In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA, **Plaintiff and Respondent,** **v.** **BILLY JOE JOHNSON,** **Defendant and Appellant.**	**CAPITAL CASE** Case No. S178272

Orange County Superior Court Case No. 07CF2849
The Honorable Frank F. Fasel, Judge Presiding

RESPONDENT'S BRIEF

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STATEMENT OF THE CASE

On November 1, 2007, the Orange County District Attorney filed an information charging Johnson with the murder of Scott Miller in violation of Penal Code[1] section 187, subdivision (a), (count 1); conspiracy to commit murder in violation of section 182, subdivision (a)(1), (count 2); and accessory after the fact in violation of section 32 (count 3).[2] The information alleged as special circumstances that Johnson was previously convicted of murder within the meaning of section 190.2, subdivision (a)(2); the murder was committed by means of lying in wait within the meaning of section 190.2, subdivision (a)(15); and the murder was committed for the benefit of, at the direction of, and in association with a criminal street gang within the meaning of section 190.2, subdivision (a)(22).[3] (1 CT 54-57.)

The information alleged that all counts were committed for the benefit of, at the direction of, and in association with a criminal street gang within the meaning of section 186.22, subdivision (b)(1); and a principal discharged a firearm in the commission of counts 1 and 2, causing death within the meaning of section 12022.53, subdivisions (d) and (e)(1). It was

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[1] All further statutory references are to the Penal Code unless noted otherwise.

[2] The information alleged nine overt acts committed in furtherance of the conspiracy. (1 CT 55-56.)

[3] Johnson's co-defendants, Michael Allan Lamb and Jacob Rump, were jointly tried in a separate trial in Orange County Superior Court case no. 03CF0441. They were both convicted of the special circumstance murder and conspiracy with additional counts and enhancements. Lamb received the death penalty, whereas Rump was sentenced to three terms of life without possibility of parole plus 70 years to life and a determinate term of 13 years in prison. Lamb's automatic appeal is currently pending before this Court in Case No. S166168. Rump's judgment was affirmed in Court of Appeal Case No. G039421 on October 22, 2009, and review was denied in Case No. S178438 on February 10, 2010.

further alleged that Johnson was previously convicted of three serious or violent felonies within the meaning of sections 667, subdivision (d), and 1170.12, subdivisions (b) and (c)(2)(A), three serious felonies within the meaning of section 667, subdivision (a)(1), and one felony for which he served a prison term within the meaning of section 667.5, subdivision (b).[4] (1 CT 56-59.)

On December 13, 2007, the prosecution noticed appellant of its intent to seek the death penalty. (1 CT 61.) On October 6, 2009, a jury was sworn to try the case. (15 CT 3810.)

On October 14, 2009, the jury found Johnson guilty of all counts as charged in the information. The jury set the murder in the first degree, found the gang and lying-in-wait special circumstances true, and found all firearm and gang enhancements true. (17 CT 4425-4434, 4530-4532; 5 RT 2071-2078 .)

On October 19, 2009, Johnson waived his right to a jury on the prior-murder special circumstance. (18 CT 4571; 6 RT 2083-2085.) Thereafter, the special circumstance was found true in a court trial, the jury was advised of that finding, and the penalty phase commenced. (18 CT 4571-4573; 6 RT 2085-2086, 2089-2094.)

On October 29, 2009, the jury rendered a verdict finding death to be the appropriate penalty. (19 CT 4991; 9 RT 2812-2815.) Subsequently, the trial court granted the prosecutor's motion to dismiss the remaining prior conviction allegations. (20 CT 5050-5051; 9 RT 2821-2822.)

On November 23, 2009, the trial court considered and denied an automatic motion to modify the verdict pursuant to section 190.4,

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[4] The prior-murder special circumstance and prior conviction allegations were bifurcated for purposes of trial. (15 CT 3793; 2 RT 1030-1032.)

subdivision (e). (20 CT 5051-5057; 9 RT 2822-2830.) On the same date, the trial court sentenced Johnson to death.[5] (20 CT 5058, 5095-5096, 5083; 9 RT 2832-2836.)

This appeal is automatic. (§ 1239, subd. (b).)

STATEMENT OF FACTS

A. Guilt Phase

1. Prosecution Evidence

a. Background

Public Enemy Number 1 (also known as "PENI Death Squad" and hereafter referred to as "PENI") is a white supremacist gang formed in 1986. (5 RT 1876-1877, 1881-1882.) Donald "Popeye" Mazza, Devlin Stringfellow, Nick Rizzo and Scott "Scottish" Miller were key founders of PENI. (4 RT 1530; 5 RT 1877.) Mazza has been the undisputed leader of PENI since the early 1990's. (5 RT 1877-1878.)

Johnson was previously associated with the Nazi Low Riders, another white supremacist gang. (5 RT 1916-1917.) In 2001 or 2002, Johnson riled the Nazi Low Riders due to his unwillingness to carry out an order to kill Joseph Govey.[6] (5 RT 1916-1917.) To redeem himself, Johnson transitioned to PENI in March of 2002. (5 RT 1517.) Johnson "pretty much walked in" to PENI as a member in good standing. (5 RT 1917.)

Michael Lamb and Jacob Rump are also PENI gang members. (5 RT 1902-1906.) Tanya Hinson is a female associate of PENI. (5 RT 1884.)

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[5] The trial court stayed imposition of sentence on counts 2 and 3 and all enhancements pursuant to section 654 since the court relied on the facts underlying those counts and enhancements in its denial of the automatic motion to modify the verdict. (20 CT 5059, 5095.)

[6] Johnson told a friend, Donald McLachlan about his problems with the Nazi Low Riders and the Aryan Brotherhood. (4 RT 1577.)

By the mid to late 1990's, Miller was no longer in "the main mix" of PENI, was not well liked, and had been marginalized within the gang's structure. (5 RT 1888.) Other PENI members ceased associating with Miller. (5 RT 1888.)

In February of 2001, Fox 11 News in Southern California broadcasted a two-segment interview with Miller. (5 RT 1894.) In the interview, Miller described how PENI sold and previously manufactured methamphetamine as a source of money, and he discussed the gang's use of violence.[7] (I Supp. CT 99-108.) Miller stated: "In this business it's guns, speed, violence and sex. That's what it's all about." (1 Supp. CT 104.)

Despite the television station's attempts to disguise him, Miller's identity was obvious from his tattoos, his mannerisms, objects around him and his pit bull which were visible in the news segments. (4 RT 1614-1615.) The interview was aired at the time Mazza and Rizzo were on trial for murder in Orange County, which was "very bad timing for them." (5 RT 1896.)

As a result of the Fox broadcast, the PENI leadership put "a green light on" Miller, marking him for death. (5 RT 1896.) Initially, no one had the courage to enforce it. (4 RT 1584-1585.)

Shortly before he was killed in March of 2002, the Costa Mesa Police Department learned of the PENI threat against Miller's life and attempted to contact him. (5 RT 1890, 1894-1895.) Lamb and Rump had recently been paroled from state prison. (5 RT 1902-1906.) Miller expressed concerns about his safety to his former girlfriend, Marnie Simmons. (4 RT 1537.)

In March of 2002, Christina Hughes lived at 1800 West Gramercy in Anaheim. (3 RT 1395-1396.) A walkway led from Hughes' apartment to a

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[7] A DVD of both segments was played for the jury. (5 RT 1894.)

back alleyway and flood control channel. (3 RT 1398.) Several weeks prior to Miller's murder, Hughes met Hinson.[8] (3 RT 1399.) Thereafter, Lamb and Rump began frequenting Hughes' apartment on a regular basis and "almost took over" her home. (3 RT 1401-1402.)

b. The Murder

On the evening of March 8, 2002,[9] Johnson attended a birthday party for his cousin, John Raphoon, in Costa Mesa. (4 RT 1542-1543, 1557.) Miller and Johnson's friend, Andrea Metzger, were also at the party. (4 RT 1539-1545.) Johnson and Miller spoke to each other, and Metzger overheard them joking about Miller keeping "his guard up."[10] (4 RT 1545-1548.)

Between 8:30 and 9:00 p.m., Johnson and Metzger left the party in Johnson's truck, and drove to a parking lot where they had sex. (4 RT 1549-1552.) Johnson then dropped Metzger off at a friend's house and returned to the party. (4 RT 1550.)

Shirley Williams, who was friends with Johnson and had been dating Miller, arrived at Raphoon's party around 10:00 p.m. (4 RT 1555-1558.) Williams saw Miller there. (4 RT 1558.) Fifteen to twenty minutes later, Williams left with a friend to get drugs in Santa Ana. (4 RT 1558-1559.) Miller was no longer at the party when Williams returned. (4 RT 1559-1560.)

At approximately 10:30 p.m., Miller left a voicemail message on Simmons' cell phone. (4 RT 1531-1532.) Miller sounded concerned, and

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[8] Hughes and Hinson had a mutual friend who was a PENI associate. (3 RT 1396-1398.)

[9] All further date references occurred in 2002, unless noted otherwise.

[10] Metzger previously testified about the conversation, but did not recall her prior testimony by the time of Johnson's trial. (4 RT 1539-1541, 1548.)

there was someone in the background talking to him who sounded like Johnson. (4 RT 1532-1536.)

That evening, Hughes received a phone call from Lamb asking if Hinson was at the apartment. (3 RT 1402.) When Hughes said Hinson was not there, Lamb told Hughes that is was important that Hinson call him when she gets home. (3 RT 1402-1403.) When Hinson arrived, Hughes told her that she did not want anyone over that night. (3 RT 1403.)

Later, while taking a break from vacuuming the upper floor of the apartment, Hughes went downstairs and saw Hinson there with Lamb and Rump. (3 RT 1403; 4 RT 1601.) Hughes told them to get out. (3 RT 1403; 4 RT 1601.) Hinson said they were leaving, and Hughes went back upstairs. (3 RT 1404; 4 RT 1601.) Shortly thereafter, Hughes heard a gunshot. (3 RT 1405; 4 RT 1601.) Hughes froze and checked on her two year old son. (3 RT 1405.)

Luis Mauras, who lived in a town home facing the flood control channel and alleyway, also heard the gunshot at approximately 11:30 p.m. (3 RT 1388-1391.) Fifteen to twenty seconds later, Mauras heard the sound of screeching tires. (3 RT 1391.) The gunshot and screeching appeared to be coming from the alleyway. (3 RT 1391, 1393.)

Hughes exited her apartment between 11:30 and 11:35 p.m. with a friend and walked to the alleyway. (3 RT 1406.) There, Hughes observed Miller's body lying on the ground with a large amount of blood streaming from it. (3 RT 1406-1407.)

Meanwhile, Johnson returned to Raphoon's party. (4 RT 1559-1560.) Johnson and Williams stayed until about 1:00 a.m.. (4 RT 1560.) After leaving the party, they got a hotel room and spent most of the weekend together. (4 RT 1560-1561.)

Later that day, March 9, Johnson called Simmons. (4 RT 1536-1537.) Johnson asked Simmons if she had heard what happened, told her that

"Scott was no longer with us," and said if she needed anything "that he would be there for" her. (4 RT 1537.)

Subsequently, Johnson spoke to McLachlan[11] about the murder while they were staying together in a Huntington Beach condominium. (4 RT 1580-1581.) Johnson told McLachlan that he used drugs as a ploy to get Miller to go with him from Raphoon's party to Anaheim.[12] (4 RT 1578-1579, 1585.) Johnson said he was walking next to Miller in the alley right before the shooting, they heard footsteps coming from behind, Miller asked Johnson, "[A]re those PENI guys," and Miller appeared resigned to the fact that something was going to happen to him. (4 RT 1578, 1581.)

Johnson told McLachlan that Lamb pulled the trigger, he was upset that Lamb shot Miller in the back of the head, and he had words with Lamb about that afterwards. (4 RT 1582-1583.) Johnson felt Miller should have been shot in the face after being told, "[Y]ou had a good run, you ran afoul of the rules, it is time to go." (4 RT 1582.) Johnson explained that Miller was killed because of the Fox interview and "his actions...in the neighborhood."[13] (4 RT 1583.)

c. Investigation

Officers from the Anaheim Police Department arrived at the murder scene 20 to 25 minutes after the shooting. (3 RT 1392.) Miller was lying facedown adjacent to a dumpster alcove in the alleyway. (3 RT 1412-1414.) A stream of blood from Miller's head was trailing towards a drain. (3 RT 1414-1415.) Underneath Miller's body, there was a bloody baseball

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[11] McLachlan was on parole for a second degree burglary conviction at the time of trial, and had additional prior felony convictions. (4 RT 1572-1573.)

[12] Miller was addicted to drugs at the time. (4 RT 1585.)

[13] In January of 2007, McLachlan told Detective Robert Blazek what he knew about Miller's murder. (4 RT 1575, 1583-1584.) As a result, McLachlan was stabbed in Costa Mesa. (4 RT 1575-1576.)

cap and a soda can. (3 RT 1419-1421, 1430.) A nine-millimeter Luger casing was found on a concrete median approximately 15 feet from Miller's body. (3 RT 1412-1413, 1430.) There were tire impressions in the blood from a vehicle traveling eastward away from the body. (3 RT 1415, 1422-1423.)

Miller had suffered a gunshot wound to the right occipital area of the back of his head. (3 RT 1439-1440, 1446.) The bullet lacerated the cerebrum and cerebellum of the brain and lodged outside Miller's right ear canal after being deflected to the right. (3 RT 1440-1445, 1447-1448.) The absence of burning, singing, stippling or soot on the entrance wound showed the barrel of the gun was some distance from Miller's head at the time it was fired. (3 RT 1443-1444, 1447.)

Miller most likely lost consciousness immediately with death occurring minutes later. (3 RT 1444-1446.) Miller had fresh abrasions on his face which were consistent with his head striking the pavement. (3 RT 1439-1440, 1446.)

On the afternoon of March 11, Sergeant Michael Helmick was surveilling a stolen car parked in an alley behind an apartment complex on South Melrose Street in Anaheim. (3 RT 1451-1455.) Helmick was in plain clothes and driving an unmarked vehicle. (3 RT 1451.) He was being assisted by Officer Brian Santy who was piloting "Angel," an Anaheim Police Department helicopter. (3 RT 1454, 1473-1475.)

