In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, **v.** **RUBEN BECERRADA,** Defendant and Appellant.	**CAPITAL CASE** Case No. S170957

Los Angeles County Superior Court Case No. LA033909
The Honorable William R. Pounders, Judge

RESPONDENT'S BRIEF

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STATEMENT OF THE CASE

An information filed by the Los Angeles County District Attorney's Office charged appellant with: two counts of rape of Maria Arevalo[1] by force or threat (Pen. Code, § 262, subds. (a)(2) & (a)(6));[2] counts 1 & 2); false imprisonment of Maria (§ 236; count 3); assault on Maria by means likely to produce great bodily injury (§ 245, subd. (a)(1); count 4); two counts of dissuading a witness (Maria) by force or threat (§ 136.1, subd. (c)(1); counts 5 & 6); murder of Maria (§ 187, subd. (a); count 7); and kidnaping of Maria (§ 207, subd. (a); count 8). The information further alleged as to counts 1 and 2 that appellant was armed with a deadly weapon (§ 12022.3, subd. (b)). It alleged as to count 7 that he personally used a deadly weapon (§ 12022, subd. (b)(1)), and committed the murder with the following special circumstances: to kill a witness, during the commission of a kidnaping, and by means of lying in wait (§ 190.2, subds. (a)(10), (15) & (17)). The information also alleged as to all counts that appellant had a prior serious felony conviction (§ 667, subd. (a)(1)) and a prior "strike" conviction (§§ 667, subds. (b)-(i), 1170.12, subds. (a)-(d)), and had served five prior prison terms (§ 667.5, subd. (b)). Appellant pled not guilty and denied the special allegations. Before jury selection, the court dismissed counts 2, 3, 4, and 6, and the deadly weapon allegation as to count 1, on the

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[1] Respondent will refer to Maria and her ex-husband, Juan Arevalo, by their first names, to avoid confusion.

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

prosecutor's motion.[3] (5CT 1354-1362, 1364-1365; 8CT 2196-2197; 9CT 2311.)

In the guilt phase, the jury found appellant guilty of first degree murder and found true the weapon and special circumstance allegations in count 7. The jury found appellant guilty as charged in counts 1, 5, and 8, and also found the special allegations to be true. (9CT 2355-2360, 2367-2369.)

In the penalty phase, the jury found death was the appropriate punishment for appellant. The trial court denied appellant's motions for new trial and for modification of the penalty from death to life without parole. (9CT 2459, 2461-2482; 27CT 7542-7546, 7549-7552.)

The trial court imposed a sentence of death as to count 7 and an aggregate prison term of 15 years as to the remaining counts. Appellant was given 3,267 days of presentence custody credit and was ordered to pay restitution, fines, and fees. (27CT 7549-7564, 7594-7595.)

There was an automatic appeal from the judgment. (31RT 4492.)

STATEMENT OF FACTS

A. Guilt Phase--Prosecution Case-in-Chief

1. Appellant's Relationship with Maria, the Rape and the Threats

Maria and Juan Arevalo married in June 1996, but separated after a year and a half. (10RT 1500-1502.) Maria was born in 1977 and was 19 years old at the time. (12RT 1728-1729.) Even after separation they remained close friends and continued to see each other three times a month and to speak on the telephone. (10RT 1503-1504.) Maria first worked at a

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[3] Following the dismissal, the remaining counts were renumbered on the verdict forms only as counts 1 through 4. For all other purposes, they retained their original numbering. (8CT 2197.)

Sav-On store and then went to work with the Manpower employment agency in Sherman Oaks. (10RT 1503.)

After the separation, Maria began dating appellant. (10RT 1503.) She got a tattoo of his first name under her navel and seemed happy at first. (10RT 1551-1552.) But then Juan started to see bruises on her arm. After speaking with Maria about the bruises, Juan discovered that they came from appellant's physical abuse. (10RT 1504.) Juan told Maria to end the relationship, but she was too scared. (10RT 1505-1506.)

On one occasion, Juan went to appellant's house on Dorrington Avenue in the Arleta neighborhood of Los Angeles to confront him about the abuse. (10RT 1506-1508.) Although the conversation was civil, appellant denied hurting Maria and told Juan not to believe her. (10RT 1508-1510.) Appellant also showed Juan his gang tattoos and mentioned that he was in a gang. (10RT 1510.) Juan still told appellant not to hurt Maria. (10RT 1510-1511.) Shortly thereafter, Maria and appellant moved in together in an apartment in the Sherman Oaks neighborhood. (10RT 1511.) Maria continued to tell Juan about physical abuse from appellant and that she was afraid for herself, her family, and for Juan. (10RT 1511-1512.) Maria explained that she did not love appellant, but could not leave because she was afraid. (10RT 1512.) Maria sometimes told Juan that she still held out hope that appellant would change. (10RT 1512-1513.)

Jennifer Rodriguez[4] became friends with Maria in 1997 and met appellant shortly thereafter at a nail salon where Maria regularly got her acrylic nails painted red. (11RT 1684-1687.) Jennifer and Maria spoke weekly and saw each other frequently at the gym. (11RT 1685-1686, 1692-1693.)

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[4] For clarity, respondent will refer to Jennifer Rodriguez as "Jennifer."

During his relationship with Maria, appellant went to prison. (12RT 1702-1703, 1716-1717.) While he was in prison, he used narcotics. However, after his release, he told Maria that he had changed. (12RT 1717.) In early 1999, Maria asked her parents, Isabel and Miguel Mejia,[5] to go out to dinner with appellant, his parents, and his son, Ruben Jr., which they did as a one-time occurrence. (12RT 1744, 1752-1753.)

In early August 1999, Juan and Maria planned on going together to the August 8th wedding of Juan's cousin, who was also Maria's friend. (10RT 1513-1514.) The night before the wedding, Juan called Maria to make plans for the next day. As they were speaking, Maria quickly said she had to hang up and did so. (10RT 1514.) Maria called back at 6:00 a.m. the next morning, scared, anxious, and crying. (10RT 1514-1515.) Juan and Maria met 15 minutes later in a supermarket parking lot. (10RT 1515.)

Maria was crying and shaking and had trouble speaking; she had fresh bruises on her neck, legs, and wrists. (10RT 1515-1516, 1519-1520.) Maria had told appellant that she wanted to leave the relationship, and he responded by choking her to the point of losing consciousness. Appellant first put her in a closet. When she stopped fighting, he put her on a bed, tied her up, and raped her. (10RT 1517-1518.) Appellant also took away her car keys. (10RT 1516.) In the morning, appellant told her not to tell anybody and threatened her by telling her that he knew where her family lived. Then he let her take her car keys and leave. (10RT 1518-1519.)

Maria was afraid to report the incident because she thought appellant would kill her and her parents. (10RT 1519.) Juan told her to go to a police station and report the rape. Juan drove her to a police station, but

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[5] For clarity, respondent will refer to Isabel and Miguel Mejia as "Isabel" and "Miguel."

Maria was too afraid to go in. (10RT 1520-1521.) Instead, they went back to Juan's house on Osborne Street in the Pacoima neighborhood. (10RT 1521-1522.) Although the house belonged to Juan's aunt, Thelma Mata, Juan lived there with his grandmother and a few cousins. (10RT 1522.)

On August 9, 1999, Juan called appellant and told him that they were going to the police to report the rape. (10RT 1522-1523.) Juan wanted to hear his side of the story. (10RT 1558.) Appellant told Juan to remember that he had a family and that he should be careful. Appellant added that he knew where Juan lived, where his family lived, and what kind of car he drove. (10RT 1523-1524.) Appellant told Juan not to believe Maria. (10RT 1524.)

On August 11, 1999, Juan finally convinced Maria to go to the police and report the rape. He took Maria with her older sister and brother-in-law, Maria Eugenia and Armando Herrera.[6] (10RT 1473-1476, 1525; 12RT 1703-1705, 1724.) When Maria Eugenia saw Maria for the first time, she was shaking and crying and repeating that she did not want to die so soon. (12RT 1705-1706.) Maria had bruises on her hands, legs, and neck. She told Maria Eugenia that appellant had choked her and tried to kill her. (12RT 1706.) Maria passed out when appellant lifted her by the neck. (12RT 1715-1716.) Maria told Maria Eugenia that she used high necklines and makeup to hide the bruises. (12RT 1716.) Appellant had also told Maria that she had to live with him and that she was not allowed to live with any other man. If Maria went to the police, he would kill her and her entire family. (12RT 1707.) Appellant also told Maria that he knew how the system worked and could make himself appear crazy to avoid conviction. (12RT 1708.) In the past, Maria Eugenia had only been able to

[6] To avoid confusion, respondent will refer to Maria Eugenia Herrera as "Maria Eugenia" and to Armando Herrera as "Armando."

speak to Maria at work because appellant would not allow her to speak to family on the phone at home. (12RT 1710-1711.) Maria was concerned that appellant had information on the addresses of family members. (12RT 1714.)

Los Angeles Police Detective Michael Dickson took the report along with photographs of bruises and lacerations on Maria's body. (10RT 1476.) The jury was shown photographs of the bruises on Maria's arm and neck and lacerations on her hands. (10RT 1477-1479.) Detective Dickson gave Maria an emergency protective order, and Juan and Maria returned to his house. (10RT 1479, 1529.)

The next morning, on August 12, 1999, as Juan and Maria were leaving for work, they saw appellant standing outside Juan's front door. (10RT 1529.) Maria screamed at appellant to leave and showed him the protective order. (10RT 1529-1530.) At the same time, Juan told appellant he was calling the police and picked up a nearby telephone. Appellant left. (10RT 1530.) One or two days later, two men who appeared to be gang members came to the back gate of Juan's house. (10RT 1531.) One of Juan's cousins, Wendy, intercepted them. They told her to tell Juan to drop the charges and left a phone number. (10RT 1531-1532.) Juan never called it. (10RT 1532.) Around the same time, a woman came to the house and spoke with Mata. She told Mata that she was the mother of appellant's two children and that, if Maria did not drop the charges, appellant's children would be left fatherless. (10RT 1533-1534.)

As a result of the visits, Juan and Maria moved out and into a friend's house for a few days before finding their own apartment on Hamlin Street in the North Hollywood neighborhood because they were afraid that they were endangering Juan's family. (10RT 1535-1536.) They also opened a joint bank account at the same time. (10RT 1547.)

Maria called Jennifer and told her that appellant had raped her and choked her when she tried to leave the relationship. (11RT 1687-1690.) Appellant also threatened to kill Maria if she brought charges against him or did not remove the protective order. (11RT 1688-1689.) Maria was also concerned for her family. (11RT 1689.)

In August 1999, Gerilind Taylor opened a Manpower office in Santa Monica and brought Maria and another co-worker, Chris Eck, along to work under her. (10RT 1565-1567; 11RT 1609-1610.) A month earlier, Taylor and Eck had run into appellant and Maria at a drugstore. (10RT 1569-1570.) Appellant was buying Marlboro Red cigarettes. (10RT 1571-1572.) Although Maria did not smoke, she would often join Taylor and Eck on smoke breaks just to speak about personal issues. (10RT 1548, 1567-1569.)

Appellant joined Manpower at another location, but visited Maria at the Santa Monica office on a couple of occasions. (10RT 1570; 11RT 1594, 1611.) During one visit, appellant told Eck, in front of Maria, and without prompting, that he had been incarcerated for homicide as a juvenile, and for attempted double homicide as an adult. Eck was surprised because it did not seem like something that would be discussed openly without reason. (11RT 1612.) Appellant also said that he was a hit man for the Mexican Mafia, and had killed people and gotten away with it. Eck was shocked. (11RT 1613-1614.)

Both before and after they moved from Sherman Oaks, Taylor saw bruises on Maria's arms and legs. (10RT 1572-1573.) After the move to Santa Monica, Eck saw new bruises every two weeks. (11RT 1614, 1629.) In one instance in early August 1999, Maria wore a turtleneck sweater on a day when it was extremely hot. When Taylor asked her about the sweater, Maria showed her dark finger-shaped bruises on her neck. Taylor called Manpower's corporate security office because she was worried, and

because the matter involved two Manpower employees, but all they did was recommend that she tell Maria to go to the police. (10RT 1573-1574, 1576; 11RT 1589, 1594.) Taylor brought it up with Maria, and Maria said she was scared and broke down crying. (10RT 1574-1575.) Maria explained that appellant had become angry when she refused to participate in a "threesome" and had grabbed her by the neck, tied her up, and repeatedly raped her. (10RT 1575, 1577; 11RT 1601.) When appellant held her neck, he told her, "If I wanted to kill you, I could easily kill you." (11RT 1590.) Maria also told Taylor that appellant would kill her in another seven or eight months. (10RT 1576.)

The same day, Eck pulled Maria aside because he could see that she was upset and she had missed work the day before. (11RT 1615-1616.) Maria told Eck the same story and explained the turtleneck sweater. (11RT 1616-1618.) Maria added that she was afraid appellant would come after her because it would be a third strike conviction for him. (11RT 1618.)

A few days later, Maria told Eck and Taylor that she had gone to the police. (11RT 1591-1592, 1619.) Maria told Eck that appellant had told her, "If I'm going down for this, then I'm going to take you with me." (11RT 1619.) The police questioned Maria and Taylor at Manpower in Santa Monica. (11RT 1591-1592.) Because appellant was also a Manpower employee, Taylor opened an internal investigation of him. (11RT 1594.)

On August 16, 1999, Los Angeles County Deputy District Attorney Peggy Beckstrand filed charges against appellant for domestic violence, rape, and dissuading a witness. (10RT 1482-1483, 1488-1489.) A warrant was issued for appellant's arrest. (10RT 1490.) Maria was the primary witness in the case as the named victim and was the only percipient witness for the rape. (10RT 1495-1497.) The prosecution could not proceed without her. (10RT 1497.)

After the charges were filed, Maria told Taylor and Eck that appellant had called her and told her that, if she did not drop the charges, he would send a sex tape of Maria to her parents. (11RT 1592, 1602, 1622, 1624.) Maria was also worried for Juan's safety. (11RT 1622.) Maria told Taylor and Eck that she loved appellant and thought she could help him, but that she could not do so and was afraid of him. (11RT 1592-1593, 1604, 1623-1624.) Maria was very trusting and naive. (11RT 1625.) Maria quit her job in September 1999. (11RT 1593.) Maria later called Eck and told him that appellant had sent the sex tape to Maria's family members. (11RT 1627.)

Maria continued to express fear to Juan that appellant knew where she was. Once, appellant called her at work and told her to meet him outside so he could drive her around. (10RT 1537.) She did so, and he drove her to her parents' house on Remick Avenue in Arleta, then to her apartment on Hamlin, and then to an area where he showed her parked cars. (10RT 1537-1538.) Appellant told Maria that the cars were stolen and that he could use them to kill her and get away. (10RT 1538-1539.) Appellant also showed Maria a mask and a weapon he could use. Appellant told her that he had previously shot someone as a gang member and gotten away with it. (10RT 1539.) Appellant told Maria that if he was apprehended he would not go alone, but would kill Juan and Maria's family. (10RT 1543.) Maria knew but did not tell the police where appellant lived out of fear for her family. (10RT 1544; 12RT 1759-1760, 1763-1764.) Whenever she spoke or met with police officers, Maria would reassure appellant that she did not cooperate. (12RT 1764-1765.)

On October 3, 1999, Juan bought Maria a new Nissan car even though she already had a car. (10RT 1544-1547.) Maria showed her new car to Jennifer. (11RT 1690, 1695.) Later that month, Maria changed jobs to Washington Mutual in the Northridge neighborhood and moved in with her

parents. (10RT 1536-1537; 11RT 1640-1641; 12RT 1730-1732.) Maria started seeing appellant again. (10RT 1555-1556.) The entire time that Maria lived with her parents, appellant would call her at home every day before she left for work at 4:40 a.m. (12RT 1732-1733, 1760-1762.) Maria's shift started at 4:55 a.m. (12RT 1660.) Isabel asked her to tell appellant to stop calling so early, but it still continued. (12RT 1732-1733.) Maria brought her own lunch to work everyday, but did not bring a knife with her. (11RT 1639, 1652; 12RT 1736.)

Juliette Shakhbazyan sat in the cubicle next to Maria at Washington Mutual. (11RT 1641-1642.) Maria told Shakhbazyan that she was having physical and mental problems with appellant[7] and that she was always scared; Maria was petite. She came in to work often with finger and hand-shaped bruises on her arms and wore turtleneck sweaters. (11RT 1644-1645.) On one occasion, Maria's forehead was black and blue. (11RT 1644.)

Rosie Guzman became good friends with Maria at Washington Mutual. (11RT 1650-1651.) Guzman only saw the bruises once on Maria's arm around the 2000 New Year. (11RT 1653-1654.) The bruises were finger-shaped and had come from appellant. (11RT 1654-1655.) Maria told Guzman that appellant had raped her and threatened to kill her if she did not drop the charges. (11RT 1655-1656.) Maria discussed the issue many times with Guzman and was always nervous and worried because she did not know what to do. For the same reason, Maria did not tell the police where appellant was hiding. (11RT 1656-1657.) Appellant had sent a sex tape of Maria to her family and because Maria and her family were religious, they were all devastated. (11RT 1657-1658.) Maria also

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[7] Shakhbazyan could not remember the name of Maria's "boyfriend." (See 11RT 1643.)

confided that she was concerned for the safety of her family and Juan. (11RT 1658.)

Maria Eugenia had moved to a new address in a different city. She thought appellant did not know her new address, but then received Maria's sex tape in the mail. It was sent anonymously. (12RT 1714-1715, 1765.)

In January 2000, Maria began dating co-worker Francisco Valenzuela and appeared happy. (11RT 1643, 1648, 1653, 1673-1675.) That same month, Maria's cousin, Laura Patricia Arreguin,[8] moved into Isabel's house and began sharing a bedroom with Maria. (12RT 1759-1761.) Maria confided in her that appellant had raped and choked her. When asked why she stayed with appellant, Maria responded that she knew it was a mistake, but that if she just left, appellant would follow her. Instead, Maria was "trying to get [appellant] to forget about" her. (12RT 1765.)

In the beginning of March 2000, Maria began apologizing to everyone at work whom she felt she had ever offended. (11RT 1648.) In particular she left an apology note on the computer monitor of Mariela Lopez, a coworker with whom she had a fight. (11RT 1646-1647.) On March 2, 2000, as she left work, Maria gave Guzman a hug and kiss and told her that appellant had again threatened to kill her. Guzman again told her to go to the police, and Maria expressed worry and doubt. (11RT 1659-1660.)

On March 3, 2000, Beckstrand interviewed Maria with Los Angeles Police Detective Bernard Pulliam. (10RT 1490-1491.) The interview was recorded. (10RT 1491.) At the interview, Maria had deep red fingernails with a square top. At trial, Beckstrand identified a photograph of Maria's broken fingernails, as having the same color and cut as her fingernails at the interview. (10RT 1493-1494.)

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[8] For clarity, respondent will refer to Laura Patricia Arreguin as "Laura."

At the beginning of the interview, Maria was "well mannered" and expressed herself articulately. (10RT 1492.) However, in the middle of the interview, Maria's cell phone rang and she did something on it with her fingers. (10RT 1494.) Immediately, her demeanor changed, and Maria became anxious and afraid. (10RT 1495.) When Maria arrived home, she said hello to Isabel, but did not tell her that she had spoken again with the police. (12RT 1733.)

2. The Murder and Its Aftermath

On March 4, 2000, appellant called Maria at 4:00 a.m., and she left the house before 4:40 a.m. as usual. (12RT 1731, 1739, 1763.) At 4:45 a.m., Maria went to the Sav-On store on Woodman Avenue in Arleta and bought a bottle of water, a pack of Marlboro Reds cigarettes, and a translucent Bic lighter. (12RT 1768-1770, 1772-1775, 1781-1791.) Maria was in a rush and did not engage in conversation. (12RT 1779-1780.) That was unusual for Maria, who was a regular customer and who had worked there in the past. (12RT 1780.) Maria did not smoke. (10RT 1548, 1568; 11RT 1646, 1652, 1690, 1711.)

A little before 5:00 a.m., Margareth and Lizbeth Gonzalez[9] woke up to a woman screaming from the alley behind their house, "Help me, help me, please. Help me." (12RT 1792, 1796; 14RT 2029-2033.) Margareth and Lizbeth, who were 18 and 16 years old at the time, respectively, shared a bedroom in their Dorrington Avenue house. (12RT 1793, 1809.) As the screaming continued, the voice moved by the side of the house, as if the woman screaming was running to the front. (12RT 1800, 1857-1858; 14RT 2033-2034.) The girls went to the living room and turned on the backyard

[9] For clarity, respondent will refer to Margareth Gonzalez as "Margareth" and to Lizbeth Gonzalez as "Lizbeth," or, collectively, as the "Gonzalez girls."

lights, but did not see anything out of the ordinary. (12RT 1800-1801; 14RT 2034.) Then they went to the front of the house, turned on the porch light, opened the front door, and saw a man kicking and hitting a woman. (12RT 1802-1803, 1810; 14RT 2034-2038.) Margareth had seen the woman sometime before walking out of a house two houses away from her house. (12RT 1854.)

Margareth also saw Adolfo Amthor, a neighbor, standing outside across the street and watching the attack from behind his fence. (12RT 1831.) The girls' mother, Luz Gonzalez,[10] and stepfather, Jorge Paz, joined them moments later. (12RT 1803; 14RT 2072-2076.) Margareth called the police on a cordless phone she had brought with her. (12RT 1826-1827; 14RT 2093.)

The man was standing outside a car parked between the girls' house and a vacant house immediately to the north, and the woman was sitting in the passenger side of the backseat of the car. (12RT 1806-1807, 1830; 14RT 2037-2039.) The car was parked so that the passenger side was facing the witnesses. (12RT 1806-1807.) The woman was against the passenger side door and the man was attacking her from the opposite side of the car. (12RT 1809-1813.) At one point, the man held on to the roof of the car and swung his legs in to kick the woman repeatedly. (12RT 1811.) The woman held her hands up and said, "Please help me." (12RT 1811-1812; 14RT 2080.) Appellant shouted "bitch" and "bullshit" in English as he beat her. (14RT 2092.)

The woman finally opened the passenger door and stood up. She stared at Margareth and Lizbeth, but did not move. The girls came closer to the woman and asked her to come inside the house, but she did not move.

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[10] For clarity, respondent will refer to Luz Gonzalez as "Luz." (See 14RT 2089-2090.)

(12RT 1812-1813; 14RT 2067.) The man did not appear to notice the family in front of the house and walked around the car to continue attacking the woman. The man grabbed the woman's neck, repeatedly hit her in the stomach with a closed fist, then picked up a nearby glass Corona beer bottle and hit her on the back of her head with it a few times. (12RT 1812, 1815-1816, 1819-1820; 14RT 2045.) The man looked up at the girls with anger on his face before he went back to hitting the woman. (12RT 1817.)

Luz walked all the way up to the man and said, "Stop hitting her," but he ignored her. (12RT 1817-1818; 14RT 2043, 2047, 2080-2081.) Paz did the same, and the man paused to look at Paz before resuming his assault on the woman. The woman finally started to move away from her assailant, but he pulled her back by the hair and tried to get her back in the car. (12RT 1818-1819.) Luz screamed, "Let go of the girl, you're killing her." (12RT 1821.) The woman tried to move again toward Paz, but the man grabbed her in a bear hug and would not let her go. (12RT 1821-1822.) The man dragged her back to the car, threw her in, and closed the door. He drove away without even turning on his headlights. (12RT 1823-1824.) The woman had stopped moving altogether at this point. (12RT 1823-1825.) Altogether the man had hit the woman more than 20 times with his closed fist. (12RT 1837-1838.)

As the man drove away with the victim, Los Angeles Police Officer David Hunt arrived with his partner at 5:03 a.m. (12RT 1824, 1827; 13RT 1873-1874, 1877.) The entire episode had lasted 10 minutes. (12RT 1827.) Margareth told Officer Hunt what she had seen and that the man had kidnaped the woman. (12RT 1835.) She also pointed out the blood and broken fingernails that had been left on the street. (12RT 1835-1836, 1878-1879; 14RT 2049-2050.) Photographs of the blood and fingernails mixed with little pieces of glass were shown to the jury. (12RT 1879-1881.) Officer Hunt called in a kidnaping report. (12RT 1877.)

At 8:00 a.m., Valenzuela called Isabel and told her that Maria had not yet arrived at work. Isabel became very worried. (12RT 1740.) Isabel began calling Maria's cell phone repeatedly. Maria never picked up. (12RT 1740-1741.)

Around the same time, Jorge Rebollar, who regularly collected the trash at an apartment complex on Van Nuys Boulevard, found a car backed into a stall in the parking lot at the rear of the building. (13RT 1918-1922.) He had never seen that car parked there before. (13RT 1922.) Rebollar saw that the car was stained with blood on the outside. (13RT 1923.) Appellant had lived at the apartment complex from 1994 until 1995. (13RT 1943-1950.)

Apartment complex resident Ana Brunes went outside to throw out her trash and found the car parked in her space. (13RT 1957-1961.) She did not recognize the car, but when she saw that it was covered in blood, she called the police. (13RT 1961-1964.) After the call, Brunes went back outside and saw a tall, dark-skinned Hispanic man, wearing a gray beanie cap and a goatee, kneeling at the side of the car and wiping it down with a rag. (13RT 1964-1968.) Brunes left for work before the police arrived. (13RT 1971-1972.)

At 10:37 a.m., Los Angeles Police Officer Kenneth Snowden received a call about an abandoned car in an apartment complex on Van Nuys Boulevard. (13RT 1884-1886.) He arrived there with his partner at 10:55 a.m. (13RT 1886.) The car had been backed into a stall in the apartment's parking lot to the rear of the building. (13RT 1888.) As Officer Snowden approached, he saw blood smeared on the exterior driver's side, as well as broken glass and a large amount of blood on the back seat. (13RT 1890-1891.) The blood on the outside looked smeared as if by a towel. (13RT 1891-1892.) There was also broken glass on the driver's seat. (13RT

1893.) The driver's side front window had been broken in from the outside. (13RT 1893-1894.)

The officers opened the car's trunk and found a women's body inside, later identified as Maria. (13RT 1892-1893.) There was a rope tied around her neck, and she was missing a shoe. (13RT 1895.) Her clothes were saturated with blood. (13RT 1895-1896.) Officer Snowden notified his commander and waited for Los Angeles Police Detective Michael Oppelt to arrive. (13RT 1896-1897, 1899-1907.) Detective Oppelt additionally found a piece of glass on the rear bumper and opined that the car appeared to have been parked hastily. (13RT 1907-1908.) The car had no license plates. (13RT 1908.)

Detective Oppelt looked cursorily at Maria's body and saw multiple abrasions and what looked like stab wounds. (13RT 1908-1909.) Some of her fingernails were missing. Inside the car, Detective Oppelt found a container of tuna salad. (13RT 1909.) In the trunk, he found part of that morning's Los Angeles Times newspaper, but no purse or any identification. (13RT 1909-1910, 1935.) A temporary vehicle registration pasted on the windshield listed Juan and Maria as the owners. (13RT 1911.) Detective Oppelt determined that no struggle had taken part where the car was then parked near Van Nuys Boulevard and had the car towed to a police tow yard for further investigation. (13RT 1912-1915.) The police investigation was recorded on video by members of the media. (13RT 1913.)

Detective Oppelt met Los Angeles Police Detectives Bradford Cochran and Bogison at the tow yard. (16RT 2381-2382.) Upon a further search of the car, Maria's missing shoe was found next to her body in the trunk together with an earring. (13RT 1932, 1936.) Although the entire interior of the car had blood on it, the blood was more concentrated on the rear passenger seat. (13RT 1937-1938.) There was very little blood in the

trunk. (16RT 2383.) Detective Oppelt also found towels saturated with blood in the back seat. (13RT 1938-1939.)

That afternoon, Valenzuela came over to Isabel's house to pick up her son, George Mejia,[11] to go to the police station to identify Maria's body, which they did. (12RT 1740-1742; 13RT 1911.) Valenzuela and George spoke with Detective Oppelt and told him that Maria was involved in a criminal complaint against appellant for rape. (13RT 1977.) The Gonzalez girls and Paz also went to the police station that afternoon to speak with other police detectives. (12RT 1836-1837; 14RT 2050.)

Detective Oppelt called Detective Pulliam regarding the rape case and discovered that Detective Pulliam had just located appellant at a house on Dorrington Avenue on the same block as the assault. (13RT 1977-1978.) Detective Oppelt arranged surveillance of the house, less than a mile from where Maria's car was found. (13RT 1978-1980.)

Los Angeles Police Officer Bobby Crees and his partner were assigned to surveil the Dorrington house where appellant was staying. (15RT 2271-2274.) At 9:20 p.m., Officer Crees saw a car pull away from the house and followed it for a few minutes before pulling it over down the block from the Van Nuys Boulevard apartment complex at the intersection of Plummer Street. (15RT 2274.) A woman named Rosa Marquez[12] was driving with Ruben Jr. in the passenger seat and appellant behind them. (15RT 2274-2275.) Detectives Oppelt and Pulliam were both called to the scene. (13RT 1981-1982; 15RT 2276.)

Appellant gave a false name, "Ruben Aguirre," and Ruben Jr. denied being related to appellant. (13RT 1982-1983; 15RT 2275.) Appellant was detained together with Ruben Jr. and Rosa. (13RT 1982.) Appellant

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[11] For clarity, respondent will refer to George Mejia as "George."
[12] For clarity, respondent will refer to Rosa Marquez as "Rosa."

appeared nervous and had abrasions on his neck and jaw. (13RT 1983-1985; 15RT 2277.) Detective Oppelt ordered appellant to be detained in a holding cell. (13RT 1985.) Appellant was only told that he was being arrested for his outstanding warrant on the rape charge. He was not informed that Maria had been found. (15RT 2242-2243, 2276-2277.)

At booking, appellant was 5'10" tall and weighed 170 pounds. (15RT 2243.) He refused to allow the police to photograph the injuries that he had under his shirt. (15RT 2244-2245.) Appellant stated, without any prompting, "I didn't kill nobody." (15RT 2246.) Appellant added that he did not rape Maria because he did not need to "take pussy, pussy comes his way." (15RT 2246-2247.) Appellant also tried to flush a metal bracelet down a toilet, but it was recovered by Officer Crees. (15RT 2278-2279.) Detective Oppelt obtained a search warrant, and appellant's injuries were subsequently photographed. (15RT 2245-2246.)

