinholster* (1992) 1 Cal.4th 865, 928.) As such, this Court should reject appellant's claim.

IV. THE TRIAL COURT DID NOT COERCE A VERDICT BY DISMISSING JUROR NOS. 5 AND 12

Appellant's fourth argument on appeal is that the trial court coerced a verdict by dismissing Juror Nos. 5 and 12 and substituting alternate jurors in their places. (AOB 152-158.) The court, however, in no way pressured the jury into reaching verdict.

"Any claim that the jury was pressured into reaching a verdict depends on the particular circumstances of the case." (*People v. Pride* (1992) 3 Cal.4th 195, 265.) Here, no circumstances establish any pressure from the court. During the interviews into alleged juror misconduct, the court neither asked for nor received a numerical split as to the then existing jurors. After excusing Juror Nos. 5 and 12, the court instructed the jury not to speculate as to the reasons for their excusal. (18RT 2996-2997.) The court further instructed the jury to "set aside and disregard all past deliberations and begin deliberating anew." (18RT 2997.) This instruction was then specifically directed to original jurors, who were ordered to "disregard the earlier deliberations as if they had not taken place." (18RT 2997.) This Court has held that under similar circumstances, it presumes the jurors followed the trial court's instructions. (*People v. Homick* (2012) 55 Cal.4th 816, 856.) As this Court noted in *People v. Fuiava* (2012) 53 Cal.4th 622, 640, appellant's speculation to the contrary is not persuasive. More importantly, such speculation is completely undermined by evidence that the reconstituted jury deliberated for about two days and requested further argument before it was able to reach a verdict. (18RT 3001-3002.)

Furthermore, the trial court did not constrain the reconstituted jury's deliberations in any way, for example by telling the jury to reach a verdict within a particular time. (See *Pride*, *supra*, 3 Cal.4th at pp. 265-266.) To the contrary, the court expressly asked again that the jurors inform it if any of them had any obligations that would limit the amount of time they could deliberate because it did not "want anyone to feel pressured into making a quick decision just because of something coming up . . . ." (18RT 2997.) As such, appellant has failed to identify any circumstances that had a coercive effect on the jury, and this Court should reject his claim.

V. THIS COURT SHOULD CORRECT THE ABSTRACT OF JUDGMENT TO REFLECT THE SENTENCES THE TRIAL COURT IMPOSED ON COUNTS 3, 4, AND 6

Appellant's fifth argument on appeal is that this Court should order that the abstract of judgment be corrected to reflect properly his sentences on counts 3, 4, and 6 to be life with the possibility of parole. (AOB 158-160.) As to those counts, the trial court imposed terms of life in prison (plus an additional 20 years as to counts 3 and 4). (21RT 3500-3501.) The abstract of judgment, however, stated that the sentences were "Life Without the Possibility of Parole . . . ." (13CT 3723-3724.) The abstract of judgment, therefore, inaccurately reflected the oral pronouncement of the sentences by the trial court, and this Court is permitted to correct the abstract as a result. (*People v. Mitchell* (2001) 26 Cal.4th 181, 185.)

VI. APPELLANT HAS FORFEITED HIS CLAIM OF INSTRUCTIONAL ERROR REGARDING CALJIC NO. 8.85 AND, REGARDLESS, THIS COURT HAS ALREADY REJECTED SIMILAR CLAIMS BECAUSE THE INSTRUCTION IS NOT UNCONSTITUTIONAL

Appellant's sixth argument on appeal is that the trial court's instructing the jury with CALJIC No. 8.85 violated his Eighth and Fourteenth Amendment rights to a reliable sentencing determination.

(AOB 161-165.) Appellant forfeited this claim because he did not ask the trial court to modify this standard instruction to accommodate his concerns. (*People v. Carpenter* (1997) 15 Cal.4th 312, 391-392; *People v. Arias* (1996) 13 Cal.4th 92, 171.) In any case, this Court has rejected similar claims in the past, and appellant has presented no reason to reconsider those decisions. (See, e.g., *People v. Russell* (2010) 50 Cal.4th 1228, 1273.)

VII. THIS COURT HAS ALREADY REJECTED SIMILAR CHALLENGES TO CALJIC NO. 8.88 BECAUSE THE INSTRUCTION IS NOT UNCONSTITUTIONAL

Appellant's seventh argument on appeal is that the trial court's instructing the jury with CALJIC No. 8.88 violated his Fifth Sixth, Eighth, and Fourteenth Amendment rights. (AOB 165-176.) Appellant, however, acknowledges (AOB 167) that this Court has previously rejected similar claims (See, e.g., *People v. Berryman* (1993) 6 Cal.4th 1048, 1099-1100; *People v. Duncan* (1991) 53 Cal.3d 955, 978), and he has failed to present any persuasive reason that this Court should reconsider its previous decisions.

VIII. CALIFORNIA'S DEATH PENALTY STATUTE, AS INTERPRETED BY THIS COURT AND APPLIED AT APPELLANT'S TRIAL, DOES NOT VIOLATE THE FEDERAL CONSTITUTION

Appellant's eighth argument on appeal is that California's death penalty scheme, both in the abstract and as applied at his trial, violated his Fifth and Fourteenth Amendment rights to due process of law, Sixth Amendment right to a jury trial, and Eighth Amendment right to reliable guilt and penalty determinations in a capital case. (AOB 176-209.) First, he contends that section 190.2 is impermissibly broad. (AOB 178-180.) The list of special circumstances qualifying a first degree murder for capital sentencing (§ 190.2) is not impermissibly broad. (*People v. Dykes* (2009) 46 Cal.4th 731, 813.)