Rump entered the stolen car, drove out of the alley and double parked on Melrose. (3 RT 1455-1456, 1471, 1480; 5 RT 1905.) Lamb then emerged from the apartment complex, walked to the car and entered the passenger side of the vehicle. (3 RT 1457, 1470, 1477; 5 RT 1903.) While he was parked and waiting for Lamb, Rump kept looking in his rear-view mirror at Helmick. (3 RT 1457.)

As soon as Lamb got in the car, Rump made a quick U-turn. (3 RT 1458.) Helmick attempted to block Rump with his vehicle. (3 RT 1458.) However, Rump swerved around Helmick, driving over the curb, and continued southbound down Melrose. (3 RT 1458-1459.)

Rump then led Helmick and Officer Danny Allen (who had responded for assistance) on a high speed chase. (3 RT 1459-1461.) The officers lost sight of the stolen car after Rump turned onto Center Street. (3 RT 1461-1462.)

Santy, who remained overhead in the helicopter, observed Rump and Lamb abandon the stolen car and flee into a nearby apartment complex. (3 RT 1462-1464, 1475.) Helmick and Allen followed down a path to a two-story apartment building behind which Rump and Lamb had run. (3 RT 1462-1464.) Allen, who had his back to the apartments, was wearing a black police raid jacket which read "Police" in yellow on the back with a smaller "Police" in yellow on the front. (3 RT 1465.)

As Allen and Helmick approached the stairwell to the building, Lamb fired two shots at Helmick from an upper apartment balcony. (3 RT 1465-1466, 1470, 1477; 5 RT 1903.) Santy warned Helmick and Allen not to go upstairs since Lamb remained in a crouched position with a stainless steel handgun pointed at the stairs. (3 RT 1467-1468, 1478.) Helmick and Allen ran for cover. (3 RT 1467-1468, 1478.)

Upon reaching a point of cover, Helmick repeatedly yelled, "Police officer, put your hands up and come on down." (3 RT 1468-1469.) Meanwhile, Lamb was fiddling with the gun at waist level. (3 RT 1479.) Thirty to sixty seconds later, Lamb tossed the gun over the balcony railing into a raised planter. (3 RT 1469, 1479-1480.)

Pursuant to Helmick's orders, Lamb then came downstairs, got down on the ground, crawled to him and was taken into custody. (3 RT 1470.)

Subsequently, Rump followed the officers' commands to come downstairs and was taken into custody. (3 RT 1470-1471, 1479.)

The gun tossed by Lamb into the planter was a stainless steel Browning semiautomatic handgun. (3 RT 1483-1485.) A triangular-shaped white bandanna was tied in a knot around the grip of the gun. (3 RT 1485-1486.) The gun was in a "ready to fire" position with the safety turned off, a loaded magazine of ammunition and the hammer back. (3 RT 1486.) However, a nine millimeter spent casing was jammed in the chamber. (3 RT 1484-1487.)

James Conley, a forensic services supervisor, explained that semiautomatic guns automatically eject expended casings after a bullet is fired, causing the slide to come forward to chamber a new live round of ammunition and cock the gun to fire again. (3 CT 1481-1482.) Since the gun was loaded with a magazine of ammunition, Conley opined that something – most likely the bandana – prevented the slide from ejecting the empty cartridge and chambering a new round.[14] (3 RT 1488-1489.)

In 2007, Rocky Edwards, a forensic firearm and tool mark examiner, test-fired Lamb's gun and compared the expended casing with the casing found near Miller's body. (5 RT 1807-1809.) Based on a microscopic comparison of the two, Edwards concluded that the expended cartridge from the murder scene was fired by Lamb's gun. (5 RT 1808-1809.)

d. Johnson's Prior Testimony from the Lamb/Rump Trial

After being of advised of his right against self-incrimination and declining the trial court's offer to appoint an attorney for him, Johnson elected to testify on Lamb's behalf in the guilt and penalty phases of the

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[14] The gun had a capacity for 14 bullets in the magazine plus one in the chamber. (5 RT 1807-1808.)

2007 Lamb/Rump trial. (4 RT 1604-1607, 1693-1694.) A redacted transcript of Johnson's prior testimony was read to the jury. (4 RT 1602-1606.)

In the guilt phase, Johnson testified that he went to Raphoon's party between 4:00 and 4:30 p.m. on March 8; he left the party with Miller to get heroin in Anaheim between 8:00 and 10:00 p.m.; he drove past a strip mall where Miller used a pay phone; he told Miller to hurry; he then drove Miller to an alley and parked his truck; as they were walking down the alley towards an apartment complex, he reached into his waistband, pulled out a gun and "blasted" Miller; he ran back to his truck; and he drove back to the party. (4 RT 1608, 1611-1617.)

Johnson testified that he was "pretty perturbed with" and "[r]eally had it with" Miller due to a problem related to some girls as well as the Fox interview, and had been mad at Miller for some time. (4 RT 1612-1617.) Johnson explained that, despite the network's attempts to disguise Miller, "everybody" knew it was him. (4 RT 1614-1615.) Raphoon's party was the first time Johnson had seen Miller since the broadcasting of the interview. (4 RT 1616.)

Johnson testified that, when he was driving Miller to Anaheim, he knew Miller would cease to exist before the night was over, but did not know exactly when it would happen. (4 RT 1662-1663.) When asked how it felt to be seated next to another human being he knew was going to die, Johnson replied, "I mean no feelings. He did wrong, he paid his price." (4 RT 1665.)

Johnson claimed that he ran into Lamb at a bar in Anaheim the following evening, gave Lamb the murder weapon after having "a quick beer," and told Lamb the gun was stolen. (4 RT 1622-1624.) Johnson had previously told Lamb's defense investigator, Gail Geco, that he gave Lamb

the gun because "Mexican gang members" were shooting at Lamb the prior evening and Lamb needed a weapon. (4 RT 1654.)

Johnson claimed he traded drugs for the gun about six months prior to the murder, but refused to identify who sold him the gun. (4 RT 1656-1657.) Johnson testified that he had kept the gun in a hiding place which he refused to reveal, and that he had access to that location from state prison through phone contacts. (4 RT 1658-1659.) After Johnson testified that the murder weapon had one safety on the left side and held eleven bullets, the prosecutor asked whether he was looking at Lamb and motioning with his fingers during this question. (4 RT 1660-1661.) Johnson then said he did not know how may safeties were on the gun. (4 RT 1661.)

Johnson denied telling anyone that Lamb and Rump were involved in the murder. (4 RT 1680-1681.) However, he admitted that he told a defense investigator, "They got out of their vehicles and scored," in relation to the Miller shooting.[15] (4 RT 1681-1682.)

Johnson and Joseph Govey were cellmates at one time. (4 RT 1637.) Johnson was assaulted in prison, which left a scar that ran from the center of his spine across the right side of his neck to just below the ear. (4 RT 1628-1629.) Johnson denied that "Cornfed," a "shot caller" for the Aryan Brotherhood, ordered him to kill Govey and Miller presented an opportunity to get himself "out of the hat" by setting up his two

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[15] Johnson waited until 2006 to make a statement about the murder to Lamb's investigator, Gail Geco. (4 RT 1629-1631.) Johnson testified that he had previously talked to Rump's investigator about the murder after receiving the investigator's number from "mutual friends" who were "the white people." (4 RT 1647-1649.) However, he told Geco that he never told anyone other than her of his involvement in Miller's murder. (4 RT 1651.) When Detective Blazek tried to interview him in October of 2002, Johnson told him that he had nothing to say to him about Miller's murder. (4 RT 1633.)

"homeboys" to kill Miller. (4 RT 1637-1639.) Johnson denied telling Geco during his interview about Miller's murder that "[t]his should clear the books." (4 RT 1665-1666.)

At the time he testified at the Lamb/Rump trial, Johnson was serving a 45 years to life prison sentence and had not yet been arrested for or charged with Miller's murder. (4 RT 1627.) In 2004, Johnson and Rump were cellmates in the county jail facility while Rump was awaiting trial for the Miller murder and Johnson was waiting to enter a plea in another case. (4 RT 1639-1640.) Johnson, Rump and Lamb smiled at and were friendly with each other at a hearing in May of 2007. (4 RT 1640-1642.)

Johnson refused to answer any questions about gangs, but explained the meaning of numerous tattoos on his body which included swastikas and "white pride." (4 RT 1625-1628.) Johnson admitted being in a photographs with white supremacist gang references and "PENI" over his head. (4 RT 1635, 1659-1660.) After his first court appearance following his arrest on this case, Johnson turned to the audience and gave a "Heil Hitler salute." (4 RT 1631.) In custody, Johnson wrote letters referring to the court as "the house of Jews," which meant "a fucked-up system." (4 RT 1631-1632.)

In the penalty phase, Johnson essentially repeated his guilt phase testimony. (4 RT 1694-1725.) He elaborated that Miller "was a dead man" after the Fox interview because he was "giving up information that – that was detrimental to gang activity" of PENI, and explained that Miller dishonored his gang and divulged secrets to its enemies, including the court system. (4 RT 1701, 1767-1768.) Johnson stated that he "take[s] care of business" and would kill "anyone like [Miller] that doesn't abide by the rules." (4 RT 1701-1703.) Johnson admitted that he and Lamb were previously housed in the same county facility in 2006, where they were "dayroom partners" for about 30 days. (4 RT 1763-1765.)

e. Gang Expert Testimony

Eric Kraus, a parole agent with the California Department of Corrections, was assigned to the Santa Ana parole office and specialized in supervising white supremacist parolees. (3 RT 1490-1493.) Kraus ran the Skinhead Information Network, an organization that met on a monthly basis to share intelligence regarding white supremacist gang members. (3 RT 1493-1494.)

Kraus testified that only a small percentage of the overall prison population affiliates with gangs, and it is not necessary to join a gang to survive in prison. (3 RT 1494.) Moreover, the Department of Corrections assists prisoners who want to leave gangs through "debriefing" and can provide special housing for their safety for the remainder of their prison sentences. (3 RT 1495-1496.)

Kraus knew Johnson since 2000. (3 RT 1496.) At one of their early meetings, Johnson told Kraus that he was ordered to assault Govey while they were prison cellmates, but refused because they were friends and he did not want a third "strike" conviction. (3 RT 1501-1502.)

In early 2001, Johnson was formally assigned to Kraus's specialized parole caseload. (3 RT 1496-1497.) Kraus supervised Johnson for approximately three years. (3 RT 1497.) During that time, Johnson was a documented associate of the Nazi Low Riders. (3 RT 1503-1504.)

On May 24, 2001, Kraus arrested Johnson on a parole violation. (3 RT 1497-1499.) One week later, Kraus learned that Johnson was assaulted in Chino State Prison. (3 RT 1499.) Another prisoner had cut Johnson in the back of the neck with a razor while they were in one of the prison yards. (3 RT 1499.) Johnson requested that Kraus come speak to him at the prison. (3 RT 1499.)

Kraus and Costa Mesa Lieutenant Clay Epperson met with Johnson at Chino State Prison. (3 RT 1499-1500.) Johnson discussed the razor attack,

showed Krauss his wound and expressed concerns for his safety.[16] (3 RT 1501.) Johnson said he was assaulted "because he refused to follow a green light order" from an unspecified source to kill Govey. (3 RT 1518-1519.) Kraus testified that such an order could only come from "a shot caller of the Aryan Brotherhood or Nazi Low Riders Criminal Street gang." (3 RT 1519.) When pressed, Johnson indicated that his current gang affiliation was with PENI, "if anything."[17] (3 RT 1503-1504.)

Epperson also had training, experience and expertise in criminal street gangs, including white supremacist gangs in Costa Mesa. (5 RT 1851-1858.) Epperson testified that white supremacist gangs are not turf-oriented like most street gangs.[18] (5 RT 1858-1859.) Instead, hatred of non-whites, Jews, law enforcement and the criminal justice system binds white supremacists together and provides group cohesion. (5 RT 1860, 1873-1874.) White supremacists tend to prey on their own community with self-serving crimes that benefit them and their gang, rather than hate crimes. (5 RT 1859.)

Tattoos are extremely important and a matter of pride in white supremacist gang culture. (5 RT 1866.) White supremacists have adopted Nazi and anarchy symbols to represent themselves. (5 RT 1866-1867.)

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[16] Johnson also apologized to Kraus for previously stating he would not cooperate with him and promised to have a good working relationship with him. (3 RT 1500-1501.)

[17] Krauss had received information confirming that Johnson was currently a member of PENI, which included correspondence from Johnson identifying himself with PENI. (3 RT 1504-1505.)

[18] Epperson explained that, unlike minority communities, white supremacists are not forced into a gang by neighborhood pressures or family history. Membership in a white supremacist gang is largely a matter of choice. (5 RT 1870.) Epperson agreed with Kraus that not everyone who goes to prison has to join a gang. (5 RT 1863.)

Membership in white supremacist gangs is typically gained through the commission of crimes outside or within the prison system. (5 RT 1863-1864.) Falsely claiming to be a member of a white supremacist gang would subject an individual to serious consequences from the gang such as being beaten or killed. (5 RT 1864.)

White supremacist gangs have a hierarchy where one's status is elevated by committing notable acts of violence for the benefit of the gang or himself, by engaging in criminal enterprises to earn money for the gang, and by serving high ranking members. (5 RT 1870-1871.) Gang member status ranges between being a "hanger-on" and a "shot-caller," based on the amount of crime and violence the individual has contributed to the gang. (5 RT 1864-1865, 1870-1871.) Thus, it is expected that criminal successes will be boasted and known to others in the gang. (5 RT 1874-1875.)

Respect is of great importance in white supremacist gang culture. (5 RT 1865.) Respect is earned by standing up for the gang through criminal activity and violence. (5 RT 1865.) Perceived disrespect from civilians or other gang members is likewise met with violence. (5 RT 1865-1866.) Backing up fellow gang members and witness intimidation are also important in white supremacist gang culture. (5 RT 1873-1874.)

White supremacists have a disciplinary mechanism for members who fail to do a task ordered by a higher ranking member, embarrass the gang, show weakness, do not stand up for the gang, or run away from a fight. (5 RT 1871.) An act which is viewed as disrespectful of the gang's leadership would require the highest sanction which could be death. (5 RT 1872.) Payback for an act of disrespect might be immediate or occur weeks, months or years later. (5 RT 1872.)