Detective Oppelt drove to the house where appellant was living on Dorrington Avenue. (13RT 1985-1987.) Detective Oppelt discovered that it was Rosa's house. He informed Rosa's twin daughters, Vanessa and Elizabeth, and her mother, Marcelina Marquez,[13] that he would be searching the house and posted police officers to remain there for the night while he obtained a warrant. (13RT 1987-1988.)

Detective Oppelt walked down the street four houses to where the Gonzalez girls lived and observed the blood and broken acrylic fingernails on the ground. (13RT 1988-1992, 2005.)

On March 5, 2000, at 2:30 a.m., appellant lay down in a fetal position on his holding cell floor and started twitching. Appellant said that he was having a seizure, and paramedics were called. (15RT 2247-2248, 2280-

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[13] For clarity, respondent will refer to Marcelina Marquez as "Marcelina."

2283.) The paramedics said that there was no sign that appellant had a seizure. Then appellant complained of difficulty breathing. (15RT 2283-2284.) Appellant was placed in an ambulance, but when the paramedics tried to insert an intravenous line ("IV"), appellant became violent and flailed his arms. The accompanying officers had to strap appellant down on a gurney, and the IV was placed in his arm. (15RT 2284-2285.)

Appellant was brought to the Granada Hills Hospital where he was examined by Dr. Ching[14] and nurse Nya Murray for a possible seizure. (14RT 2120-2124, 2249.) Murray talked appellant into letting her insert an IV. (15RT 2285.) Murray found a number of lacerations on his arms, neck, and jaw, and a puncture wound behind his left ear, which appellant attributed to shaving. (14RT 2138-2139.) Appellant exhibited no signs of having suffered an actual seizure. (14RT 2124-2133.) Instead, appellant told Murray that he had an "aura," which she understood as a premonition that he would have a seizure, but not a seizure itself. (14RT 2128-2129.) Dr. Ching ordered more invasive tests, but appellant refused any further testing. (14RT 2134-2135.) Appellant was in a patient gown and became upset that he was being prevented from getting dressed. He ripped off his monitoring equipment and the IV and became belligerent. (14RT 2135-2136.) Appellant declined to sign the form stating that he was refusing medical care. (14RT 2136-2137.) Dr. Ching was upset. (15RT 2290.)

At the hospital, Los Angeles Police Officer Michael Coogle felt that every time he came near appellant, appellant looked him up and down, "sizing him up," and focused his eyes on Officer Coogle's gun. (15RT 2285.) At one point, appellant asked Officer Coogle why he was being arrested for "187." (15RT 2286-2287.) Officer Coogle said that he did not

[14] Dr. Ching's first name does not appear in the record. He had died by the time of trial. (14RT 2122-2123.)

know anything about that, but that appellant had been arrested for his outstanding warrants. Appellant responded that he was not stupid and knew what 187 was, murder. (15RT 2287.) Appellant also said that he did not want to be a part of his ex-girlfriend's craziness, that she was having problems with her jealous ex-husband, and that he would not be surprised if the ex-husband killed her. (15RT 2288-2290.) Appellant said that he "better not be blamed" for something that happened to his ex-girlfriend. (15RT 2289.) Officer Coogle had never mentioned Maria, a girlfriend, or anything about murder and actually was unaware of the murder or details of appellant's crimes. (15RT 2287-2289.)

Officer Coogle put appellant in the backseat of his patrol car and began driving to the Van Nuys police station. (15RT 2291.) Appellant again began convulsing, unbuckled himself, and dropped to the floor of the backseat. (15RT 2292.) Officer Coogle pulled over and called the paramedics again. This time, they tested him for seizures and when they found no sign that he had a seizure, Officer Coogle continued to the jail. (15RT 2292-2294.) The paramedics told Officer Coogle that appellant was "faking it." (15RT 2293-2294.)

Once at the Van Nuys station, the station nurse treated appellant's lacerations. (15RT 2294.) She also discovered one on appellant's ankle. She asked him where he received the injuries, but appellant said he did not know. (15RT 2294-2295.) There was nothing sharp in Officer Coogle's patrol car that could have caused any injury. (15RT 2296.) Appellant was medically cleared and taken to the Twin Towers jail facility for Los Angeles County. (15RT 2295-2296.)

At 6:00 a.m., Detective Oppelt served the search warrant on the Marquez house. (13RT 2008-2009.) Rosa had returned home and told him which room was appellant's. (13RT 2009.) On appellant's dresser, Detective Oppelt found a pack of Marlboro Reds with a blood smear on it.

(13RT 2009-2010.) He also found a gray beanie cap and a black leatherbound address book containing Detective Pulliam's business card. (13RT 2014-2015.) Detective Oppelt opined that the address book belonged to either Maria or Maria and appellant jointly. (15RT 2253.) Detective Oppelt additionally found an envelope addressed to appellant's brother, Gabriel, in Corcoran State Prison. (15RT 2255-2256.) The envelope contained a photograph of appellant standing with Maria. On the back was written, "This is the bitch, Ruben, JKS." (15RT 2256.)[15] "JKS" stood for "Jokers," the name of a clique within the Venice 13 gang. (15RT 2256-2257.)

Detective Oppelt went back to the scene in front of the Gonzalez girls' house and found shards from a broken Corona beer bottle. (13RT 2018.) He found a piece of the same type of bottle in a planter outside the Marquez house. (13RT 2021-2024.) Detective Oppelt also discovered that the Los Angeles Times was delivered to the Marquez house daily. (15RT 2249-2250.)

Beckstrand received a call at home that Maria had been found dead. (10RT 1497-1498.) Shortly thereafter, appellant was arraigned on the rape charges. (10RT 1498-1499.)

After Juan found out about Maria's murder from her family, he spoke to the police about the car he had bought her. (10RT 1548-1549.) He eventually got it back, the inside covered in blood, and the driver's window smashed out. (10RT 1549-1550.) Mata sold her house and moved out of fear. (10RT 1550.)

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[15] Detective Oppelt testified that there was a drawing next to the words, but did not describe the drawing. Nevertheless, the jury was shown the drawing. (15RT 2256.)

3. The Autopsy

Dr. Eugene Carpenter conducted the autopsy on Maria. (14RT 2142-2144.) Maria was 5'2" tall and weighed 126 pounds. (14RT 2147-2148.) At the time of death, Maria had suffered three fatal injuries: strangulation with a ligature, a stabbing with a knife in the jugular vein, and a blunt force traumatic injury to the left rear of the head that had caused bleeding under Maria's scalp and in her brain. (14RT 2148-2149.)

The ligature was composed of a shoelace bound so tightly around Maria's neck that Dr. Carpenter was unable to get his finger under it. (14RT 2149-2151.) The neck had abrasions where the skin had been rubbed off and the ligature left an indentation in the skin. (14RT 2151.) Maria also displayed scratches and abrasions caused by her own acrylic fingernails as she tried to get the ligature off. (14RT 2159-2161.) Dr. Carpenter cut the ligature off Maria's neck and found contusions that indicated that Maria had also been manually strangled in addition to the ligature. (14RT 2152, 2162-2164.) Dr. Carpenter opined that it would have taken one minute for Maria to lose consciousness, three and a half minutes before she ran out of oxygen, and eight to ten minutes before her heart stopped beating. (14RT 2158.) Maria was definitely alive when she was strangled. (14RT 2161-2162.)

The knife wound was three-quarters of an inch wide on the left side of Maria's neck, angled downward into the jugular vein. (14RT 2164-2165.) The blade had broken off in her neck when it hit bone and the ligature formed a fulcrum. (14RT 2165-2166; 15RT 2198-2199.) The tip of the knife was bent. (14RT 2168-2169.) Left untouched, the jugular vein wound would have caused death from bleeding in between one and ten minutes. (14RT 2177-2178.) The ligature was made before the knife wound. (14RT 2179-2180.) Relatedly, Maria had incisions on both hands

that appeared to be defensive wounds, probably from when she tried to pry the ligature off her neck and push the knife away. (15RT 2184-2187.)

Maria had also suffered blunt force trauma across her entire body. (14RT 2170.) There was an abrasion on her left arm, an inch-deep incision above her right knee, multiple abrasions below both knees and across her body, and a laceration on the top left of her head, three quarters of an inch long and down to the skull. (14RT 2170-2174.) It was the last injury that was the fatal injury that caused bleeding under the scalp and in the brain. (14RT 2173-2174.) The injury was consistent with the beer bottle. (14RT 2174-2175.) Dr. Carpenter also opined that the injury was more likely caused by being hit with an object rather than falling. (15RT 2202-2203.) It would have taken Maria between 10 and 24 hours to die from the internal bleeding. (15RT 2187.)

Criminalist Ronald Raquel examined the broken acrylic fingernails that had been collected from Dorrington Avenue and compared them to Maria's acrylic fingernails. (15RT 2213-2223.) Raquel was able to affirmatively match the fingernail fragments to the fingernails remaining on Maria's hands. (15RT 2223.)

Criminalist Debra Kowal examined Maria's body in the trunk of her car and determined that the ligature was wrapped three times around her neck and then tied in a bow. (15RT 2223-2229.) Kowal could only fit one finger under the ligature. (15RT 2229.) Kowal was also present for the autopsy and noted that Maria had injuries on both breasts. (15RT 2232, 2239-2240.)[16]

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[16] Kowal was never more specific than describing "injuries," however photographs of the injuries were shown to the jury. (15RT 2239-2240.)

4. Marquez Family Testimony

Noemi Hernandez grew up in Venice. (16RT 2305-2307.) Rosa was one of her six sisters. Hernandez had seven brothers, including Beto, Ricardo, Robert, and Ruben Marquez.[17] (16RT 2306-2308, 2317, 2343-2344, 2346, 2379-2380.) Rosa and appellant were the same age and had been friends since they were little. (16RT 2317.) Several of Hernandez's brothers were involved in the Venice 13 gang. (16RT 2308.) Hernandez had known appellant and his brothers their entire life. (16RT 2306-2307.) Four of her own brothers were friends with appellant. (16RT 2308-2309.) Appellant's gang moniker was "Crow." (16RT 2309.) Appellant called Rosa by the nickname "Chita." (16RT 2327, 2347.)

In 1997, Marcelina owned the house on Dorrington Avenue where Rosa lived with her twin daughters, Vanessa and Elizabeth, and their brother Robert. (16RT 2309-2311, 23.) At that time, Hernandez was also living at the Dorrington house, and she became friends with Maria when Maria worked at the nearby Sav-On store. (16RT 2311-2312.) Maria asked Hernandez what she thought about her writing letters to appellant while he was in prison with the aim of dating him after he got out. Hernandez told Maria it was up to her but that she believed in second chances. (16RT 2324-2325.)

Robert died in September 1999, after Hernandez had moved out of the Marquez house. Appellant moved in with Rosa a week later, because he was running from the police. (16RT 2309-2312, 2316, 2346-2347, 2367.) Most of Hernandez's siblings were upset, especially because appellant was alone in the house with four females, but her oldest brother told them all to respect Marcelina's decision. (16RT 2325-2326.) While appellant lived

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[17] For clarity, respondent will refer to Beto, Ricardo, Robert, and Ruben Marquez by their first names only.

there, he smoked Marlboro Reds cigarettes. (16RT 2347-2348.) Appellant did not have any seizures while living there. (16RT 2352.)

Maria visited appellant four or five times while appellant was at the Marquez house. On those occasions, they went out on dates and/or into appellant's bedroom. They appeared friendly to each other. (16RT 2366-2368, 2375-2380.) On some occasions, Maria stayed in appellant's room past 10:00 p.m., when Vanessa went to sleep, but Maria did not spend the night. (16RT 2376-2377.) Appellant sometimes drove Vanessa around the neighborhood and on one occasion, he showed her the Van Nuys apartment complex where he used to live. (16RT 2365, 2368.)

Hernandez was working as a paralegal at the time, and appellant asked her for legal advice on his rape charge. (16RT 2312-2313.) He asked, "How can [Maria] claim rape when we were living together." (16RT 2314.) As time went on, appellant's anger about the rape charges grew worse. (16RT 2315.) In conversation about once a week, appellant told Hernandez that he was going to "kill that bitch" because he was "not going back to jail." (16RT 2317-2318.) Appellant always referred to Maria as "the bitch." (16RT 2323.) Hernandez was personally aware of appellant's abuse of Maria and as time went on, appellant told her more about how he raped her. (16RT 2318.) Although appellant believed that Maria was going to meet with a representative of the District Attorney, to get the office to drop the charges, Hernandez explained that the representative would pick up on the abuse and that it was no longer Maria's decision. (16RT 2319.)

A few days before the murder, appellant put a duffel bag in the trunk of Hernandez's car and told her the bag contained clothes, because he knew that the police would arrest him soon on the rape charges. When Hernandez got home, she threw the bag into her own garage and never looked at it. (16RT 2320.)

Early in the morning on March 4, 2000, appellant woke up Vanessa and Elizabeth by knocking on their window, which overlooked the alley behind Dorrington Avenue. (16RT 2352.) Appellant was wearing a red sweatshirt, gray sweat shorts, and his gray beanie. He asked to be let in. The twins let him in through the back door and went back to sleep. (16RT 2353-2356, 2374.) Appellant was carrying a plain cup of coffee with a plastic top. (16RT 2374-2375.)

Later that morning, Vanessa woke up again and went to appellant's bedroom. She noticed that he was bleeding from his right ankle through his sock and commented on his shaving ability. Appellant laughed. Vanessa also saw scratches on the front of his neck. (16RT 2356-2358.) Appellant had never actually shaved his legs before, and his regular day for shaving his face was mid-week, before the weekend. Appellant had never had cuts before. (16RT 2358-2359.)

Appellant left the house and came back in the afternoon. Vanessa went back to his bedroom. (16RT 2359-2360.) Appellant had a television on, and Vanessa saw a news report about a car that she noted looked like Maria's car. Appellant said it was not Maria's car, and Rosa came in and told Vanessa to leave the room. (16RT 2360-2361.)

Later that evening, Ruben Jr. came over with appellant's mother, Estella Aguirre. (16RT 2361.)[18] Rosa left shortly thereafter with appellant and Elizabeth to drop Ruben Jr. back home at his apartment near the intersection of Plummer and Van Nuys. (16RT 2361-2362.) After appellant was arrested, Rosa took the twins to visit appellant in jail four or five times and spoke with him multiple times by telephone. (16RT 2363, 2369.)

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[18] For clarity, respondent will refer to Estella Aguirre as "Estella."

After she learned that appellant had been arrested for murder, Hernandez gave the bag to Estella. (16RT 2320-2321.) Appellant called Hernandez from jail, and she told him to stop calling because he no longer had any friends outside of jail. (16RT 2322.)

Before she testified at the preliminary hearings in this case, Vanessa was instructed by Rosa not to "talk" because it would get her uncles in trouble because they were in the same Venice 13 gang as appellant. (16RT 2363-2364.) Vanessa had uncles in prison at the time. (16RT 2364-2365.) Instead, Vanessa was instructed to tell everyone that she did not remember anything from the day of the murder. Vanessa's father, however, took her to the hearings and told her to tell the truth. (16RT 2364.)

Hernandez was arrested for refusing to respond to a subpoena and brought back to California from out-of-state against her will. (16RT 2306.) Hernandez had trouble testifying against appellant and did not want to do so. She agreed to testify only after she had spent a few days jail for the first time in her life. (16RT 2319.)

5. Further Investigation

On March 6, 2000, Detectives Cochran and Bogison went to the Twin Towers jail to obtain blood and nail and hair clippings from appellant and to take photographs of him. (16RT 2383-2384.) They took the photographs, blood, and hair clippings, but were not able to get the nail clippings because appellant had already pared down his nails. (16RT 2299-2304, 2384-2385, 2387-2388.) They asked appellant how he had injured his ankle, and he told them that it was from the patrol car at the time of his arrest. (16RT 2385.) Appellant's sock from the time of his arrest had blood on it. (16RT 2387.)

Shortly thereafter, Detective Cochran picked up a videotape that had been sent to George with the return address of "Guess Who?" (16RT

2389.) The videotape contained a recording of appellant having sex with Maria. (16RT 2389.)

Criminalist Robert Monson examined Maria's car in the tow yard. (16RT 2405-2408.) Marks on the trunk, roof, and windows/windshield of the car indicated that someone had wiped blood off those surfaces in an attempt to destroy evidence, either blood samples or fingerprints. (16RT 2409-2411.) Monson also found blood on one of the hub caps, both rear wheel wells, and the right front fender. (16RT 2414-2416, 2429-2430.) As to the interior of the car, in addition to the seats and floors of the car which had large amounts of blood, Monson also found blood on the steering wheel and car controls. (16RT 2425-2427.)

On March 16, 2000, Estella met with Detectives Cochran and Bogison and showed them the locations where appellant used to live, including the Van Nuys apartment complex, where appellant had lived in 1994. (16RT 2391-2392.) On March 21, 2000, Rosa gave Detective Cochran an envelope of papers from appellant's bedroom. (16RT 2393.)

Criminalist Harry Klann conducted DNA analysis on items of evidence in this case. (16RT 2438-2442.) Klann matched the blood found on the pack of cigarettes found in appellant's room to Maria and excluded appellant as a possible source. (16RT 2442-2449.) Klann also matched the blood from Dorrington Avenue, the blood from Maria's front fender, the blood from the steering wheel, and the debris found under Maria's fingernails to Maria and excluded appellant as a possible source. (16RT 2451-2458.) An independent laboratory confirmed Klann's results. (16RT 2450-2451, 2460-2473.) The independent laboratory also determined that blood on the left rear wheel hub cap, blood on the right rear wheel well, blood on one of the towels found on the back seat, and blood found on the front passenger all matched Maria and excluded appellant as the source. (16RT 2473-2475.)

Detective Oppelt opined that there had to have been a third crime scene where the blood got on the car, but he never found it. (15RT 2251-2253.)

6. Gang Evidence

When Detective Oppelt brought Rosa into the courtroom to testify at appellant's preliminary hearing, appellant made a "V" gang sign for the Venice 13 gang. (15RT 2258-2264; 16RT 2330-2331.) Detective Oppelt also identified one of appellant's tattoos as consistent with Venice 13. (15RT 2264.)[19]

Inside the address book that Detective Oppelt found in appellant's bedroom was a page with gang-related writing. (16RT 2331-2332.) One inscription read "Venice JKS," which stood for the Jokers clique of the Venice 13 gang. (16RT 2332.) The page also contained the gang monikers "Spanky," "Risto," "Squid," "Sneeks," and "Gumby," next to the name "David Saenz." The inscribed names "Poncho" and "Turtle" may or may not have been gang monikers. The page also listed "Chita Marquez" as living at the Marquez house on Dorrington. (16RT 2333-2334.)

7. Rape Trauma Expert Testimony

Sandra Baca testified as an expert on rape trauma. (16RT 2483-2486.) Intimate Partner Violence ("IPV") used to be known as Battered Woman's Syndrome and consists of a set of symptoms that can cause a person to have emotional problems similar to Post Traumatic Stress Disorder. (16RT 2486-2487.) Rape Trauma Syndrome is similar to IPV. (16RT 2487.)

One common reaction is minimization of the abuse in order to avoid dealing with it. (16RT 2488.) Victims try to think of ways to make the

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[19] Although the tattoos in question in were never described, the jury was shown photographs of them. (See 15RT 2264.)

abuser nice again or less aggressive, blaming themselves for the abuse. (16RT 2488-2489.) Patterns of these types of abuse include threats, intimidation, coercion to do things the victims do not want to do, and isolation from family. (16RT 2490.) This is especially true of Latino culture where men are dominant and women are submissive. (16RT 2490-2491.)

Specifically in this case, appellant's behavior consisted of threats and intimidation. (16RT 2491-2492.) The threats had a special meaning to Maria who had previously been abused, because she knew how capable appellant was of carrying them out, especially because of his gang affiliation. (16RT 2491-2493.) At that point, a victim in Maria's place would be in terror and talk to friends and family about the threats made against her and her friends and family. (16RT 2493.) The terror, however, through traumatic bonding ("Stockholm Syndrome") also would allow the abuser to control the victim. (16RT 2493-2494.) On these cases, the victim would return to the abuser, looking forward to the good times and why the victim started the relationship in the first place. (16RT 2496-2497.) In this case, Baca counted to 15 the number of times that Maria had expressed that appellant needed her and that they loved each other in interviews she gave regarding the rape. (16RT 2491, 2496.) Thus, Maria tried to separate from appellant at least twice, but she always went back. (16RT 2497.) Maria had no life experience to put the abuse she experienced in context and she naively believed she could fix appellant. (16RT 2499-2500.)

When appellant distributed to friends and family the sex tape they had made along with e-mails that Maria had written trying to solicit a third party for sex, he was trying to cause them to distance themselves from Maria and force her to return to him when nobody else wanted her. (16RT 2500-2501.) This was also part of the pattern that appellant had set by not

allowing Maria to talk to her sister on the telephone and denying her the ability to receive outside input on her dire situation. (16RT 2501-2505.)

When a victim moves to separate from her abuser, she is actually in increased danger. Separating does not stop abuse. (16RT 2505.) There is also a common belief held by some members of society that if an abuser lives with a victim, his acts cannot legally be considered rape, and similarly if the victim moves back in with the abuser. (16RT 2505-2506.)

In the interview Maria gave on March 3, 2000, she stated that if something were to happen, she preferred it happen to her and not to her family or Juan, a premonition of what was to come. (16RT 2499.) However, Maria allowed her emotional self to win out over her intellect and did not do enough to separate from appellant. (16RT 2503-2504.) Baca opined that it was appellant's choice to become violent and his statement that he was out of control was a false statement. (16RT 2506-2507.) In studies on the subject, abusers were not found to attack their victims because they "fly out of control." (16RT 2507.) Similarly, although alcohol would lower abusers' inhibitions, it cannot ultimately be blamed for an attack that has to be planned in the first place. (16RT 2507-2508.)

B. Penalty Phase--Prosecution Case-in-Chief

1. Appellant's Behavior in Jail

From 2001 to 2005, appellant was housed at the Men's Central Jail in Los Angeles in module 1750 for gang members. (18RT 2814-2816, 2822; 19RT 2895-2896.) Module 1750 was primarily inhabited by Mexican Mafia ("La Eme") members and came with inmate prestige as a result. (18RT 2826-2827.) The Mexican Mafia controlled Hispanic street gangs in Los Angeles. (18RT 2827.) In addition to "Crow," appellant also used the monikers "Joker" and "Tupac" while he was there. (18RT 2828-2830,

2839-2840; 19RT 2924-2926; 20RT 3126-3127, 3133-3134; 21RT 3224-3226.)

On October 6, 2001, Los Angeles County Sheriff's Sergeant Raymond Roth led a search of appellant's cell. (19RT 2897.) Deputy Viet Tran found a two-inch long piece of sharpened metal hidden in appellant's toilet. (19RT 2898, 2969-2973.) The item was typical of a jailhouse shank used for stabbing, as was the hiding place. Toilets full of feces were generally used to dissuade deputies from putting their hands in to check for shanks. (19RT 2899.) Appellant had purposely kept the water in his toilet murky in order to obscure view of the shank. (19RT 2973.)

On December 4, 2002, Los Angeles County Sheriff's Deputies Thomas Davis and Wadie Musharbash searched appellant's cell and found jail-made alcohol and several razor blades of the type used by inmates for stabbing and slashing. (18RT 2841-2843; 20RT 3127-3128.) They also found cups of feces and urine of the type used in "gassing" attacks, where appellant would throw them on jail personnel and other inmates. (18RT 2842-2843; 20RT 3128.) Appellant regularly stored his feces and urine in order to "gas" jail personnel and inmates, and did so a number of times. (18RT 2822-2824, 2843.) Additionally, appellant threatened nursing staff and other inmates by bragging that he had previously gassed sheriff's deputies. (18RT 2824, 2843; 20RT 3128.) Appellant had even told jail personnel that he hoped to be known as the "shit man" as a result. (18RT 2824.) Appellant would also regularly and falsely shout "man down," a cry that resulted in two deputies immediately dropping whatever they were doing and responding to appellant, causing a disruption in the jail. (18RT 2824-2826.) Appellant also threatened suicide when nurses did not give him what he wanted, knowing that they would have to transport him to the jail clinic for evaluation. (20RT 3128-3129.) Appellant never actually attempted suicide. (20RT 3129-3130.)

Los Angeles County Sheriff's Lieutenant Michael Rosson was the hearing officer for the disciplinary action against appellant for the December 4 incident. (19RT 2901-2904, 2906.) Evidence was presented that appellant had threatened to "gas" deputies if he did not receive a special diet. This was routine behavior by appellant. (19RT 2906.)

On January 30, 2003, Los Angeles County Sheriff's Deputies Timothy Lee, Henri Sayegh, Jimmy Ramirez, Scott Lawler, and Walid Ashrafnia were called to assist in extracting appellant from his cell in the 1750 module following a report that inmates on appellant's row were drunk and had razor blades. (18RT 2857-2862; 19RT 2907-2909, 2914-2916, 2993-2995; 22RT 3292-3294.) Deputy Ramirez's job was to record the extraction on video. (19RT 2909.) Deputy Ramirez first recorded the extraction of the inmate in the cell next to appellant's performed by Deputy Ashrafnia and others. While he was doing that, appellant took the opportunity to spray urine on the bare right arms of Deputies Ramirez and Lawler, the left arm of Deputy Ashrafnia, and Deputy Sayegh's entire body before retreating to the back of his cell. (19RT 2911-2912, 2919, 2995-2997; 22RT 3294-3295.) The deputies were pulled back by their sergeant and regrouped for appellant's extraction. (19RT 2919-2920.) They were scared of contracting diseases. (22RT 3295.)

As Deputy Lee and others moved to extract appellant, he took a lotion bottle full of feces and urine and sprayed it on them. Deputy Lee was wearing short sleeves, and the mixture was sprayed directly onto his skin. (18RT 2862-2863.) Although the deputies had shields to protect them from just such an attack, appellant had climbed up on his cell bars so that he could spray it down on them over the shield. (18RT 2863.) Appellant was eventually extracted, after deputies used pepper spray and then a sting ball grenade when the pepper spray did not subdue appellant. (18RT 2877-2879; 22RT 3295-3296.) The deputies were subsequently tested for

Hepatitis B and C, incurable diseases, because appellant was infected with the viruses and tried to infect the deputies. (18RT 2874-2875, 2910; 22RT 3294.)

Lieutenant Rosson was also the hearing officer for the disciplinary action against appellant for the January 30 incident. (19RT 2902-2904.) Lieutenant Rosson heard evidence that appellant had cups of feces, several razor blades, and a two-gallon bag of alcohol in his cell. At the hearing, appellant did not admit his offenses and instead threatened to kill Lieutenant Rosson. (19RT 2904-2905.) Evidence was also presented that appellant had stabbed other inmates, including Marcus Adams ("Sunny") in the chest. (19RT 2905.)

On May 13, 2003, Los Angeles County Sheriff's Deputy Christopher Carpenter searched appellant's cell in module 3301, a special module for discipline called "the hole." (18RT 2853-2855.) Deputy Carpenter found a plastic comb with a razor attached by strings ripped off bed sheets. (18RT 2855-2856.)

On July 14, 2003, appellant was housed in a segregated discipline module. (19RT 2953-2955.) Los Angeles County Sheriff's Deputy Michael Smith went to appellant's cell to tell him that his discipline time was over and escort him back to his regular cell. (19RT 2955-2956.) Instead, appellant ripped up his sheets and tied his cell door shut. (19RT 2956.) Appellant said, "Fuck that. I ain't going nowhere. You guys are going to have to extract my ass." (19RT 2957.) Appellant threatened to "gas" anyone who came into the row and yelled aggressively, "You guys are going to have to come in here and get me." (19RT 2957-2959.) Appellant's behavior was routine for him. (19RT 2958.) Appellant also claimed to have seizures in an attempt to manipulate the jail system on a regular basis; Deputy Smith actually saw other inmates have seizures, but not appellant. (19RT 2959-2960.) It was common for appellant to do

exactly the opposite of what was asked of him. (19RT 2960-2961.) Even though appellant would be punished, he enjoyed being defiant and making problems for the jail system in general and for the deputies and other inmates in particular. (19RT 2964-2965.) Additionally, appellant gained prestige among gang members by being in the discipline module, breaking jail rules, and fighting with deputies. (19RT 2965-2966.) While committing rape lowers prestige, if other inmates knew the charges against him, that would only increase appellant's desire to regain prestige. (19RT 2967-2968.) Additionally, the other inmates had no way to learn that appellant had committed a sex offense in addition to his murder, but they did know about the murder. (19RT 2968.)

On July 30, 2003, Los Angeles County Sheriff's Deputies Scott Larsen and Mike Davis escorted a nurse dispensing medication in the 1750 module. (19RT 2926; 20RT 3136.) The nurse refused to give appellant medication without a prescription. Appellant threatened to start shouting, "Man down," and threatened to throw "poop." (19RT 2927-2928; 20RT 3136.) Deputy Larsen and the nurse immediately left the module while appellant started laughing and shouting, "Man down," when there was no emergency. (19RT 2928-2929.) Incidents like these were a recurring problem with appellant. (19RT 2929.) Appellant also admitted to Deputy Davis that he had slashed an inmate worker, leaving a five-inch cut on the inmate's chest. (20RT 3137-3138.)

On August 31, 2003, appellant was being housed in the 4500 disciplinary module. (21RT 3270-3273.) An inmate worker was giving the inmates in that module breakfast. (21RT 3273.) Appellant asked the worker for extra jelly and orange juice, and the worker passed on the request to Los Angeles County Sheriff's Deputy Dennis Elmore. (21RT 3273-3274.) Deputy Elmore gave the worker the jelly immediately and sent him back while he tried to find extra orange juice. The worker brought

the jelly to appellant, and in return appellant threw a mixture of urine and feces on the worker's face. (21RT 3274.) Appellant explained to Deputy Elmore that when he did not get what he wanted he would do whatever it took to get a supervisor's attention so that he could speak with him directly. (21RT 3275.) Appellant was kept in a single-man cell for the protection of other inmates. (21RT 3275-3276.) Appellant regularly stored urine and feces in his cell. (21RT 3276.)

On September 11, 2003, appellant challenged Los Angeles County Sheriff's Deputy Brandon Love to a fight. (21RT 3226-3227.) Appellant was returning to his cell and wanted Deputy Love to return shoelaces that had been removed from his shoes. Deputy Love told appellant to return to his cell and assured him that he would get the laces. Appellant said, "No. I want them now." (21RT 3227.) Then he yelled, "Hey, go ahead and take these chains off. Let's go one on one." (21RT 3227-3228.) Two more deputies were called to assist because of appellant's threat, but he was given his laces back so that he would return to his cell. (21RT 3230-3231.) Appellant also regularly faked seizures and acted crazy to try to get his way. (21RT 3228-3229.) Of all the inmates in the 1750 module, appellant was one of those most difficult and one of the highest security concerns. (21RT 3229-3230.)