Second, he claims that the broad application of section 190.3, subdivision (a) violated his constitutional rights. (AOB 180-182.) This Court has already rejected this claim. (*People v. Jones* (2011) 51 Cal.4th 346, 380-381, and cases cited therein.)

Third, he claims that his death sentence is unconstitutional because it is not premised on findings made beyond a reasonable doubt. (AOB 183-194.) This Court has rejected this claim as well. (*Jones*, *supra*, 51 Cal.4th at pp. 380-381, and cases cited therein.)

Also rejected in the past by this Court is his fourth argument that some burden of proof is required or the jury should have been instructed that there was no burden of proof (AOB 194-197). (*Jones*, *supra*, 51 Cal.4th at pp. 380-381.)

This Court has further rejected his fifth claim that his right to meaningful appellate review was violated by the failure to require the jury to make written findings (AOB 197-201). (*People v. Scott* (2011) 52 Cal.4th 452, 496; *People v. McKinnon* (2011) 52 Cal.4th 610, 693.)

In his sixth claim, appellant suggests that the failure to conduct inter-case proportionality review violates the Fifth, Sixth, Eighth, and Fourteenth Amendment (AOB 201-203), but this Court has already determined that this claim lacks merit. (*Prieto*, *supra*, 30 Cal.4th at p. 276.)

In his seventh claim, appellant argues that any use of unadjudicated criminal activity by the jury as an aggravating factor under section 190.3, subdivision (b), violates due process, and the Fifth, Sixth, Eighth, and Fourteenth Amendments. (AOB 203-205.) This Court has rejected this claim. (*People v. Gonzales and Soliz* (2011) 52 Cal.4th 254, 334; *People v. Abilez* (2007) 41 Cal.4th 472, 534.)

This Court has also rejected appellant's eighth claim that the jury instructions for section 190.3, subdivisions (d) and (g), are unconstitutional

for including the adjectives "extreme" and "substantial." (*People v. Lightsey* (2012) 54 Cal.4th 668, 731-732.)

Appellant's ninth claim that the California capital sentencing scheme violates the equal protection clause has been rejected by this Court (AOB 205-208). (*People v. Manriquez* (2005) 37 Cal.4th 547, 590.)

Appellant's tenth and final claim that California's use of the death penalty as a regular form of punishment falls short of international norms has also been rejected by this Court (AOB 208-210). (*People v. Cook* (2006) 39 Cal.4th 566, 620.)

In sum, appellant raises the usual challenges to California's death penalty scheme and instructions, but offers no valid reasons for this Court to reconsider its previous denials of these claims.

IX. NO CUMULATIVE PREJUDICE EXISTS IN THIS CASE

Appellant's ninth and final argument on appeal is that he suffered cumulative prejudicial error. (AOB 210-212.) But where few or no errors have occurred, and where any such errors found to have occurred were harmless, the cumulative effect does not result in the substantial prejudice required to reverse a defendant's conviction. (*People v. Price* (1991) 1 Cal.4th 324, 465.) The essential question is whether the defendant's guilt was fairly adjudicated, and in that regard a court will not reverse a judgment absent a clear showing of a miscarriage of justice. (*People v. Hill* (1998) 17 Cal.4th 800, 844; see also *People v. Cunningham* (2001) 25 Cal.4th 926, 1009; *People v. Box* (2000) 23 Cal.4th 1153, 1219.) For the reasons explained, there was no error in this case, and even if there was error, it was harmless. The several alleged errors, or small groups of related errors, that appellant points to are all discrete and unrelated, and therefore have no accumulating effect. Thus, even considered in the aggregate, the alleged errors could not have affected the outcome of trial.

There was no miscarriage of justice, and reversal is not required on this ground.

CONCLUSION

For the reasons stated, respondent respectfully requests that this Court correct the abstract of judgment to reflect the oral pronouncement of sentence on counts 3, 4, and 6, and otherwise affirm the judgment in its entirety.

Dated: December 16, 2013

Respectfully submitted,

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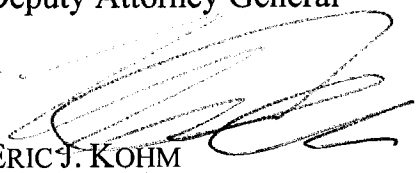

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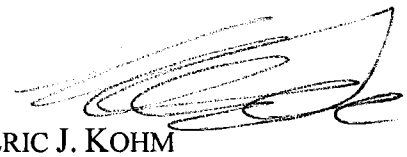
CERTIFICATE OF COMPLIANCE

I certify that the attached **RESPONDENT'S BRIEF** uses a 13 point Times New Roman font and contains 20,164 words.

Dated: December 16, 2013

KAMALA D. HARRIS
Attorney General of California



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DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **People v. Craigen Lewis Armstrong**
No.: **S130659**

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 **December 17, 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 300 South Spring Street, Suite 1702, Los Angeles, CA 90013, 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 **December 17, 2013**, at Los Angeles, California.

Lupe Zavala
Declarant

Signature

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