The Aryan Brotherhood (also referred to as "AB" or "the Brand") is the oldest white supremacist gang in the California prison system.[19] (5 RT 1867.) Modeled after the Mexican Mafia, the Aryan Brotherhood is well organized, successful in criminal enterprises, able to inflict violence, and "call[s] shots for most all other white racist gangs." (5 RT 1867-1868.)

PENI was formed in 1986 by followers of a punk rock band and transitioned into a white supremacist street and prison gang. (5 RT 1876-1877.) Mazza, Stringfellow, Rizzo and Miller were key founders of PENI. (5 RT 1877.) At the time, Mazza, Stringfellow and Rizzo were also Aryan Brotherhood associates.[20] (5 RT 1878.) Mazza has been the undisputed leader of PENI since the early 1990's. (5 RT 1877-1878.) Mazza intended to run PENI as a money-making operation and become a member of the Aryan Brotherhood – both of which he has accomplished. (5 RT 1878.)

In 1996, the Nazi Low Riders which had been the most prominent white supremacist gang below the Aryan Brotherhood saw their power start to decline due to events in the state prison system. (5 RT 1880-1881.) PENI rose to fill the power vacuum and grew rapidly.[21] (5 RT 1881.) By March of 2002, PENI had approximately 200 members. (5 RT 1881.)

PENI refers to itself as Public Enemy Number 1, PDS and PENI Death Squad. (5 RT 1881.) PENI uses racist hate symbols such as the number 14 to represent the 14-word phrase, "We must secure the existence of our race and the future for white children," and the number 88 which represents the letters HH for Heil Hitler as well as David Lande's 88

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[19] In August of 2009, there were approximately 42 validated members and 150 validated associates of the Aryan Brotherhood in the state prison system. (5 RT 1819-1820.)

[20] A number of PENI gang members have been validated as Aryan Brotherhood associates within the prison system. (5 RT 1880.)

[21] The Nazi Low Riders now tend to blend with PENI, and the two gangs work together. (5 RT 1859.)

precepts upon which white supremacist ideology is based. (5 RT 1881-1886.)

PENI targets law enforcement, prison officials and prosecutors for violence. (5 RT 1883.) Its members have been arrested with personal identifying information of law enforcement personnel. (5 RT 1883-1884.) PENI's money-making activities include identity theft, passing fraudulent checks and drug trafficking. (5 RT 1882-1883, 1901.)

In its criminal enterprises, PENI uses female associates as well as individuals who are manipulated through illegal drugs or intimidation. (5 RT 1875-1876.) Women, referred to as "twists" and "twirls," are frequently used for communication purposes. (5 RT 1822.)

Epperson testified that PENI's central theme "would be self-serving thuggery and violence," "the use of violence is the measure of a man within PENI," and "[v]iolence is their stock and trade." (5 RT 1886.) In light of its primary activities and prior criminal convictions of its members, Epperson opined that PENI was a criminal street gang within the statutory definition of the Penal Code. (5 RT 1896-1901.)

Prior to 2002, Johnson was a member of the Nazi Low Riders in good standing. (5 RT 1916-1917.) However, Johnson got into trouble with the Nazi Low Riders due to his unwillingness to carry out the order to kill Govey who fell out of favor with the Aryan Brotherhood. (5 RT 1823, 1916-1917.) Johnson was able extricate himself from the situation by transitioning from the Nazi Low Riders to PENI in March of 2002. (5 RT 1917.) Johnson "pretty much walked in" to PENI with good standing despite his prior problems with the Nazi Low Riders. (5 RT 1917.)

Based on prior personal contacts with Johnson, the Chino State Prison interview, discussions with other law enforcement officers, a prior conviction for dissuading a witness for the benefit of a street gang, Johnson's prior testimony from the Lamb/Rump trial, Johnson's "House of

Jews" statement and Heil Hitler salute in open court, Johnson's prior reference to Mazza as his employer, recorded phone calls in which Johnson sent out orders on behalf of PENI, and his multiple white supremacist and PENI tattoos, Epperson concluded that Johnson was a member of PENI in March of 2002. (5 RT 1907-1911, 1917.) Johnson's tattoos include an "SS" bolt on his neck, "white" and "pride" on the back of his arms, demon figures around a swastika on both legs, a swastika on his stomach, and "Fuck C.D.C." on the back of his head.[22] (5 RT 1911-1916.)

By the mid to late 1990's, Miller was no longer "in the main mix" of PENI, was distanced and not well liked by other members, and had been marginalized within the gang's structure. (5 RT 1888.) Miller's Fox news interview was aired in back-to-back segments in February of 2001 when Mazza and Rizzo were on trial for conspiracy to commit murder. (5 RT 1894-1896.) As a result of the broadcast and its "very bad timing," the PENI leadership put out "a green light on" Miller's life. (5 RT 1896.)

In March of 2002, Lamb and Rump were active PENI members. (5 RT 1902-1906.) Prior to Miller's murder, Lamb and Rump were paroled from prison. Shortly before the shooting, the Costa Mesa Police Department learned of the PENI threat against Miller's life as a result of the Fox news segments, and attempted to contact him. (5 RT 1890, 1894-1895.)

Orange County Sheriff's Deputy Seth Tunstall testified how inmates' incoming and outgoing phone calls and mail are screened and recorded at the Theo Lacey county jail facility. (5 RT 1810-1817.) Tunstall also explained how inmates use "kites" to communicate with each other in writing within the jail system and use the phone system (including three-

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[22]Johnson already had substantial white supremacist tattoos prior to going to prison in 1989. (5 RT 1918.)

way calls) to pass information and messages to people on the street. (5 RT 1820-1821.)

On May 18, 2007, four days after opening statements in the Lamb/Rump trial, the jail monitored a phone call between Johnson and Rebecca Mangan, who was Lamb's former girlfriend. (5 RT 1824-1828; 16 CT 4199.) They discussed a local news article reporting that Lamb's attorney had referred to Johnson as "the boogie man," which Johnson raved about as great publicity. (16 CT 4200-4203.) Johnson told Mangan that Govey had been stabbed at Chino State Prison as a result of an "ongoing thing with the ... Big Giant Heads" and "the BRAND," commenting that it should "be a done deal now" after 15 years.[23] (16 CT 4204-4205.) Johnson also said he has to "be moving and "make things happen [.]" (16 CT 4206.)

On June 5, 2007, the jail monitored a call between Johnson and Jill Walker. (5 RT 1830; 16 CT 4208.) Johnson told Walker that he wanted fingers broken, hands cut off, hands torn up and teeth knocked out in reference to "a rat" who was "trying to tell on [him] for this case right here." (16 CT 4209-4210.) Johnson further stated that he was "going to go on a mission and stab somebody." (16 CT 4210.)

On September 11, 2009, the jail monitored another phone call between Johnson and Mangan. (5 RT 1831-1832; 16 CT 4212.) Johnson mentioned an article about PENI and America's top ten most wanted gang members in the Orange County Register. (16 CT 4213.) Johnson said a publication wanted to interview him about gang activity, but he told the reporter, "[T]hat's why I'm down here for court right now, for killing ... the

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[23] Tunstall testified that Govey had indeed been stabbed in Chino State Prison, and that the reference to the "Big Giant Heads" meant the Aryan Brotherhood. (5 RT 1828-1830.)

last son of a bitch that did that, why would I want to do that?" (16 CT 4214.)

When given a hypothetical of the facts of the case including Johnson's prior testimony, Epperson opined that Miller's murder was done for the benefit of, at the direction of and in association with a gang such as PENI, and promoted, furthered and assisted in the criminal conduct of its members by regulating the activities of those within the gang's sphere of influence, enhancing the status of the individual setting up the execution, and allowing one gang member "to take the fall for others" and garner respect when he was already serving time for another crime. (5 RT 1919-1921.)

2. Defense Evidence

Johnson did not present any evidence in the guilt phase. (5 RT 1931.)

B. Penalty Phase

1. Prosecution Evidence

a. Prior Violent Conduct

(1) The Clyde Nordeen Murder

On April 19, 1991, Johnson, John Alder, Ronald Rostamo and other inmates were assigned to a wood-cutting job on the China Hill work area of Folsom State Prison.[24] (6 RT 2177.) Inmates assigned to work on China Hill are dressed in denim pants and long-sleeved blue chambray shirts with usually a white T-shirt underneath. (6 RT 2169.)

[24] Alder testified about the Nordeen murder in a pre-trial conditional examination at the request of the prosecutor. (6 RT 119-122.) Johnson reserved objections to the testimony. (6 RT 120.) However, the conditional examination testimony was not presented to the jury.

At approximately 11:00 that morning, Rostamo left the work site to go to the bathroom.[25] (6 RT 2227.) When he returned about ten minutes later, Rostamo overheard Alder tell Johnson, "[H]e's not dead yet." (6 RT 2226-2228.) Alder picked up a wooden pick handle from the wood pile and told Johnson that there was another handle on the ground that "would work." (6 RT 2228.) Rostamo then observed Johnson and Alder walk down a pathway towards the rear of a shed and disappear from view behind a small trailer. (6 RT 2229.) Johnson and Alder were just wearing their white T-shirts and blue jeans at the time. (6 RT 2229.)

Two to three minutes later, Johnson and Alder walk back up the pathway together, checking each other for blood stains. (6 RT 2229-2230.) Johnson told Rostamo, "[G]ive me your T-shirt, mine has blood on it." (6 RT 2230.) Rostamo complied because he was afraid of Johnson. (1 RT 2230.) Johnson and Rostamo entered the shed, Johnson took and put on Rostamo's T-shirt, and Rostamo was left wearing his long-sleeved blue shirt. (6 RT 2230.) Johnson and Alder hid their original T-shirts before returning to work with Rostamo. (6 RT 2230-2231.)

Ten to fifteen minutes later, Correctional Officer Marshall Stewart noticed blood running down the back side of China Hill along a fence line. (6 RT 2170; 2230.) Stewart followed the bloody trail to the body of inmate Clyde Nordeen, which was stuffed between the rear corner of the shed and

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[25] During the prison investigation, Sergeant Steven Vance interviewed Rostamo. (6 RT 2226.) Rostamo was very nervous, apprehensive and initially reluctant to give Vance any information. (6 RT 2227.) Upon further questioning, Rostamo told Vance about his observations of Johnson and Alder on the morning of the murder. (6 RT 2227-2231.) At trial, Rostamo testified that he did not recall any of his prior statements to Sergeant Vance. (6 RT 2200-2204.) Accordingly, Rostamo's prior statements were admitted through Vance's testimony.

some large granite blocks.[26] (6 RT 2170-2171, 2230-2231.) Nordeen "had been beaten pretty badly." (6 RT 2171.) There were large holes above his eyes, and he was bleeding from the back of his head. (6 RT 2171-2172.) The shed had blood splatter on it. (6 RT 2174-2175.) Nordeen's dentures and eyeglasses were on the ground near his body. (6 RT 2216.)

A concrete-filled metal pipe was found approximately 65 feet from Nordeen's body in some tall grass. (6 RT 2216-2217, 2223.) A wooden pick ax handle was lying approximately 82 feet away from the body in the same general area as the metal pipe. (6 RT 2217.) Both objects had blood on them. (6 RT 2223.) Another wooden pick ax handle and a wooden shovel handle were also found nearby. (6 RT 2217.) A sliver of wood matching the second pick ax handle was found underneath Nordeen's body. (6 RT 2216, 2220, 2224.) Johnson's and Alder's T-shirts and other clothing were discovered underneath the storage trailer. (6 RT 2218, 2222, 2231.)

When Johnson and Alder returned to the lower yard, Correctional Officer Robert Buda noticed that they did not have their long-sleeved blue chambray shirts. (6 RT 2212.) When asked why, Johnson and Alder stated that they had taken their shirts off when they were on China Hill and were not allowed to retrieve them. (6 RT 2212.)

Nordeen's autopsy was conducted the next day. (6 RT 2187-2189.) Nordeen suffered extensive blunt force trauma to his head and face, which consisted of 16 different external injuries and "very extensive" internal injuries. (6 RT 2189-2194.) There was a large fracture on the right top portion of his skull as well as fractures on both sides of the frontal bone. (6 RT 2192.) The tops of his eye sockets were broken into multiple pieces. (6 RT 2192.) Several areas of brain tissue were torn, especially on the upper

[26] Nordeen was in custody for molesting a child. (6 RT 2234.)

right cerebral hemisphere. (6 RT 2192-2193.) There were no defensive wounds. (6 RT 2190.)

Blood and vomit in Nordeen's nostrils were indicative of direct trauma to the nose and sévere brain injury. (6 RT 2190.) The cause of death was "blunt craniocerebral trauma" from multiple blows to the head. (6 RT 2194.) Death was not immediate, and unconsciousness did not occur until a number of the injuries had been inflicted. (6 RT 2194-2195.)

The Nordeen case was referred to the Sacramento County District Attorney, but no charges were filed. (6 RT 2232.) Alder and Johnson were transferred to an administrative segregation unit because of the murder. (6 RT 2232, 2238-2239.) At the Lamb/Rump trial, Johnson testified that Nordeen was beaten to death in 1991 with a pick ax handle, a metal bar, sticks and metal tube in his presence. (7 RT 2462.)

(2) The Cory Lamons Murder

The weekend before April 4, 2004, Sara Lenard and her boyfriend, James Hartman, began moving into a Huntington Beach apartment which belonged to Patrick Carroll. (7 RT 2405-2406.) The two-story apartment had an attached garage with a door leading into the hallway on the first floor. (7 RT 2406, 2433-2434.)

At approximately 4:00 in the afternoon of April 4, 2004, Lenard was upstairs with Hartman in the apartment when she decided to go downstairs to get something to eat. (7 RT 2406-2408.) Suzanne Miller, Johnson and two other men Lenard did not recognize were downstairs. (7 RT 2408-2409, 2411.) The situation seemed "very weird." (7 RT 2410.)

Johnson was holding a hammer in his hand and standing close to the door to the garage with his back against the hallway wall. (7 RT 2410-2411.) When Lenard asked what was going on, Suzanne Miller said, "[T]his isn't going to be good." (7 RT 2412.)