On January 28, 2004, Los Angeles County Sheriff's Deputies Davis and David Florence strip searched appellant. (19RT 2975-2978; 20RT 3134.) A latex glove containing five razor blades was found hanging out of appellant's buttocks. (19RT 2979; 20RT 3135.) Appellant had recently himself been injured by a razor to the chin in an attack from another inmate. (20RT 3142.)

Among the thousands of inmates with whom Deputy Florence had dealt in his nine years working in the jail, appellant was in the top-five most difficult and most able to manipulate a jail situation to achieve the outcome

he desired. (19RT 2981-2983.) Appellant was adept at creating incidents and getting attention placed on him, taking advantage of every transportation situation to get things that he wanted. (19RT 2984-2985; 20RT 3138-3139.) Appellant was a danger to the deputies working the 1750 module and other inmates. (19RT 2986.) Appellant never showed fear of other inmates and, to the contrary, behaved in an aggressive manner toward the deputies to show other inmates that he had no fear of anything. (19RT 2987; 20RT 3143-3144.) Appellant commonly acted aggressively against other inmates. (19RT 2988.) As a result of his behavior, appellant was eventually moved into a cell with a Plexiglas fourth wall instead of bars called a "hard door cell." That type of cell was used for inmates with a propensity for violence against other inmates or deputies and to prevent gassing. (19RT 2989.)

On February 2, 2004, Los Angeles County Sheriff's Deputy Elizabeth Meyer gave appellant a razor blade to shave with, but when she came to collect it he no longer had it. Deputy Meyer escorted appellant to the jail's x-ray technician to find out if appellant had secreted the blade in his body. (18RT 2817-2818.) The technician told Deputy Meyers that he found what appeared to be a blade in appellant's rectum. (18RT 2818.) Deputy Meyers told appellant that she was going to have to take him to the hospital until it was removed. (18RT 2818-2819.) Appellant offered to show her what he had put in his rectum and pulled out a large box staple that was over an inch long. (18RT 2819-2820.) Inmates would typically use a staple of that type as a weapon to slash other inmates or jail personnel. It could also be used to pick the lock on their handcuffs. (18RT 2820.)

On another occasion, Deputy Meyers escorted appellant to the jail medical clinic for treatment of a knife wound he received from another inmate. (18RT 2827.) Appellant never indicated that he did not want to be in module 1750. (18RT 2828.)

On February 5, 2004, Deputy Larsen escorted an inmate worker to pick up food trays from the prisoners in module 1750. (19RT 2929.) Appellant refused to give his tray to the worker until he spoke with Deputy Larsen. (19RT 2930.) The tray was a hard plastic that could be fashioned into shanks. (18RT 2864; 19RT 2930.) Appellant was housed in a special cell with no inmates on either side because of the problems that he had caused in the past and because he was in the Mexican Mafia. (19RT 2933-2935.) Sometimes gang members purposely caused trouble in order to be punished, which would gain them respect in their gang. (19RT 2937-2938.)

Appellant told Deputy Larsen that he wanted his television turned on. (19RT 2931.) Deputy Larsen started to walk away to find out why the television was off and was hit in the back of the head by a mixture of feces and urine. Deputy Larsen turned back around and saw that appellant was holding a milk carton with the top ripped off that he had just emptied onto Deputy Larsen. (19RT 2932.) Appellant started to reach for another milk carton in his cell, and Deputy Larsen sprayed him with a harsh pepper spray. (19RT 2932-2933.)

Deputy Lee was called to appellant's cell after being advised about what had happened to Deputy Larsen. (18RT 2863-2864.) When Deputy Lee arrived, he offered appellant another opportunity to return the tray and to exit his cell, but appellant refused. (18RT 2865.) Appellant had prepared his cell to fight off the extraction team by wrapping moist towels around his head to counter the effects of the anticipated pepper spray, by barricading himself behind mattresses for the same reason, and by tying sheets across the cell to make his apprehension more difficult. (18RT 2866-2867.) The sheet also allowed appellant to assault the deputies without forewarning. (18RT 2867.) Deputy Lee and six other deputies put on bio-hazard suits. (18RT 2865-2866.)

One deputy sprayed the harshest type of pepper spray that the deputies had access to, with no apparent effect on appellant. (18RT 2869-2070.) Appellant said, "Go get three or four more cans, because I'm not coming out." (18RT 2870.) They waited 10 minutes for the spray to take effect and again requested compliance. Appellant still refused. (18RT 2871.) The deputies repeated the process three times and finally after the third time waiting 10 minutes, appellant complied. (18RT 2871-2872.) Inside the cell, Deputy Lee found several milk containers' worth of feces and urine mixture. (18RT 2872.) The whole process took three hours and required a lockdown of the whole jail of 5,000 inmates, including guest and attorney visits. (18RT 2876.)

On February 23, 2004, Deputies Carrasco, Musharbash, and Juan Rivera escorted appellant to his cell. (18RT 2830-2831, 2844.) As they walked, appellant guided himself down the wall as if fainting. Deputy Carrasco went to get a nurse, but Deputies Rivera and Musharbash believed it obvious that appellant was faking illness. (18RT 2831, 2845.) That was based on the deputies' experience with actual seizures and with appellant faking seizures in the past. (18RT 2833, 2844-2847.) Appellant looked up with one eye. The deputies said, "Get up, stop faking it, take it to your cell." (18RT 2832, 2845.) Appellant opened both eyes, looked at the deputies, and said, "Fuck that. I ain't going nowhere." (18RT 2832, 2845-2846.) Deputy Musharbash repeated, "Stop faking it. Get up, go to your cell." Appellant said that he wanted to see a nurse. (18RT 2832.)

Deputies Rivera and Musharbash picked appellant up and carried him toward his cell. Deputy Rivera took the top half and Deputy Musharbash the bottom. (18RT 2833.) Although appellant appeared to be chained, he pulled his hand free and punched Deputy Rivera. Deputy Rivera dropped him and punched him back. Appellant kicked at both deputies, and the three of them tussled for about a minute. (18RT 2834, 2847-2848.) The

deputies had difficulty regaining control because of the narrow hallway they were in, but yelled, "Stop fighting," the whole time. (18RT 2834-2835, 2848.) Three other deputies finally arrived to assist, and the five of them together got appellant under control and handcuffed him again. (18RT 2835, 2848.) Deputy Rivera found a bent piece of metal on the floor that appellant had used as a "jail-made handcuff key." (18RT 2836, 2849-2850.) Deputy Musharbash injured his hand in the fight and had to take eight weeks off work. (18RT 2849.)

2. Appellant's Criminal History

a. 1980 Shooting

Los Angeles Police Detective William Humphrey worked as a lead detective in western Los Angeles in 1980. (20RT 3027-3029.) At that time, Venice 13 and its rival, the Culver City Boys gang, were involved in a gang war. (20RT 3014, 3016, 3032-3033.) On August 18, 1980, at 10:30 p.m., Richard Cortez, a member of the Venice 13 gang, was shot for the second time that month. (20RT 3032-3033.)

In the early hours of the morning on August 19, 1980, Shelley McGuire attended a meeting at the Becerrada house on Venezia Avenue in the Venice neighborhood of Los Angeles with a number of Venice 13 gang members. (20RT 3014-3016, 3021, 3044, 3047.) She was 19 years old and just out of high school. (20RT 3015.) Present at the meeting were Ruben Marquez (moniker "Mosca"), Ricardo Marquez ("Casper"), David Saenz ("Gumby"), Gustavo Perez ("Tavo"), Carlos Becerrada,[20] and appellant. (20RT 3045-3047.)

Some of the Venice 13 members at the meeting were planning to retaliate against the Culver City Boys for the shooting of Cortez and handed

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[20] For clarity, respondent will refer to Carlos Becerrada as "Carlos."

out firearms that had been hidden in the ceiling, including a rifle with a scope and a handgun that Perez took. (20RT 3016-3020, 3049.) Saenz was told that if he stole a car for them to use for the shooting, he would be exempt from taking further part in the retaliation. (20RT 3049-3050.) Saenz told appellant that he needed a screwdriver for the theft, and appellant provided one. (20RT 3050.)

Saenz left, returned 10 minutes later, and told everyone that he had the car parked in front of the house. (20RT 3050.) Ruben and Perez agreed to do the actual shooting. (20RT 3051, 3057.) McGuire left the meeting and went to nearby Oakwood Park, a Venice 13 hangout. (20RT 3018-3019, 3023, 3051.) As she left, she saw an unfamiliar light-colored Ford LTD parked in front of the house. (20RT 3051.) At 2:00 a.m., Raul Garcia was shot. (20RT 3030, 3032.) All six of the men present at the meeting were arrested and charged with murder and conspiracy to commit murder. (20RT 3052-3053.)

On his back, appellant had a tattoo of "Venice Jokers," his clique within the Venice 13 gang. (20RT 3053.) Appellant also had a tattoo of "Venice" written across his chest. The "13" in Venice 13 showed the gang's allegiance to the Mexican Mafia, "M" being the 13th letter in the alphabet. (20RT 3054.)

Dr. Louis Pena testified as an expert on the autopsy of Garcia. (21RT 3233-3238.) Garcia was shot in the head with an entry wound on the upper right. (21RT 3239.) The bullet entered the skull and ricocheted around; it was found in the brain. (21RT 3240.) Part of the bullet broke off and formed a small exit wound. (21RT 3240-3241.) Garcia was also shot in his hip and inner thigh. (21RT 3241-3242.) Garcia's non-fatal wounds were consistent with him riding a bicycle at the time of his death. (21RT 3242.) Dr. Pena determined that the wounds were consistent with a .22 caliber

bullet. (21RT 3245.) Garcia was 18 years old when he was killed. (21RT 3246.)

b. 1984 Shootings

Frederico Rodriguez[21] grew up with appellant and Jimmy Preciado in Venice. (3063-3064, 3066-3068.) At trial, Frederico admitted being at a party on March 25, 1984, at a house on Westminster Avenue, but denied that appellant or Preciado were there. (20RT 3067-3068.) He also denied that he fought with Carlos, and instead said that he got hit with gunfire from "Black people" as he was leaving because he "got caught in the cross," and did not know who the shooters were. (20RT 3068-3070.) Frederico was shot twice, once in the hand and once in the chest, and was taken to the hospital for surgery. (20RT 3071-3072.) Frederico also denied telling police at the hospital that appellant had shot him or that he knew appellant had ever been called "Crow" by others. (20RT 3072.) Frederico admitted that he never mentioned "Black people" or crossfire at appellant's preliminary hearing in 1984. (20RT 3073-3076.) Frederico was convicted of murder in 1984, assault in 1989, spousal abuse in 1992, and assault with a deadly weapon in 2001. (20RT 3064-3066.)

At trial, Preciado denied even being friends or growing up with Frederico or appellant. (20RT 3085-3086.) Preciado admitted being at the party on March 25, 1984, but then denied any memory of being shot or anything at all in the 1980s or 1990s due to a drug addiction problem and "accidents." (20RT 3086-3087.) Preciado then said he was not at the party but only picked up his stepdaughter there. (20RT 3087.) Preciado also denied knowing that appellant was ever called "Crow." (20RT 3088.) Preciado denied seeing appellant or Frederico that night. (20RT 3088-

[21] For clarity, respondent will refer to Frederico Rodriguez as "Frederico."

3089.) Preciado remembered picking up his stepdaughter and then waking up in the hospital. Preciado denied fighting with Carlos. (20RT 3089.) Preciado had been shot in the stomach. (20RT 3089-3090.)

Preciado denied all memory of appellant's preliminary hearing. (20RT 3090-3091.) However, at the preliminary hearing, Preciado testified that at the party he had tried to break up a non-physical argument between Carlos and Frederico by telling them that they should go outside. (20RT 3106-3109.) Frederico left the house, and appellant shot at him twice. (20RT 3098-3103, 3110.) Surrounding people yelled, "He's shooting," and, "He's got a gun." (20RT 3110.) Appellant then turned around and shot Preciado. (20RT 3093-3094, 3103-3104.) Preciado was unarmed. (20RT 3106.)

Los Angeles Police Officer Gene Solis responded to the shooting at around midnight, and the paramedics were already there. (20RT 3113-3116.) Frederico was lying on the kitchen floor. (20RT 3116-3118.) Officer Solis asked him, "What happened?" Frederico said, "Crow shot me." (20RT 3110.) Officer Solis received no reports about "Black people" shooting. (20RT 3121-3122.) Officer Solis arrested appellant and a woman named Chrissy Rosales, who was carrying live ammunition of the same type that was used in the shooting. (20RT 3123-3124.) Bullets were recovered from a car parked in front of the Westminster house with the license plate "Venice J." (20RT 3124-3125.)

Detective Oppelt testified as a gang expert and opined that a gang member's denial of having memory of being shot was common. (21RT 3281-3284, 3286.) That was because the gang code requires that members not snitch on each other, even decades later. (21RT 3282.) Although gang members might privately disclose information to officers, they will never do so publicly. (21RT 3283-3284.) Testifying that they do not remember allows the gang members to take the safe route by not snitching, but yet not

allowing the questioning attorney to show they are definitely lying. (21RT 3286-3287.)

c. Appellant's Abuse of Myra Bian

Myra Bian dated appellant in the 1980s. (21RT 3246-3249.) Her niece, Jessica Bian,[22] spent a lot of time with her and appellant at the time, especially when appellant and Myra lived with Jessica's grandmother in Sun Valley. (21RT 3247-3250.) Jessica characterized the relationship as abusive. As a result, Jessica hated him. (21RT 3250.) Jessica was seven years old when they started dating. (21RT 3249.)

Before Myra started dating appellant, she was a religious person from a close and loving family and had a good job in a medical office. (21RT 3251.) After she started dating him, she began abusing narcotics and alcohol. (21RT 3251-3252.) Jessica found burnt spoons, crumpled up pieces of foil, and syringes in the trailer that appellant lived in with Myra behind the Sun Valley house. (21RT 3257-3258.) Myra was only able to work during the periods when she was trying to clean up and was in rehab. But she never stayed sober for long. (21RT 3266-3270.)

In one incident, Myra had an argument with appellant. He took her aside and told her, "If you don't shut the fuck up, you know, if you don't act right, I'm going to beat the shit out of you." (21RT 3250.) Appellant often used language like that and threats against Myra in front of Jessica. (21RT 3250, 3253-3254.) Myra also began to develop bruises all over body, especially below the neck on her chest and stomach, and would not explain them to Jessica. (21RT 3252-3253.) Although Jessica never saw appellant hit Myra, she heard him "hitting" her from the trailer and saw the trailer move back and forth during their fights. (21RT 3260-3262.)

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[22] For clarity, respondent will refer to Myra and Jessica Bian as "Myra" and "Jessica," respectively.

In another incident, when the seven-year-old Jessica bought water balloons from a vendor outside her house, appellant told her, "If you don't behave, I'm going to, you know, beat the shit out of you." (21RT 3253.) Myra brought Jessica to watch appellant box on a number of occasions. (21RT 3255.) Myra died in 1994 of an overdose of heroin at the age of 30. (21RT 3256, 3258.) Photographs of Myra were shown to the jury, both when she was abusing narcotics with appellant and when she was not. (21RT 3258-3260.)

d. Incarceration History

Rodger Moore testified as a representative of the California correctional system as to appellant's incarceration history. (21RT 3172-3187.) Appellant entered the California state prison system in January 1985. (21RT 3187.) He left prison on parole in August 1987. (21RT 3187-3188.) Appellant returned to prison in November 1990. Although he got out on parole the next year, he was returned to prison for revocation of parole within two months. (21RT 3188.) Appellant was transferred to the prison's Civil Addict Program for heroin addiction and was released in January 1993. (21RT 3188-3189.) He returned to the program in May and was paroled in August. (21RT 3189.) Appellant's parole was revoked again shortly thereafter, but he was not apprehended until October 1994. (21RT 3189-3190.)

At some point appellant told a doctor that he had seizures, and the doctor requested a lower bunk for him. (21RT 3204.) Lower bunks were considered the better bunk in prison. (21RT 3204-3205.) There was no indication in the paperwork that appellant had ever actually had a seizure, however. (21RT 3204-3205.) He also had no psychiatric hospitalizations. (21RT 3205.) Appellant never complained of custodial mistreatment or that he was not receiving proper medical or psychiatric treatment. (21RT 3222-3224.)

Prison testing indicated appellant read at close to a 10th grade level and solved mathematical problems at an 8th grade level. (21RT 3205-3206.) He gained certification as a welder while in prison and receive high grades in the program. (21RT 3206-3207.) The instructor indicated that appellant had great potential for outside employment and gave no indication of seizures or psychiatric disorders. (21RT 3208-3209.)

While in prison, appellant was held in administrative segregation, the highest level of secure housing for inmates. (21RT 3210-3212.) The first step in getting into administrative segregation is a prison validation process certifying that an inmate is a gang member. (21RT 3212.) That process consists of obtaining at least three separate sources identifying the inmate as a gang member, such as admission by inmate, gang tattoos, gang graffiti, and written correspondence or telephone conversations with other validated gang members. (21RT 3213-3214.) Appellant was validated as a gang member in 1996, based partially on his tattoos and three pages of gang graffiti for "Venice WS," or Venice Westside, found in his personal effects. (21RT 3212-3215, 3218-3220.)

Once validated as gang members, if they are a danger to the prison security, the inmates are placed in administrative segregation. (21RT 3219-3222.) In administrative segregation, inmates have an hour of recreational activity every other day and no personal possessions outside of paper and pencil. (21RT 3222.)

3. Victim Impact Evidence

a. Rosia Guzman

Guzman found out that Maria had been murdered from Valenzuela. (21RT 3152.) As soon as she heard, she knew in her heart who had murdered her. Guzman felt pain because Maria had confided in her for months about what appellant was doing. Eight years later, Guzman still

thought about Maria constantly because Maria was such a beautiful person, and her murder affected Guzman permanently. Guzman thought of Maria as a daughter. (21RT 3153.) Maria did not deserve the pain that appellant inflicted on her. (21RT 3153-3154.)

After the funeral, Maria's coworkers went back to the office where grief counselors helped them with their loss. They all thought Maria was a beautiful person who had touched everyone. (21RT 3154.) Within an hour Guzman had collected $15,000 for Maria's family from the 300 coworkers who had been touched by her. (21RT 3154-3155.) They all attended her funeral. (21RT 3156-3157.) Guzman still went regularly to Maria's grave to tell her that she missed her and decorated her headstone at Christmas. (21RT 3157.) Photographs of Maria from the office Christmas party before her death were shown to the jury. (21RT 3156.)

b. Laura Patricia Arreguin

Laura had come from Arizona and moved in with Maria before her murder to finish her last two years of college. They talked every night before bed and became closer than they had ever been before. They used to joke a lot. (21RT 3159.) The whole family was very close, though. (21RT 3166.)

On the day of Maria's murder, Laura spent the day calling Maria with no response. (21RT 3160.) She asked her boyfriend to drive them around and as they drove past a police station, Laura saw Isabel and Miguel walking up the steps. Laura told her boyfriend to park, and she followed them in. (21RT 3160-3161.) Laura waited with them for 45 minutes before a detective came out and apologized. He had wanted to make sure that it was actually Maria who had been murdered before he came out to tell them. (21RT 3161.) Laura told Isabel that Maria was dead, and Isabel at first could not believe it and then started crying as the detective

continued speaking. (21RT 3162.) Laura would never forget telling Isabel that Maria was dead. (21RT 3162-3163.)

Laura and her boyfriend bought groceries and went home to help Isabel and the family. They were praying, but Laura was too angry at God to pray. Maria was too good to die. She was the type to always see good in others. (21RT 3163.) The whole family gathered, all the siblings and cousins. (21RT 3163-3164.) Laura's father, Saul Arreguin,[23] drove overnight from Arizona. (21RT 3164.)

Maria was buried on her 23rd birthday. (21RT 3164.) Laura did her makeup because she had watched Maria put on makeup every morning. (21RT 3164-3165.) Laura sat with a cousin in front of the coffin for an hour getting up the courage to see what appellant had done to her. When they finally opened the coffin, they took in the damage to her body and counted the cuts. Maria's skull had caved in a little on the left side, and they used a veil "to make her look decent." (21RT 3165.)

Laura finished up her school year and then returned to Arizona for her last year in college. Laura thought constantly about her safety in a way she never had before the murder. She had never imagine the damage that one person could inflict on another for no reason at all. Laura checked her windows and doors three times after locking them. (21RT 3167.)

Even eight years later, when the family got together, the cousins still talked about Maria. Isabel lived with it every day. (21RT 3167.) Photographs of Maria at family gatherings were shown to the jury. (21RT 3168-3170.)

Isabel sold the house within two months of the murder. She could not live with the memories of Maria in the house. (21RT 3170-3171.) Maria "was the energy of the house." While Isabel was still there, she asked her

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[23] For clarity, respondent will refer to Saul Arreguin as "Saul."

brothers to stay because she was afraid of appellant's retaliation. (21RT 3171.) Isabel had lived there 15 years. (21RT 3172.)

c. Saul Arreguin

Saul had a close relationship with Maria before she was killed. (22RT 3297-3298.) That was why he and two of his brothers drove all the way to Los Angeles support the family and attend the funeral. (22RT 3298-3299.) Saul was unable to continue speaking when asked how Maria's death affected him because he loved her. (22RT 3302.)

Saul lived in the same house with Maria in Mexico for the first four years of her life. (22RT 3304.) When Saul still lived in California, his wife was pregnant with a baby boy. Maria gave up her room so that Saul's wife could stay there for the last three months of a complicated pregnancy. (22RT 3302-3303.) One morning at 3:00 a.m., Saul's wife started bleeding, and Saul asked Maria to come with them to the hospital. Maria accompanied them and stayed with them through a difficult childbirth. (22RT 3303.)

Saul still thought about and missed Maria. (22RT 3304-3305.) Since Maria's death, Isabel remained sad. Family reunions had a tinge of sadness for the same reason. Everyone was there but Maria. (22RT 3305.) The jury was shown photographs of Saul and other family members with Maria at her quinceanera party and with Saul's then-baby boy. (22RT 3300-3301, 3303-3304.)

d. Antonio Arreguin

Antonio Arreguin[24] was another of Isabel's brothers. (22RT 3306-3307.) Antonio was close to Isabel and drove with Saul when he heard Maria was dead. (22RT 3307, 3309.) He remembered Maria as particularly affectionate and kind. She used to play with Antonio's daughters frequently, especially during a period of time when they all lived together. (22RT 3308.)

Their close-knit family "just fell apart" when Maria was killed. The death affected Antonio as well. (22RT 3310.) The jury was shown photographs from when Maria lived in Antonio's house at the age of eight and other family photographs with her in them. (22RT 3308-3311.)

e. George Mejia

George was very close to Maria. (22RT 3312-3313.) George knew there were problems between Maria and appellant but still thought appellant was fundamentally "a nice guy." Appellant had portrayed himself as a former gang member who was "born again," but Isabel and Miguel did not believe him. (22RT 3313-3314.)

When George heard that Maria was murdered, he knew that appellant was guilty. (22RT 3317.) The police sent over cars and a helicopter to make sure that the Mejias' house was safe because they were not sure if appellant was going to kill the whole family; but George still spent the night with an aunt in Palmdale. (22RT 3317-3318.) That night, at around midnight, the police called and asked George to identify Maria's body. (22RT 3318.)

The coroner only showed George a photograph of Maria and told George he was not showing him her actual body "because he had been a

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[24] For clarity, respondent will refer to Antonio Arreguin as "Antonio."

coroner for several years[] and [] had never seen anything that gruesome." (22RT 3318-3319.) Even eight years later, George still had a fresh memory of the identification. (22RT 3319.) George never went back to the house he had been living in when Maria died. (22RT 3321-3322.)

George moved to Mexico for six years after Maria's death because he could not live in California with everything reminding him of Maria. (22RT 3319.) George finally moved to Arizona in 2006, but still could not handle living in California. (22RT 3319-3320.) George and his wife would have made their lives in California with Maria and her husband had she not been murdered. Her death caused the family to fall apart. (22RT 3320.) George still only got together with his family in Mexico and did not come to California for reunions. (22RT 3320-3321.) George had grown apart from his parents and his other sisters since Maria's death. She was the heart of the family. (22RT 3321.) The jury was shown a family photograph with George and Maria. (22RT 3322.)

f. Miguel Mejia

Maria had five sisters and one brother. (22RT 3322-3323.) Maria was the youngest. (22RT 3326.) Miguel had a close relationship with her, especially because she was living with him and Isabel when she was killed. (22RT 3324.) Miguel could not explain what it was like to hear his daughter was dead. It was "something that you feel inside you." (22RT 3327.)

Miguel never thought he would outlive Maria. (22RT 3327.) Her funeral was one of the most difficult days of his life, and he did not want to remember it. Miguel would have preferred that appellant had killed him instead of her. (22RT 3328.) The worst thing that ever happened to Miguel was Maria's murder. (22RT 3329.) The jury was shown photographs of the Mejia family on happy occasions. (22RT 3324-3327.)

g. Isabel Mejia

When Isabel heard that Maria was dead, she became hysterical. (22RT 3344-3346.) Since that day, Isabel had felt no joy about anything in her life. Isabel and Miguel aged faster than normal and were affected medically by Maria's death. Appellant did not just kill Maria, he killed the entire Mejia family. (22RT 3346.) Even eight years later, Maria was still alive in Isabel's mind and heart. (22RT 3347.)

To Isabel, the death of a child was the worst possible thing that can happen to a mother. (22RT 3349.) Maria had always been happy, and even as appellant was abusing her, she never let Isabel know anything but happiness. (22RT 3349-3350.) The day before Maria was killed, Isabel was standing and cooking, and Maria came over and hugged her as if to say goodbye. (22RT 3350.) Isabel was particularly sad that Maria died because she loved someone who did not deserve her. (22RT 3351.)

After Maria's death, Isabel sold the house they lived in because there were too many memories and also out of fear of appellant. (22RT 3349.) It still caused Isabel pain that she did not know the location where Maria was killed, particularly because she wanted to place a cross, candles, and flowers there. (22RT 3350.) The jury was shown photographs of Isabel and Maria, happy. (22RT 3347-3349.)

h. Maria Eugenia Herrera

Maria Eugenia and Maria were very close because Maria Eugenia was the oldest and Maria was the youngest among the sisters. (22RT 3330-3331.) Maria was also especially close to Maria Eugenia's daughter as she was her godmother. They wanted Maria to be there for the quinceanera, but she was murdered instead. (22RT 3334.)

On March 4, 2000, Maria Eugenia was at a restaurant with Armando and their children. A voice in her head told her that Maria was dead, and

she started trembling. She got really upset, and Armando told her that she was crazy. (22RT 3334-3335.) Maria Eugenia called Isabel and asked where Maria was. Isabel's friend answered the phone and told Maria Eugenia that Maria was dead. When Maria Eugenia told her children, they told her that she was lying. They all started crying and immediately drove to Isabel's house. (22RT 3335.) When they got there, Isabel's friend told them that Isabel and Miguel were at the police station. (22RT 3335-3336.) Maria Eugenia and Armando joined them at the police station. (22RT 3335-3336.)

Maria Eugenia bought Maria's dress for the funeral. It was a difficult purchase to make. (22RT 3341-3342.) When another of her siblings saw Maria in the casket, she fainted. There were over 700 people present for the funeral, and she felt their support for the family. (22RT 3342.) For the first three years, Maria Eugenia would visit the grave daily. (22RT 3342-3343.) A friend recommended that for Maria Eugenia to heal, she should visit less frequently, so she cut back. But she still went frequently to place flowers. (22RT 3343.)

Even after eight years, Maria Eugenia still thought of Maria daily. (22RT 3336, 3343.) Maria was very affectionate and the joy of the household. Even while Maria was being abused and receiving death threats, she never let the family know what she was going through. The last time that Maria Eugenia saw her, eight days before her death, Maria gave her an especially tight hug. (22RT 3336.) Maria Eugenia's children saw Maria after that, and Maria told them that she would always love them and always hold them in her heart, as if she was saying goodbye. (22RT 3336-3337.) The jury was shown photographs of Armando and Maria Eugenia's wedding with Maria, when she was 10 years old, and with them at other family occasions. (22RT 3332-3333, 3337-3341.) The jury was also

shown a photograph of the gravestone which read, "Dearest daughter, sister and friend." (22RT 3343.)

C. Penalty Phase--Defense Case

1. Estella Aguirre

Estella had a different last name than appellant because she remarried. (22RT 3362-3363.) Estella grew up in Santa Monica, but met appellant's father in Venice. Appellant's father was named Ruben Becerrada Sr.[25] (22RT 3363.) They married in 1963, and appellant was born in 1964. They had two more boys and a girl in quick succession, Gabriel, Carlos, and Monica. (22RT 3364.) Ruben Sr. was Afro-Cuban, and Estella's family did not approve of the marriage because Ruben Sr. was a "nigger." (22RT 3363-3364.)

The first six months of marriage were good, but then Ruben Sr. stopped coming home every night and when he did come home he and Estella would fight and call each other names, even as the children were born and grew up watching the fights. (22RT 3364-3365.) The children watched Ruben Sr. hit Estella two to three times per week. The children would ask Ruben Sr., "Don't hit Mommy, leave Mommy alone, don't hit her." Ruben Sr. responded by telling them, "Go back in the fucking room." (22RT 3365.) Ruben Sr. also hit the children with his belt for "ruffling his feathers." (22RT 3366.)

Ruben Sr. used to force Estella to have sex with him. Other times when Estella would not have sex with him, Ruben Sr. would go "somewhere else." (22RT 3367.) In 1971, when appellant was seven years old, Ruben Sr. hit her one last time and Estella told him to leave or she would call the police. He left her with $35 in cash. (22RT 3368.)

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[25] For clarity, respondent will refer to Ruben Becerrada Sr. as "Ruben Sr."

Estella hated Ruben Sr., but because she was powerless, she took it out on the children, especially appellant. She would hit him a lot, using a belt and shoe. (22RT 3369-3371.) One incident with a shoe left a permanent mark on appellant's back when he was seven years old. Estella also verbally abused the children. (22RT 3370.) However, the children never required medical attention, and appellant was always healthy. (23RT 3480, 3482-3483.) Money was always a problem. (22RT 3371-3372.) Estella shoplifted food and clothes with the children. (22RT 3372-3373.) Although Estella's family helped her, she was overwhelmed as a single mother. (22RT 3373-3374.)

Ruben Sr. sometimes picked up the children on weekends. Appellant even lived with him for a short time before calling Estella to pick him up after Ruben Sr. beat him. Estella was always angry when the children wanted to see their father. (22RT 3375.) Estella would ask the children, "What do you want to see that motherfucker for? He doesn't give a shit about you." Sometimes she stopped them from seeing him, other times she allowed it. (22RT 3376.)

In school, appellant had behavioral problems. Estella was told that he was "hyper." (22RT 3378-3379.) She took appellant to a mental health clinic where the doctors wanted to give him Valium. (22RT 3379-3380.) Estella declined because she believed appellant to be too young and thought the medication habit-forming. She never went back. (22RT 3380.)

Often appellant would return home from school crying because other children called him "nigger." (22RT 3384-3385.) One common reaction from Estella was to encourage him to fight back physically by telling him, "You know what? I don't want no sissies here. Don't come crying to me. Give them something to remember you by." (22RT 3385.) Appellant never brought homework home. (22RT 3386.) When appellant was around 10 years old, Estella lost all control over him. When she told him to come

straight home from school, he and his siblings would not listen. (22RT 3386-3387.)

Estella did call the police on her children but the police never helped and just told her to keep the children at home. (22RT 3387.) Estella was never afraid of beating her children because the police did not stop her. On one occasion, Gabriel ran to the police station when Estella was going to whip him with a Hot Wheels track. Estella chased him all the way to the station. The police checked Gabriel for marks, took away the track, and sent them home. (22RT 3387-3388.) However, Estella stopped beating her children when she lost control and determined that the beatings were not effective. (22RT 3388.) The jury was shown photographs of appellant as a little boy. (22RT 3376-3378.)

Estella would sometimes leave her children with her brother, Edward Corner, who was a heroin addict and would use narcotics in front of the children. They both thought he was a better caretaker than Estella. Estella believed that Corner stepped into the bathroom to inject the heroin away from the children. (22RT 3388-3390.)

Eddie Aguirre[26] was a friend of Corner when Estella met him in January 1973. (22RT 3390-3391.) Eddie was arrested and sent to San Quentin State Prison in February 1973, but was released in December of the same year. Eddie and Estella moved in together immediately upon his release. Eddie was arrested and tried in early 1974, and Estella married him in May 1974, the day before his sentencing on the related convictions. The sentencing judge conducted the ceremony in-court. (22RT 3391.) Eddie was incarcerated for armed robberies. (23RT 3466.)

Estella and the children visited Eddie for the next three years, twice a month, sometimes spending two days with him in a trailer in "family

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[26] For clarity, respondent will refer to Eddie Aguirre as "Eddie."

visits." (22RT 3391-3392.) Eddie was incarcerated during that time in prisons in Soledad, Tehachapi, and Chino. (22RT 3392.) When Eddie was in Soledad, Corner was incarcerated there as well, and Estella and the children would visit both of them. (22RT 3392-3393.) Corner was incarcerated for narcotics crimes involving heroin. (23RT 3466.) The jury was shown photographs of the family visiting the state prisons. (22RT 3393-3395.)

Appellant began to hang out with the same children who were calling him "nigger." Although Estella tried to chase them away, she had no control. (22RT 3397.) The group of children eventually became a criminal gang. (22RT 3397-3398.) At that point, Estella felt she was in a losing tug-of-war for appellant's affection with the gang. Estella believed that she pushed appellant away and toward the gang through her poor parenting and trouble showing love. (22RT 3398-3399.) Appellant's brothers also joined the gang and ended up in prison. Gabriel was shot and killed in 2004, and Carlos was still in Lompoc Federal Prison. (22RT 3399-3400.) Appellant's moniker was "Crow," and Gabriel's moniker was "Shady." (22RT 3409.) The gang members would use Estella's house when she was not home and use narcotics there. (22RT 3410.) Estella herself would accept food in exchange for allowing narcotics users to ingest narcotics in her bathroom. They wanted to just pay five dollars cash per use, but food was more valuable. (23RT 3476-3478.)

Estella did not remember what grade appellant completed last in school, but thought that he had at least completed 5th Grade. (23RT 3452-3452.) Appellant and his siblings used to go to the local Boys and Girls Club where they had many opportunities, including professional boxing. (23RT 3478-3479.) Estella admitted that all of her children were bullies and brats throughout their lives. (23RT 3455-3456.) She also admitted that appellant was intelligent and adept at manipulating people. (23RT 3479.)

Estella admitted that both she and appellant were adept at lying, but all of her children were even more skilled at manipulation than she was. (23RT 3479-3480.)

Once Eddie got out of prison in 1977 (when appellant was 13 years old), he got a steady job and tried to be a role model for appellant, to no avail. (23RT 3470-3471, 3483.) Similarly, Estella worked at McDonald's for a few years and then got a job at a Marina Del Rey hospital, where she worked from 1979 until 1999. Estella's children saw that she and Eddie would go to work every day, but it did not affect them. (23RT 3470-3471.)

As a child, appellant babysat his younger siblings and protected them using physical violence. (22RT 3401.) In 1994, when he was between stints in prison, appellant cared for his dying grandmother. (22RT 3400-3401.) Since he was incarcerated for Maria's murder, and especially after Gabriel's death, appellant had started reading the Bible and sent letters to Estella recommending she read passages from Proverbs and Psalms. (22RT 3405-3406.)

At some point, appellant had a boy and a girl with Rosales (the woman who was arrested with him at the time of the attempted double homicide). (23RT 3457.) Estella raised Ruben Jr. and the sister, Angelina, was raised by a different grandmother. (23RT 2357-2358.) Appellant and Rosales were never present because they were in prison. (23RT 3458.)

Estella admitted that she had lied for appellant in the past, but denied that any of her testimony at this trial was a lie. (22RT 3410.) Specifically, Estella lied to doctors that appellant had a history of seizures to try to get him disability payments in 1997. (22RT 3411-3412.) She also lied that appellant had never worked when she was aware of his work history, including a stint for the City of Santa Monica, and had actually worked with him at a McDonald's for a time. (23RT 3459.) During an interview at the social security office, Estella "interpreted" for appellant from English to

Spanish, even though she knew that appellant did not speak Spanish. (23RT 3460, 3463, 3487-3492.) Estella omitted information that appellant abused alcohol and narcotics in the application. (23RT 3464.) Estella claimed that she did not know that it was fraud, even though she had lied to get money. (23RT 3446-3447.)

Estella was convicted of bringing Gabriel heroin when he was in state prison in 2003. She got out of prison in 2005 and was still on probation. (22RT 3403-3404, 3409.) Although appellant showed no mercy to Maria, Estella asked the jury to show mercy to appellant because his life, even in prison, could still be useful to other people, including herself. (22RT 3407-3408.) Estella felt that she "messed up" appellant's life even though she admitted he had free will and that Monica did not enter a life of crime despite the same upbringing (absent the beatings). (23RT 3449-3451, 3484-3489.)

2. Monica Becerrada

Monica did not remember a time when Estella and Ruben Sr. lived together. (26RT 3885-3886.) She was five years younger than appellant. (26RT 3886.) After the divorce, Monica lived with Estella. (26RT 3886-3887.) Monica's earliest memories were of a lot of people and narcotics being around her childhood house. (26RT 3887.) At night, when Estella worked, Corner would sometimes watch the children, and he and his friends would inject heroin in front of them. (26RT 3887-3888.) Monica thought that was normal as a child, although as an adult she knew it was not appropriate. (26RT 3888-3889.) Corner was her favorite uncle. (26RT 3888.)

Estella used to beat the boys with racecar tracks and extension cords and yelled profanely at them all. She would beat them all especially if they asked about Ruben Sr., who she repeatedly told them did not care about

them. (26RT 3889.) The brothers wore extra clothing as padding for the beatings. Appellant and Gabriel were beaten more often. (26RT 3890.)

As the boys got older and started going to jail, Estella would take Monica to visit on the weekends. They would also visit Corner and Eddie in prison. Monica did not like that and started spending her weekends with Ruben Sr. (26RT 3891-3894.) Eventually, Monica decided that she wanted to live with Ruben Sr. full-time because he did not beat her, use profanity with her, or call her names. (26RT 3894-3895.)

Whenever Monica had a problem at school for being part Black, she would tell appellant and appellant would talk to the culprits and tell them to stop. (26RT 3900-3901.) As appellant became involved in Mexican gangs, he had to prove himself against rival Black gangs because was part Black. (26RT 3901-3903.) Appellant and his friends would sniff glue and paint and use other narcotics. When appellant was high, he would sometimes act comically, talking to people who were not there. (26RT 3904.)

Monica was convicted of petty theft in 1995. (26RT 3899.)

3. Edward Corner

Corner helped Estella out whenever he could by stealing food and clothes, bringing the children milk, and watching them. (27RT 3976-3978.) Corner injected heroin with his friends while he was watching the children. (27RT 3979-3980.) Corner did not think about the impact he was having on the children. (27RT 3980, 3987.)

Corner also committed unrelated burglaries and robberies during that time, and appellant knew about them. (27RT 3981.) On one occasion, when appellant was 14 years old, Corner used appellant to knock on a heroin dealer's door. When the door opened, Corner told appellant to get out of the way and robbed the dealer at gunpoint in front of appellant. (27RT 3981-3982.)

Corner blamed himself for how appellant grew up because appellant saw him as a role model. (27RT 3984, 3987.) Corner, however, had never been involved with gangs. (27RT 3987-3988.) He had been sober for 27 years at the time of trial as a result of programs in prison. (27RT 3978, 3986.) Corner decided on his own to take responsibility for his life and ask a court for help joining a program for narcotics addicts. (27RT 3991.) He had used narcotics for so long, that Estella's children took a long time to believe that he was sober after he got out of prison at the age of 33. (27RT 3986, 3989.) Although Corner never taught appellant violence, Eddie (appellant's stepfather) did teach appellant that, if someone bothered him and he did not fight back, he "was not a man." (27RT 3988.) Corner did not have any negative violent experiences in prison, but he told appellant that prison was bad so that appellant would not go down that path; it had no apparent effect on appellant's behavior. (27RT 3988, 3990.)

Corner moved away from Venice in 1999 when his 14-year-old son began to feel pressure to join a gang. None of his three sons ever joined gangs. (27RT 3989-3990.) Corner never raped or killed anyone. (27RT 3992-3993.)

4. Deputy Matt Ahari

Los Angeles County Sheriff's Deputy Matt Ahari had been assigned for the 14 months before trial to the module where appellant was housed. (23RT 3418-3419.) During that time, appellant volunteered to gather dirty laundry for cleaning, to clean up after meals, and to clean areas of the module including showers and his own cell. (23RT 3421-3422.) Appellant's volunteering was above the average for inmates. (23RT 3423.) He received extra food for the volunteering. (23RT 3434.)

Deputy Ahari had never had any problems with appellant, who was always respectful to him. (23RT 3423.) Appellant had also exhibited no problems with other staff or inmates. (23RT 3423-3424.) Deputy Ahari

had never found appellant in possession of any weapons, feces, or urine. (23RT 3424-3425.) However, appellant's cell had a glass fourth wall instead of bars so that he never had the opportunity to reach through the front door or spray feces or urine before he was handcuffed. (23RT 3431-3432.)

Also during the time Deputy Ahari supervised appellant, he had never had a seizure or hallucination or exhibited any sort of mental illness. (23RT 3433-3434.)

5. Deputy Michael Wilhite

Los Angeles County Sheriff's Deputy Michael Wilhite had been assigned for the two years before trial to the module where appellant was housed. (23RT 3435-3436.) During that time, appellant volunteered to clean up after meals and sweep. (23RT 3437-3438.) Deputy Wilhite had never had any problems with appellant, who was always respectful to him. (23RT 3438-3441.) Appellant had also exhibited no problems with other staff or inmates. (23RT 3438-3439.) However, appellant was always alone in his cell and exercise area. (23RT 3440-3442.)

Deputy Wilhite had never found appellant in possession of any weapons, feces, or urine. (23RT 3439-3440.) Appellant always followed instructions. (23RT 3440.)

Also during the time Deputy Wilhite supervised appellant, he had never had a seizure or hallucination or exhibited any sort of mental illness. (23RT 3442-3444.)

6. Defense Expert Witness Dr. Roger Light

Dr. Roger Light testified as a clinical neuropsychological expert. (24RT 3499-3518.) Only 10 to 15 percent of Dr. Light's overall practice was in court cases (forensic), the majority of which was civil. (24RT 3509, 3530.) Within the criminal practice, however, Dr. Light had only done work for the defense bar or the courts themselves, but never for the prosecution. (24RT 3530.) Dr. Light saw his job as assisting the triers of fact rather than the defense. (24RT 3530-3531.) Dr. Light derived 10 percent of his income from court work. (25RT 3599, 3602.) In his clinical evaluations, Dr. Light had factored in bias and the probability that a subject is lying and approached the subjects' statements with "heightened skepticism." (24RT 3528-3530.)

Dr. Light was hired in 2003 to conduct an evaluation of appellant. (24RT 3509.) Prior to the evaluation, Dr. Light reviewed documentation of appellant's history. (24RT 3531-3532.) However, Dr. Light was only given a very small record from appellant's entire medical history. (24RT 3604-3606.) Dr. Light did not try obtain additional records and felt that would have been inappropriate as an expert witness, even with appellant's permission, and even though he commonly did that in his personal practice. (25RT 3606-3610.)

The evaluation itself took four hours and was conducted at the jail. (24RT 3533, 3536.) Dr. Light began with a malingering test to determine if appellant was lying about his symptoms or history. Dr. Light received positive test results that indicated the evaluation was going to be accurate and not skewed by malingering. (24RT 3536-3542.) This was bolstered by appellant showing areas of strength that would generally be incompatible with someone putting forth his best effort to malinger. (24RT 3557.) However, appellant also told Dr. Light that he was in jail for something he did not do. (25RT 3632.)

Appellant told Dr. Light that he had a seizure two days earlier. If appellant had taken medication, it would have affected his test performance; but Dr. Light relied on appellant's assertion that he was not on any medication. Dr. Light was unsure if appellant was undergoing withdrawal from any medications at the time, which could have affected the test results. (25RT 3621-3622.) Additionally, many of the tests required appellant to use his hands, which were handcuffed with chains. The restraints could have affected his scores. (25RT 3620, 3622-3623.)

The evaluation was geared toward traumatic head injury with a possibility of seizure disorder. For that reason, Dr. Light tested appellant's intellectual level, memory measure, speed measure, and attention measures. (24RT 3548) Appellant showed symptoms of pathological confabulation (logical memory deficiency), or a tendency exaggerate or input alternate information in a story, which was tested in a manner not susceptible to faking. (24RT 3553, 3555.) The symptoms indicated orbital frontal and medial temporal lobe dysfunction. (24RT 3553.) Appellant was also borderline deficient in verbal learning, even with cuing from Dr. Light, which also indicated medial temporal lobe as well as hippocampus dysfunction. (24RT 3556-3558.)

Dr. Light tested appellant's motor speed and found that he had a first percentile deficiency, meaning that 99 percent of the population performed better than him. (24RT 3554.) Appellant had strong face memory. (24RT 3555.) Appellant's performance in a complex figure test (testing copying skills) was also deficient, indicating right and left hemisphere dysfunction, and specifically medial temporal lobe deficit. (24RT 3558.) Many other tests indicated borderline deficiency. (See 24RT 3559.)

Appellant also suffered from cognitive limitations evidenced by an intelligence quotient ("IQ") function of 74, in the fourth percentile deficient range, close to the mental retardation cut-off of 70. (24RT 3559.)

Appellant was also deficient in verbal abstraction and cognitive tests. (24RT 3560.) As to frontal lobe executive functions (holding information and using it), appellant had a first percentile deficiency in visual sequencing and alternating attention. However, appellant showed normal fluency in language. (24RT 3554.) Thus, tests of appellant's executive functions were uneven. (24RT 3554, 3560-3561.)

Dr. Light opined based on his results that appellant reflected deficits in neuropsychological and cognitive intellectual functioning. (24RT 3561-3562.) Someone with those particular deficits would have trouble functioning in school and vocationally. Specifically, he would have deficits in socialization, reading people, and responsiveness to inhibitions that would lead to poor decisions and judgment. (24RT 3562-3563.) Because inhibitions, including gratification delay, are a frontal lobe function, deficiencies in frontal lobe functions could lead to errors of judgment and perception. (24RT 3563-3564.) Similarly, these deficits would affect a person's ability to control anger. (24RT 3564.)

Dr. Light found that the most likely cause of appellant's deficiencies was a traumatic brain injury, because that type of injury usually damages the frontal lobes as well as the medial temporal lobe as exhibited in appellant. (24RT 3564-3565.) Appellant described a number of life events that could have resulted in such injury, namely: being hit in the head by a baseball as a child; being hit in the head by a flashlight from a prison guard in the 1980s (after hitting the guard); and being hit in the head repeatedly and knocked out twice during boxing matches. (24RT 3565-3566; 25RT 3658-3659.) Dr. Light saw no supporting documentation that appellant had ever been injured boxing. (25RT 3660.) Dr. Light clarified, however, that even without an identifiable injury, appellant's deficits were real and irreparable. (24RT 3566; 25RT 3713-3714.) At the same time, a deficit in executive function did not mean that appellant was incapable of devising a

plan, strategizing, following through on goal-oriented behavior, changing strategy as the need arises, and continuing action to a desired conclusion. (25RT 3634-3635.) Dr. Light was unable to determine what appellant's brain functioning was like in 2000, especially since it was three years before he was able to even evaluate appellant for the first time. (25RT 3694-3695.) Dr. Light admitted that executive functioning was difficult to test in a jail setting. (25RT 3705-3708.)

Dr. Light admitted that appellant's aggressive behavior started as a child in kindergarten and that he had been kicked out of school and sent to a juvenile home at the age of nine when other corrective measures did not help. (25RT 3656-3657, 3662-3663.) The records from appellant's elementary school indicated that he was "very aggressive" but functioning intellectually as an average person. (25RT 3677-3678.) In 1991, 1992, 1993, 1995, 1996, and again in 1997, appellant reported to examiners that he had never had a seizure and that he had never had any psychiatric problems. (25RT 3678-3679, 3682-3683; 26RT 3766-3767, 3770-3771.) In a 1995 document, appellant admitted that he had earlier lied and that he had never had a seizure. (26RT 3767-3768.) Other reviewed documents indicated that evaluators believed appellant was lying about seizures to secure benefits, and that appellant also claimed to be homosexual for the same reason. (26RT 3768, 3773-3774, 3782-3784.) In a series of psychiatric evaluations done in 1995, 1997, and again in 2000, appellant was found to have logical thought and no indication of hallucinations, delusions, or impaired thought. (25RT 3681-3684; 26RT 3760-3761, 3771-3773.)

Although appellant had average grades in school and in prison, Dr. Light did not find that any single brain injury was the cause of appellant's deficits and added that those grades could have come before appellant's boxing injuries. (25RT 3702-3703.) Dr. Light admitted that appellant

could have lied about seizures to get a lower bunk in jail. (25RT 3703.) Dr. Light also admitted that appellant had lied in the evaluation interview about not having any relations with his family and last using narcotics in 1996. (25RT 3672-3673; 26RT 3782.)

Dr. Light evaluated appellant a second time on September 5, 2008. The second evaluation was conducted under more ideal circumstances in private, though still within the Twin Towers jail facility. (24RT 3568.) For the most part, Dr. Light used new tests so that the previous evaluation would not skew results. (24RT 3568-3569; 25RT 3583.) However, since he was sure enough of his 2003 results as to executive functioning, he did not retest that despite the more optimal setting of the 2008 evaluation. (25RT 3704-3710.)

Dr. Light readministered the malingering tests and determined that appellant was not malingering and was giving his best effort. (25RT 3580-3581.) However, as in 2003, Dr. Light was unsure if appellant was experiencing withdrawal symptoms from any medications at the time, which could have affected the test results. (25RT 3621-3622.) Appellant also embellished the number of times he was knocked out boxing to five times in amateur fighting and twice professionally. (25RT 3660-3661.)

The 2008 results confirmed Dr. Light's earlier analysis that appellant suffered from organic brain dysfunction that was not localized. Appellant showed deficits in immediate memory, delayed memory, visual constructional functions, and intentional functioning. (25RT 3585.) Appellant had deteriorated in these areas, which fit with psychiatric diagnoses made of appellant in the 1990s of paranoid schizophrenia or an unspecified psychotic disorder, cognitive deteriorating disorders consisting of detachment from reality. (25RT 3585-3586.) Dr. Light opined that appellant would have suffered from the brain dysfunction and deficits in 2000, as well. (25RT 3586-3587.) Dr. Light opined that the causes of the

dysfunction would have occurred before the murder, including traumatic brain injury, environmental deprivation, malnutrition, cognitive deteriorating seizure disorder, a history of childhood beatings, and a long history of narcotics abuse associated with cognitive deterioration. (25RT 3587-3591.) Additionally, appellant had hepatitis and hepatic damage, which is a progressive disorder associated with cognitive decline. (25RT 3588.) Dr. Light tempered his opinion by admitting that most people with brain injury do not commit criminal acts. (25RT 3589.)

Dr. Light found a deterioration between 2003 and 2008 and ascribed that deterioration to lack of oxygen from appellant's seizures. If it turned out that the seizures were falsified, Dr. Light would find this deterioration mysterious. (26RT 3826-3828.) If it also turned out that appellant had no psychosis (delusions and hallucinations), Dr. Light agreed that antisocial personality disorder was the next likely culprit. (26RT 3828-3831.) However, appellant could very well have suffered from brain dysfunction and antisocial personality disorder simultaneously (but not schizophrenia specifically and antisocial personality disorder). (26RT 3854-3855, 3857, 3872-3873.) Antisocial personality disorder was a psychological condition rather than neuropsychological, and Dr. Light did not test for it because it was not his specialty. (26RT 3872-3873.)

Dr. Light opined that appellant's faking seizures for manipulative purposes did not mean that he did not have seizure disorder, but only that he had learned how to fake the symptoms when it was convenient for him to do so. (25RT 3592-3593.) Appellant had received prescriptions for the seizure drug Dilantin "a number of times," a nonaddictive drug with undesirable side effects that was not in demand by narcotics abusers. (25RT 3593-3594.)

Dr. Light did not write a report or document the tests he conducted in 2008, even though he described it as unethical not to report on the basis of

an expert opinion for the purposes of peer review, because in 2008 he was only updating and confirming his findings from the 2003 evaluation. (25RT 3609-3613.) Dr. Light instead produced a data sheet with appellant's actual scores. (25RT 3612-3613.) He explained that in a "medicolegal" environment he had an obligation to do what his client asked and not to use his independent ethical judgment, but then admitted that he was never told by the client not to write a report. (25RT 3613-3614; 26RT 3785.) Similarly, Dr. Light did not ask appellant about his criminal history for the same reason. (25RT 3670.) Dr. Light did not feel that the cuffing of appellant's non-dominant right hand would have significantly affected his scores in 2008, even though appellant was not able to use both hands in writing as test-takers usually do. (25RT 3623-3625.) Dr. Light also did not feel that contradictory reports about which of appellant's hands was dominant and appellant's use of both hands to change how his writing looked was relevant. (26RT 3786-3788.)

Dr. Light opined on a hypothetical based on a burglary committed by appellant in 1995, where appellant used a fake identification, his children, and a receipt with scrubbed payment information to repeatedly receive refunds for stolen merchandise, that the actions showed aspects of planning included within executive functioning. (25RT 3639-3641.) After initially trying to explain appellant's behavior in defending his jail cell against extraction as "extremely disordered psychotic behavior," Dr. Light opined on a hypothetical based on the facts surrounding appellant's defense of his jail cell that it was goal directed and excusable because appellant told Dr. Light that he was treated badly in jail. (25RT 3636-3639.)

Dr. Light opined on a hypothetical based on the facts of this case that appellant did not have intact executive function, that his choices were not well thought out in any way that he thought he could get away with the murder, and that the choices appeared spurred by anger, although he

obviously had the capacity to plan and had some executive function. (25RT 3641-3650; 26RT 3845-2848.) Dr. Light's definition of executive function differed from the American Psychological Association's ("APA") definition, which he found incomplete. (25RT 3652-3654.) The APA's definition was "higher level cognitive processes that organize and order behavior," including "logic, right reasoning, abstract thinking, problem solving, planning, carrying out and terminating goal directed behavior." (25RT 3651-3652.) Dr. Light opined that executive functioning also includes sociability, self-awareness, and ability to modulate behavior. (25RT 3650- 3651; 26RT 3844-3845.)

Dr. Light noticed wide discrepancies in the record he reviewed on what appellant told people about when his seizures started, how frequent they were, and whether he could tell if one was about to occur (an "aura"). (25RT 3669-3670; 26RT 3761-3766.) Appellant came to many of his prior medical evaluations without a shirt, showing a torso covered in tattoos, apparently in an attempt to influence the diagnoses. (26RT 3875-3877.) Dr. Light also noticed that even though appellant had completed 11th grade, he changed his story frequently about what his highest grade of completion was, ranging from 6th to 10th grades. (25RT 3668-3669; 26RT 3780-3782.) Appellant lied about work experience in the past, claiming that he had none and was unable to work when it benefited him, even though he performed well in a number of positions. (26RT 3774-3778.) Appellant also lied to Dr. Light about his siblings, telling him that he had only one brother and one sister. (26RT 3788-3789.) Dr. Light opined that appellant knew the difference between right and wrong. (26RT 3825-3826.)

Although Dr. Light did not see it prior to testifying in court, he acknowledged a report that appellant had psychological testing in 1985 after his attempted double murder and was found to have no evidence of

thought disorder or other psychopathology would have been of interest. (25RT 3728-3732, 3736-3738.) In that report, the evaluators indicated that appellant showed no remorse for the shootings, something that Dr. Light would fit under antisocial personality disorder, which characterizes someone who is deceitful, manipulative, irritable, impulsive, aggressive, unempathetic, and does not care about the consequences of his actions, yet able to display superficial charm. (25RT 3737-3749, 3806-3808.) Dr. Light disagreed with the Diagnostic and Statistical Manual of the APA ("DSM") as to the definition of antisocial personality disorder. The DSM listed as a criteria for diagnosis, evidence of onset before 15 years of age; Dr. Light would not view behavior at that age as onset of the disorder. (26RT 3808-3811.) However, Dr. Light agreed that a report that appellant smiled when he heard that a person had died in a drive-by shooting he was involved in together with saying, "he actually died," indicated that appellant showed no remorse for the consequences of his actions. (26RT 3812-3814.)

Dr. Light would be able to find the death penalty appropriate in certain cases. (26RT 3779-3780.)

D. Penalty Phase Rebuttal--Prosecution Expert Witness Dr. Robert Brook

Dr. Robert Brook was a clinical psychologist with a specialty in neuropsychology. (28RT 4019-4026.) Dr. Brook had conducted around 350 forensic evaluations, around 275 of which were for criminal cases. (28RT 4026-4027.) Half of those were for the prosecution and half for the defense. (28RT 4034.) Dr. Brook always wrote a report so that others could review his work. (28RT 4034-4035.)

Dr. Brook opined that although an inmate's prison file was not directly relevant to his medical history, it was very important for a neuropsychological evaluation because the evaluation results had to be

contextualized into an individual inmate's personal history. (28RT 4029-4031.) Dr. Brook would want as much personal history as possible on an inmate when conducting a forensic evaluation. (28RT 4031.) When an inmate refused to sit for an interview, Dr. Brook would have to do his best to assess the inmate's psychological state based on records, a practice accepted in the industry. (28RT 4032-4033.) Additionally, just because someone tested on the low end of the spectrum for cognition, it would not mean that he had brain injury, as some people were just born that way. (28RT 4040.) Dr. Brook opined that in the prison system if an inmate tells doctors that he has a seizure disorder and nothing in his story contradicts that, seizure medication will be prescribed and given without further corroboration, which may not always be possible. (28RT 4049-4050.)

Dr. Brook was not able to personally evaluate appellant, although he did request it, because appellant could not be legally compelled to sit for an evaluation. (28RT 4053-4053, 4160.) However, Dr. Brook opined that reviewing appellant's test results administered by Dr. Light, coupled with appellant's record, would allow for him to reach professional conclusions. (28RT 4053-4056.)

Dr. Brook's first observation was that in reviewing all of appellant's records (three feet thick) he found no indication that anyone had ever witnessed a seizure, psychosis, delusions, or hallucinations. (28RT 4056-4057.) Dr. Brook also did not find random acts of violence that might be associated with psychosis, but instead a pattern of using violence for a rational goal. (28RT 4057-4058.) The records themselves also displayed no sign that appellant suffered from brain dysfunction. (28RT 4058.)

As to Dr. Light's 2003 evaluation, Dr. Brook found limitations on the testing that would have negatively impacted the utility of the results, namely, the presence and use of a deputy in conducting the test, a glass partition so dirty that Dr. Light himself noted it, and limitations on hand

movements through cuffs. (28RT 4058-4060; 29RT 4190-4192.) As a result, any results would have to be interpreted with caution. The results would be better used as a "floor" of appellant's abilities. (28RT 4061.) Dr. Brook opined that the lack of evidence of malingering on Dr. Light's malingering tests did not indicate that appellant was not malingering. (28RT 4063-4064.)

Dr. Brook opined that, based on the 2003 test results, appellant did not have brain dysfunction. (28RT 4066.) The test results were all within normal limits. (28RT 4067-4068.) And that was especially convincing given that the test was given under poor circumstances with many distractions. (28RT 4069.) Additionally, brain injury does not always impact behavior. (28RT 4064-4065.)

Dr. Brook also opined that, based on 2008 test results, appellant did not have brain dysfunction, even within the limitation that it was given eight years after the murder. (28RT 4070-4071.) Dr. Brook added that the 2008 results showed dramatic "improvement," which, because brains do not heal themselves, meant that appellant's minimum executive function ability was greater than the 2003 tests showed. (28RT 4071-4076.) In contrast, the results of one test from 2003 dramatically decreased in 2008, which made Dr. Brook suspicious of the 2008 results. (28RT 4076-4077.) But even with that, appellant's executive function dramatically "improved" from 2003 to 2008. (28RT 4077.)