Cory Lamons then entered the apartment from the garage, and Johnson hit him in the head with the hammer. (7 RT 2412-2413.) Johnson struck him "a lot" of times while Lamons screamed, "I didn't do anything. I didn't do anything." (7 RT 2413.)

Lenard ran out the front door as Lamons continued to scream in terror. (7 RT 2413-2414.) A minute or two later, the screaming stopped and Lenard went back inside to get Hartman. (7 RT 2414.) There was a lot of blood in the hallway and on the wall. (7 RT 2414-2415.) Lamons was lying motionless on the floor. (7 RT 2415.)

Lenard ran upstairs, grabbed Hartman and left the apartment while Suzanne Miller was scrubbing blood off the wall. (7 RT 2415.) When Lenard and Hartman returned to the apartment a few hours later to get their property, two different men were there who said, "[K]eep your mouth shut or something like this will happen to you." (7 RT 2416-2417.) The blood in the hallway had all been cleaned. (7 RT 2417.)

On the evening of April 6, 2004, Huntington Beach Detective Steven Mack and other officers were conducting a surveillance of Johnson who was driving a Ford pickup truck in the City of Riverside. (7 RT 2424-2427.) Suzanne Miller was in the passenger seat. (7 RT 2427.) At Mack's request, California Highway Patrol officers effected a traffic stop. (7 RT 2426.)

In the bed of Johnson's truck, there was a pile of wood covered with gray carpeting. (7 RT 2427.) As Mack approached the rear of the truck, he detected the odor of decomposing flesh. (7 RT 2427-2428.) Under the stack of various types of wood, Lamons' body was found. (7 RT 2428.) The body was wrapped in a burgundy material and covered with trash bags and a black bed sheet, which had strips of a blue bed sheet tied around it to provide leverage for lifting. (7 RT 2428-2431, 2439.)

Lamons had visible bruising on his forehead, a swollen left eye, a laceration below the right eye, swollen lips, bruising on the knuckles of both hands, and nickel-sized round bruises on the upper part of both legs. (7 RT 2431-2432.) Lamons' abdomen was greenish-blue in color which was indicative of the internal organs decomposing 48 to 72 hours after death. (7 RT 2432.)

The County Coroner's office was unable to determine the precise cause of death due to a very high level of drugs in Lamons' body in addition to the blunt force head injuries. Thus, the cause of death was stated as "blunt force head injuries with methamphetamine and amphetamine intoxication." (8 RT 2503-2504.)

On April 8, 2014, Mack searched the Huntington Beach apartment pursuant to a search warrant. (7 RT 2433.) There were numerous bleach stains with dark spots in the middle of them on the hallway carpet. (7 RT 2434-2435.) A claw hammer was found on the floor of an upstairs bedroom. (7 RT 2435, 2439-2440.) The striking portion of the hammer head was consistent with the round bruises found on Lamons' body. (7 RT 2440.) In the garage, there were remnants of a blue bed sheet which matched the binding material on the body. (7 RT 2437.)

In the Lamb/Rump trial, Johnson testified that he beat Lamons to death primarily with the claw hammer and with his fists. (7 RT 2448, 2454, 2457-2458, 2461.) Johnson admitted that he wrapped the body in the condition the officers found it. (7 RT 2460.)

Johnson testified that the reason he killed Lamons was "[b]ecause he had it coming," because Lamons was "a dope fiend" and stealing things, that "maybe" it had something to do with Lamons "ripping off" a girl or some girls, and"[i]t was other gang-type stuff or whatever you want to call it." (7 RT 24448, 2458-2459.) Johnson testified, "Cory Lamons' mishap is

running into me and pissing me off," and proclaimed, "Because I am Billy Joe Johnson." (7 RT 2460.)

Johnson, Suzanne Miller, Jason Karr, Erin Lee and Carroll were charged with Lamons' murder. (7 RT 2449-2450.) Johnson admitted it was "possible" he faced the courtroom gallery and gave a Heil Hitler salute after his arraignment. (7 RT 2459.)

Johnson also admitted that, while awaiting trial for Lamons' murder, he "possibly" wrote letters to "the homeboys" telling them to "always have the hammer at the ready." (7 RT 2454, 2461.) Johnson testified that any and all weapons are his weapons of choice. (7 RT 2461.)

On June 30, 2006, Johnson pled guilty to second degree murder, street terrorism, and dissuading a witness by force or threat with gang enhancements on behalf of PENI. (7 RT 2451-2452, 2460, 2463-2464.) He was sentenced to 45 years to life in state prison. (7 RT 2458, 2464.)

(3) The Residential Robbery of George Troutman

Virgil George Troutman knew Johnson since childhood. (6 RT 2157-2158.) Gary Smith was a mutual friend of theirs. (6 RT 2158.) Troutman resided in an apartment on West 18th Street in Costa Mesa. (6 RT 2158.) Johnson was paroled from Tehachapi State prison on July 29, 1984. (6 RT 2121-2122.)

At approximately 11:00 p.m. on April 22, 1985, Troutman was leaving his apartment with Smith when Johnson, Gerald Schaffer and Henry Rogers burst inside.[27] (6 RT 2158-2159.) Johnson and his cohorts demanded money and drugs, and started pushing around Troutman and

[27] Troutman knew Schaffer and Rogers and had no prior quarrels with them. (6 RT 2160.)

Smith.[28] (6 RT 2159-2161.) Schaffer punched Troutman in the right eye, which left a scar. (6 RT 2161.)

Troutman and Smith were told to empty their pockets. (6 RT 2162.) Johnson, Schaffer and Rogers took various valuables, including a diamond ring and some small change from Troutman. (6 RT 2161.) As they were leaving, Johnson and his cohorts threatened to kill Troutman if he went to the police. (6 RT 2161-2162.)

Troutman and Smith armed themselves with baseball bats, gathered some friends, and looked for Johnson, Schaffer and Rogers around the neighborhood, but did not find them. (3 RT 2162-2163.) Troutman then reported the incident to the police. (6 RT 2108-2109, 2162-2163.)

On April 24, 1984, Johnson called his parole agent, Michael Teichner, and said he had struck Troutman during the April 22 incident. (4 RT 2122-2123.) Teichner told Johnson to turn himself in to the Costa Mesa Police Department. (6 RT 2123.)

The following day, Johnson turned himself in and was arrested. (6 RT 2112-2114, 2123.) Johnson told Officer Matt Collett that Troutman was a drug dealer and that one of the reasons he was angry with Troutman was because he sold cocaine to a twelve year old boy.[29] (6 RT 2114-2115.)

(4) The Robbery of Cathy Brandolino

In the early morning hours of April 1, 1989, Cathy Brandolino and her friend, Linda Nguyen, went to breakfast at a Denny's restaurant in Costa Mesa. (6 RT 2130-2131, 2138.) After they finished eating, Nguyen walked through the parking lot towards her car when a man named

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[28] Troutman was previously a drug dealer, but had "turned a new leaf" and was no longer selling drugs by 1985. (6 RT 2159, 2164-2167.)

[29] Troutman testified that he previously used cocaine, but never sold cocaine to a child or anyone else. (6 RT 2164.)

Bennett[30] approached and asked her what time it was. (6 RT 2132.) Nguyen told Bennett that she did not have a watch. (6 RT 2132.)

When Brandolino subsequently exited the restaurant, Bennett asked her the same question. (6 RT 2132-2133, 2138, 2140.) Meanwhile, Johnson pulled up in a truck with its passenger door open and stopped on the other side of them. (6 RT 2132-2133, 2135.) Bennett suddenly lunged towards Brandolino, grabbed her purse off her shoulder, jumped into Johnson's idling truck, and shut the door. (6 RT 2133, 2138-2139.)

Brandolino and Nguyen held onto the truck in an attempt to retrieve the purse. (6 RT 2134, 2139.) However, Johnson drove away, forcing Brandolino and Nguyen to let go of the truck. (6 RT 2134, 2139.) Brandolino suffered a minor laceration at the base of her left ring finger which bled a little. (6 RT 2125-2126.)

Officer Michael Cacho was dispatched to the Denny's parking lot, obtained statements from Brandolino and Nguyen, and broadcasted the license plate and description of Johnson's truck. (6 RT 2125-2127.) Officer Clay Epperson stopped the truck and detained Johnson, who was still driving, and Bennett, the passenger.[31] (6 RT 2127-2128.)

(5) The Reckless Evading of a Peace Officer

At 9:30 a.m. on October 29, 1994, Officer Tom Dare was patrolling an area on the east side of Garden Grove where residential burglaries had been reported. (6 RT 2288-2290.) Dare observed a white car driven by

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[30] No first name for Bennett was provided. (6 RT 2128.)

[31] Brandolino and Nguyen positively identified the truck. (6 RT 2128.) Brandolino identified Bennett as the man who took her purse. (6 RT 2128.) Nguyen was unable to positively identify Bennett. (6 RT 2128-2129.) Nguyen did not recognize Johnson's face, but told Cacho that the checkered shirt Johnson was wearing was "just like the one that the driver of the vehicle was wearing[.]" (6 RT 2129.)

Johnson make a quick and erratic turn into a residential driveway on Volkwood Street. (6 RT 2290, 2295-2296.) Dare ran the license plate, which came back as belonging to a recently impounded vehicle.[32] (6 RT 2291.)

Dare drove slowly past the residence and noticed that Johnson did not exit the car. (6 RT 2291.) Dare decided to investigate and made a U-turn. (6 RT 2292.) Meanwhile, Johnson had exited the driveway and was traveling southbound on Volkwood. (6 RT 2292.) Dare followed Johnson. (6 RT 2292.)

Johnson drove 40 miles an hour and ran a stop sign. (6 RT 2292.) When Dare activated his patrol car's overhead lights to conduct a traffic stop, Johnson accelerated to 75 miles per hour through the residential neighborhood. (6 RT 2292.) Dare activated his siren and advised dispatch that he had a pursuit. (6 RT 2293.) Johnson ran another stop sign without braking, skidded erratically, sped towards a house where young children were playing in the front yard, pulled into the driveway, slammed on his brakes stopping a foot away from a palm tree and the garage, exited the car and fled on foot, jumping the fence into the back yard. (6 RT 2293, 2297.)

Dare established a perimeter until other officers arrived. (6 RT 2294.) They searched some of the yards, but eventually called off the search since the neighborhood was not friendly to law enforcement and it appeared that Johnson had escaped into one of the homes. (6 RT 2294.) Dare found a wallet containing Johnson's driver's license on the front passenger seat of the abandoned car.[33] (6 RT 1195.) Dare also found a Department of Corrections letter addressed to Johnson in the car. (6 RT 2295.)

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[32] The car was not registered to Johnson. (6 RT 2299.)

[33] During the incident, Dare and Johnson looked at each other and Dare got " a pretty good look" at Johnson's face. (6 RT 2296.) Dare

(continued...)

(6) Additional Custodial Offenses

On June 4, 1991, Correctional Officer Susan Mireles was in the control booth of the administrative segregation unit[34] of New Folsom State Prison when she observed Johnson attack his cellmate named Settles.[35] (6 RT 2142-2144.) Johnson was standing over Settles and punching him with closed fists while Settles was seated with his back against the cell door. (6 RT 2144.) Mireles ordered Settles out of the cell and then closed the door to separate Johnson from him. (6 RT 2145.)

Five days later, Johnson admitted the assault at a disciplinary hearing, explaining that he wanted Settles out of his cell, and "threw him out" because he "couldn't take it anymore[.]" (6 RT 2150-2152.) Johnson lost 61 days of behavior credits, was counseled and reprimanded, and referred back to administrative segregation. (6 RT 2152.)

On the morning of May 22, 1992, Correctional Officer Andrew Gomez was in the control booth of the Secured Housing Unit (hereafter "SHU") in Corcoran State Prison when he heard Johnson shouting from his cell.[36] (6 RT 2267-2269.) Gomez observed Johnson's cellmate named Vlahos seated on his bunk with bloodstains on his shirt.[37] (6 RT 2269-2271.) Johnson told Gomez, "I am not gonna babysit this guy. Get him out of this cell. He fell down and he is bleeding all over." (6 RT 2270.)

(...continued)
testified that Johnson was the person depicted on the driver's license. (6 RT 2296.)

[34] Mireles explained that the administrative segregation unit "is like a jail within a jail" for inmates who have committed or are being investigated for crimes within the prison. (6 RT 2143.)

[35] No first name for Settles was provided. (6 RT 2143-2144.)

[36] Gomez testified that SHU is where dangerous or violent inmates are housed. (6 RT 2267.)

[37] No first name for Vlahos was provided. (6 RT 2269.)

Gomez ordered Vlahos out of the cell, and then removed Johnson. (6 RT 21271.) Johnson told a sergeant, "[H]e called me a punk, said he would beat my ass. He took a swing at me, so I hit him. He's crazy." (6 RT 2271.) Johnson was transferred to a different cell. (6 RT 2272.)

On July 2, 1992, Correctional Officer John Schuman observed Johnson attack an inmate named Agee in the SHU exercise yard of Corcoran State Prison.[38] (6 RT 2274-2278.) Johnson struck Agee on the head and shoulders with clenched fists, causing Agee to fall backwards. (6 RT 2278-2279.) After Agee fell, Johnson continued to hit him in the head. (6 RT 2279-2280.) Schuman did not see Agee do anything to Johnson to precipitate the attack. (6 RT 2278.)

When Johnson did not respond to verbal commands to stop fighting, Schuman fired a round from his gas gun in his direction. (6 RT 2280.) Johnson and Agee ceased fighting and lay on the ground in a prone position. (6 RT 2280-2281.) Agee then got up and began to assault Johnson who fought back. (6 RT 2281.) After another verbal order, Schuman discharged the gas gun again, forcing Johnson and Agee back to the ground. (6 RT 2282.) Agee received unspecified medical treatment. (6 RT 2282.)

On the afternoon of May 4, 1995, Correctional Officer Anthony Wren responded to "a man down call" in a housing area for gang members in the California Institute for Men in Chino (hereafter "C.I.M. Chino"). (6 RT 2302-2303.) In a two-man cell occupied by Johnson and Eugene Dowling, Wren observed Dowling lying on the cell floor bleeding profusely. (6 RT 2303.) Wren escorted Dowling from the cell for medical attention. (6 RT 2303-2304.)

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[38] No first name for Agee was provided. (6 RT 2278.)

Dowling had multiple deep cuts in his right shoulder, right hand, right forearm, chest and thigh. (6 RT 2304-2305.) Johnson had a laceration on his right hand which was consistent with the use of a razor blade as a weapon. (6 RT 2305.) Johnson's cell was searched, but no weapons were found.[39] (6 RT 2306.)

On the morning of September 15, 1995, Correctional Officer Joe Hinojos responded to a "man down" call in C.I.M. Chino. (6 RT 2310-2311.) In a cell occupied by Johnson and Antonio Young, Hinojos observed that Young had a head injury while Johnson had minor abrasions and bleeding on his left middle and ring fingers. (6 RT 2311-2313.) A search of the cell revealed no weapons. (6 RT 2313.)

On May 27, 1996, Correctional Officer Clinton Smith searched a cell occupied by Johnson and an inmate named Wagner in the administrative segregation unit of Corcoran State Prison.[40] (6 RT 2314-2315.) In the cell, Smith found two pieces of metal that he considered weapon stock and an inmate-manufactured handcuff key.[41] (6 RT 2316.) The two pieces of metal, which were about two inches long with one of them sharpened to a point, were discovered on Wagner's side of the cell. (6 RT 2317.) The handcuff key was found on Johnson's side of the cell.[42] (6 RT 2317.)

On the afternoon of November 27, 1996, Correctional Officer Randall Priest heard a commotion from a cell occupied by Johnson and an inmate named White at Corcoran State Prison.[43] (6 RT 2326-2327.) From his control booth, Priest observed Johnson standing over White, punching and

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[39] Wren explained how inmates move weapons between cells through "fish lines" made of paper products. (6 RT 2306.)

[40] No first name for Wagner was provided. (6 RT 2315.)

[41] Inmates in the administrative segregation unit are usually handcuffed for security purposes when moved. (6 RT 2316.)

[42] The two beds in the cell were side by side. (6 RT 2317-2318.)

[43] No first name for White was provided. (6 RT 2327.)

kicking him in the head and upper torso. (6 RT 2328-2329.) White was lying on the cell floor in a fetal position trying to fend off the attack. (6 RT 2328.)

Priest yelled at Johnson to stop, sounded an alarm, opened the cell door and ordered either Johnson or White to exit. (6 RT 2329.) However, Johnson continued to kick and punch White. (6 RT 2330.) After ordering Johnson a few more times and noticing that White was not responding or fighting back, Priest fired a non-lethal rubber baton at Johnson, which finally stopped him. (6 RT 2330.)

On June 28, 2002, Culinary Officer Richard Nava conducted cell searches in connection with a homicide that had taken place the previous day at C.I.M. Chino.[44] (6 RT 2333-2334.) As Nava approached one of the cells, Johnson yelled out in a loud voice: "[R]adio, radio, all wood pile, all wood pile and comrades. The sergeants are conducting – are taking interviews in the kitchen so you will not, I repeat, you will not go into the kitchen. And I mean no one."[45] (6 RT 2334-2336.) Johnson then "said, 'thank you,' and all the inmates in sequence afterwards automatically responded 'thank you.'" (6 RT 2335-2336.) When Nava asked Johnson what was going on, Johnson told him that none of the white inmates would be going to the kitchen for interviews. (6 RT 2337.) No white inmates participated in the interviews. (6 RT 2337.)

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[44] Johnson was not involved in the homicide which was being investigated. (6 RT 2337.)

[45] Nava explained that "wood pile" refers to the white inmates. (6 RT 2335.)

(7) Other Evidence

Recordings of Johnson's monitored phone calls in the Orange County Jail were played for the jury.[46] (7 RT 2471-2482; 8 RT 2485-2489.)

On April 28, 2007, Johnson spoke with Rebecca Mangan and Eric Snelson, a PENI gang member known as "Rabbit."[47] (7 RT 2471-2472; 18 CT 2499.) Mangan told Johnson that "Stomper" was stabbed by someone from USAS.[48] (18 CT 4600.) Johnson said USAS was "gettin[g] out of line," that he was going to "get one of them guys" when he was face to face with one of them for "jumpin[g]" someone in San Diego, that Mangan should tell "them" he will "meet them in the back field when he "come[s] back, and he was so irritated that he "want[ed] to chop their fuckin heads off." (18 CT 4600-4603.) Johnson directed Mangan to "[t]ell him I said go get one now." (18 CT 4604.)

On May 18, Johnson spoke with Mangan again. (18 CT 4742.) Johnson said he was "going straight ahead, full Monty," Mangan said "he" needed to know how Johnson got "the bullshit to him," and Johnson answered, "Oh, that, that was, at the fucking, uh, uh, Margaritaville," and, "Yeah, he, that's how, that's, yeah, Margaritaville, for sure." (18 CT 4743.) Johnson said the story was already "layed" and "hatched a long time ago," and Mangan said she did not know why "he" was forgetting. (18 CT 4744.)

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[46] Letters from Johnson to Wayne Marshall (a PENI affiliate known as "Bullet or "B"), from "Suzzy Q" to Johnson, and from Johnson to Aryan Bluemel were admitted into evidence, but apparently not included in the appellate record. (7 RT 2469-2470.)

[47] All subsequent date references within this portion of the Statement of Facts occurred in 2007 unless noted otherwise.

[48] "Stomper" was Karr, a PENI gang member who was stabbed six or seven times in state prison. (7 RT 2472.) USAS is the United Society of Aryan Skinheads, another white supremacist gang which had been at war with PENI for several years. (7 RT 2468-2469.)

On May 22, Johnson spoke with Jill Walker and Jason Cary, a PENI gang member known as "Bulldog." (7 RT 2473; 18 CT 4606.) Johnson told Walker to "grab his scooter" and "anything else that ain't nailed down," "take him down," "divvy it up when they're done," and "call the homeboy" to set up the guidelines. (18 CT 4607-4608.) Johnson told Cary to get touch with "the homeboy" on a secure line; Cary replied, "[I]f I know you, you make it happen;" and Johnson replied, "I want to make sure this thing happens." (18 CT 4609-4611.)

On May 22, Johnson also spoke with Jason Jones, a PENI gang member with a "PDS" tattoo on his neck. (7 RT 2473-2475; 18 CT 4613.) Johnson told Jones that he just talked to "the home skillet," "everything goes... from fucking head to toe," "there's a reason behind it," a "scooter" worth 30 thousand dollars was there, "she" would fill Jones in on all the details, and that Jones and his friends should have fun. (18 CT 4614-4616.)

On May 23, Johnson spoke to Walker again. (7 RT 2475; 18 CT 4618.) Johnson asked if she had talked "to the home boys" and got "everything established." (18 CT 4619.) Walker said she did, but "JJ did not want the bike." (18 CT 4619.) Johnson said he wanted the bike, there was also safe in the home, and he wanted "that fucking dude fucking taken care of." (18 CT 4619-4621.) Johnson told Walker to make a phone call to "HD," said there was probably guns and money there, and repeated that he wanted the "thirty thousand scooter." (18 CT 4624-4626.)

On June 2, Johnson spoke again with Walker and Cary. (7 RT 2476; 18 CT 4628.) Johnson said he would "smash that fucking fag," bust all of his fingers with a nutcracker and "fuck him up;" said he hates "rats" and pedophiles the most in the world; commented that "race trading" was "just fucking disgusting;" suggested a "smash and go"; said he would have to talk "on a clear line" and that "somebody needed to hear [his] voice" to "make it happen;" discussed getting everybody together; and told Walker to

"fucking shoot his knee caps." (18 CT 4629-4639.) Johnson then described to Walker "the new PENI sign," which he designed which included symbols for "white power," iron crosses and swastikas, and explained how it all added up to the number 88. (18 CT 4640-4644.)

On June 14, Johnson and Mangan discussed an article in the Orange County Weekly that featured Johnson's photograph and testimony in the Lamb/Rump trial. (7 RT 2476-2477; 18 CT 4646-4649.) They laughed about the article and photo, which they said was cool and funny. (18 CT 4649-4653.) Johnson mentioned a video about PENI gangs, murders, Miller, his "other guy" and "a bunch of other ones." (18 CT 4655-4656.)

About an hour later, Mangan arranged a phone call between Johnson and Lamb. (7 RT 2478; 18 CT 4660-4661.) Johnson told Lamb that charges had been filed against him; Lamb complained about someone talking to the Orange County Weekly; and Johnson mentioned his "stash place" and "hiding spot" which he would not reveal. (18 CT 4662-4665.) They discussed the Lamb/Rump trial; Lamb said he warned Rump about opening "to[o] many doors;" and Johnson said, "Yeah, yeah, don't start the Pandora box." (18 CT 4666-4667.) After referring to various individuals by their monikers, Johnson mentioned USAS, Lamb responded that he was "on top of that," and Johnson said that "little half pint just got one up there in Calapat" when there were "nine of them up there on the yard with us."[49] (7 RT 278-2479; 18 CT 4669-4678.)

Johnson and Mangan spoke to each other again that day. (18 CT 47479.) Johnson said he was going to "make 'em go all the way to the box" and prove that he "did it," and they laughed about him being called "the boogie man." (18 CT 4750-4752.)

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[49] Half Pint was the moniker of PENI gang member Scott Gillespie. (7 RT 2472.)

On July 9, Johnson and Mangan discussed how death row was "a better place" to serve life in prison. (7 RT 2479-2480; 18 CT 4682-4682.) Johnson stated, "[F]uck if anything[,] I'm gonna kill everything until they fuckin kill me, you know what I mean." (18 CT 4683.)

Later that day, Johnson spoke to Mangan again, and told her that it was "kinda like playing hangman ... [¶][¶] just fill in, fill in the blanks okay." (18 CT 4747.) Mangan then told Johnson that "the trigger" was gold, and Johnson said alright. (18 CT 4747.)

On July 29, Johnson spoke with his two brothers Carl and Bobby. (7 RT 2480-2481; 18 CT 4686.). Johnson talked about finding "some jobs" to get money, said he knew someone who would "do them," discussed taking mid-size cars, and said he had a crew but just needed "the piece work" done. (18 CT 4687-4691.)

On September 3, Johnson spoke with Mangan. (7 RT 2482; 18 CT 4693.) Johnson gave her a phone number for "that HB thing" and "CB," said he was "working on another one right now," and told her that he was going to put money on someone's "books" to make something happen." (18 CT 4694-4695.) Johnson said there was a Toyota at the residence, instructed Mangan to tell someone that "there's a whole gun cabinet as soon as he walks in the door," and asked her to get this "off the ground" and get "some momentum going" while he was working on another job. (18 CT 4695-4698.)

On September 10, Johnson and Mangan spoke again. (8 RT 2484-2485; 18 CT 4710.) Johnson said, "[N]ow we know that they know," "I hope they fucking cell me up with one 'cause I'm gonna kill him," someone was after PENI, and he needed to get in contact with "Half PP." (18 CT 4711-4712, 4716.) Johnson talked about "killing mother fuckers," and stated: "[W]hen they shut the hatch, that's it, you know what I mean, game set match, now it's on, anybody that fucking comes in my fucking, in, in

my range, and, and I don't like them, I'm killing them, period." (18 CT 4714-4717.)

On March 12, 2008, Johnson spoke with Andrea Metzger. (8 RT 2485; 18 CT 4719.) Johnson asked whether she got a letter regarding USAS out to "Patrick." (18 CT 4720.) Referring to the guys that jumped "three homies" in San Diego, Johnson said he would "smash them all until they fucking go blind." (18 CT 4720-4722.)

On April 5, 2008, Johnson and Govey spoke to each other. (8 RT 2486-2487; 18 CT 4724.) Johnson told Govey that, if he ever caught any of the guys who jumped his three "homies," he would be "playing soccer." (18 CT 4725-4726.) In reference to Miller's murder, Johnson told Govey that he "did it," "they" were trying to "pinpoint" others for it, and he did not appreciate them trying to take away his fame. (18 CT 4727.)

On July 29, 2009, a few weeks before trial, Johnson had a telephone conversation with Richard Briggs, Daniel Lansdale and an individual named Jason.[50] (8 RT 2488-2489; 18 CT 4729.) Johnson spoke of weeding out people that had nothing to with his "crew," and said that "it's all one team" and "all about the white thing." (18 CT 4730.) Johnson talked about "back up," regrouping and "business," explained that there were no girls in PENI, and said, "I don't give a fuck about no bitch, I don't give a fuck what the fucking bitch said I don't care" unless it is someone's wife speaking for him. (18 CT 4731-4733.) He complained about people committing crimes while claiming to be PENI when they were not members of the gang, and said two individuals "walked over the tier" and off the "yard" at Calipatria

[50] Lansdale was a PENI gang member known as "Danny Boy," while Briggs was a skinhead affiliate who was not in any specific gang. (8 RT 2487-2488.)

State Prison because no one was "paying attention to what was going on."[51] (18 CT 4734-4737.)

In his prior testimony from the Lamb/Rump trial, Johnson admitted that he was caught multiple times in possession of deadly weapons in prison, he retained contacts on the outside while in the Orange County Jail, Mangan set up phone calls for him to communicate with other people, he "possibly" attempted to set up home invasion robberies while in custody, and he "probably" "put out a hit" to have people he did not like killed in the past few years while in custody. (7 RT 2465-2466.) Johnson had numerous "RIP" or rest in piece tattoos on this body, but denied that they were for Miller, Nordeen or Lamons. (7 RT 2467.)

b. Victim Impact Testimony

Miller and his mother, Bonnie, were always close, "did everything together," and lived together except for a few years in the early 1990's. (8 RT 2491, 2496.) Since the murder, there has been "a big hole in [her] heart," "[p]art of [her] died with him and [she] can't be happy." (8 RT 2491, 2497.) Bonnie misses and thinks of her son everyday, which never gets easier. (8 RT 2501.) Since Miller loved the ocean and surfing, Bonnie is particularly heartbroken in the summertime when she is at the beach. (8 RT 2495.)

Miller's father became ill and died after the murder. (8 RT 2492.) Before he died, Miller's father told Bonnie, "[P]lease, get justice for our son. Please, do that for me." (8 RT 2492.) Bonnie sat through the Lamb/Rump trial, and attended court everyday for the various defendants for seven and a half years in order to "get justice." (8 RT 2497.)