Dr. Brook opined that, contrary to Dr. Light's position, appellant's memory fell within the normal range. (28RT 4080-4084.) Moreover, Dr. Brook opined that the confabulation detected by Dr. Light was completely normal, especially given the specific circumstance of appellant's career criminalism, and not a sign of brain dysfunction. (28RT 4084-4086.) Dr. Brook agreed with the APA dictionary's definition of executive functioning. (28RT 4087-4090.) Moreover, Dr. Light, in his 2003 report,

defined executive functioning in the same manner. (28RT 4090-4091.) High level executive functioning did not require that decisions be smart. (29RT 4230-4231.)

In 2008, Dr. Light did not give any executive functioning tests whatsoever, despite his concerns indicated in 2003. (28RT 4091-4092.) Dr. Brook named and explained several tests that Dr. Light could and should have given (but did not) to test executive function generally and brain dysfunction specifically, tests suitable for jail that Dr. Brook had administered himself under those circumstances. (28RT 4093-4107.)

As to appellant's life history, no records from childhood or current time would be too remote or too recent to be unimportant, especially if he had a history of lying and manipulation, as appellant did. (28RT 4108-4110.) If Dr. Brook felt he was being lied to when he asked about the existence of records that should have been kept and that he should have been given access to, he would drop the client, as he did in one case. (28RT 4110-4113.) And if the records were really unavailable and he still had to go ahead and conduct an evaluation, he would tell the hiring attorney that his results would have limited weight and state the same in any subsequent report. (28RT 4114-4115.) That duty was incumbent upon an expert. (28RT 4119.) Especially in a case where documented history was missing, it would be important to administer psychological and brain imaging tests, as well as an electroencephalogram. (28RT 4119-4121.) Additionally, if Dr. Brook came to a diagnosis, but then encountered new information, he would, as an expert witness, reconsider and possibly change his diagnosis in light of the new information. (28RT 4139-4140.)

Dr. Brook opined that the records did not support a finding of schizophrenia or psychosis. (28RT 4140-4142.) Nothing besides self-reporting supported those findings. (28RT 4142.)

As an alternate diagnosis, Dr. Brook opined that appellant had merely lived a criminal lifestyle his entire life, with no brain dysfunction. (28RT 4121-4122.) Specifically, appellant had antisocial personality disorder, which is a personality type rather than a brain dysfunction. The diagnosis was bolstered by the fact that any alleged brain trauma occurred after appellant had already established a pattern of criminal conduct. (28RT 4122-4123.) Appellant demonstrated intact higher order executive function in a number of his criminal schemes, including the present crimes, and his behavior in jail. (28RT 4127-4134; 29RT 4178-4189.)

E. Penalty Phase Surrebuttal--Defense Expert Witness Dr. Light

Dr. Light opined that although there were distractions in the 2003 evaluation, the results were interpretable, though qualified. (29RT 4243-4244.) It was because of these qualifications that he performed the second 2008 evaluation. (29RT 4244.) Dr. Light disagreed that appellant's test results could have been interpreted as being in the normal range. (29RT 4243-4244.)

Dr. Light explained that the tests he did not administer were either no longer in use by neuropsychologists or were only useful in cases were a subject tested well in some areas. (29RT 4246-4248.) In this case, where appellant already tested poorly in some areas, he would not have done any better with the omitted tests and the results would have been clinically inappropriate at best and misleading at worst. (29RT 4248.) There was no such test that "purely" measured executive functioning. (29RT 4249.) As to the apparent lack of behavior change after any possible physical trauma, Dr. Light opined that brain injury could cause a personality disorder to become more pronounced. (29RT 4253.)

ARGUMENT

I. THE TRIAL COURT PROPERLY ALLOWED PHOTOGRAPHS OF APPELLANT'S TATTOOS

Appellant contends that the trial court erred in allowing the prosecutor to show photographs of appellant's tattoos that were allegedly more prejudicial than probative, specifically People's Exhibit numbers 37A, 37C, 37D, and 38B. Appellant also argues that their introduction violated his federal constitutional rights. (AOB 44-56.) However, the photographs' probative value to bolster testimony regarding Maria's behavior toward appellant, and especially as a victim of IPV, outweighed any potential prejudice caused by appellant's tattoos. Regardless, appellant was not ultimately prejudiced by their introduction.

A. Factual Background

Before the opening statements, defense counsel objected to the photographs of appellant's tattoos proposed to be included in the prosecutor's PowerPoint presentation. (10RT 1413-1414.) Specifically, counsel argued that the only reason that photographs of appellant's bare body were being admitted was to show that appellant had scratches on his body after he was arrested and that a full panorama of the tattoos was unnecessary for that. (10RT 1414.) Additionally, appellant was willing to stipulate to the presence of the scratches and the gang tattoos, and photographs of them were unnecessary. (10RT 1414-1415.)

The trial court noted that the prosecutor was allowed to prove its case even if the appellant did not contest parts of it. Further, it found no "prejudice" in including the tattoos in the photographs of the scratches because the photographs were not introduced solely to show the scratches, but to show the tattoos themselves. The tattoos were "somewhat overpowering to the extent that they do show the gang Venice Jokers on the

back and have some interesting perhaps frightening images" that tended to explain Maria's behavior in her reluctance to cooperate with the police and her compliance with appellant's demands. The court added that it was less prejudicial to show photographs of the tattoos than the actual tattoos and overruled the objection. (10RT 1416.)

In the guilt phase, the photographs at issue were shown to the jury to support testimony as to scratches and cuts on appellant's body (13RT 1983-1985; 15RT 2245-2246 [Detective Oppelt], 2277 [Officer Crees]; 16RT 2357 [Vanessa], 2384-2385 [Detective Cochran]) and as to appellant's gang affiliation (15RT 2264 [Detective Oppelt]).

At the close of the guilt phase, the prosecutor offered the photographs, inter alia, into evidence. (16RT 2516.) Defense counsel renewed her objections. Counsel said that she understood what the court had earlier found that the tattoos helped explain Maria's intimidation and reactions to appellant's abuse, but still renewed the objection. The court explained that the tattoos were relevant both because they were intimidating and because one of them was a caricature of a woman suggestive of appellant's attitude toward women and corroborative of witness testimony. (16RT 2519.)

In the penalty phase, the photographs at issue were shown to the jury to support testimony as to appellant's gang affiliation. (20RT 3053-3054 [Detective Oppelt].)

B. The Applicable Law

A trial court has broad discretion in determining the relevancy and admissibility of evidence, including such questions as probative value and undue prejudice. (*People v. Michaels* (2002) 28 Cal.4th 486, 532; *People v. Rodriguez* (1999) 20 Cal.4th 1, 9.) Relevant evidence is defined in Evidence Code section 210 as evidence "having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." Evidence Code section 352 allows a trial

court to exclude evidence if its probative value is substantially outweighed by the probability that its admission will necessitate undue consumption of time or create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury. But in this context, "prejudicial" is not synonymous with "damaging." (*People v. Coddington* (2000) 23 Cal.4th 529, 588, overruled on other grounds in *Price v. Superior Court* (2001) 25 Cal.4th 1046, 1069, fn. 13.) Instead, "undue prejudice" involves the admission of "evidence which uniquely tends to evoke an emotional bias against the defendant as an individual *and which has very little effect on the issues*." (*People v. Gionis* (1995) 9 Cal.4th 1196, 1214, quoting *People v. Karis* (1988) 46 Cal.3d 612, 638; emphasis in original.)

A prosecutor need not stipulate to proof in place of photographs "if the effect would be to deprive the state's case of its effectiveness and thoroughness," nor is the prosecutor "obligated to present its case in the sanitized fashion suggested by the defense." (*People v. Salcido* (2008) 44 Cal.4th 93, 147; see *People v. Mills* (2010) 48 Cal.4th 158, 191 ["[t]hat the challenged photographs may not have been strictly necessary to prove the People's case does not require that we find the trial court abused its discretion in admitting them"].)

In any event, a trial court's discretionary ruling on evidentiary matters should not be disturbed on appeal except upon a showing that the court "exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a miscarriage of justice." (*People v. Rodriguez*, *supra*, 20 Cal.4th at pp. 9-10.) In turn, a "miscarriage of justice" should be declared only when the reviewing court, after an examination of the entire record, is of the opinion that it is reasonably probable that a result more favorable to the defendant would have been reached in the absence of the alleged error. (Cal. Const., art. VI, § 13; Evid. Code, § 353, subd. (b);

People v. Earp (1999) 20 Cal.4th 826, 878; *People v. Watson* (1956) 46 Cal.2d 818, 836.)

C. Because the Photographs Were Highly Probative of Maria's Intimidation, As Well As the Presence of Scratches, the Trial Court Properly Admitted Them into Evidence

Here, as the trial court explained (10RT 1416; 16RT 2519), aside from showing the location of scratches on appellant's body, the photographs of appellant's intimidating and sexual tattoos were clearly relevant to Maria's behavior in returning to appellant even after he had raped her, as explained by Baca in her expert testimony. (See 16RT 2491-2493.) Maria's behavior and state of mind were material issues because appellant argued at trial that the evidence did not show she had been raped. (17RT 2633-2634.) Although appellant describes the tattoos as particularly graphic (see AOB 50), it was their very unique nature that made them so probative. Ordinary gang tattoos would have carried a certain level of intimidation. But appellant's tattoos were out of the ordinary and, as a result, were particularly intimidating. Appellant describes one of the tattoos as three "menacing" gentlemen and another as showing a woman "in a sexually submissive pose." (AOB 44.) Maria unquestionably was aware of these tattoos and would have been intimidated by what they represented about appellant's gang lifestyle and violent attitude toward women. Thus, the photographs were clearly more probative than prejudicial as to the issues of Maria's behavior, Baca's IPV diagnosis, and the location of the scratches on appellant's body. (See 17RT 2656-2657 [prosecutor's guilt-phase closing argument].)

Appellant argues that the tattoos were more prejudicial than probative because his gang affiliation was not relevant toward proving his conduct and that his sexually charged tattoos were not relevant as to whether he committed a sex crime, and cites case law in support of those propositions.

(See AOB 50-51.) Arguably, appellant would be correct if the tattoos were admitted to show his disposition to rape or kill. However, as just explained, their relevance was to *Maria's* behavior to help the jury understand the relationship between Maria and appellant, and specifically appellant's failed attempts at intimidation that led to his perceived need to kill her in order to eliminate her as a witness. As such, their probative value was significant. (See, e.g., *People v. Sanchez* (1997) 58 Cal.App.4th 1435, 1450 [gang evidence probative of witness intimidation].)

Appellant also argues that because Maria was unavailable to testify that she had been intimidated by his tattoos, there was an insufficient link between the tattoos and her intimidation. (AOB 49.) However, as appellant himself notes, "an experienced jurist," the trial judge, found the tattoos relevant to the material issue of intimidation. (AOB 51.) Appellant cannot argue both that the tattoos were overpoweringly prejudicial but not intimidating to Maria. The court was well within its discretion in finding that the prosecutor could make an argument that appellant having these tattoos was intimidating to Maria without any additional testimony.

Additionally, the fact that the prosecution was able to use the photographs in the penalty phase did not constitute error under state law. (See AOB 54-55.) As just explained, the tattoos were relevant to show appellant's intimidation of Maria and other witnesses, as well as his active involvement in criminal gangs, all of which were legitimately considered by the jury as aggravating circumstances. (See § 190.3, factor (b).)

Finally, for all the same reasons, and contrary to appellant's position (see AOB 55-56), the introduction of the photographs did not violate his constitutional rights. Preliminarily, appellant forfeited his conclusory claim that his constitutional rights were violated. He only raised below an Evidence Code section 352 objection to the evidence (10RT 1413-1415; 16RT 2519), which did not preserve any constitutional objection for

appellate purposes. (See *People v. Huggins* (2006) 38 Cal.4th 175, 240, fn. 18 [failure to preserve Fifth Amendment claim]; but see *People v. Partida* (2005) 37 Cal.4th 428, 433-435 [defendant may make only narrow due process argument that admitting evidence over a § 352 objection was prejudicial].)

In any event, the relevance of the challenged evidence defeats these belated constitutional objections. (*People v. Monterroso* (2004) 34 Cal.4th 743, 773.) As appellant notes, "the submission of gang affiliation evidence in a criminal proceeding may be constitutional error when such evidence is irrelevant to the issues at hand." (AOB 55, citing *Dawson v. Delaware* (1992) 503 U.S. 159, 165 [112 S.Ct. 1093, 117 L.Ed.2d 309].) However, as just explained, the tattoos were highly relevant.

Additionally, appellant does not argue herein there were constitutional standards of admissibility more exacting than the statutory standards imposed by the California Evidence Code. And he does not otherwise show the admission of this relatively insignificant evidence, at a trial involving a horrific murder and rape, rendered his trial fundamentally unfair or deprived him of due process. (See *People v. Kipp* (2001) 26 Cal.4th 1100, 1125.) Accordingly, appellant's claim should be denied under any standard.

D. Because Appellant Only Contested Whether the Killing was Premeditated, He Was Not Ultimately Prejudiced By the Photographs

Although, as explained, the tattoos were highly probative of the issue of Maria's IPV diagnosis and otherwise inexplicable behavior in returning to appellant despite the rape and domestic violence, they were not ultimately prejudicial to appellant under any standard. (*Chapman v. California* (1967) 386 U.S. 18, 24 [87 S.Ct. 824, 17 L.Ed.2d 705]; *People v. Watson*, *supra*, 46 Cal.2d at p. 836.) Arguably, the only improper

prejudice that could have resulted from the tattoos was the inference that appellant was more likely to be violent. But appellant did not contest that he murdered Maria, in light of the overwhelming evidence of guilt. Defense counsel also conceded to the jury that appellant was a bully, an abuser, and "an intimate partner batterer." (17RT 2625-2626.) Needless to say, the jury was well aware of appellant's violent conduct against Maria and the savage manner in which he killed her.

Appellant's sole argument in the guilt phase was that he impulsively killed Maria without premeditation or planning. (See 17RT 2262-2638 [defense guilt phase closing argument].) However, there was nothing about the tattoos that made appellant more likely to lie in wait and plan his murders ahead of time. On the contrary, a person who made the decision to obtain socially unacceptable tattoos would probably be more likely to make poor rash judgments. Regardless, in no way did the tattoos prejudice the jury's findings that appellant committed the murder with premeditation and lying in wait, as the findings of premeditation and lying in wait were supported by compelling evidence. (See Arg. VIII, *post*; Statement of Facts, *ante*.)

In the penalty phase as well, appellant suffered no prejudice because after hearing testimony about appellant's prior involvement in gang murders, rape, and witness intimidation, in addition to the savage circumstances of Maria's horrific death, there is no way that viewing photographs of appellant's tattoos would have made a difference in the jury's verdict. (See *People v. Kipp*, *supra*, 26 Cal.4th at p. 1125.) That is especially true where the tattoos themselves were somewhat ambiguous to a jury unfamiliar with criminal culture. Aside from mentioning appellant's gang, they can best be described as tattoos of someone performing oral sex on a woman and three men standing next to each other. Although socially unacceptable and intimidating, especially the semi-pornographic tattoo of

the woman, they depict no violence or abuse that would compare to the crimes appellant actually committed. (See Peo. Exhs. 37, 38, & 90.) Thus, for these reasons as well, appellant's claim should be denied.

II. THE TRIAL COURT PROPERLY ADMITTED TESTIMONY THAT APPELLANT DISPLAYED A GANG SYMBOL AT A PRETRIAL HEARING AS WELL AS FOUNDATIONAL TESTIMONY BY THE GANG EXPERT

Appellant also contends that the trial court improperly admitted testimony that he had displayed a gang symbol using his fingers at a pretrial hearing, together with gang expert testimony as a foundation, in violation of Evidence Code section 352 and the federal Constitution. (AOB 57-67.) However, the trial court properly admitted the testimony. Any error was harmless, regardless.

A. Factual Background

During trial, Detective Oppelt testified that in a search of appellant's room he found an envelope addressed to Gabriel with a photograph of Maria and the note, "This is the bitch, Ruben, JKS." (15RT 2253-2256.) Detective Oppelt was then asked a series of questions to explain what Venice 13 and the Jokers were. (15RT 2256-2257.) As part of that questioning, Detective Oppelt testified that at a pretrial hearing where Rosa testified, appellant displayed a V-shaped gang sign to her, which indicated he still considered himself a member of the Venice 13 gang. (15RT 2257-2259.)

Defense counsel objected that the evidence was more prejudicial than probative. The court sustained the objection, but on foundational grounds (i.e., there was no showing Detective Oppelt knew the V-shape was a gang sign for Venice 13). (15RT 2258.) The prosecutor proceeded to establish that Detective Oppelt was familiar with how Venice 13 gang members communicated. (15RT 2258-2259.) Counsel objected again and explicitly

asked for a ruling that the evidence was more prejudicial than probative. (15RT 2259.) The court explained that the only basis for sustaining the objection was as to foundation and overruled the objection as to prejudice. (15RT 2259-2260.) The prosecutor continued to lay a foundation for Detective Oppelt to testify about how police detectives learn about gangs. (15RT 2260.)

Defense counsel objected again as a "continuing objection." The court responded, "You asked for the foundation, you're getting the foundation. If you don't like it, don't ask for it. [¶] Overruled." (15RT 2260.) The court added, "[D]on't ask for it if you don't want it. You wanted to know the basis for his conclusion about the V sign. That's what you're getting." Counsel tried to correct the court, "The original objection was more prejudicial than probative." The court responded, "You can't keep it out when you ask for it and then object when it's brought out anyway. [¶] The objection is overruled." (15RT 2261.)

The prosecutor continued to lay out a foundation for Detective Oppelt's knowledge about how he gathered information on gangs. (15RT 2261-2262.) However, when the prosecutor asked Detective Oppelt if he discovered information on the gang's "shot callers" the same way, the court cut her off and said, "I think we're going further than you need to to show the foundation. You have shown the foundation for his opinion." (15RT 2262-2263.) With that foundation, the prosecutor again elicited testimony from Detective Oppelt that appellant had displayed a Venice 13 gang sign in the courtroom and that the use of this gang sign was consistent with the reference to the gang in his letter to Gabriel. (15RT 2263-2264.) The prosecutor also elicited testimony from Detective Oppelt that appellant's Venice 13 tattoo further showed his gang affiliation and was "the largest one [he had] ever seen with a V13 gang member." (15RT 2264.)

The court called a recess to discuss the objections. (15RT 2265.) The court admitted that it had not understood defense counsel's objection and explained that if counsel had intended to object on Evidence Code section 352 grounds, she should have done so before the prosecutor mentioned appellant's courtroom display to begin with. (15RT 2265-2266.) However, the court still ruled that the evidence was not more prejudicial than probative because it was brought in to explain that appellant and Rosa were still involved with Venice 13. (15RT 2266.) Counsel responded that while the testimony about the hand sign and its meaning was probative, it was more prejudicial than probative because of the detail that Detective Oppelt was required to go into. (15RT 2266-2267.) The court found that Detective Oppelt had not testified in such detail as to make the evidence more prejudicial than probative. (15RT 2267.)

The prosecutor added that she was surprised by the objection altogether because the understanding of all parties was that appellant would be testifying and that his credibility and background would be fair game for impeachment, especially because the majority of his prior convictions were gang-related. (15RT 2267-2268.) Defense counsel responded that while the possibility of appellant testifying was strong (based on her opening statement), it was appellant's decision and that the court had a duty to protect the record until he made that decision. Further, counsel clarified that she was not objecting to the "information itself" but to the "additional evidence" which was unnecessary. (15RT 2268.)

The court reiterated that evidence that appellant had displayed a gang sign in the courtroom when he should have been on his best behavior was more probative than prejudicial to show continuing association with a gang and with Rosa as part of that gang. (15RT 2268-2269.) Additionally, the court found no prejudice in a trial in which gang evidence was already present, including appellant's body tattoos and his signature in the letter to

Gabriel, which were relevant to show "his attitude about the victim in the case." The court ruled that the prosecutor was permitted (as she did) to elicit testimony about how a detective communicates with gang members to learn about the gang, but could not go further and elicit testimony about "shot callers" in the gang, which was why the court cut the prosecutor off from that line of questioning. (15RT 2269.) Otherwise, the court reiterated its ruling overruling the Evidence Code section 352 objection. (15RT 2269-2270.) All parties agreed for the record that defense counsel did not seek the foundational testimony. (15RT 2270.)

Detective Oppelt testified one further time that the gang sign appellant displayed in court was for Venice 13, a second-generation gang, and the Jokers was a clique within the gang. (16RT 2331-2332.) Detective Oppelt testified that names found in Maria's address book were gang monikers, including one that was identified as Rosa's own moniker by other witnesses. (16RT 2332-2334; see 16RT 2327, 2347.)

B. The Applicable Law

Evidence Code section 352 allows a trial court to exclude evidence if its probative value is substantially outweighed by the probability that its admission will necessitate undue consumption of time or create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury. (See generally Arg. I(B), *ante*.) Evidence of gang membership and activity is admissible when relevant to prove a material fact if its probative value is not substantially outweighed by its prejudicial effect. (*People v. Carter* (2003) 30 Cal.4th 1166, 1194.)

The decision on whether gang evidence is relevant, not unduly prejudicial and thus admissible, rests within the discretion of the trial court. (*People v. Avitia* (2005) 127 Cal.App.4th 185, 193.) "Where, as here, a discretionary power is statutorily vested in the trial court, its exercise of that discretion must not be disturbed on appeal except on a showing that the

court exercised its discretion in an arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice." (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124-1125, italics and internal quotation marks omitted.) It is an appellant's burden on appeal to establish an abuse of discretion and prejudice. (*People v. Jordan* (1986) 42 Cal.3d 308, 316.) Error in admission of gang evidence is subject to the *Watson* reasonable-probability-of-a-different-outcome standard. (*People v. Partida*, *supra*, 37 Cal.4th at p. 439; *People v. Watson*, *supra*, 46 Cal.2d at p. 836.)

C. The Trial Court Properly Admitted Testimony That Appellant Displayed a Gang Sign in the Courtroom and the Minimal Gang Expert Testimony Necessary to Establish a Foundation for That Testimony

Here, appellant's active gang association and lifestyle was directly relevant to explain his letter to Gabriel and his intimidation of Maria ("that bitch"). (See 15RT 2253-2256; see also Arg. I(C), *ante*.) The fact that appellant and Rosa maintained association with each other and Venice 13 was also directly relevant to bolster or corroborate Vanessa's testimony that Rosa tried to convince her not to testify and to explain why Rosa and Elizabeth were not testifying at trial. (See 16RT 2363-2365.) The testimony that appellant displayed a gang sign in court was brief and did not associate appellant with any particular gang activity. (See 15RT 2258, 2263-2264.) Because the testimony of appellant's in-court gang sign was relevant for reasons unrelated to his character, was brief, and was not unduly prejudicial, the court did not abuse its discretion in allowing the testimony. (See *People v. Carter*, *supra*, 30 Cal.4th at p. 1194.)

Appellant also argues that the foundational testimony as to how Detective Oppelt knew what the V sign represented was more prejudicial than probative. (AOB 60-64.) The testimony of Detective Oppelt was minimal, briefly explaining that a police detective gathered information by speaking to gang members and asking them what graffiti meant and what

types of crimes they were involved in. (15RT 2260-2262.) Detective Oppelt also described that Venice 13 was a second generation gang. (15RT 2331.) And that was the extent of the testimony that appellant now argues was more prejudicial than probative in the guilt stage. (See AOB 63.) However, the disputed testimony was not only necessary to lay a foundation for Detective Oppelt's elucidation of the gang sign, but was also relevant in explaining the gang-related nature of the tattoos that appellant used to intimidate Maria, as set forth *ante* in Argument I(C). For all the foregoing reasons, and because the gang testimony at the guilt stage was minimal and not unduly prejudicial, the trial court properly admitted the evidence at trial. (See *People v. Rodrigues*, *supra*, 8 Cal.4th at pp. 1124-1125.)

For all the same reasons, the introduction of the minimal gang evidence did not violate appellant's constitutional rights. (See AOB 64.) Preliminarily, appellant forfeited his conclusory claim that his constitutional rights were violated. He only raised an Evidence Code section 352 objection below to the evidence (15RT 2258-2261, 2265-2270), which did not preserve any constitutional objection for appellate purposes. (See *People v. Huggins*, *supra*, 38 Cal.4th at p. 240, fn. 18 [failure to preserve Fifth Amendment claim]; but see *People v. Partida*, *supra*, 37 Cal.4th at pp. 433-435 [defendant may make only narrow due process argument that admitting evidence over a § 352 objection was prejudicial].)

In any event, the relevance of the challenged evidence defeats these belated constitutional objections. (*People v. Monterroso*, *supra*, 34 Cal.4th at p. 773.) As appellant noted in his opening brief, "the submission of gang affiliation evidence in a criminal proceeding may be constitutional error when such evidence is irrelevant to the issues at hand." (AOB 55, citing *Dawson v. Delaware*, *supra*, 503 U.S. at p. 165; see AOB 64, citing *McKinney v. Rees* (9th Cir. 1993) 993 F.2d 1378, 1385.) However, as just

explained, the objected-to gang evidence was highly relevant to material issues, such as the nature of appellant's violent and intimidating nature toward the victim.

Additionally, appellant does not argue herein there were constitutional standards of admissibility more exacting than the statutory standards imposed by the California Evidence Code. And he does not otherwise show the admission of this relatively insignificant evidence, at a trial involving a horrific murder and rape, rendered his trial fundamentally unfair or deprived him of due process. (See *People v. Kipp*, *supra*, 26 Cal.4th at p. 1125.) Accordingly, appellant's claim should be denied under any standard.

D. Because Appellant Only Contested Whether the Killing Was Premeditated, He Was Not Ultimately Prejudiced By the Gang Evidence

Although, as described *ante*, the gang evidence was highly relevant to explain the violent and intimidating nature of appellant's relationship with Maria, as well as other material issues, it was not ultimately prejudicial to appellant under any standard. (*Chapman v. California*, *supra*, 386 U.S. 18 at p. 24; *People v. Partida*, *supra*, 37 Cal.4th at p. 439; *People v. Watson*, *supra*, 46 Cal.2d at p. 836.) Arguably, the only improper prejudice that could have resulted from the gang evidence was the inference that appellant was more likely to commit crime. (See AOB 63-64, citing *People v. Hill* (2011) 191 Cal.App.4th 1104, 1140.) But appellant did not contest that he murdered Maria. Defense counsel also conceded to the jury that appellant was a bully, an abuser, and "an intimate partner batterer." (17RT 2625-2626.)

Appellant's sole argument in the guilt phase was that he impulsively killed Maria without premeditation or planning. (See 17RT 2262-2638 [defense guilt phase closing argument].) However, there was nothing about

appellant's gang association that made it more likely that he lay in wait and planned to kill Maria rather than killing her impulsively in anger. Regardless, in no way did the minimal gang evidence prejudice the jury's findings that appellant committed the murder with premeditation and lying in wait, as the findings of premeditation and lying in wait were supported by compelling evidence. (See Arg. VIII, *post*; Statement of Facts, *ante*.)

In the penalty phase as well, appellant suffered no prejudice because after hearing testimony about appellant's prior involvement in gang murders, rape, and witness intimidation, in addition to the savage circumstances of Maria's horrific death, there is no way that the additional gang evidence to which appellant objected in the guilt phase would have made a difference in the jury's verdict. (See *People v. Kipp*, *supra*, 26 Cal.4th at p. 1125.) Moreover, the gang sign itself, displayed to Rosa, could have legitimately been considered by the jury as a crime of witness intimidation by "implied threat to use force or violence" (§ 190.3, factor (b)), as he had already murdered Maria and used Rosa to pressure Vanessa and presumably Elizabeth not to testify. (See 16RT 2363-2365.) Thus, for these reasons as well, appellant's claim should be denied.

III. THE TRIAL COURT PROPERLY ADMITTED GANG-RELATED EVIDENCE OF THE CONTENTS OF THE ADDRESS BOOK FOUND IN APPELLANT'S ROOM

Appellant also contends that the trial court improperly admitted evidence of gang-related entries contained in the address book found in appellant's room, in violation of the hearsay rule, Evidence Code section 352, and the federal Constitution. (AOB 68-73.) However, the trial court properly admitted the testimony. Any error was harmless, regardless.

A. Factual Background

During a search of appellant's room, Detective Oppelt found an address book that he opined belonged to Maria or to Maria and appellant jointly, based on its contents. (Peo. Exh. 4; 13RT 2014-2015; 15RT 2253.) Appellant's letters concerning Maria, including his letter to Gabriel, were stuck in the pages of the book. (15RT 2253-2254.) The book contained Maria's handwriting as well as handwriting from someone else. (10RT 1539; 15RT 1734-1735, 1738-1739.) The writing that was not Maria's recorded names and information about Maria's maiden identity and family members. (10RT 1540-1542.) It also recorded Rosa's address under "Chita Marquez," which was significant because Isabel had never heard of Rosa before and because it was appellant who was friends with her and called her "Chita." (See 15RT 1735; 16RT 2327, 2347.)

Later in the trial, Detective Oppelt was asked about gang graffiti and monikers inscribed in the address book. (16RT 2331-2334.) Defense counsel objected to the testimony on hearsay grounds. The court overruled the objection. (16RT 2332.) As the prosecutor went through each moniker found in the address book, counsel also objected under Evidence Code section 352. The court overruled the objection as to the testimony that had come in already, but indicated that if the questioning continued it might lose relevance. The prosecutor discontinued that line of questioning. (16RT 2334.) The address book was admitted into evidence. (16RT 2552.)

B. The Applicable Law

Evidence Code section 1200, subdivision (a), defines hearsay as "evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated." A statement, in turn, is defined as an "oral or written verbal expression." (Evid. Code, § 225.)

Evidence Code section 352 allows a trial court to exclude evidence if its probative value is substantially outweighed by the probability that its admission will necessitate undue consumption of time or create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury. (See generally Arg. I(B), *ante*.) Evidence of gang membership and activity is admissible when relevant to prove a material fact if its probative value is not substantially outweighed by its prejudicial effect. (*People v. Carter*, *supra*, 30 Cal.4th at p. 1194; see generally Arg. II(B), *ante*.)

C. The Contents of the Address Book Did Not Constitute Inadmissible Hearsay

First, appellant contends that the trial court improperly overruled his hearsay objection as to the contents of the address book. (AOB 69-70.) Appellant correctly identifies the definition and standard for excluding hearsay as an out-of-court statement admitted for its truth. (AOB 69.) However, he thereafter neglects to explain how the gang graffiti and monikers in the address book were introduced for their truth. (See AOB 69-70.) In a footnote, appellant instead asserts that the "prosecutor did not contend that the writing . . . was not being admitted for the truth of the statements" (AOB 69, fn. 11), even though the prosecutor was not required to explain why each piece of testimony was *not* hearsay.