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[51] Deputy Tunstall explained that the terms "walking off the tier" or "yard" means dropping out of the gang in prison. (8 RT 2489.)

Miller's brother, Calvin, was 18 months older and disabled. (8 RT 2491-2492, 2498.) Miller was very close to his grandmother. (8 RT 2498.) Following the murder, Calvin had to be hospitalized for a breakdown and Miller's grandmother almost died from a heart condition. (8 RT 2498.)

Miller has a son, "Little Scott," who was born after the murder on October 5, 2002. (8 RT 2497-2499.) Little Scott did not understand why he did not have a father. (8 RT 2499.) He asked Bonnie how his father got to heaven and whether he could go there to see him at least once. (8 RT 2493, 2500.) Except for Little Scott, Bonnie "just kind of shut [herself] off from the rest of the world." (8 RT 2497.) She takes Miller's son to the gravestone every few weeks to clean it, but her "heart won't take it" to go more often because it is painful and unbearable. (8 RT 2493.)

Lamons' mother, Sharon Thompson, testified that Lamons was a good son. (7 RT 2442-2443.) When Thompson learned of her son's death, it felt "like the air is being totally sucked out of the whole room" and it was difficult to accept that it really happened. (7 RT 2443.) The worst part for Thompson was that Lamons died a violent death from which she was unable to protect him. (7 RT 2443-2444.) She misses her son every day, which never gets easier. (7 RT 2444.) A week before testifying at the penalty phase, Thompson broke at down at work because it was Lamons' birthday. (7 RT 2444.)

Thompson testified that Lamons' death has left a "horrible, huge hole in the middle of [her] stomach." and explained, "It is not like God took him. Someone chose to take him. Violently." (7 RT 2444.) Since the murder, Thompson is "more closed up" and will not allow anybody to get close to her.[52] (7 RT 2444.)

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[52] In response to defense counsel's questions whether killing Johnson would make her pain go away or get better, Thompson testified (continued...)

2. Defense Evidence

Shirley Williams testified that Johnson was a good friend, always courteous and respectful towards her, willing to help her in any way, respectful and protective of women in general, a good father, and very family-oriented.[53] (4 RT 1563-1566.) Johnson has a gentle side and another side that "parties." (4 RT 1566.) However, Williams never saw him "fly off the handle" or be violent. (4 RT 1567.) If she had a child, Williams would trust him or her with Johnson. (4 RT 1567.)

Williams also cared about Miller and "thought he was a great guy." (4 RT 1567.) After Williams learned of Miller's murder, she called his mother. (4 RT 1568-1569.) It broke Williams' heart to hear Bonnie talk about her son's death. (4 RT 1569.)

Suzanne Miller was Johnson's current girlfriend.[54] (6 RT 2260.) Johnson accepted a sentence of 45 years to life for the Lamons murder so that she and the other codefendants could receive determinate sentences. (6 RT 2261.) She received, and was currently serving, a 15 year sentence for manslaughter in the case. (6 RT 2261.)

Suzanne Miller testified that Johnson was a loving and respectful family man, who always treated her and others with kindness and respect. (6 RT 2260, 2262-2264.) Although there were two sides to Johnson, she only saw the kind, protective and respectful side . (6 RT 2260-2261) She believed Johnson's life had value, finding "[e]verything about him" valuable. (6 RT 2263.)

(...continued)
that she believes Johnson's execution might help ease her pain. (7 RT 2445.)

[53] At the request of the defense, Williams' penalty phase testimony was presented at the guilt phase to facilitate her return to prison. (5 RT 1562.)

[54] Suzanne Miller is not related to Scott Miller. (8 RT 2625.)

Dr. Flores de Apodaca, a clinical psychologist, met with Johnson at the county jail for a total of six hours on October 12 and October 15, 2009 – approximately two weeks before Flores testified at the penalty phase. (7 RT 2344-2346.) Dr. Flores administered psychological tests and reviewed records provided by defense counsel. (7 RT 2346.)

Dr. Flores testified that Johnson was the youngest of four siblings, whose parents separated when he was ten years old. (7 RT 2347-2349.) Thereafter, Johnson resided with his mother, and his relationship with his father was essentially nonexistent. (7 RT 2349.) Around that time, Johnson began having behavioral problems in school. (7 RT 2349.) He got into fights, was suspended and gave up on academics. (7 RT 2349-2450.)

Johnson had a positive relationship with his mother, who was very caring of him and his siblings. (7 RT 2350.) Although Johnson had great respect and admiration for his mother, she was financially overwhelmed and unable to exercise adequate authority over him. (7 RT 2353-2354.) Johnson had positive relationships with each of his siblings, and received parental type care and guidance from his older brothers.[55] (7 RT 2350.) He grew up in a good household with no gangs around. (7 RT 2397-2398.)

Johnson first ran afoul of the law when he was arrested for receiving stolen property to buy alcohol at the age of ten, and maintained a "kind of low to medium to moderate level of criminality through adolescence." (7 RT 2350-2351.) When he was 20 years old, Johnson stole some guns and became involved in illegal activities related to substance abuse. (7 RT 2350-2351) Johnson began using marijuana when he was ten years of age, LSD when he was 14 or 15 years old, and cocaine and methamphetamine

[55] One of Johnson's brothers has led a crime-free life, while the rest of his brothers have been involved in drug abuse and crimes resulting in incarceration. (7 RT 2389.)

by the age of 25. (7 RT 2352.) Johnson was incarcerated much of his life since his early twenties. (7 RT 2347.)

Dr. Flores testified that Johnson talked about his prior criminal conduct with "aplomb," "[w]ith no anxiety, no equivocation, no intention to minimize or whitewash or otherwise apologize or express remorse for these behaviors" in a "[v]ery straightforward...matter of fact...nonchalant kind of way itemization of this particular kind of history." (7 RT 2351.)

Johnson was 46 years old at the time of trial, and had been married and divorced twice. (7 RT 2347, 2354-2357.) The marriages ended because of his drug use, gang affiliations and incarcerations. (7 RT 2356-2357.) Johnson had two sons – one with each of his prior spouses – who were eight and 25 years old at the time of trial. (7 RT 2355- 2357.) Johnson believed he was a caring person, devoted and committed to family life. (7 RT 2357.)

Johnson told Dr. Flores, "I can be your best friend or your worst nightmare." (7 RT 2357-2358.) Flores interpreted the statement to mean Johnson "could be very violent, he could be vengeful, he could be vindictive and vicious when circumstances, and in his own judgment, the situation calls for that. But then he can also be loyal and committed and helpful, under a different set of circumstances." (7 RT 2358.) Johnson also stated that everyone can be forgiven except rapists, child molesters, "rats" and gang members who violate the gang's code of ethics and code of honor. (7 RT 2358.)

A nonverbal intelligence test (T.O.N.I.) showed Johnson to have an intelligence quotient (I.Q.) of 92. (7 RT 2358-2359.) The average I.Q. for the general population is 100. (7 RT 2358-2359.) Dr. Flores felt Johnson's score of "92 was probably an underestimate of what he could have accomplished" had he not given up on school at such an early age. (7 RT 2359-2460.)

The Personality Assessment Inventory (P.A.I.) showed Johnson had drug problems, aggression and antisocial features, proneness to aggression and violence, a history of criminality and violating others' rights, and disregard for social norms and laws. (7 RT 2360-2364.) Based on the P.A.I., Dr. Flores concluded that Johnson was prone to aggression, irritability, a short temper and extreme displays of physical aggression against others. (7 RT 2365.) Dr. Flores believed drug abuse was both a cause and an effect of Johnson's impulsivity. (7 RT 2366.)

Johnson told Dr. Flores that he wanted to receive the death penalty and be on death row rather than in SHU at another prison. (7 RT 2366-2367, 2391.) In light of a zero score for suicidal ideation on the P.A.I., Dr. Flores testified that Johnson's desire for the death penalty was a rational, calculated decision based on the belief that there were better conditions of confinement on death row and that he would outlive his mother to spare her the trauma of an execution. (7 RT 2362-2363, 2366-2369, 2395.) Dr. Flores opined that the confinement conditions of an SHU would not "sit well" with Johnson's mental makeup. (7 RT 2391-2392.)

The HARE psychopathy checklist showed Johnson was cunning and manipulative, lacked remorse for his actions, felt normal societal rules do not apply to him, had his own set of rules and principles, and was able to turn himself "on and off" to control his behavior. (7 RT 2369-2386.) Johnson scored very high (the 94th percentile of the prison population) on the psychopathy scale. (7 RT 2386-2387.)

Based on the test results, Dr. Flores diagnosed Johnson as psychopathic with a antisocial personality disorder.[56] (7 RT 2390.) Dr. Flores testified that Johnson chooses the rules he wants to follow, is able to

[56] There was no indication of Johnson having ever been diagnosed or treated for any psychological or psychiatric conditions. (7 RT 2394.)

exercise free will in the choices he makes and crimes he commits, and has never expressed regrets for his crimes. (7 RT 2381, 2392-2394.) Since he was ten years of age, Johnson's decisions "largely went towards criminality, drug and alcohol abuse, an impulsive lifestyle, hedonistic, pleasure, drugs, what he was doing, and not being responsible, and not incorporating values that people socialize into when they abide by the law." (7 RT 2388.)

Johnson told Dr. Flores that he "'hadn't accomplished what [he] thought [he] would accomplish, which is living at the top of the hill looking down on creation.'" (7 RT 2373.) To Dr. Flores, this indicated that Johnson believed he "didn't get where [he] want[s] to go yet [.]" (7 RT 2396.)

Daniel Vasquez was previously a correctional officer, program administrator, chief deputy, acting warden and warden of San Quentin State Prison. (8 RT 2505-2506.) He described the restrictive conditions of SHU at Pelican Bay where Johnson was housed at one time. (8 RT 2506-2508.) Although it is a maximum security unit, SHU inmates still have privileges to a small amount of personal property, family visitations, and access to television or radio. (8 RT 2507, 2515-2516.) The SHU exercise areas are self-contained, and the prisoners do not go outside for fresh air. (8 RT 2516-1518.)

Vasquez also described the various housing blocks comprising San Quentin's Death Row. (8 RT 2508-2509.) Death Row prisoners are able to exercise, visit with family members, have access to television or radio, and receive various other privileges based on good conduct. (8 RT 2508-2515.) Death Row inmates get to go outside "[a] little bit" for a minimum of ten hours a week. (8 RT 2518.) Vasquez thought it reasonable for a defendant with gang affiliations to prefer being on Death Row because it provides more security from violence than an SHU. (8 RT 2520-2521.) That

reasoning, however, would not apply to an inmate who is the aggressor. (8 RT 2522.)

Vasquez testified about allegations of staged fights between inmates and betting by correctional officers in the late 1980's and early 1990's at Corcoran State Prison, which were investigated by the FBI and other law enforcement agencies. (8 RT 2419.) The Corcoran SHU is less restrictive than the SHU at Pelican Bay. (8 RT 2518-2519.)

Vasquez chronicled Johnson's history with the Department of Corrections from October 19, 1983 through May 7, 2003, which consisted of multiple recommitments for parole violations and new cases. (8 RT 2524-2530.) Johnson had several rules violation reports ("115's") between February 8 and July 18, 1984. (8 RT 2530-2532.)

John Govey testified that he and Johnson were former cellmates. (8 RT 2536.) At one time, Johnson showed Govey a letter which indicated that someone wanted Johnson to kill him, but Johnson refused to kill him because they were friends. (8 RT 2537-2538.)

Johnson testified on his own behalf at the penalty phase. (8 RT 2538-2539.) He explained that he previously testified at the Lamb/Rump trial against his attorney's advice. (8 RT 2539.)

Johnson testified that he drove Miller to the murder scene and killed him because "he messed up on the laws that were written by us." (8 RT 2541.) However, he refused to testify "about the inner sanctions of what we are, what we do" because it could get him killed. (8 RT 2541.) Johnson maintained that he shot Miller, and Rump and Lamb had nothing to do with it. (8 RT 2551.)

Despite the prior phone call with Mangan, Johnson denied that he "hatched" a story about transferring the gun to Lamb or needed to be reminded of the color of the trigger prior to testifying for Lamb. (8 RT 2597-2599.) Johnson felt bad for Miller's mother, but countered that Miller

"knew the consequences of his actions," stated that "Scott Miller got Scott Miller killed," and claimed his own mother was "going through the same thing on a different aspect." (8 RT 2542, 2567.) Johnson considered McLachlan "a rat." (8 RT 2601.)

Johnson pled guilty to the Lamons murder and accepted all of the blame to help Suzanne Miller and his other codefendants. (8 RT 2587, 2591.) Johnson testified that Lamons owed him money for drugs and was disrespectful to some girls he knew by stealing from them. (8 RT 2588.) However, the actual beating "[j]ust happened" when Lamons walked in while Johnson was playing with the hammer. (8 RT 2587-2588.)

Johnson wrapped up Lamons' body, put it in the truck, covered it with wood, and intended to take it to a specific location in Twenty-Nine Palms. (8 RT 2623-2624.) Johnson testified that he has specific burial sites for bodies, which he would not reveal. (8 RT 2623.) He also has stash houses in different locations where weapons are kept, which he refused to divulge. (8 RT 2622.)

Johnson did not like Nordeen because he was a pedophile who got too low of a sentence. (8 RT 2572.) After Nordeen's murder, Johnson assaulted other prisoners because they were "known rats" trying to get him to talk about the incident. (8 RT 2574.)

Johnson burglarized Troutman because he wanted drugs and heard that Troutman had sold drugs to children. (8 RT 2592.) Johnson claimed he was on cocaine and alcohol at the time of the Brandolino incident, he did not know his friend was going to snatch her purse, and he consistently had strong respect for women.[57] (8 RT 2553-2555.) He denied involvement in

[57] Johnson insisted that he respects women even though he had sex with Metzger and spent the night with Williams while he was married to his second wife and referred to women as "bitches." (8 RT 2602.)

the October 1994 evasion from Officer Dare, insisting that "it was a little Mexican guy named Alex" who was driving the car that day. (8 RT 2556-2557.)

Johnson testified that he assaulted inmate Agee because they were in the "gladiator arena" of Corcoran prison; he assaulted inmate White because White dropped out from one of the gangs and "[he] did what [he] had to do;" and the weapon found by Officer Smith was two pieces of a broken paper clip used for his and his cellmate's fingernails. (8 RT 2576-2577.)

Johnson testified that he has committed at lot of crimes, including at least two murders which the prosecutor was unaware of. (8 RT 2620.) One of those overlooked murders occurred out of custody with a male victim prior to the Miller shooting, while the other one occurred in custody. (8 RT 2620-2621.)

Johnson admitted that he had also committed a lot of robberies, home invasion robberies and "beat ups." (8 RT 2620-2621.) In the week prior to testifying, Johnson made arrangements for USAS members to be assaulted, on probably more than five occasions, because he is "on a mission." (8 RT 2621-2622.)

Johnson recounted his personal and family background, and characterized himself as "a two-sided coin" with his family life "completely different than these other parts."[58] (8 RT 2546-2550, 2560-2565.) He was "in some aspects" a white supremacist prior to going to prison, had "no problem with the other races ...[u]nless they come into [his] area," and would not back down to anything. (8 RT 2542-2544.) Johnson testified that he did not "really hate, per se" other races as long as they do not harass

[58] Johnson did not want any family members to come to court and testify on his behalf. (8 RT 2568.)

his "people...being the white people." (8 RT 2589-2590.) Then, he will "do everything feasibly possible to make sure that they leave the neighborhood, or the city," including killing non-whites "[i]f that's what it takes." (8 RT 2590.)

When he told Dr. Flores about working hard to get to the top of the hill, Johnson was referring to the "AB" (Aryan Brotherhood). (8 RT 2629.) Johnson testified that he only preys on drug addicts, gang members and convicts, whom he considers fair game. (8 RT 2550-2555, 2567, 2590.) "[R]apoes and rats" also drive him crazy. (8 RT 2566.)

Johnson blamed his criminal behavior on drugs and claimed he was "for the most part" a product of the prison system. (8 RT 2552-2553, 2629.) He explained why he aligned himself with gangs in prison. (8 RT 2557-2558, 2565-2566.) However, Johnson lives by his own set of rules in "some aspects" and did not feel Govey deserved getting killed. (8 RT 2568-2571.)

Johnson has no respect for authority or law enforcement, and likes to taunt and play "cat and mouse" with the police and parole agents. (8 RT 2579, 2584, 2586.) He has figured out ways to communicate and get things done in prison without the guards knowing. (8 RT 2586.)

Johnson wants to receive the death penalty because it is a better place to be incarcerated – not because he wants to die. (8 RT 2593.) He would rather be on Death Row which has a "[l]ittle bit more range of movement" than Pelican Bay. (8 RT 2540.)

ARGUMENT

I. VIEWING THE FACTS IN THE LIGHT MOST FAVORABLE TO THE PROSECUTION AND DRAWING ALL REASONABLE INFERENCES FROM THE FACTS IN SUPPORT OF THE JUDGMENT, THERE WAS SUBSTANTIAL EVIDENCE OF LYING-IN-WAIT FOR PURPOSES OF THE SPECIAL CIRCUMSTANCE AND A THEORY OF FIRST DEGREE MURDER

Johnson claims the evidence was insufficient to support his conviction for first degree murder on a lying-in-wait theory and the jury's true finding on the lying-in-wait special circumstance.[59] (AOB 49-59.) However, Johnson fails to assess the evidence under the applicable standard of review, insisting on viewing the facts in the light most favorable to himself and refusing to draw any reasonable inferences from the facts in support of the judgment. Under the proper standard of review, the first degree murder conviction and special circumstance true finding were supported by substantial evidence of lying-in-wait.

A. Standard of Review

The standard for reviewing the sufficiency of the evidence in criminal cases is well-established. (*People v. Jennings* (2010) 50 Cal.4th 616, 638.)

> "When considering a challenge to the sufficiency of the evidence to support a conviction, we review the entire record in the light most favorable to the judgment to determine whether it contains substantial evidence—that is, evidence that is reasonable, credible, and of solid value—from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citation.]"

(*People v. D'Arcy* (2010) 48 Cal.4th 257, 293, quoting *People v. Lindberg* (2008) 45 Cal.4th 1, 27.) The standard is the same under the federal

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[59] The jury was instructed on willful, deliberate and premeditated murder and lying-in-wait as two theories of first degree murder (17 CT 4383-4386 [CALCRIM No. 521]), and the lying-in-wait special circumstance (17 CT 4403-4405 [CALCRIM No. 728]).

Constitution. (See *Jackson v. Virginia* (1979) 443 U.S. 307, 319 [99 S.Ct. 2781, 61 L.Ed.2d 560].)

When assessing a sufficiency-of-the-evidence claim, the reviewing court has a limited role. (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206.) It does " 'not retry the case' " on appeal. (*Tecklenburg v. Appellate Division* (2009) 169 Cal.App.4th 1402, 1412, quoting *People v. Sanchez* (2003) 113 Cal.App.4th 325, 330; see also *People v. Veale* (2008) 160 Cal.App.4th 40, 46.) It "neither reweigh[s] the evidence nor reevaluate[s] the credibility of witnesses." (*People v. Lindberg, supra,* 45 Cal.4th at p. 27; see *Jackson v. Virginia, supra,* 443 U.S. at p. 324.)

"[I]t is the *jury*, not the appellate court, which must be convinced of the defendant's guilt beyond a reasonable doubt." (*People v. Ceja* (1993) 4 Cal.4th 1134, 1139 [emphasis in original].) "Therefore, an appellate court may not substitute its judgment for that of the jury" (*ibid*) and must defer to the jury's resolution of factual conflicts (*Cavazos v. Smith* (2011) __ U.S. __ [132 S.Ct. 2, 6, 181 L.Ed.2d 311] (*per curiam*); *Jackson v. Virginia, supra,* 443 U.S. at p. 326; *People v. Ochoa, supra*, 6 Cal.4th at p. 1206).

"[E]vidence is sufficient to support a conviction so long as 'after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.' " (*Cavazos v. Smith, supra,* 132 S.Ct. at p. 6, quoting *Jackson v. Virginia, supra,* 443 U.S. at p. 319 [emphasis in original].) Thus, the reviewing court "must presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence." (*People v. Jones* (1990) 51 Cal.3d 294, 314; see also *Jackson v. Virginia, supra,* 443 U.S. at p. 326; *People v. Ochoa, supra,* 6 Cal.4th at p. 1206.)

Convictions may rest primarily on circumstantial evidence. (*People v. Perez* (1992) 2 Cal.4th 1117, 1124; *People v. Bean* (1988) 46 Cal.3d 919, 932.)

> Although it is the jury's duty to acquit a defendant if it finds the circumstantial evidence susceptible of two reasonable interpretations, one of which suggests guilt and the other innocence, it is the jury, not the appellate court that must be convinced of the defendant's guilt beyond a reasonable doubt.

(*People v. Kraft* (2000) 23 Cal.4th 978, 1053-1054.)

Thus, a conviction may not be reversed merely because circumstances might support or be reconciled with a contrary finding. (*People v. Kraft, supra*, 23 Cal.4th at p. 1054; *People v. Ceja, supra,* 4 Cal.4th at pp. 1138-1139.) Reversal is only warranted where it clearly appears that " 'upon no hypothesis whatever is there sufficient substantial evidence to support' " the verdict. (*People v. Bolin* (1998) 18 Cal.4th 297, 331, quoting *People v. Redmond* (1969) 71 Cal.2d 745, 755.) The same standard of review applies to sufficiency-of-the-evidence claims for special circumstance findings. (*People v. Booker* (2011) 51 Cal.4th 141, 172; *People v. Lindberg, supra,* 45 Cal.4th 1, 27.)

B. Under the Applicable Standard of Review, There Was Substantial Evidence of Lying-in-Wait to support the First Degree Murder and Special Circumstance Verdicts

The lying-in-wait special circumstance requires proof of " ' " ' "an intentional murder, committed under circumstances which include (1) a concealment of purpose, (2) a substantial period of watching and waiting for an opportune time to act, and (3) immediately thereafter, a surprise attack on an unsuspecting victim from a position of advantage....' [Citations.]' " ' " (*People v. Streeter* (2012) 54 Cal.4th 205, 246-247, quoting *People v. Combs* (2004) 34 Cal.4th 821, 853; *People v. Mendoza* (2011) 52 Cal.4th 1056, 1073; *People v. Jurado* (2006) 38 Cal.4th 72, 119.)

As a theory of first degree murder, lying-in-wait is "slightly different" inasmuch it "requires only a wanton and reckless intent to inflict injury likely to cause death" rather than an intent to kill.[60] (*People v. Streeter, supra,* 54 Cal.4th at p. 246, quoting *People v. Lewis* (2008) 43 Cal.4th 415, 511, disapproved on another ground in *People v. Black* (2014) 58 Cal.4th 912, 919-920; see *People v. Stevens* (2007) 41 Cal.4th 182, 202, fn. 11; *People v. Gutierrez* (2002) 28 Cal.4th 1083, 1148-1149.) Therefore, where " 'the evidence supports the special circumstance, it necessarily supports the theory of first degree murder' " (*People v. Moon* (2005) 37 Cal.4th 1, 22, quoting *People v. Carpenter* (1997) 15 Cal.4th 312, 388, superseded by statute on another ground as stated in *Verdin v. Superior Court* (2008) 43

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[60] Formerly, there was another difference between the lying-in-wait special circumstance and theory of first degree murder. The special circumstance applied to murders committed "*while* lying in wait," whereas the first degree murder theory applies to killings "perpetrated *by means of* ... lying in wait...." (*People v. Edelbacher* (1989) 47 Cal.3d 983, 1022, citing § 189, and former § 190.2, subd. (a)(15) [emphasis in original].) Thus, "the lying-in-wait special circumstance require[d] that the killing 'take place during the period of concealment and watchful waiting or the lethal acts must begin at and flow continuously from the moment the concealment and watchful waiting ends.' " (*Ibid.*, quoting *Domino v. Superior Court* (1982) 129 Cal.App.3d 1000, 1011; see also *People v. Ceja, supra,* 4 Cal.4th at p. 1145 [murder must be "immediately preceded by lying in wait"].)

Effective March 2000, the lying-in-wait special circumstance was amended to substitute "while" with "by means of," bringing that aspect of the special circumstance into conformity with the first degree murder theory. (See *People v. Streeter, supra,* 54 Cal.4th at p. 246 & fn. 7, citing Stats. 1998, ch. 629, § 2, p. 4165, and *People v. Lewis, supra,* 43 Cal.4th at p. 512, fn. 25; see also *People v. Hajek* (2014) 58 Cal.4th 1144, 1184; *People v. Livingston* (2012) 53 Cal.4th 1145, 1172 & fn. 7.) Since Miller's murder occurred on March 8, 2002, it was only necessary to prove the killing was perpetrated "by means of" lying in wait for both the special circumstance and first degree murder theory, and the evidence did not need to comport with the timing requirements of *Edelbacher* and *Ceja.*

Cal.4th 1096, 1106-1107), and this Court " ' "focus[es] on the special circumstance because it contains the more stringent requirements" ' " (*People v. Mendoza, supra,* 52 Cal.4th at p. 1073, quoting *People v. Moon, supra,* 37 Cal.4th at p. 22).

The elements for lying-in-wait can be established independently or through the defendant's own testimony viewed in the light most favorable to the People. (See *People v. Moon, supra,* 37 Cal.4th at pp. 22-23.) It is not necessary that the defendant be the actual killer for either the special circumstance or murder theory for lying-in-wait. (See *People v. Bonilla* (2007) 41 Cal.4th 313, 330-331 & fn. 5 [special circumstance applies to aiders and abettors]; *People v. McCoy* (2001) 25 Cal.4th 1111, 1122 ["when a person, with the mental state necessary for an aider and abettor, helps or induces another to kill, that person's guilt is determined by the combined acts of all the participants as well as that person's own mens rea"].)

All elements of the lying-in-wait theory of first degree murder and special circumstance were supported by substantial evidence in Johnson's case. As a threshold matter, Miller's murder was an intentional killing.

Miller was killed by a single gunshot to the back of his head. (3 RT 1439-1448.) This manner of execution demonstrated an intent to kill. (See, e.g., *People v. Koontz* (2002) 27 Cal.4th 1041, 1082 [gunshot to a vital area of the body at close range and preventing witness from calling ambulance was probative of a deliberate intent to kill]; *People v. Mayfield* (1997) 14 Cal.4th 668, 768 [firing gun at victim's face "entirely consistent with a preconceived design to take his victim's life"].) In addition, "evidence of motive is often probative of an intent to kill." (*People v. Smith* (2005) 37 Cal.4th 733, 741.) Miller was killed because of his televised interview wherein he discussed PENI gang activities. (4 RT 1583; 5 RT 1896, 1918-

1920.) Accordingly, there was substantial evidence of an intentional killing.[61]

The concealment element was also proved through substantial evidence.

> The concealment required for lying in wait "is that which puts the defendant in a position of advantage, from which the factfinder can infer that lying-in-wait was part of the defendant's plan to take the victim by surprise. [Citation.] It is sufficient that a defendant's true intent and purpose were concealed by his actions or conduct. It is not required that he be literally concealed from view before he attacks the victim. [Citations]"

(*People v. Webster* (1991) 54 Cal.3d 411, 448, quoting *People v. Morales* (1989) 48 Cal.3d 527, 555, disapproved on another ground in *People v. Williams* (2010) 49 Cal.4th 405, 459.)

Luring the victim "to an isolated location on a pretext" constitutes a concealment of purpose. (*People v. Webster, supra,* 54 Cal.3d at p. 448 [victim led about halfway down a trail to a riverbank encampment where stabbing occurred]; see also *People v. Jurado, supra,* 38 Cal.4th at p. 120 [defendant lured victim into a car where killing occurred without revealing his purpose].) That is precisely what occurred here.