Ultimately, the contents of the book were not introduced for their truth, but, instead, to show that the unidentified handwriting in the address book belonged to appellant, with the implication that he was recording Maria's personal and family information with an eye toward intimidation. (See 17RT 2609-2612.) Contrary to appellant's position (AOB 70), the fact that the prosecutor chose not to use a handwriting expert for that proof was not relevant to the question of whether it was hearsay.

Additionally, the graffiti and monikers showed that appellant still associated with Venice 13 and the Jokers, which was relevant to show

witness intimidation and for all the reasons listed *ante* in Arguments I(C) and II(C). Because the contents of the address book were not inadmissible hearsay, appellant's hearsay claim should be denied.

D. The Trial Court Properly Admitted the Gang-Related Contents of the Address Book into Evidence As More Probative Than Prejudicial

Appellant also contends that the trial court improperly overruled his Evidence Code section 352 objection. (AOB 70-71.) However, as just explained in Argument III(C), the address book gang graffiti and monikers were necessary to show that the other (non-Maria) handwriting in the book was appellant's, with the implication that he was recording Maria's personal and family information with an eye toward intimidation. (See 17RT 2609-2612.) Additionally, the graffiti and monikers showed that appellant still associated with Venice 13 and the Jokers, which was relevant to show witness intimidation and for all the reasons listed *ante* in Arguments I(C) and II(C). This intimidation evidence was material to whether appellant raped Maria and then killed her to avoid prosecution for the rape.

For all the same reasons, the introduction of the minimal gang evidence did not violate appellant's constitutional rights. Preliminarily, appellant forfeited his conclusory claim (see AOB 72-73) that his constitutional rights were violated. He only raised below hearsay and Evidence Code section 352 objections to the evidence (16RT 2332, 2334), which did not preserve any constitutional objection for appellate purposes. (See *People v. Huggins*, *supra*, 38 Cal.4th at p. 240, fn. 18 [failure to preserve Fifth Amendment claim]; *People v. Brown* (2003) 31 Cal.4th 518, 542; *People v. Catlin* (2001) 26 Cal.4th 81, 138, fn. 14 [hearsay objection does not preserve constitutional claim]; but see *People v. Partida*, *supra*, 37

Cal.4th at pp. 433-435 [defendant may make only narrow due process argument that admitting evidence over a § 352 objection was prejudicial].)

In any event, the relevance of the challenged evidence defeats these belated constitutional objections. (*People v. Monterroso*, *supra*, 34 Cal.4th at p. 773.) As appellant noted in his opening brief, "the submission of gang affiliation evidence in a criminal proceeding may be constitutional error when such evidence is irrelevant to the issues at hand." (AOB 55, citing *Dawson v. Delaware*, *supra*, 503 U.S. at p. 165; see AOB 64, citing *McKinney v. Rees*, *supra*, 993 F.2d at p. 1385.) However, as just explained, the objected-to gang evidence was highly relevant.

Additionally, appellant does not argue herein there were constitutional standards of admissibility more exacting than the statutory standards imposed by the California Evidence Code. And he does not otherwise show the admission of this relatively insignificant evidence, at a trial involving a horrific murder and rape, rendered his trial fundamentally unfair or deprived him of due process. (See *People v. Kipp*, *supra*, 26 Cal.4th at p. 1125.) Accordingly, appellant's claim should be denied under any standard.

E. Because Appellant Only Contested Whether the Killing Was Premeditated, He Was Not Ultimately Prejudiced By the Gang Evidence

Although, as explained, the gang evidence was highly relevant to show that the other (non-Maria) handwriting in the address book belonged to appellant and to explain appellant's intimidation of Maria, it was not ultimately prejudicial to appellant under any standard. (*Chapman v. California*, *supra*, 386 U.S. 18 at p. 24; *People v. Watson*, *supra*, 46 Cal.2d at p. 836.) Arguably, the only improper prejudice that could have resulted from the gang evidence was the inference that appellant was more likely to commit crime. (See *People v. Hill*, *supra*, 191 Cal.App.4th at p. 1140.)

But appellant did not contest that he murdered Maria. Defense counsel also conceded to the jury that appellant was a bully, an abuser, and "an intimate partner batterer." (17RT 2625-2626.)

Appellant's sole argument in the guilt phase was that he impulsively killed Maria without premeditation or planning. (See 17RT 2262-2638 [defense guilt phase closing argument].) However, there was nothing about appellant's gang association that made it more likely that he lay in wait and planned to kill Maria rather than killing her impulsively in anger. Regardless, in no way did the minimal gang evidence prejudice the jury's findings that appellant committed the murder with premeditation and lying in wait, as the findings of premeditation and lying in wait were supported by compelling evidence. (See Arg. VIII, *post*; Statement of Facts, *ante*.)

In the penalty phase as well, appellant suffered no prejudice because after hearing testimony about appellant's prior involvement in gang murders, rape, and witness intimidation, in addition to the circumstances of Maria's horrific death, there is no way that the additional gang evidence to which appellant objected would have made a difference in the jury's verdict. (See *People v. Kipp*, *supra*, 26 Cal.4th at p. 1125.) Thus, for these reasons as well appellant's claim should be denied.

IV. THE TRIAL COURT PROPERLY ADMITTED TESTIMONY THAT APPELLANT TOLD ECK IN FRONT OF MARIA THAT HE WAS A HIT MAN FOR THE MEXICAN MAFIA

Appellant also contends that the trial court improperly admitted testimony that he told Eck in front of Maria that he was a hit man for the Mexican Mafia and had killed people, in violation of Evidence Code section 352 and the federal Constitution. (AOB 74-80.) However, the trial court properly admitted the testimony. Any error was harmless, regardless.

A. Factual Background

Before trial, the prosecutor informed the court that she would be introducing testimony that appellant made statements to various people in front of Maria about his past criminal history, including murder, and boasted that he was a Mexican Mafia hit man. (10RT 1468-1469.) The testimony was relevant to explain Maria's state of mind. Defense counsel objected that Maria's state of mind was not relevant. (10RT 1469.)

The court found that Maria's state of mind was clearly relevant and that it was an issue put in contention by defense counsel when she argued in her opening statement that the rape may have been a figment of Maria's imagination or a false statement. Thus, Maria's fear of appellant helped explain her behavior in initially telling people that she was raped and her subsequent hesitance in pursuing the claim with law enforcement. (10RT 1469.) The prosecutor asserted that while it was true that appellant had murdered and attempted to murder people in the past, she did not have evidence that he was actually a hit man for the Mexican Mafia. (10RT 1470.) The court added that the statements were relevant even if appellant was never a Mexican Mafia hit man because they instilled fear in Maria. Thus, the only question for the court was whether the potential prejudice substantially outweighed the probative value of the statements. (10RT 1469-1471.) To that question, the court found the probative value was substantial enough to outweigh any prejudice. (10RT 1471.)

At trial, Eck testified that appellant told Eck, in front of Maria, that he had been incarcerated once for murder and a second time for double attempted murder. (11RT 1612.) Appellant also told Eck that he was a hit man for the Mexican Mafia and that he had killed people in the past and gotten away with it. (11RT 1613.) Eck did not feel that appellant was trying to impress him with the statement. (11RT 1630.)

B. The Applicable Law

Evidence Code section 352 allows a trial court to exclude evidence if its probative value is substantially outweighed by the probability that its admission will necessitate undue consumption of time or create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury. (See generally Arg. I(B), *ante*.) Evidence of gang membership and activity is admissible when relevant to prove a material fact if its probative value is not substantially outweighed by its prejudicial effect. (*People v. Carter*, *supra*, 30 Cal.4th at p. 1194; see generally Arg. II(B), *ante*.)

C. The Trial Court Properly Admitted Testimony That Appellant Had Told Eck, in Front of Maria, That He Was a Hit Man for the Mexican Mafia and Had Killed People in the Past and Gotten Away with It

Here, as explained *ante* in Argument I(C), and as the trial court found (10RT 1469), appellant's statements in front of Maria were highly probative of Maria's behavior in returning to appellant after he raped her, as explained by Baca in her expert testimony (see 16RT 2491-2493). The challenged evidence was particularly probative of Maria's behavior in not leaving appellant for good and hesitating to accuse him of rape, as appellant's boasting about the Mexican Mafia and getting away with murder necessarily intimidated Maria. Defense counsel made the same argument in closing, arguing that appellant bragged to people that he was a hit man, regardless of whether it was true, in order "to scare people and to manipulate them, to make them fear him." (17RT 2625.)

As appellant points out, there was no direct evidence that Maria felt threatened by appellant, his tattoos, his active gang membership, or his braggadocio (AOB 76-77), which is all the more reason why all these pieces of circumstantial evidence were crucial to together explain to the jury that any woman in Maria's place would have acted as she did.

Needless to say, Maria's overall conduct was circumstantial evidence that she was afraid of appellant.

Finally, for all the same reasons, the introduction of appellant's Mexican Mafia statement did not violate his constitutional rights. Preliminarily, appellant forfeited his conclusory claim that his constitutional rights were violated. (AOB 74, 79-80.) He only raised below an Evidence Code section 352 objection to the evidence (10RT 1469), which did not preserve any constitutional objection for appellate purposes. (See *People v. Huggins*, *supra*, 38 Cal.4th at p. 240, fn. 18 [failure to preserve Fifth Amendment claim]; but see *People v. Partida*, *supra*, 37 Cal.4th at pp. 433-435 [defendant may make only narrow due process argument that admitting evidence over a § 352 objection was prejudicial].)

In any event, the relevance of the challenged evidence defeats these belated constitutional objections. (*People v. Monterroso*, *supra*, 34 Cal.4th at p. 773.) As appellant noted in his opening brief, "the submission of gang affiliation evidence in a criminal proceeding may be constitutional error when such evidence is irrelevant to the issues at hand." (AOB 55, citing *Dawson v. Delaware*, *supra*, 503 U.S. at p. 165.) However, as just explained, the Mexican Mafia statement, even if taken as gang evidence rather than braggadocio (but see 17RT 2625), was highly relevant to the issue of intimidation.

Additionally, appellant does not argue herein there were constitutional standards of admissibility more exacting than the statutory standards imposed by the California Evidence Code. And he does not otherwise show the admission of this relatively insignificant evidence of braggadocio, at a trial involving a horrific murder and rape, rendered his trial fundamentally unfair or deprived him of due process. (See *People v. Kipp*,

supra, 26 Cal.4th at p. 1125.) Accordingly, appellant's claim should be denied under any standard.

D. Because the Evidence against Appellant Was Overwhelming, He Was Not Ultimately Prejudiced By the Mexican Mafia Evidence

Although, as explained, the Mexican Mafia evidence was highly relevant to explain appellant's aggressive attitude toward Maria and her hesitant and fearful behavior following the rape, it was not ultimately prejudicial to appellant under any standard. (*Chapman v. California*, *supra*, 386 U.S. 18 at p. 24; *People v. Watson*, *supra*, 46 Cal.2d at p. 836.) The evidence against appellant was overwhelming. Here, in addition to threatening Maria for months, appellant asked Maria to come to his house for the purpose of killing her. (12RT 1763, 1769-1770.) There were witnesses to the initial assault only because Maria managed to run from the back of appellant's house to the front. (See 12RT 1796, 1800, 1857-1858; 14RT 2032-2034.) And mid-beating, appellant put Maria in her car and drove her to another location (see 12RT 1823-1824), where he strangled her with a ligature and stabbed her with a knife that he had brought with him (see 11RT 1639, 1652; 12RT 1736). Given the overwhelming evidence that Maria's murder was planned, there is no way the braggadocio evidence prejudiced the jury's finding that appellant committed the murder with premeditation and lying in wait. Also, the jury was instructed not to be biased against appellant (see, e.g., 17RT 2660-2662; 9CT 2325), and was never told by any of the parties to find appellant guilty because of his claimed affiliation with the Mexican Mafia. The prosecutor did not use the statement at all in his closing argument, and defense counsel characterized it as "hyperbole" to "scare people." (See 17RT 2625.)

In the penalty phase as well, appellant suffered no prejudice because after hearing testimony about appellant's prior involvement in gang

murders, rape, and witness intimidation, in addition to the circumstances of Maria's horrific death, there is no way that the additional braggadocio to which appellant objected would have made the difference in the jury's verdict. (See *People v. Kipp*, *supra*, 26 Cal.4th at p. 1125.) Thus, for these reasons as well, appellant's claim should be denied.

V. THE TRIAL COURT PROPERLY ADMITTED MARIA'S STATEMENT THAT APPELLANT HAD TOLD HER HE COULD GET AWAY WITH MURDER BY ACTING CRAZY

Appellant also contends that the trial court improperly failed to limit to Maria's state of mind the use of a statement made by Maria that appellant had told her he could get away with murder by acting crazy, in violation of the hearsay rule and the federal Constitution. (AOB 81-85.) However, the court properly admitted the statement without limitation as a spontaneous declaration, and appellant forfeited the instant claims by failing to argue that the statement was not spontaneous. In the alternative, the statement was nevertheless admissible as to Maria's state of mind, and any error was harmless.

A. Factual Background

Appellant brutally raped Maria after choking her into unconsciousness and tying her to a bed, bruising her in numerous places in the process. (10RT 1515-1520.) Appellant threatened to kill Maria and her family if she told anyone. (10RT 1518-1519.) Maria was so traumatized by the incident that she was barely able to speak the next morning when she first told Juan about the rape. (10RT 1515-1516.) Because of her fear and trauma, Juan had to wait another three days before Maria was able to tell anybody else, when she finally agreed to go to the police station with him. (10RT 1519-1521, 1524-1525.) There, Maria met and spoke with her sister Maria Eugenia for the first time since the rape. (10RT 1525; 12RT 1704.)

At trial, Maria Eugenia testified that she met Maria at the police station to give her support, when Maria went to report the rape to the police for the first time. (12RT 1704-1705.) Maria made a number of spontaneous statements to Maria Eugenia, including that appellant had told her he knew how to get away with her murder by acting crazy. (12RT 1708.)

Defense counsel requested that the court limit the statement to Maria's state of mind. The prosecutor responded that the statement was admissible without limitation as a spontaneous statement. The court called for a side bar conference. (12RT 1708.) At side bar, the court agreed that the statement was admissible as a spontaneous statement but explained that it understood the issue to be whether the assertion contained within it, that appellant could get away with murder, should be limited to state of mind. (12RT 1708-1709.) Counsel clarified that she was actually objecting to the statement itself as double hearsay. With that clarified, the court overruled the objection. (12RT 1709.)[27]

B. The Applicable Law

"Evidence of a statement is not made inadmissible by the hearsay rule if the statement: (a) Purports to narrate, describe, or explain an act, condition, or event perceived by the declarant; and (b) Was made

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[27] The prosecutor asserted that she believed the statement fell under Evidence Code section 1240, "as we discussed prior to trial." (12RT 1709.) That reference was to discussions centered around possible confrontation clause objections under *Crawford v. Washington* (2004) 541 U.S. 36 [124 S.Ct. 1354, 158 L.Ed.2d 17] and *Giles v. California* (2008) 554 U.S. 353 [128 S.Ct. 2678, 171 L.Ed.2d 488] that were not germane to Maria's statements to her family because of their obvious nontestimonial nature. Although section 1240 was referenced generally in that context, there was no specific objection and ruling as to any of Maria's statements to Maria Eugenia at the previous hearing. (See, e.g., 4RT 559, 600; 5RT 613, 629, 725.)

spontaneously while the declarant was under the stress of excitement caused by such perception." (Evid. Code, § 1240.) This Court has identified the following three requirements for a statement to be admissible under this hearsay exception: (1) the event must be startling enough to produce a nervous excitement and render the utterance spontaneous and unreflecting; (2) the statement was uttered before there has been time to contrive and misrepresent; and (3) the statement must relate to the circumstance of the occurrence preceding it. (*People v. Gutierrez* (2009) 45 Cal.4th 789, 809-810.) As to the second requirement, the crucial issue is the declarant's mental state, and the timing and manner of the statement are just indicators of this mental state. (*Id.* at p. 811; *People v. Brown*, *supra*, 31 Cal.4th at p. 541.)

"Whether an out-of-court statement meets the statutory requirements for admission as a spontaneous statement is generally a question of fact for the trial court, the determination of which involves an exercise of the court's discretion." (*People v. Merriman* (2014) 60 Cal.4th 1, 65.) The reviewing court should "uphold the trial court's determination of facts when they are supported by substantial evidence and review for abuse of discretion its decision to admit evidence under the spontaneous statement exception." (*Ibid*; *People v. Lynch* (2010) 50 Cal.4th 693, 752 [trial court's discretion is broadest as to the second requirement].)

Moreover, under Evidence Code section 1250, testimony concerning "a statement of a declarant's state of mind, when offered to prove or explain the declarant's conduct, is admissible, as long as the statement was made under circumstances indicating its trustworthiness." (*People v. Guerra* (2006) 37 Cal.4th 1067, 1114.) A trial court's ruling that is correct in law on any theory will not be disturbed on appeal merely because the trial court made the right ruling for the wrong reason. (See, e.g., *People v. Chism* (2014) 58 Cal.4th 1266, 1307, fn. 13.)

C. Appellant Forfeited the Instant Claim by Failing to Object below to the Trial Court's Spontaneous Declaration Ruling

Preliminarily, appellant forfeited any claims regarding the trial court's spontaneous declaration ruling by failing to object below on that specific ground. (See *People v. Hajek* (2014) 58 Cal.4th 1144, 1208.) Here, defense counsel objected generally to the statement as "double hearsay" and asked for the statement to be limited to Maria's state of mind, but did not specifically challenge the prosecutor's assertion that the evidence had been introduced as a spontaneous declaration. (12RT 1708-1709; see 4RT 563 [where counsel told the court that she was going to generally object to all of Maria's statements at the police station "for the record" because "you never can tell what kind of rulings we're going to be getting from the Court subsequent to the trial in this matter"].)

That is, counsel did not object, and give the prosecutor and/or the court a chance to respond, to the assertion that the statement was spontaneous, or outside the otherwise admissible description of the rape, as appellant now argues (see AOB 82-83). As a result, any such claim is now forfeited on appeal. (*People v. Hajek*, *supra*, 58 Cal.4th at p. 1208.)

D. Maria's Statement Was Admissible As a Spontaneous Declaration

Here, the trial court did not abuse its discretion in finding that Maria's entire statement to Maria Eugenia fell under the spontaneous declaration exception to the hearsay rule. (See *People v. Merriman*, *supra*, 60 Cal.4th at p. 65; *People v. Lynch*, *supra*, 50 Cal.4th at p. 752.) Maria's rape was exceptionally brutal, as described above, and the very threat that appellant issued in the contested statement was part of the rape incident that kept her in an excited state for three days until she was ready to even discuss the rape with anyone other than Juan. It was Maria's first opportunity to

outpour her previously withheld emotions and utterances to her family members. She was still visibly distraught, agitated, afraid, tearful, and emotional. (12RT 1705-1706.) Thus, the trial court properly found that the challenged statement met the first two requirements outlined in *Gutierrez*. (*People v. Gutierrez*, *supra*, 45 Cal.4th at 809-810.)

As to the third *Gutierrez* requirement, as noted above, appellant's threat to kill Maria and her family and his statement that he knew how to get away with murder were an integral part of the rape described by Maria, and one of the main reasons it took her three days to bring herself to discuss the assault with anyone other than Juan. Thus, the trial court properly found that the entire statement about the rape and appellant's threat met the third requirement as well. (*People v. Gutierrez*, *supra*, 45 Cal.4th at p. 810.) Accordingly, appellant's claim should be denied.

E. Maria's Statement Was Admissible for Her State of Mind

Additionally, Maria's statement was admissible to show her state of mind as a declaration of why she was fearful of appellant and ultimately to explain her attitude and behavior toward him, as defense counsel admitted at trial. (See 12RT 1708.) Maria's statement was trustworthy, because she had no reason to lie to her sister about appellant's statement or the rape. (See *People v. Guerra*, *supra*, 37 Cal.4th at p. 1114.)

Although the trial court did not ultimately offer a limiting instruction because defense counsel changed the nature of her hearsay objection and did not renew her request for a limiting instruction (see 12RT 1709), this Court has held that lower courts are not in error admitting similar statements without limitation where the declarant's state of mind is directly relevant and where the statements pose little danger of undue prejudice or jury confusion. (*People v. Riccardi* (2012) 54 Cal.4th 758, 822-823.) That was certainly the case here, where appellant's statement was clearly meant

as a threat and where Maria's state of mind was directly relevant to explain her behavior in belatedly reporting a rape that was contested by appellant at trial (17RT 2633-2634). In other words, there was no need for a limiting instruction as the relevance of the evidence was obvious. Accordingly, appellant's claim should be denied. (*People v. Chism*, *supra*, 58 Cal.4th at p. 1307, fn. 13.)

F. Appellant Forfeited Any Constitutional Claims, Which Fail Regardless

For all the same reasons, the introduction of Maria's statement did not violate appellant's constitutional rights. Preliminarily, appellant forfeited his conclusory claim that his constitutional rights were violated. (AOB 81, 83-85.) He only raised below a hearsay objection to the evidence (12RT 1708-1709), which did not preserve any constitutional objection for appellate purposes. (See *People v. Brown*, *supra*, 31 Cal.4th at p. 542; *People v. Catlin*, *supra*, 26 Cal.4th at p. 138, fn. 14.)

In any event, the relevance of the challenged evidence defeats these belated constitutional objections. (*People v. Monterroso*, *supra*, 34 Cal.4th at p. 773.) As noted *ante*, the evidence was relevant to Maria's state of mind, as conceded by appellant at trial. Additionally, appellant does not argue herein there were constitutional standards of admissibility more exacting than the statutory standards imposed by the California Evidence Code. And he does not otherwise show the admission of this relatively insignificant evidence that he threatened Maria, at a trial involving a horrific murder and rape, with innumerable other instances of threat and abuse, rendered his trial fundamentally unfair or deprived him of due process. (See *People v. Kipp*, *supra*, 26 Cal.4th at p. 1125.) Accordingly, appellant's claim should be denied under any standard.

G. Appellant Was Not Prejudiced

Regardless of whether the trial court should have given a limiting instruction, the subject statement was not ultimately prejudicial to appellant under any standard. (*Chapman v. California*, *supra*, 386 U.S. 18 at p. 24; *People v. Watson*, *supra*, 46 Cal.2d at p. 836.) Preliminarily, even without appellant's immediate threat to Maria after the rape, the jury was inundated by evidence of appellant's repeated graphic threats. On one occasion, appellant even drove Maria past parked stolen cars that he told her he would use to get away after he murdered her. (10RT 1537-1539.) Clearly, the jury did not need the challenged statement to conclude appellant intended to kill Maria and get away with the murder.

Furthermore, no prejudice was possible here, where the evidence against appellant was so overwhelming. In addition to threatening Maria for months, appellant called Maria to his house intending to kill her. (12RT 1763, 1769-1770.) There were witnesses to the initial assault only because she managed to run from the back of appellant's house to the front. (See 12RT 1796, 1800, 1857-1858; 14RT 2032-2034.) And mid-beating, appellant put Maria in her car and drove her to another location (see 12RT 1823-1824), where he strangled her with a ligature and stabbed her with a knife that he had brought with him (see 11RT 1639, 1652; 12RT 1736). Given the overwhelming evidence that Maria's murder was planned, there is no way evidence of one more threat to Maria or appellant's belief that he could get away with murder prejudiced the jury's finding that appellant committed the murder with premeditation and lying in wait.

In the penalty phase as well, appellant suffered no prejudice because after hearing testimony about appellant's prior involvement in gang murders, rape, and witness intimidation, in addition to his numerous threats and the circumstances of Maria's horrific death, there is no reasonable possibility that the additional threat made to Maria would have made a

difference in the jury's verdict. (See *People v. Kipp*, *supra*, 26 Cal.4th at p. 1125.)

Finally, appellant overstates the significance of his statement vis-à-vis the mental health testimony presented at the penalty phase (AOB 84), because the gist of Dr. Light's testimony was that appellant had poor decisionmaking ability and a diminished capacity to control his anger (see, e.g., 24RT 3561-3564), all of which could arguably have been true even if appellant had a plan to try to act crazy to avoid a murder conviction or the death penalty. Moreover, Dr. Light testified explicitly and at length that he tested appellant for malingering and felt certain that appellant was not able to cheat on his evaluation. (See, e.g., 24RT 3536-3542, 3557.) Needless to say, the prosecution presented more compelling evidence, in the form of Dr. Brook's testimony, to challenge or undermine appellant's mental health evidence. Thus, for these reasons as well, appellant's claim should be denied.

VI. APPELLANT WAS PROPERLY CONVICTED OF FIRST DEGREE MURDER REGARDLESS OF THE LANGUAGE USED IN THE INFORMATION

Appellant contends he could not be convicted of first degree murder because the information charged him only with murder in violation of section 187, subdivision (a). (AOB 86-93; see 5CT 1358.) Appellant concedes this Court has repeatedly rejected similar claims, citing *People v. Hughes* (2002) 27 Cal.4th 287. (AOB 86.)

As just mentioned, this Court has previously rejected similar claims. (*People v. Abel* (2012) 53 Cal.4th 891, 937-938 [pleading referring only to § 187, subd. (a), provides adequate notice of possible conviction on a felony-murder theory]; *People v. Famalaro* (2011) 52 Cal.4th 1, 37

[*Apprendi*[28] does not require that the charging document specifically plead first degree murder]); *People v. Tate* (2010) 49 Cal.4th 635, 696-697 [defendant may be convicted of first degree murder even though the indictment or information charges only murder with malice in violation of § 187]; *People v. Hughes*, *supra*, 27 Cal.4th at pp. 288 [an accusatory pleading charging a defendant with murder need not specify the theory of murder on which the prosecution intends to rely], 369-370 [the accused received adequate notice of the prosecution's theory of the case from the testimony presented at the indictment proceeding].) As appellant provides no valid reason to revisit those conclusions, his claim should be summarily rejected.

VII. THE TRIAL COURT PROPERLY INSTRUCTED THE JURY WITH CALJIC NOS. 2.01, 2.21.1, 2.21.2, 2.22, 2.27, 2.51, 8.20, AND 8.83

Appellant also contends that several of the standard jury instructions given by the trial court, CALJIC Nos. 2.01, 2.21.1, 2.21.2, 2.22, 2.27, 2.51, 8.20, and 8.83, unconstitutionally lowered the burden of proof. (AOB 94-105; see 9CT 2326-2328, 2333, 2335; 17RT 2666-2667, 2669-2673, 2690-2692, 2699-2701.) Appellant concedes this Court has previously rejected these challenges citing, inter alia, *People v. Cleveland* (2004) 32 Cal.4th 704. (AOB 94, 103.)

As just mentioned, this Court has previously and repeatedly rejected arguments that the instructions challenged herein erode the requirement of proof beyond a reasonable doubt. (See, e.g., *People v. McKinzie* (2012) 54 Cal.4th 1302, 1354-1357; *People v. Dement* (2011) 53 Cal.4th 1, 53-55; *People v. Solomon* (2010) 49 Cal.4th 792, 825-827; *People v. Hartsch* (2010) 49 Cal.4th 472, 506; *People v. Friend* (2009) 47 Cal.4th 1, 53;

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[28] *Apprendi v. New Jersey* (2000) 530 U.S. 466 [120 S.Ct. 2348, 147 L.Ed.2d 435].

People v. Cleveland, *supra*, 32 Cal.4th at pp. 750-751; *People v. Riel* (2000) 22 Cal.4th 1153, 1200; *People v. Crittenden* (1994) 9 Cal.4th 83, 144; *People v. Noguera* (1992) 4 Cal.4th 599, 633-634.) Because appellant presents nothing new or significant that would call into question this Court's earlier holdings, his claim should be summarily rejected.

VIII. SUBSTANTIAL EVIDENCE SUPPORTED THE LYING-IN-WAIT SPECIAL CIRCUMSTANCE

Appellant also contends that there was insufficient evidence to support the lying-in-wait special circumstance and that the trial court improperly denied his section 1118.1 motion to dismiss the lying-in-wait special circumstance for lack of evidence. Appellant additionally argues that, as a result, the death penalty must also be reversed because, regardless of other special circumstances, the lying-in-wait finding exaggerated his culpability. (AOB 106-116.) However, substantial evidence supported the lying-in-wait special circumstance and the court properly denied the section 1118.1 motion. Even if the lying-in-wait special circumstance were reversed, appellant is not entitled to a reduction in punishment.

A. Procedural Background

The information alleged the following special circumstances that, if found true, would allow the jury to ultimately impose the death penalty on appellant: to kill a witness, during the commission of a kidnaping, and by means of lying in wait (§ 190.2, subds. (a)(10), (15) & (17)). (5CT 262-263.)

After the close of evidence in the guilt phase, as part of a section 1118.1 motion to dismiss charges, defense counsel asked the trial court to "take a hard look" at the evidence in support of the lying-in-wait special circumstance allegation and to dismiss it for insufficient evidence. The court responded that it wanted to hear counsel's argument regarding appellant's early morning call to Maria, her purchase of cigarettes for him,

and her subsequent trip to his house, where he beat her and put her in a car, because that "suggest[ed] lying in wait to" the court. Counsel submitted the motion without further argument. (16RT 2523.)

Following closing arguments, the jury found all three special circumstance allegations to be true. (17RT 2735-2737; 9CT 2367-2369.)

B. The Applicable Law

Section 1118.1 requires a court to "order the entry of a judgment of acquittal of one or more of the offenses charged in the accusatory pleading if the evidence then before the court is insufficient to sustain a conviction of such offense or offenses on appeal." The standard applied by the trial court under section 1118.1 in ruling on a motion for judgment of acquittal is the same as the standard applied by an appellate court in reviewing the sufficiency of the evidence to support a conviction. (*People v. Whisenhunt* (2008) 44 Cal.4th 174, 200.)

The standard of review for claims of sufficiency of the evidence is well settled. In general, even if reasonable minds may differ on the resolution of a sufficiency issue, the appellate court must view the record in the light most favorable to the judgment and determine whether it discloses substantial evidence such that any rational trier of fact could find the conviction true beyond a reasonable doubt. Thus, the role of the reviewing court is to determine the legal sufficiency of the found facts and not to second-guess the reasoning or wisdom of the trier of fact in choosing between competing theories of the evidence presented at trial. (See, e.g., *People v. Moon* (2005) 37 Cal.4th 1, 22.) Reversal is unwarranted unless "it appears 'that upon no hypothesis whatever is there sufficient substantial evidence to support the conviction.'" (*People v. Hughes*, *supra*, 27 Cal.4th at p. 370.)

The same standard applies to circumstantial evidence. (*People v. Stanley* (1995) 10 Cal.4th 764, 792.) Circumstantial evidence "is as

sufficient as direct evidence to support a conviction." (*People v. Bloom* (1989) 48 Cal.3d 1194, 1028.) Although it is the duty of the jury to acquit a defendant if it finds that circumstantial evidence is susceptible of two interpretations, one of which suggests guilt and the other innocence, "it is the jury, not the appellate court which must be convinced of the defendant's guilt beyond a reasonable doubt." (*People v. Bean* (1988) 46 Cal.3d 919, 932-933.) Indeed, if the circumstances reasonably justify the trier of fact's findings, the opinion of the reviewing court that the circumstances might also reasonably be reconciled with a contrary finding does not warrant a reversal of the judgment. (*Id.* at p. 933; see *People v. Proctor* (1992) 4 Cal.4th 499, 529.)

To affirm a jury's the lying-in-wait special circumstance finding (§ 190.2, subd. (a)(15)), the reviewing court must find substantial evidence that the defendant committed an intentional murder with: (1) a concealment of purpose; (2) a substantial period of watching and waiting for an opportune time to act; and (3) immediately thereafter, a surprise attack on an unsuspecting victim from a position of advantage. The element of concealment is satisfied by evidence that a defendant's true intent and purpose were concealed by his actions or conduct. There is no requirement that the defendant be literally concealed from view before he attacks the victim. Also, although the period of watchful waiting must be "substantial," there is no fixed time limit on this requirement and the precise period of time is not critical. (*People v. Moon*, *supra*, 37 Cal.4th at p. 22.)

C. Substantial Evidence Supported the Lying-in-Wait Special Circumstance Finding

In *People v. Combs* (2004) 34 Cal.4th 821, this Court found sufficient evidence to support the lying-in-wait special circumstance finding based on the following evidence. To carry out his secret plan to rob and kill Janine,

the defendant devised a ruse about needing a ride to a campsite to meet a fictitious friend. Using this ruse, he tricked Janine into giving him a ride. As Janine drove the defendant to the desert, he sat in the backseat behind Janine with both electrical cords that he had obtained earlier, waiting for the opportune time to strangle her. After Janine parked the car at their destination, the defendant surprised her by placing the electrical cord over her head and strangling her. (*Id.* at p. 853; see also *People v. Streeter* (2012) 54 Cal.4th 205, 247-248 [defendant lured ex-girlfriend victim to restaurant parking lot on false pretense of reconciliation, grabbed his son from the victim, and when she tried to get the boy back they argued until the defendant doused her with gasoline from his trunk and lit her on fire]; *People v. Morales* (1989) 48 Cal.3d 527, 554-555 [unaware of any plan to harm her, the victim was lured under false pretenses into going for a ride with the two defendants, was driven to an isolated location, and was strangled and beaten with a hammer by the defendant who was sitting behind her in the car].) As explained *post*, the instant case presents a similar factual scenario to the ones in *Combs*, *Streeter*, and *Morales*. Consequently, the lying-in-wait special circumstance finding should be similarly upheld.

Here, appellant threatened to kill Maria many times after he raped her. Leading up to the murder, appellant repeatedly told his friend Hernandez that he was going to kill Maria and became increasingly angry. (16RT 2315-2318; 17RT 2647-2648.) A few days before the murder, appellant gave Hernandez a duffel bag of clothing to hold so he could pick it up quickly, anticipating that the police would soon be searching for him. (16RT 2320; 17RT 2584.)

On the day of the murder, appellant called Maria very early in the morning at 4:00 a.m. and, even though she had to be at work at 4:55 a.m., Maria rushed to Sav-On to pick up cigarettes for appellant. (12RT 1660,

1763, 1769-1770, 1779-1780.) Maria did not initiate the meeting, appellant did, and the jury could properly infer from Maria's trip that he used the cigarettes as a ruse to get her to come over to his house. (See 17RT 2647-2649 [prosecutor's closing argument].) Appellant planned the meeting and obtained a knife and a ligature ahead of time. (See 11RT 1639, 1652; 12RT 1736.) Appellant had Maria meet him in his room, waited until she gave him the cigarettes (see 13RT 2009-2010 [cigarettes found in appellant's room]; 16RT 2442-2449 [Maria's blood on cigarettes]), and then pounced. Maria screamed and managed to escape through the back door. Appellant was forced to give chase and subdue her in public. (See 12RT 1796, 1800, 1857-1858; 14RT 2032-2034.) In sum, the evidence provided at trial clearly constituted substantial evidence of lying in wait.

Appellant argues that there was no evidence that he concealed the purpose of the meeting that morning. (AOB 108-110.) However, he then notes that Maria received a text message during her meeting with the police detectives the day before her murder that changed her demeanor and made her anxious and afraid. (AOB 109, citing 10RT 1494.) Appellant fails to explain why Maria would visit appellant alone and in private if he did not say something to her to conceal his murderous intentions. In any event, as explained above, appellant used a ruse (i.e., the cigarettes) to get Maria to come over to his home, where he was ling in wait kill her.

Further, appellant asks this Court to surmise that, because he was angry during the beating, he only started beating Maria after discovering that she did not intend to drop the rape charges; in other words, before her visit, appellant must not have known she had not dropped the charges. (AOB 109.) Appellant's position is contradicted by the testimony of Hernandez that appellant was well aware that Maria had not dropped the charges and, as a result, was growing angrier by the week. (See 16RT 2315-2318.) Moreover, he incredibly asks this Court to find that, despite

all his threats, and even though she was in a rush on the way to work, Maria decided to seclude herself with appellant and foolishly tell him that she was not dropping the rape charges. However, appellant may not ask this Court to second-guess the contrary inference by the jury that she would not have done so. (See *People v. Bean*, *supra*, 46 Cal.3d at p. 933.)

In the course of his argument, appellant also implies that he began attacking Maria in her car in the street (AOB 110), ignoring evidence that the attack commenced in his room, or at the very least, his backyard. Certainly, the testimony of Margareth and Lizbeth shows the attack began well before appellant forced the victim into her car. (12RT 1796, 1800, 1857-1858; 14RT 2032-2034.) Appellant argues that there was no evidence that Maria was taken by surprise (AOB 110), but as explained above, both Maria's decision to meet appellant at his house and the nature of the attack wherein Maria suddenly started screaming and running to the front of the house where she was caught by appellant, all lead to the inexorable conclusion that he took her by surprise.

Appellant also argues that Maria's murder occurred too long after the lying in wait to be included within the special circumstance, as defined in 2000, which required the murder be committed directly after the lying in wait or without interruption from the lying in wait period. (AOB 111.) However, Maria's murder followed continuously from the lying in wait and the special circumstance applied.

The iteration of the lying-in-wait special circumstance that applied in 2000 "required a showing that the defendant intentionally killed the victim while lying in wait.'" (*People v. Hajek*, *supra*, 58 Cal.4th at p. 1184.) The Court of Appeal in *Domino v. Superior Court* (1982) 129 Cal.App.3d 1000, in an opinion that formed the basis of the subsequent standard jury instruction, interpreted that statutory language to mean "the lethal acts must begin at and flow continuously" from the lying in wait without "cognizable

separation." (*Id.* at p. 1011; see *People v. Lewis* (2008) 43 Cal.4th 415, 512-513.)

In both *Hajek* and *Domino*, the respective victim was captured while the defendant by lying in wait, but then was either taken to a new location or held prisoner and killed some time after. In those cases, the lying-in-wait special circumstance did not apply. (*People v. Hajek*, *supra*, 58 Cal.4th at p. 1185; *People v. Domino*, *supra*, 129 Cal.App.3d at p. 1011.) In contrast, here, the deadly attack commenced at appellant's home, where he was lying in wait. As Maria attempted to run away, she was beaten unconscious and was stuffed in the car. Appellant then took her to another location to finish the job because there were witnesses at the first location. (See 12RT 1823-1825.) Thus, in contrast to *Hajek* and *Domino*, the evidence supported the jury's finding that Maria's murder flowed without interruption from the initial surprise attack. And contrary to appellant's claim (AOB 113), all the evidence in this case indicates that he intended to kill Maria from the get-go. Thus, for this reason as well, appellant's claim should be denied.

In the final tally, appellant impermissibly asks this Court to reweigh the evidence. (See *People v. Cravens* (2012) 53 Cal.4th 500, 507-508.) For all the reasons above, substantial evidence supported the lying-in-wait special circumstances finding. Accordingly, the trial court properly denied appellant's motion to dismiss the lying-in-wait special circumstance allegation, and his claim should be denied.

D. Even If This Court Finds Insufficient Evidence to Support the Lying-in-Wait Special Circumstance, the Finding Was Harmless in the Penalty Phase Due to the Remaining Two Special Circumstance Findings

Even if this Court finds insufficient evidence to support the lying-in-wait special circumstance, appellant is not entitled to the reversal of the death penalty due to the remaining two special circumstance findings.

(*People v. Holt* (1997) 15 Cal.4th 619, 693 [reversal of one special circumstance finding does not mandate reversal of the death penalty]; see *Clemons v. Mississippi* (1990) 494 U.S. 738, 752 [110 S.Ct. 1441, 108 L.Ed.2d 725] [even if under state law, the weighing of aggravating and mitigating circumstances is not an appellate, but a jury, function, it is open to the state supreme court to find that an error which occurred during a sentencing proceeding is harmless].)

Here, appellant argues that the lying-in-wait special circumstance must be reversed because there was insufficient evidence that he used a ruse to get Maria to visit and because the murder happened too long after the lying-in-wait. (AOB 108-113.) However, even assuming arguendo that appellant did not technically fit into the lying-in-wait special circumstance, there is no dispute that sufficient evidence supports the jury's findings that he killed Maria after kidnaping her and because she was a witness against him in the rape case. Moreover, even if the trial court had dismissed the lying-in-wait special circumstance under section 1118.1 in the guilt phase, the jury would not have reached a different decision in the penalty phase, especially in light of the brutal nature of Maria's murder and the pervasive nature of appellant's criminal history. As this Court explained recently in *Hajek*,

> That the evidence was insufficient to establish lying in weight (*sic*) did not render its consideration by the jury inappropriate. Because the invalid lying-in-wait special circumstances "did not alter the universe of facts and circumstances to which the jury could accord ... weight" [citation] and because "[t]here is no likelihood that the jury's consideration of the mere existence of the [lying-in-wait] special circumstance tipped the balance toward death" [citation], the invalidity of the lying-in-wait special circumstances does not warrant reversal of the death sentences.

(*People v. Hajek, supra*, 58 Cal.4th at pp. 1186-1187.) Accordingly, for this reason as well, appellant's claim should be denied.

IX. THE LYING-IN-WAIT SPECIAL CIRCUMSTANCE PROPERLY NARROWS THE NUMBER OF CASES ELIGIBLE FOR THE DEATH PENALTY; REGARDLESS, THE REMAINING TWO SPECIAL CIRCUMSTANCE FINDINGS REMAIN SUFFICIENT FOR IMPOSITION OF THE DEATH PENALTY

Appellant next contends that the lying-in-wait special circumstance fails to narrow the number of cases eligible for the death penalty as required by the Eighth Amendment. Specifically, he agues that there is no difference between the lying-in-wait special circumstance and premeditated or lying-in-wait murder. (AOB 117-127.) However, these related claims have been rejected by this Court numerous times. Specifically, this Court has repeatedly rejected arguments that California's lying-in-wait special circumstance is unconstitutional (*People v. Livingston* (2012) 53 Cal.4th 1145, 1174; *People v. Mendoza* (2011) 52 Cal.4th 1056, 1095 [collecting cases]) and is not different than premeditated and deliberate murder (*People v. Stevens* (2007) 41 Cal.4th 182, 203-204) or lying-in-wait murder (*People v. Streeter, supra*, 54 Cal.4th at p. 246). Appellant offers no cogent reason for this Court to reconsider or reverse its prior decisions. Accordingly, his claim should be denied.

In any event, the jury found two other special circumstances to be true, i.e., murder of a witness and murder in the commission of a kidnapping. As a result, appellant's challenge to the constitutionality of the lying-in-wait special circumstance, even if valid, would not justify reversing his death sentence. (*People v. Maciel* (2013) 57 Cal.4th 482, 521 [claimed error in not dismissing multiple-murder special circumstance as to some victims would not have required reversing death judgment because dismissal would not have changed underlying facts available for jury to consider when it returned death verdict at end of penalty phase]; *People v.*

Nunez (2013) 57 Cal.4th 1, 50 [dismissing duplicative multiple-murder special-circumstance findings did not require reversing death judgment]; *People v. Bonilla* (2007) 41 Cal.4th 313, 333-334 [declining to consider challenge to constitutionality of lying-in-wait special circumstance because defendant was independently death eligible under murder-for-financial-gain special circumstance; lying-in-wait special circumstance "was superfluous for purposes of death eligibility and did not alter the universe of facts and circumstances to which the jury could accord aggravating weight"]; see *Brown v. Sanders* (2006) 546 U.S. 212, 221-225 [126 S.Ct. 884, 163 L.Ed.2d 723] [no constitutional issue where all aggravating facts and circumstances that jury could consider under invalidated factor were also open to proper consideration under other factors].)

As explained *ante* in Argument VIII(E) and in light of the entire record (see Statement of Facts, *supra*), the jury's lying-in-wait special-circumstance finding, even if unconstitutional, was harmless under *Brown* and *Chapman* as to appellant's death sentence. (*Brown v. Sanders*, *supra*, 546 U.S. at pp. 221-225; *Chapman v. California*, *supra*, 386 U.S. 18 at p. 24.) Accordingly, for this reason as well, appellant's claim should be denied.

X. THE TRIAL COURT PROPERLY ADMITTED THE CHALLENGED TESTIMONY FROM DEPUTIES FLORENCE AND DAVIS; ANY ERROR WAS HARMLESS

Appellant also contends that some of the penalty phase testimony given by Deputy Florence and Deputy Davis constituted improper opinion testimony and/or hearsay. (AOB 128-135.) However, the trial court properly admitted all of the challenged testimony. Regardless, any error was harmless.

A. Factual Background

In the penalty phase of trial, Deputy Florence testified that he had been a Los Angeles County Sheriff's deputy for 21 years, had worked in the jail for nine years, and was personally very familiar with appellant from his time there. (19RT 2976.) In the course of his testimony regarding incidents that occurred during appellant's time in jail in 2003 and 2004, Deputy Florence was asked if, among the thousands of inmates with which Deputy Florence had come in contact, appellant was more or less difficult and more or less violent. (19RT 2982.) Defense counsel objected to the expected testimony as improper opinion, and the court overruled the objection. (19RT 2982-2983.) Deputy Florence answered that appellant was in the top-five of inmates who were most difficult and most able to manipulate a jail situation to achieve the outcome he desired. (19RT 2983.)

Deputy Florence next testified that he personally had witnessed appellant challenge deputies to fight him and say things like, "Take this waist chain off and let's go one on one." Defense counsel objected on hearsay grounds, and the court overruled the objection. (19RT 2984.)

Deputy Florence next testified that, in his opinion and based on his observations, appellant posed a danger to deputies, inmates, and staff in the jail facility. Defense counsel objected that the testimony was improper opinion testimony, and the court overruled the objection. (19RT 2986.)

Deputy Florence next testified that, in his opinion and based on his observations, appellant acted as he did to show other inmates that he had no fear. Deputy Florence added that, generally, inmates who wanted to show that they had no fear would disregard rules, disobey instructions, and provoke fights. Defense counsel objected that the testimony was improper opinion testimony, and the court overruled the objection. (19RT 2987.)

Deputy Davis testified that he had been a Los Angeles County Sheriff's deputy for nine years and had worked in the jail for six years.

(20RT 3133-3134.) In the course of his testimony regarding incidents that occurred during appellant's time in jail in 2002 through 2004, and specifically involving possession of weapons, Deputy Davis was asked if appellant ever appeared to fear for his safety. Defense counsel objected that the testimony was improper opinion testimony, and the court overruled the objection. (20RT 3143.) Deputy Davis opined that appellant was not concerned for his own safety and that he willingly participated in fights, which was why he armed himself. (20RT 3143-3144.) Appellant never expressed to Deputy Davis that he was afraid of other inmates, which was something that inmates would otherwise do to gain protection. (20RT 3144.)

B. The Applicable Law

Expert testimony is admissible if it is "[r]elated to a subject that is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact." (Evid. Code, § 801, subd. (a).) To qualify as an expert, a witness must possess special knowledge, experience, training, or education sufficient to qualify the witness as an expert on the subject. (Evid. Code, §§ 720, 801, subd. (b).) "The qualification of expert witnesses, including foundational requirements, rests in the sound discretion of the trial court. That discretion is necessarily broad: 'The competency of an expert "is in every case a relative one, i.e. relative to the topic about which the person is asked to make his statement."' [Citation.]" (*People v. Ramos* (1997) 15 Cal.4th 1133, 1175.) A court abuses its discretion in allowing expert testimony only if the witness clearly lacks qualifications as an expert. (*People v. Panah* (2005) 35 Cal.4th 395, 478.)

"If a witness is not testifying as an expert, his testimony in the form of an opinion is limited to such an opinion as is permitted by law, including but not limited to an opinion that is: (a) Rationally based on the perception of the witness; and (b) Helpful to a clear understanding of his testimony."

(Evid. Code, § 800.) "[T]hat opinion need only be 'helpful'--rather than necessary--to understanding the witness's testimony." (*People v. McAlpin* (1991) 53 Cal.3d 1289, 1306, fn. 11.) "The admission of a layperson's opinion testimony lies in the discretion of the trial court and will not be disturbed 'unless a clear abuse of discretion appears.'" (*People v. Brown* (2001) 96 Cal.App.4th Supp. 1, 33, quoting *People v. Mixon* (1982) 129 Cal.App.3d 118, 126; see *People v. Curl* (2009) 46 Cal.4th 339, 357.)

C. Deputy Florence's Testimony That Appellant Was a Difficult Inmate Was Properly Admitted

Appellant first contends that the trial court improperly admitted Deputy Florence's testimony that appellant was one of the most difficult and manipulative prisoners he had encountered during his time in the jail. (AOB 129-130.) However, to the extent that Deputy Florence's testimony was even an opinion as opposed to factual perception, it was proper lay opinion testimony because, as he testified, it was rationally based on his own perceptions and ample experience in jail, and helped the jury at least minimally understand the difficulty that the deputies experienced when dealing with appellant's acts of violence and resistance, something which was generally beyond the experience of someone who had never been in a jail. Deputy Florence's "opinion" about appellant being in the "top five" helped clarify his testimony about the extent and nature of appellant's conduct in jail as personally experienced by Deputy Florence. (See *People v. Farnam* (2002) 28 Cal.4th 107, 153-154 [prison guard's lay opinion testimony that the defendant stood "like he was going to start fighting" and appeared defiant was admissible because it was based on personal observation, had a rational basis, and clarified his testimony].)

To the extent that appellant also argues that the testimony was not relevant (see AOB 129-130), he forfeited that claim by not objecting on this ground at trial. (See *People v. Hajek, supra*, 58 Cal.4th at p. 1208.)

Additionally, the testimony was relevant because it was part of the overall picture of appellant's violent and threatening conduct in jail, which was worse than the vast majority of inmates. (See generally Arg. XI, *post.*) Accordingly, for all the aforementioned reasons, appellant's claim should be denied.

D. Deputy Florence's Testimony That Appellant Challenged Deputies to Fight Was Properly Admitted

Appellant next contends that the trial court improperly admitted Deputy Florence's testimony that appellant challenged deputies to fights because it was hearsay. Specifically, he argues that Deputy Florence did not have personal knowledge of the challenges and must have only heard about them from other deputies. (AOB 130-131.) However, Deputy Florence explicitly testified that he "personally observed" appellant make the subject challenges. (19RT 2984.) Apparently, appellant misunderstands surrounding testimony to come to the conclusion that Deputy Florence was only aware of the challenges, instead of having personally observed them. In any event, since Deputy Florence personally observed the challenges, he did not testify to hearsay. Accordingly, appellant's claim should be denied.

E. Deputy Florence's Testimony That Appellant Posed a Danger to People in the Jail Was Properly Admitted

Appellant next contends that the trial court improperly admitted Deputy Florence's testimony that appellant posed a danger to different people in the jail. (AOB 131-132.) However, Deputy Florence's testimony was proper lay opinion testimony because, as he testified, it was rationally based on his own perception and helped the jury at least minimally understand the difficulty that the deputies experienced when dealing with appellant's acts of violence and resistance, something which was generally

beyond the experience of someone who had never been in a jail. (See *People v. Farnam*, *supra*, 28 Cal.4th at pp. 153-154.)

To the extent that appellant also argues that the testimony was irrelevant propensity evidence (see AOB 131), he forfeited that claim by not objecting on this ground at trial. (See *People v. Hajek*, *supra*, 58 Cal.4th at p. 1208.) Additionally, because Deputy Florence's testimony was an "opinion" based on specific acts admissible under section 190.3, factor (b), it was relevant to help the jury understand the circumstances of the specific acts and did not implicate Evidence Code section 1101. (See generally Arg. XI, *post*.) Accordingly, for all the aforementioned reasons, appellant's claim as to this testimony should be denied.

F. Deputy Florence's Testimony That Appellant Acted Violently in Jail in Order to Show Other Inmates That He Lacked Fear Was Properly Admitted

Appellant next contends that the trial court improperly admitted Deputy Florence's testimony that appellant committed violent acts in jail to show other inmates that he had no fear. (AOB 132-133.) However, Deputy Florence's testimony was proper lay opinion testimony because it was rationally based on his own perceptions of appellant's conduct, as well as his experience with other inmates, and helped the jury to understand appellant's demeanor when he was committing these violent acts. (See *People v. Farnam*, *supra*, 28 Cal.4th at pp. 153-154.)

In the alternative, the testimony was also admissible as expert opinion testimony. Deputy Florence had nine years' experience alone working in the jail with inmates. (19RT 2976.) Based on his ample experience, Deputy Florence testified that an inmate who acted like appellant did, disregarding rules, disobeying instructions, and provoking fights, behaves that way in order to display to other inmates that he has no fear. (19RT 2987.) Because the testimony was "[r]elated to a subject that is sufficiently

beyond common experience," the otherwise inexplicable behavior of inmates like appellant in jail, and because it was based on and related to Deputy Florence's special experience in the jail, the testimony was properly admitted by the trial court under this theory, as well. (Evid. Code, § 801.) Accordingly, under either theory, appellant's claim should be denied.

G. Deputy Davis's Testimony That Appellant Did Not Appear to Fear for His Own Safety Was Properly Admitted

Appellant next contends that the trial court improperly admitted Deputy Davis's testimony that, in the context of weapon possession, appellant did not appear to fear for his safety. (AOB 133.) However, Deputy Davis's testimony was proper lay opinion testimony because it was rationally based on his own perceptions of appellant's conduct and helped the jury understand appellant's demeanor when he was committing violent acts in jail. (See *People v. Farnam*, *supra*, 28 Cal.4th at pp. 153-154.) Specifically, Deputy Davis was able to observe appellant's demeanor around other inmates and whether he was the aggressor or victim in jail fights. (See 20RT 3143-3144.)

In the alternative, the testimony was also admissible as expert opinion testimony. Deputy Davis had six years' experience alone working in the jail with inmates. (20RT 3134.) Based on his ample experience, Deputy Davis testified that an inmate who feared for his safety would ordinarily let a deputy know so that he could received extra protection and that, on that basis, it did not appear that appellant had that fear. (20RT 3144.) Because the testimony was "[r]elated to a subject that is sufficiently beyond common experience," the otherwise inexplicable behavior of inmates like appellant in jail, and because it was based on and related to Deputy Davis's special experience in the jail, the testimony was properly admitted by the

trial court under this theory, as well. (Evid. Code, § 801.) Accordingly, under either theory, appellant's claim should be denied.

H. Any Error Was Harmless

Even if this Court finds that all or some of the above testimony was improperly admitted into evidence, any error was harmless. Preliminarily, after hearing testimony about appellant's prior involvement in gang murders, rape, and witness intimidation, in addition to the circumstances of Maria's horrific death, there is no reasonable possibility that, but for the challenged testimony about appellant's difficult behavior as an inmate in the early years of his time in jail, he would have received a more favorable verdict.

Additionally, even without the challenged testimony, the prosecutor presented evidence of at least 12 separate incidents from 2001 through 2004 in which appellant used violent, aggressive, and dangerous tactics against deputies, inmates, and staff. This included testimony from Deputy Love that appellant challenged *him* to a fight. (21RT 3226-3227.) In light of the overwhelming evidence of appellant's poor behavior during those years, the additional opinions of Deputies Florence and Davis could not possible have made a difference in the jury's verdict or its overall view of appellant. Accordingly, for these reasons as well, appellant's claim should be denied.

XI. THE TRIAL COURT PROPERLY INSTRUCTED THE JURY WITH CALJIC NO. 8.87 AND APPELLANT FORFEITED ANY CLAIM RELATED TO THE INSTRUCTION

Appellant also contends that the trial court improperly instructed the jurors with CALJIC No. 8.87, which allegedly allowed jurors to consider misconduct that fell outside section 190.3, factor (b), such as nonviolent acts or words that obstructed a peace officer, or outbursts that were not true threats of violence. He adds the instruction improperly directed the jury to

find that misconduct amounted to criminal acts involving force or violence. (AOB 136-147.) He acknowledges this Court has repeatedly upheld similar instructions, citing *People v. Nakahara* (2003) 30 Cal.4th 705 and *People v. Ochoa* (2001) 26 Cal.4th 398. (AOB 143.) Additionally, appellant forfeited any claims, and any error was harmless.

A. The Applicable Law

A jury is allowed to consider the circumstances of the charged offenses, as well as evidence of the defendant's uncharged criminal activity that involved the use or attempted use of force or express or implied threats to use force or violence. (*People v. Russell* (2010) 50 Cal.4th 1228, 1271; *People v. Bacon* (2010) 50 Cal.4th 1082, 1127; § 190.3, factors (a) & (b).) But a juror may consider uncharged criminal activity independently as aggravating evidence only if the juror is first satisfied beyond a reasonable doubt that the defendant committed the acts. (*People v. Wilson* (2008) 44 Cal.4th 758, 799; *People v. Lewis* (2006) 39 Cal.4th 970, 1052.) The "violent 'criminal activity' presented in aggravation may be shown in context, so that the jury has full opportunity, in deciding the appropriate penalty, to determine its seriousness." (*People v. Welch* (1999) 20 Cal.4th 701, 759, quoting *People v. Melton* (1988) 44 Cal.3d 713, 757.)

The trial court lacks discretion to exclude all subdivision (a) or (b) evidence on the ground it is inflammatory or lacking in probative value, but it retains its traditional discretion to exclude specific evidence if it is misleading, cumulative, or unduly prejudicial. (*People v. Booker* (2011) 51 Cal.4th 141, 187-188; *People v. Wallace* (2008) 44 Cal.4th 1032, 1079; see *People v. Moon*, *supra*, 37 Cal.4th at p. 35 ["the trial court's discretion at the penalty phase to exclude circumstances-of-the-crime evidence as unduly prejudicial is more circumscribed than at the guilt phase . . . and the prosecution is entitled to place the capital offense and the offender in a morally bad light"].)

B. Factual Background

The jury was instructed that, aside from the circumstances of the murder, it could consider the circumstances of other crimes for which appellant was convicted, as well as other criminal activity by appellant, as long as the crimes involved the use or attempted use of force or violence or the express or implied threats to use force or violence against a person. (31RT 4441-4442; 9CT 2432-2433; CALJIC Nos. 8.86 & 8.87.) Specifically, the trial court listed the possible crimes of: "Murder, Conspiracy to Commit Murder, Attempted Murder, Assault, Battery, Battery by Gassing of a Custodial or Peace Officer, Attempted Battery by Gassing of a Custodial or Peace Officer, Assault with Force Likely to Cause Great Bodily Injury, Possession or Manufacture of a Weapon while confined in a Penal Institution or County Jail, and Obstructing or Resisting a Peace Officer, which involved the express or implied use of force or violence or the threat of force or violence." (31RT 4442; 9CT 2433.)

As to uncharged criminal activity, the jury was instructed that, before a juror could consider the criminal acts as an aggravating circumstance, the juror must first be satisfied beyond a reasonable doubt that appellant did in fact commit the criminal acts. (31RT 4442; 9CT 2433; CALJIC No. 2.90.)

C. Appellant Forfeited Any Claims

Preliminarily, appellant never argued below that it was a violation of his constitutional rights or section 190.3 for the jury to consider at the penalty phase any of the 20 incidents or acts he now lists in his brief. (AOB 139-141; 18RT 2824-2825; 19RT 2905-2906, 2927-2928, 2959-2960, 2964, 2980, 2982, 2984, 2988; 20RT 3129, 3138-3139; 21RT 3227-3229, 3277.) Moreover, appellant never objected on *any* grounds to 17 of the 20 incidents. (But see 19RT 2959, 2984; 21RT 3229; Arg. X(D), *ante*.) Under these circumstances, appellant has not preserved the evidentiary

portion of his contention for appellate purposes. (See, e.g., *People v. Lewis*, *supra*, 39 Cal.4th at pp. 1052, 1054; *People v. Riel*, *supra*, 22 Cal.4th at p. 1207.)

D. The Trial Court Properly Instructed the Jury, Given the Evidence in Aggravation Presented in This Case

Appellant first challenges a series of 11 incidents recounted by jail deputies who had personal experience with appellant, involving acts for which appellant had not been tried and convicted. (AOB 139-140.) However, of these acts, only two constituted a threat of violence against anyone--two incidents where appellant challenged deputies to fight. (AOB 139-140; 19RT 2984; 21RT 3127-3128.) The other nine clearly did not involve "the express or implied use of force or violence," and as such were not covered by the challenged instructions. (31RT 4442; 9CT 2433; CALJIC No. 8.87.) These include appellant faking seizures, making false reports of injured people, and not following instructions (AOB 139-140), none of which involved any use of force or violence. They were instead properly admitted to put into context appellant's criminal behavior in jail under section 190.3, factor (b). (See *People v. Russell*, *supra*, 50 Cal.4th at p. 1271.) As to the remaining two where appellant did threaten violence against deputies, the jury was explicitly instructed that appellant was presumed innocent, and that before a juror could consider the criminal acts as an aggravating circumstance, the juror must first be satisfied beyond a reasonable doubt that appellant did in fact commit the criminal acts, thus resolving any jury confusion. (31RT 4443; 9CT 2329; CALJIC No. 2.90.)

Appellant next challenges two incidents where he threatened to kill and "gas" deputies, for which he was not tried and convicted. (AOB 140.) Incredibly, appellant argues that these incidents did not involve true threats, despite his repeated possession of weapons, urine, and feces in his jail cell, and numerous actual attacks on deputies and inmates. (See, e.g., 18RT

2842-2843, 2863; 19RT 2904-2905, 2911-2912, 2919, 2995-2997; 20RT 3128; 22RT 3294-3295.) Appellant also argues that the jury was not instructed on criminal threats (AOB 140); however the crime of criminal threats was not one of the listed possible crimes, but rather obstructing an officer by threat, which appellant clearly did. (See 31RT 4442; 9CT 2433.) Regardless, the trial court was not asked to instruct on the elements of the uncharged acts, and those instructions would not have been essential to the jury's moral assessment of appellant's actions. (*People v. Lewis* (2006) 39 Cal.4th 970, 1054, citing *People v. Cain* (1995) 10 Cal.4th 1, 72 [trial court has no sua sponte duty to instruct on elements of section 190.3, factor (b), crimes].) Ultimately, the jury was instructed that appellant was presumed innocent and that before a juror could consider the uncharged criminal acts as an aggravating circumstance, the juror must first be satisfied beyond a reasonable doubt that appellant did in fact commit the criminal acts, thus resolving any jury confusion. (31RT 4443; 9CT 2329; CALJIC No. 2.90.)

Appellant finally challenges another seven statements made by deputies at the penalty phase that described in general terms violent and threatening behaviors by appellant, but not specific incidents or acts (e.g., routinely threatening to "gas" deputies and acting aggressively toward deputies). (AOB 141.) Still, this testimony was evidence that appellant committed the crime of obstructing officers by threat or force, and placed into context the testimony about appellant's specific violent or threatening acts against others in jail. (See *People v. Welch*, *supra*, 20 Cal.4th at p. 759.) In any event, the jury was properly instructed to consider the testimony as aggravating only if satisfied beyond a reasonable doubt that appellant did in fact commit the criminal acts (31RT 4443; 9CT 2329; CALJIC No. 2.90), thus resolving any confusion.

It was never suggested to the jury that it could decide appellant's penalty on evidence other than his violent criminal activity. Contrary to

appellant's claim, CALJIC No. 8.87, as given, did not create "a presumption that the wide range of aggravation introduced in the penalty phase were criminal acts that involved force or violence." (AOB 142.) Instead, the instruction first told the jury that *some* of the penalty phase evidence was introduced for the purpose of showing that appellant committed one or more specific criminal acts with the "use of force or violence"; second, that in order to consider even such an act in aggravation, it must have been proven beyond a reasonable doubt; and third, that any other evidence that does not support one of the specific enumerated crimes, even if it supports a different crime, "may not" be considered in aggravation. (31RT 4441-4442; 9CT 2433.) Thus, CALJIC No. 8.87 clearly precluded the jury from considering misconduct that did not involve force or violence or threats of violence as aggravating.

In addition, the prosecutor's opening statement clearly explained the three factors that the law allowed the jury to consider in aggravation as the circumstances of the crime (factor (a)), the presence of felony convictions (factor (c)), and "[f]actor (b), the presence or absence of any criminal activity involving violence [or] the threat of violence, attempts to commit acts of violence, things of that nature." (18RT 2780.) In his closing argument, the prosecutor once again stressed that factor (b) only allowed the jury to consider "evidence that indicates that the defendant either is a threat, poses some sort of a danger, commits crime, things of that nature." (31RT 4398.)

Accordingly, there is no factual support whatsoever for appellant's contention that the trial court gave improper instructions on aggravating evidence or that the jury considered inadmissible evidence in aggravation. (See *People v. Quartermain* (1997) 16 Cal.4th 600, 630; *People v. Clark* (1992) 3 Cal.4th 41, 156; see also *People v. Nakahara*, *supra*, 30 Cal.4th at p. 730; *People v. Ochoa*, *supra*, 26 Cal.4th at p. 453.) As explained above,

the evidence either involved specific acts of violence or threats by appellant, or placed these specific acts in context. Even if some of the evidence of appellant's misconduct in jail could be deemed outside the scope of factors (a) and (b), it must be presumed the jury followed the court's instructions and did not consider non-aggravating evidence as an aggravating circumstance. (*People v. Brady* (2010) 50 Cal.4th 547, 582; *People v. Monterroso*, *supra*, 34 Cal.4th at p. 771.)

Appellant's conclusory claim that his federal constitutional rights were violated due to the admission of aggravating evidence not listed in section 190.3 or by the instruction concerning this evidence is equally unavailing. First, as explained above, the jury did not consider evidence inadmissible under state law. Second, appellant has not asserted a cognizable claim under the federal Constitution. The high court has clarified that a trial court's noncompliance with state law in considering nonstatutory factors in support of a death sentence does not constitute a violation of federal law and, consequently, does not provide grounds for any relief in federal court. (*Wilson v. Corcoran* (2010) 562 U.S. 1, 5-6 [131 S.Ct. 131, 78 L.Ed.2d 276]; *Zant v. Stephens* (1983) 462 U.S. 862, 878-879 [103 S.Ct. 2733, 77 L.Ed.2d 235] [the federal Constitution does not require the jury to ignore other possible, unlisted aggravating factors in the process of selecting, from among the class of persons eligible for the death penalty, those defendants who will actually be sentenced to death].) And like the prosecution in *Wilson*, respondent does not concede the existence of a federal right to be sentenced in accordance with state death penalty law. (*Wilson*, *supra*, at p. 17.)

Moreover, the prosecution presented very compelling circumstances in aggravation, such as appellant's long and uninterrupted history of violent crimes and the despicable and cruel way in which he beat and murdered Maria. In contrast, appellant was unable to present any truly mitigating

evidence, as even following his questionable evaluations, Dr. Light had to admit that appellant knew the difference between right and wrong and had the ability to make moral decisions. (See, e.g., 26RT 3825-3826.)

In sum, aside from being forfeited for appellate purposes, appellant's claim lacks any merit. (See *People v. Thornton* (2007) 41 Cal.4th 391, 464 ["[b]ecause the evidence was properly introduced under factor (b), there was no violation of defendant's right to a reliable penalty determination under the Eighth and Fourteenth Amendments"]; *People v. Quartermain*, *supra*, 16 Cal.4th at pp. 630-631.) And for all the same reasons set forth above, any error was harmless beyond a reasonable doubt. (*Chapman v. California*, *supra*, 386 U.S. at p. 24.) Accordingly, for all of the above reasons, appellant's claim should be denied.

XII. CALIFORNIA'S DEATH PENALTY STATUTE AND ITS IMPOSITION IS LEGAL UNDER ANY STANDARD

Appellant also contends that California's death penalty statute is illegal under the federal Constitution and international law. However, as he admits, each of his claims has been rejected by this Court and/or the United States Supreme Court. (AOB 148-169.)

A. Section 190.2 Is Not Overbroad

Appellant argues his death sentence is invalid because section 190.2 is impermissibly broad and does not perform the constitutionally required narrowing function. According to appellant, almost every murderer is eligible for the death penalty. (AOB 148-149.) This Court has repeatedly rejected appellant's contention and found section 190.2 "'does not contain so many special circumstances that it fails to perform the constitutionally mandated narrowing function.'" (*People v. Bennett* (2009) 45 Cal.4th 577, 630, quoting *People v. San Nicolas* (2004) 34 Cal.4th 614, 677; accord, *Pulley v. Harris* (1984) 465 U.S. 37, 53 [104 S.Ct. 87, 179 L.Ed.2d 29] [California's requirement of a special circumstance finding adequately

"limits the death sentence to a small sub-class of capital-eligible cases"].) Appellant has not provided any valid reasons for this Court to reconsider its previous holdings. Accordingly, this contention should be rejected again. (See *People v. Bacon*, *supra*, 50 Cal.4th at p. 1129; *People v. Beames* (2007) 40 Cal.4th 907, 933.)

B. Section 190.3, Factor (a), Is Not Overbroad

Appellant argues that section 190.3, factor (a), violates his federal constitutional rights because allowing the jury to consider the "circumstances of the crime" in aggravation is so overbroad as to allow arbitrary and capricious imposition of the death penalty. However, appellant also recognizes that this Court has repeatedly rejected this very claim. (AOB 149-150.)

In that vein, this Court rejected the same contention in *People v. Bennett*, *supra*, 45 Cal.4th at pages 630-631. As found by this Court and the United States Supreme Court, "section 190.3, factor (a) 'instructs the jury to consider a relevant subject matter and does so in understandable terms.'" (*Id.* at p. 631, quoting *Tuilaepa v. California* (1994) 512 U.S. 967, 976 [114 S.Ct. 2630, 129 L.Ed.2d 750] ["[t]he circumstances of the crime are a traditional subject for consideration by the sentencer, and an instruction to consider the circumstances is neither vague nor otherwise improper under our Eighth Amendment jurisprudence"]; see *People v. Lynch*, *supra*, 50 Cal.4th at p. 766; *People v. Jackson* (2009) 45 Cal.4th 662, 699-700.) There is no valid basis for this Court to reconsider its previous holding. Thus, the contention should be rejected once again. (See *People v. Russell*, *supra*, 50 Cal.4th at p. 1274; *People v. Jennings* (2010) 50 Cal.4th 616, 688-689.)

C. The Penalty Phase Instructions Properly Do Not Require Findings beyond a Reasonable Doubt or Unanimity

Appellant argues that California prosecutors should be required to prove beyond a reasonable doubt: (1) the factors relied upon by the jury to impose a death sentence; (2) that aggravating factors outweigh mitigating factors; and (3) that death is the appropriate sentence. He criticizes this Court's reasoning that penalty phase determinations are moral and not factual functions, and, thus, are not susceptible to a burden-of-proof quantification. He further criticizes this Court's ruling that *Cunningham v. California* (2007) 549 U.S. 270 [127 S.Ct. 856, 166 L.Ed.2d 856], *Blakely v. Washington* (2004) 542 U.S. 296 [124 S.Ct. 2531, 159 L.Ed.2d 403], *Ring v. Arizona* (2002) 536 U.S. 584 [122 S.Ct. 2428, 153 L.Ed.2d 556], and *Apprendi*, do not apply to our death penalty determination. According to appellant, California jurors are required to engage in fact-finding as to aggravating factors in the penalty phase, this fact-finding is part of the eligibility phase, and these factual determinations should be made unanimously and beyond a reasonable doubt under *Ring*. (AOB 151-154.) Appellant's contention has been repeatedly rejected by this Court, and he provides no valid reasons for this Court to reconsider its prior holdings. Therefore, the contention should be rejected again. (See *People v. Russell*, *supra*, 50 Cal.4th at pp. 1271-1272; *People v. Jennings*, *supra*, 50 Cal.4th at p. 689; *People v. Dykes* (2009) 46 Cal.4th 731, 813; *People v. Bennett*, *supra*, 45 Cal.4th at p. 631; *People v. Williams* (2006) 40 Cal.4th 287, 337-338; *People v. Anderson* (2001) 25 Cal.4th 543, 589-590 & fn. 14.)

Appellant also claims California law violates the federal Constitution by failing to require unanimous jury agreement on aggravating factors. He again cites to *Ring* as requiring this Court to reexamine its precedent to the contrary. (AOB 154-156.) This contention has been repeatedly rejected by

this Court, and he provides no new and valid reasons for this Court to revisit its prior holdings. Therefore, the contention should be rejected again. (See *People v. Bacon*, *supra*, 50 Cal.4th at p. 1129; *People v. Dykes*, *supra*, 46 Cal.4th at pp. 799-800 [*Apprendi*, *Ring*, and *Cunningham* do not require juries to enter unanimous findings concerning aggravating factors]; *People v. Williams*, *supra*, 40 Cal.4th at p. 338 [*Ring* does not mandate jury unanimity as to aggravating factors].)

Appellant further claims CALJIC No. 8.88 is unconstitutionally vague and violates his rights under the Eighth and Fourteenth Amendments by informing the jury that "[t]o return a judgment of death, each of you must be persuaded that the aggravating circumstances are so substantial in comparison with the mitigating circumstances that it warrants death instead of life without the possibility of parole." (AOB 156; see 31RT 4449; 9CT 2434.) This Court has previously held that the phrase "so substantial" in the last paragraph of the instruction properly instructs the jury that aggravating circumstances must outweigh mitigating ones. (*People v. Lindberg* (2008) 45 Cal.4th 1, 52; *People v. Moon*, *supra*, 37 Cal.4th at p. 43; *People v. Young* (2005) 34 Cal.4th 1149, 1227; *People v. Arias* (1996) 13 Cal.4th 92, 171.) CALJIC No. 8.88 is not vague and adequately guides the jury's sentencing discretion. (*People v. Hovarter* (2008) 44 Cal.4th 983, 1028 [CALJIC No. 8.88 "is not overly vague for using the words 'so substantial' as a modifying phrase"]; *People v. Smith* (2005) 35 Cal.4th 334, 369; *People v. Carter*, *supra*, 30 Cal.4th at p. 1226 [rejecting argument that phrase "so substantial" contained in CALJIC No. 8.88 was unconstitutionally vague, conducive to arbitrary and capricious decision making, and created an unconstitutional presumption in favor of death].) In addition, the United States Supreme Court has stated that once the jury finds a defendant is within a category of persons eligible for the death penalty, the sentencer may be given "'unbridled discretion' in determining

whether the death penalty should be imposed." (*Tuilaepa v. California*, *supra*, 512 U.S. at pp. 979-980.) Indeed, this Court has cited *Tuilaepa* in rejecting a claim that the phrase "so substantial" is too vague. (*People v. Davenport* (1995) 11 Cal.4th 1171, 1231; see *People v. Manriquez* (2005) 37 Cal.4th 547, 589.) As appellant presents no persuasive reason for this Court to revisit any of its past rulings, his claims should be rejected. (See *People v. Frye* (1998) 18 Cal.4th 894, 1024;[29] *People v. Rodrigues, supra,* 8 Cal.4th at p. 1193.)

D. The Jury Was Properly Instructed with CALJIC No. 8.88

Appellant makes additional arguments that the jury was improperly instructed with CALJIC No. 8.88 from a series of different angles. (AOB 157-161; see AOB 156; Arg. XII(C), *ante*.) Contrary to appellant's first argument (AOB 157), CALJIC No. 8.88 properly describes the weighing process for determining whether death is an appropriate penalty (*People v. Page* (2008) 44 Cal.4th 1, 56), and adequately conveys that life in prison without the possibility of parole is the appropriate punishment if the burden of proof for a verdict of death is not met (*id.* at p. 57).

Appellant next argues that CALJIC No. 8.88 did not convey to the jury that a life sentence was required if the aggravating factors did not outweigh the mitigating factors. (AOB 158-159.) The trial court need not expressly instruct the jury that a sentence of life imprisonment without parole is mandatory if the aggravating circumstances do not outweigh those in mitigation. (*People v. Kipp* (1998) 18 Cal.4th 349, 381; *People v. Duncan* (1991) 53 Cal.3d 955, 978.) This Court has found that CALJIC No. 8.88 gives the jury adequate instruction on how to return a life sentence

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[29] Overruled on other grounds in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.

(*People v. Taylor* (2001) 26 Cal.4th 1155, 1181; *Kipp*, *supra*, at p. 1138; *People v. Frye*, *supra*, 18 Cal.4th at pp. 1023-1024; *People v. Arias*, *supra*, 13 Cal.4th at pp. 170-171) and the standard instruction has been consistently upheld. (*People v. Moon*, *supra*, 37 Cal.4th at p. 43; *People v. Smith*, *supra*, 35 Cal.4th at p. 370; *People v. Medina* (1995) 11 Cal.4th 694, 781-782; *Duncan*, *supra*, at p. 978.) CALJIC No. 8.88 permits a death penalty only if aggravation is so substantial in comparison with mitigation that death is warranted; if aggravation even failed to outweigh mitigation, it could not reach this level. (*Smith*, *supra*, at p. 370.) The instruction was proper.

Appellant next argues that the jury should have been instructed on a burden of proof when deciding the appropriate penalty, that the instruction was necessary to insure the death penalty was imposed with reasonable consistency, and that the error was reversible per se. (AOB 159-160.) This contention has been repeatedly rejected by this Court and should be rejected again, as appellant provides no valid reasons for this Court to revisit its prior holdings. (*People v. Russell*, *supra*, 50 Cal.4th at p. 1272; *People v. Jennings*, *supra*, 50 Cal.4th at p. 689 ["[u]nlike the guilt determination, the sentencing function is inherently moral and normative, not factual . . . and hence, not susceptible to a burden-of-proof quantification"; internal quotation marks omitted]; *People v. Salcido* (2008) 44 Cal.4th 93, 167 [*Apprendi* and progeny do not justify reconsideration of prior rulings]; *People v. Smith*, *supra*, 35 Cal.4th at p. 374 ["[b]ecause no burden of proof is required at the penalty phase . . . , the law is not invalid for failing to require an instruction on burden of proof"]; accord, *Tuilaepa v. California*, *supra*, 512 U.S. at p. 979 ["capital sentencer need not be instructed how to weigh any particular fact in the capital sentencing decision"].)

Similarly, appellant's claim that the jury should have been instructed that he bore no particular burden to prove mitigating factors and that the

jury was not required to unanimously agree on the existence of mitigation has also been rejected by this Court. In *People v. Breaux* (1991) 1 Cal.4th 281, the defendant claimed that the trial court improperly rejected his proposed jury instruction that unanimity was not required for consideration of mitigating evidence. (*Id.* at p. 314.) This Court disagreed, explaining:

> There was nothing in the instructions to limit the consideration of mitigating evidence and nothing to suggest that any particular number of jurors was required to find a mitigating circumstance. The only requirement of unanimity was for the verdict itself. [Citation.] [¶] The instructions that were given in this case unmistakably told the jury that each member must individually decide each question involved in the penalty decision. They were told to consider all the evidence, specifically including any circumstance in mitigation offered by defendant. We find no error in the court's refusal to give defendant's proposed instruction.

(*Id.* at p. 315, italics in original.)

Such was the case here. As in *Breaux*, there was nothing in the given instructions that limited the jurors' consideration of mitigating evidence or that suggested that "any particular number of jurors was required to find a mitigating circumstance." (*People v. Breaux*, *supra*, 1 Cal.4th at p. 315.) Also, similar to the instructions in *Breaux*, the jurors were instructed with CALJIC No. 8.88, which told them that "[t]o return a judgment of death, each of you must be persuaded that the aggravating circumstances are so substantial in comparison with the mitigating circumstances that it warrants death instead of life without the possibility of parole." (31RT 4449; 9CT 2434.) Appellant has provided no persuasive reason for this Court to reexamine this holding.

Appellant also contends the trial court should have been required to instruct the jury with the presumption of life. (AOB 160-161.) This Court has repeatedly rejected this challenge, holding a trial court is not required to instruct on a "presumption of life." (*People v. Gamache* (2010) 48 Cal.4th

347, 407; *People v. Dunkle* (2005) 36 Cal.4th 861, 940; *People v. Combs*, *supra*, 34 Cal.4th at p. 868; *People v. Arias*, *supra*, 13 Cal.4th at p. 190.) There being no requirement for the trial court to do so, appellant's constitutional challenges must fail.

E. The Jury Was Not Required to Make Written Findings

Appellant further argues that the failure to require written or other specific findings by the jury regarding aggravating factors deprived him of his federal due process and Eighth Amendment rights to meaningful appellate review. He asserts an equal protection violation on the ground that non-capital defendants are provided greater protections in this context. (AOB 161.) As appellant notes, this argument has been repeatedly rejected by this Court, and he provides no valid reasons for this Court to revisit its prior holdings. Thus, the contention should be rejected again. (See *People v. Russell*, *supra*, 50 Cal.4th at p. 1274; *People v. Bennett*, *supra*, 45 Cal.4th at p. 632.)

F. The Trial Court Properly Instructed with CALJIC No. 8.85

Appellant claims that the trial court improperly instructed with CALJIC No. 8.85 in three different ways. (AOB 162-167.) First, appellant argues that by limiting mitigation to "*extreme* mental or emotional disturbance" in section 190.3, factor (d), CALJIC 8.85 acted as a barrier to the consideration of mitigation, in violation of his federal constitutional rights. (AOB 162-166.) Second, appellant argues that instructing on the inapplicable sentencing factors diminished the weight of mitigation in a manner that violated his constitutional rights. (AOB 166.) Third, appellant argues that the failure of CALJIC No. 8.85 to indicate which factors were intended for mitigation and which for aggravation allowed the jury to aggravate appellant's sentence based on "non-existent" aggravating factors in violation of the Eighth and Fourteenth Amendments. (AOB 167.)

Appellant admits that all three arguments have been repeatedly rejected by this Court. (AOB 162-167.)

CALJIC No. 8.85 told the jury to consider the entire list of 11 factors found in section 190.3, including, inter alia, the following three mitigating factors:

> (d) whether or not the offense was committed while the defendant was under the influence of extreme mental or emotional disturbance.
>
> (h) whether or not at the time of the offense the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect. . . .
>
> (k) any other circumstance which extenuates the gravity of the crime, even though it is not a legal excuse for the crime, and any sympathetic or other aspect of the defendant's character or record that the defendant offers as a basis for a sentence less than death, whether or not related to the offense for which he is on trial.

(31RT 4436-4439; 9CT 2431-2432.)

In the penalty phase closing argument, the prosecutor argued that Dr. Light's testimony fell under factor (h) rather than factor (d) because it did not describe sufficiently extreme mental disturbance. As to factor (h), it still fell short because appellant knew right from wrong and the evidence showed that appellant was able to conform his behavior but chose not to do so. (30RT 4267-4273.) In her own closing argument, defense counsel explained that there is no "mechanical weighing" of the aggravating and mitigating circumstances and that even if the jury found the factors in aggravation outweighed those in mitigation, it still did not need to find for death. (31RT 4351-4352.) Without mentioning it by name, she also argued that Dr. Light's testimony should be evaluated under factor (d) as well because appellant did suffer from brain dysfunction. (31RT 4364.)

Preliminarily, any limitation on factor (d) was irrelevant because the jury was able to consider the very same evidence under factor (h), as indicated by the prosecutor and conceded by appellant, as evidence that appellant was unable or had difficulty conforming his conduct to the law. (AOB 162.) However, the jury could have considered Dr. Light's testimony under catchall (k) factor, which covered anything that could be considered mitigating by a juror. Regardless, though, appellant's contention that the limitation violates his constitutional rights has been repeatedly rejected by this Court, and he provides no new and persuasive reasons for this Court to revisit its prior holdings. Accordingly, the contention should be rejected again. (*People v. Russell*, *supra*, 50 Cal.4th at p. 1274; *People v. Williams*, *supra*, 40 Cal.4th at p. 338; *People v. Avila* (2006) 38 Cal.4th 491, 614.)

As this Court also has repeatedly held, "failing to delete from its instructions references to assertedly inapplicable factors listed in section 190.3" is not error. (*People v. Moore* (2011) 51 Cal.4th 386, 417; see *People v. Lightsey* (2012) 54 Cal.4th 668, 731 ["[n]or must the trial court amend the standard jury instruction regarding the sentencing determination, CALJIC No. 8.85, specifically to delete factors the defendant claims are inapplicable, or designate certain factors as mitigating only, or inform the jury that mitigating factors must be considered only in mitigation and the absence of proof of a mitigating factor cannot be considered an aggravating factor"].)

As to appellant's third argument, this Court also has repeatedly held that failure to identify which factors are aggravating and which are mitigating is not error, as "the aggravating and mitigating nature of the factors is self-evident within the context of each case." (*People v. Dickey* (2005) 35 Cal.4th 884, 928; see *People v. Homick* (2012) 55 Cal.4th 816, 890; *People v. Elliott* (2012) 53 Cal.4th 535, 594 ["trial court is not

constitutionally required to instruct the jury that certain sentencing factors can only be mitigating"]; *People v. Moore*, *supra*, 51 Cal.4th at p. 417.)

G. This Court Properly Refrains from Inter-Case Proportionality Review

Appellant also argues that this Court's failure to engage in inter-case proportionality review is a violation of the federal Constitution. (AOB 167-168.) Appellant's contention has been repeatedly rejected by this Court, and he provides no new and valid reasons for this Court to revisit its prior holdings. Accordingly, the contention should be rejected again. (*People v. Russell*, *supra*, 50 Cal.4th at p. 1274; *People v. Loker* (2008) 44 Cal.4th 691, 755-756; accord, *Pulley v. Harris*, *supra*, 465 U.S. at pp. 50-51 [Constitution does not require inter-case proportionality review].)

H. The California Capital Sentencing Scheme Does Not Violate the Equal Protection Clause

Appellant also argues that California's capital sentencing scheme provides fewer procedural protections than does its noncapital sentencing scheme, resulting in violation of the equal protection clause of the federal Constitution, though he admits that this Court has repeatedly rejected the argument, citing *People v. Manriquez*, *supra*, 37 Cal.4th at p. 590. (AOB 168.)

This Court has consistently held our death penalty statute does not violate the equal protection rights of capital defendants because it provides a different method of determining the sentence than is used in noncapital cases. (*People v. Bennett, supra,* 45 Cal.4th at p. 632; *People v. Smith*, *supra*, 35 Cal.4th at pp. 374-375.) This Court has specifically found that "capital and noncapital defendants are not similarly situated and therefore may be treated differently without violating constitutional guarantees of equal protection of the laws or due process of law." (*People v. Manriquez*, *supra*, 37 Cal.4th at p. 590; see *People v. Lynch*, *supra*, 50 Cal.4th at p.

767; *People v. Loker*, *supra*, 44 Cal.4th at p. 756.) As in his other challenges to California's death penalty law, appellant asserts arguments that have been soundly and repeatedly rejected by this Court and does not provide any new or valid reasons for this Court to revisit its prior holdings. Thus, the contention should be rejected once again. (See *People v. Jennings*, *supra*, 50 Cal.4th at p. 690; *People v. Brady*, *supra*, 50 Cal.4th at p. 590.)

I. Imposition of the Death Penalty Does Not Violate International Law, Which Is Irrelevant, Regardless

Finally, appellant argues that California's use of the death penalty, especially as a regular form of punishment, falls short of international norms of decency and violates the Eighth and Fourteenth Amendments. Appellant specifically asks this Court to reconsider imposition of the death penalty in light of *Roper v. Simmons* (2005) 543 U.S. 551, 575-578 [125 S.Ct. 1183, 161 L.Ed.2d 1], in which the United States Supreme Court used international law to support its finding that the execution of juveniles violated the Eighth and Fourteenth Amendments. Appellant recognizes this Court has repeatedly rejected this argument. (AOB 169.)

Even after the decision in *Roper*, this Court has repeatedly rejected the contention that, because our death penalty allegedly violates international norms of decency, it also violates the Eight and Fourteenth Amendments. (*People v. Jennings*, *supra*, 50 Cal.4th at pp. 690-691; *People v. Bennett*, *supra*, 45 Cal.4th at p. 632; *People v. Mungia* (2008) 44 Cal.4th 1101, 1143 ["California's status as being in the minority of jurisdictions worldwide that impose capital punishment, especially in contrast with the nations of Western Europe, does not violate the Eighth Amendment]; *People v. Kelly* (2007) 42 Cal.4th 763, 801 [death sentence "that complies with state and federal constitutional and statutory requirements does not violate international law"]; *People v. Cook* (2006) 39

Cal.4th 566, 619-620 ["international law does not bar imposing a death sentence that was rendered in accord with state and federal constitutional and statutory requirements"]; *People v. Moon*, *supra*, 37 Cal.4th at p. 48 ["[a]lthough defendant would have us consider that the nations of Western Europe no longer have capital punishment, those nations largely had already abolished it officially or in practice by the time the United States Supreme Court, in the mid-1970's, upheld capital punishment against an Eighth Amendment challenge"].) Appellant raises arguments that have been soundly rejected by this Court in the past and does not provide any valid reason for this Court to revisit its prior holdings. Accordingly, the arguments should be rejected once again. (See *People v. Russell*, *supra*, 50 Cal.4th at p. 1275; *People v. Brady*, *supra*, 50 Cal.4th at pp. 590-591.)

XIII. APPELLANT'S GUILT AND PENALTY PHASE TRIALS WERE FAIR AND PROPERLY CONDUCTED

Appellant finally argues that reversal is required based on the accumulated prejudice arising from multiple errors, even if those errors individually could be deemed harmless. (AOB 170-172.) 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 *People v. Cunningham* (2001) 25 Cal.4th 926, 1009; *People v. Box* (2000) 23 Cal.4th 1153, 1214, 1219.) For the reasons explained, there was no error in this case, and even if there was error it was harmless. Appellant points to several alleged errors, or small groups of related errors, that are discrete and unrelated, and therefore have no accumulating effect. (AOB 171.) 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 aforementioned reasons, respondent respectfully requests that the judgment be affirmed.

Dated: May 14, 2015

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached **RESPONDENT'S BRIEF** uses a 13 point Times New Roman font and contains **43,319** words.

Dated: May 14, 2015

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DECLARATION OF SERVICE
CAPITAL CASE

Case Name: **The People of the State of California v. Ruben Becerrada**
Case No.: **S170957**

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

On **May 14, 2015**, I served the attached **RESPONDENT'S BRIEF** by placing a true copy thereof enclosed in a sealed envelope in the internal mail system of the Office of the Attorney General at 300 South Spring Street, Suite 1702, Los Angeles, CA 90013, addressed as follows:

PLEASE SEE SERVICE LIST

On **May 14, 2015**, I caused an original and eight (8) copies of the **RESPONDENT'S BRIEF** in this case to be delivered to the California Supreme Court at 350 McAllister Street, First Floor, San Francisco, CA 94102-4797 by **Federal Express, Tracking # 802905086176.**

On **May 14, 2015**, I caused one electronic copy of the **RESPONDENT'S BRIEF** in this case to be submitted electronically to the California Supreme Court by using the Supreme Court's Electronic Document Submission system.

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on **May 14, 2015**, at Los Angeles, California.

Jocelyn C. Santos
Declarant

Signature

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SERVICE LIST

Case Name: **The People of the State of California v. Ruben Becerrada**
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