Johnson told McLachlan that he used drugs as a ploy to get Miller to go with him to the alleyway behind Hughes' apartment. (4 RT 1585.) Lamb called Hughes and told her it was important that Hinson call him as soon as she gets home. (3 RT 1402-1403.) Subsequently, Lamb and Rump were in Hughes' apartment awaiting Johnson's and Miller's arrival. (3 RT 1403.) They left Hughes' apartment shortly before the shooting. (3 RT 1404-1405.) As Johnson and Miller were walking down the alley side-by-

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[61] Johnson does not contest that Miller's murder was an intentional killing. (See AOB 53-58.)

side, Miller heard footsteps from behind and asked Johnson, "[A]re those PENI guys?" (4 RT 1581.) At that moment, Miller appeared resigned to the idea that something was going to happen to him, and Lamb shot Miller in the back of the head. (4 RT 1581-1582.)

From this evidence, the jury could reasonably infer that Johnson concealed his true intent and purpose for leading Miller to the alleyway, and the jury could reasonably infer that lying-in-wait was part of Johnson's, Lamb's and Rump's plan to take Miller by surprise. Accordingly, there was substantial evidence of concealment of purpose. (*People v. Webster, supra,* 54 Cal.3d at p. 448.)

There was substantial evidence of watching and waiting for an opportune time to act. "Lying in wait does not require that a defendant launch a surprise attack at the first available opportune time. [Citation.] Rather, the defendant ' "may wait to maximize his position of advantage before taking his victim by surprise." ' " (*People v. Lewis, supra,* 43 Cal.4th at p. 510, citing and quoting *People v. Hillhouse* (2002) 27 Cal.4th 469, 501.) Although the watchful and waiting period must be substantial, this Court has "never placed a fixed time limit on this requirement." (*People v. Moon, supra,* 37 Cal.4th at p. 23.)

In *Hillhouse,* for example, the defendant waited until the victim stepped outside his truck to urinate before stabbing him. (*People v. Hillhouse, supra,* 27 Cal.4th 469 at p. 501.) This Court found the jury could reasonably find this was the most opportune time to take the victim by surprise. (*Ibid.*) Similarly, Lamb and Rump waited until Johnson arrived with Miller. (See *People v. Streeter, supra,* 54 Cal.4th at p. 247 [being watchful "can include being 'alert and vigilant' in anticipation of the victim's arrival to take him or her by surprise"].)

Johnson's accomplices then waited until Miller was approximately halfway down the alleyway in an isolated area near the dumpster alcove

before firing the fatal shot. (3 RT 1412-1414, 1422.) At that location, there was no one else around to warn or assist Miller, and there were no eyewitnesses. As in *Hillhouse*, it was the most opportune time for Johnson and his accomplices to take Miller by surprise. (See, e.g., *People v. Jurado, supra,* 38 Cal.4th at p. 120 [defendant waited until victim was driven to a location where killing would not be witnessed by other motorists or pedestrians].)

Finally, there was substantial evidence proving a surprise attack on an unsuspecting victim from a position of advantage. This element requires that the victim be "taken by surprise, with little or no opportunity to escape or fight back." (*People v. Jurado, supra,* 38 Cal.4th at p. 120.) Once Miller asked Johnson whether there were "PENI guys" behind them, he was already isolated in the middle of the alleyway surrounded by Johnson, Lamb and Rump. Miller had no opportunity to escape his armed assailant or fight back at that point. From that position of advantage, Lamb shot Miller in the back of the head.

Johnson and his accomplices "did not kill out of rash impulse, but rather in a purposeful manner that required stealth and maneuvering to gain a position of advantage over the unsuspecting" victim. (See *People v. Mendoza, supra,* 52 Cal.4th at p. 1074.) Substantial evidence supported all elements of the lying-in-wait first degree murder theory and special circumstance.

Johnson's arguments to the contrary are unpersuasive. He first cites to evidence that Miller was generally aware that there would be consequences to his televised interview, Miller had previously told Simmons that he was concerned for his safety, Miller commented at the party that he had to keep his guard up, and Miller sounded concerned in his voicemail message to Simmons on the evening of the murder. (AOB 56.)

Johnson overlooks several crucial facts which undermine his argument and fails to apply the proper standard of review to the evidence.

Lieutenant Epperson testified that an act of payback from a gang could happen "[r]ight on the spot" or weeks, months or years after the offending act. (5 RT 1872.) Miller "was still running around" for a substantial period of time after the interview because no PENI member had the courage to enforce the "green light" on him initially. (4 RT 1584-1585.) Simmons testified that Miller expressed concerns for his safety only a couple times during the year preceding his death. (4 RT 1537.)

Miller did not know when, where and how retribution from PENI would occur. His generalized concerns for his safety during the year-long expanse of time between the February 2001 broadcast of the interview and the March 2002 shooting did not defeat the element of surprise on the particular date Johnson and his associates chose for the murder.

It is notable that Miller "sounded concerned" rather than scared, afraid, fearful or terrified in the voicemail message to Simmons. (4 RT 1534-1535.) Also, Metzger previously testified that Miller and Johnson *were joking about* Miller keeping his guard up, everyone was laughing together and the conversation between Johnson and Miller at the party was not serious talk. (4 RT 1547-1549.)

In order to prevail on a sufficiency claim, the defendant must set forth all of the material facts in the case in his or her opening brief in the light most favorable to the prosecution, and persuade the reviewing court that such evidence cannot reasonably support the verdict. (*People v. Sanghera* (2006) 139 Cal.App.4th 1567, 1574.)

> If the defendant fails to present [the reviewing court] with all the relevant evidence, or fails to present that evidence in the light most favorable to the People, then he cannot carry his burden of showing the evidence was insufficient because support for the jury's verdict may lie in the evidence he ignores.

(*Ibid.* [noting that such failure is "often the case in criminal appeals"].)

Viewing the evidence cited by Johnson in the light most favorable to the prosecution, it did not show Miller was expecting to be killed that evening. Had he suspected Johnson was leading him to his death rather than taking him to buy drugs, Miller would not have willingly made himself vulnerable by proceeding down the alleyway to an isolated location with Johnson. Drawing all reasonable inferences from the facts in support of the judgment, the evidence showed Johnson was an unsuspecting victim at the time of the shooting.

Johnson next argues the sound of footsteps just before the shooting constituted an "introduction of Lamb and Rump [which] destroyed the element of surprise or position of advantage ...." (AOB 56.) As previously stated, it is not required that the killer be " 'literally concealed from view before he attacks the victim.' " (*People v. Webster, supra,* 54 Cal.3d at p. 448.) Thus, general awareness of a defendant's or co-defendant's presence does not negate the concealment element. (*Ibid.*)

Miller's awareness of someone behind him seconds before the fatal bullet was fired into the back of his head was hardly an "introduction" to Lamb and Rump. It left Miller "with little or no opportunity to escape or fight back." (*People v. Jurado, supra,* 38 Cal.4th at p. 120.)

In *Hillhouse*, this Court found a comment by the defendant that he ought to kill the victim which was "virtually simultaneous" with the ensuing stabbing did not negate the elements of surprise or position of advantage. (*Hillhouse, supra,* 27 Cal.4th at p. 501.) Similarly, Johnson's argument that Miller was technically unrestrained or could have attempted to outrun the bullet based on his virtually simultaneous awareness of the footsteps and the shooting is unavailing.

Johnson next cites to his own self-serving prior testimony that he warned Miller at the party that he was going to kill him. (AOB 57.)

However, the jurors implicitly rejected that testimony as not credible in finding the lying-in-wait special circumstance true. Johnson's invitation to reweigh that testimony and reevaluate the jury's credibility findings should be rejected. (See *People v. Lindberg, supra,* 45 Cal.4th at p. 27; *People v. Ochoa, supra*, 6 Cal.4th at p. 1206; *People v. Ceja, supra,* 4 Cal.4th at p. 1139.)

Lastly, Johnson dismisses the wealth of circumstantial evidence proving lying-in-wait as "sheer speculation." (AOB 57-58.) As this Court stated in *People v. Letner & Tobin* (2010) 50 Cal.4th 99, "The jury's reliance upon circumstantial evidence and the reasonable inferences to be drawn from that evidence, in determining whether both defendants were guilty, does not demonstrate, as defendants urge, that the verdict was the result of speculation." (*Id.* at p. 164 [rejecting argument that there was no direct evidence as to which defendant performed which acts other than the testimony of one of the defendants, which jury clearly rejected].) Likewise, Johnson's speculation argument should be rejected.

"The factors of concealing murderous intent, and striking from a position of advantage and surprise, 'are the hallmark of a murder by lying in wait.' "' (*People v. Stevens, supra,* 41 Cal.4th at p. 202, quoting *People v. Hardy* (1992) 2 Cal.4th 86, 164.) Each of these factors was proved by substantial evidence here. Johnson cannot show that " 'upon no hypothesis whatever is there sufficient substantial evidence to support' " the verdicts. (See *People v. Bolin, supra,* 18 Cal.4th at p. 331, *People v. Redmond, supra,* 71 Cal.2d at p. 755.) Accordingly, the jury's first degree murder verdict and true finding on the lying-in-wait special circumstance should be affirmed.

The judgment can be affirmed on an additional ground. As previously noted, the jury was instructed on both lying-in-wait and willful, deliberate and premeditated murder as theories of first degree murder. (17 CT 4383-

4386 [CALCRIM No. 521]).) For his first degree murder conviction, Johnson challenges only the factual sufficiency of the lying-in-weight evidence. (AOB 49-58.)

" 'If the inadequacy of proof is purely factual, of a kind the jury is fully equipped to detect, reversal is not required whenever a valid ground for the verdict remains, absent an affirmative indication in the record that the verdict actually did rest on the inadequate ground."[62] (*People v. Hughes* (2002) 27 Cal.4th 287, 350, quoting *People v. Guiton* (1993) 4 Cal.4th 1116, 1129.) Johnson does not contest the sufficiency of evidence supporting a first degree murder theory of willful, deliberate and premeditated killing. (See AOB ii-viii [Topical Index].) Accordingly, the judgment can also be affirmed regardless of the merits of Johnson's challenge to the lying-in-wait evidence.

II. THE LYING-IN-WAIT SPECIAL CIRCUMSTANCE IS CONSTITUTIONAL

Johnson claims the lying-in-wait special circumstance, as amended effective March 2000, is unconstitutional because the amendment rendered it "indistinguishable" from the first degree murder theory of lying-in-wait. Consequently, he argues that the special circumstance fails to narrow the class of death-eligible defendants, is unconstitutionally vague and creates a substantial risk of arbitrary and capricious application of the death penalty in violation of the Eighth Amendment of the federal Constitution. (AOB 59-62.)

This Court has already rejected similar constitutional challenges to the lying-in-wait special circumstance. (See *People v. Streeter, supra,* 54 Cal.4th at pp. 249-250; *People v. Livingston, supra,* 53 Cal.4th at p. 1174;

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[62] The verdict form for count 1 did not specify a theory of first degree murder. (17 CT 4425.)

People v. Lewis, supra, 43 Cal.4th at pp. 515-517; *People v. Stevens, supra,* 41 Cal.4th at pp. 203-204.) As this Court explained in *Stevens*,

> A...narrowing distinction is discernible between the lying-in-wait special circumstance and lying-in-wait murder because the former requires an intent to kill, while the latter does not. [Citations.] Thus, any overlap between the elements of lying in wait in both contexts does not undermine the narrowing function of the special circumstance.

(*People v. Stevens, supra*, 41 Cal.4th at p. 204.)

Johnson fails to acknowledge or discuss these decisions which defeat his claim. (See AOB 59-62.) As such, Johnson offers no reason to reconsider or revisit this issue, and the judgment should be affirmed.

III. JOHNSON'S INSTRUCTIONAL ERROR CLAIM WAS FORFEITED; THE AIDING AND ABETTING INSTRUCTIONS WERE PROPER SINCE THEY WERE NOT BASED ON THE NATURAL AND PROBABLE CONSEQUENCES DOCTRINE; ANY ALLEGED ERROR WAS HARMLESS IN LIGHT OF JOHNSON'S ADMISSIONS AND THE JURY'S CONSPIRACY VERDICT; AND THERE WAS NO INEFFECTIVE ASSISTANCE OF COUNSEL

Relying on *People v. McCoy* (2001) 25 Cal.4th 111 (*McCoy*), and its progeny, Johnson claims the trial court committed prejudicial error by instructing the jury with CALCRIM No. 400 which stated in part, "A person is *equally guilty* of the crime whether he committed it personally or aided and abetted the perpetrator who committed it." (AOB 63-68, 72-74, citing 17 CT 4377 and 5 RT 2029 [emphasis added in AOB].) Johnson argues the "equally guilty" language "permitted the jury to convict appellant of first degree murder without consideration of his own mental state." (AOB 67.) Johnson further contends that the instructional error was not forfeited, and trial counsel was ineffective to the degree the claim was waived or forfeited. (AOB 69-71.)

All of Johnson's contentions are meritless. The instructional error claim was forfeited since Johnson deprived the trial court of the opportunity

to modify CALCRIM No. 400 in conformity with his argument raised for the first time on appeal. Nonetheless, since Johnson was not prosecuted under the natural and probable consequences doctrine of aiding and abetting, the rule in *McCoy* does not apply to his case and CALCRIM No. 400 was a proper instruction as given. Furthermore, any alleged error was harmless in light of Johnson's prior admissions and because the jurors necessarily found he had a preconceived intent to kill through their guilty verdict on the conspiracy count. For the same reasons, Johnson fails to show deficient performance or prejudice for his ineffective assistance of counsel claim. Accordingly, the judgment should be affirmed.

A. The Claim Was Forfeited

On appeal, Johnson argues the "equally guilty" language of CALCRIM No. 400 should not have been given in his case, implicitly suggesting that it should have been deleted or modified in some fashion. (AOB 63-68.) However, he did not object or request any such modifications to CALCRIM No. 400 in the trial court. (See 5 RT 1933-1938 [discussion of court and counsel regarding instructions and verdict forms]; 17 CT 4340-4341.)

" 'Generally, a party may not complain on appeal that an instruction correct in law and responsive to the evidence was too general or incomplete unless the party has requested appropriate clarifying or amplifying language.' [Citation.]" (*People v. Castaneda* (2011) 51 Cal.4th 1292, 1348, quoting *People v. Hudson* (2006) 38 Cal.4th 1002, 1011-1012; see also *People v. Jones* (2013) 57 Cal.4th 899, 969-970.) Since CALCRIM No. 400 is generally a correct statement of law, although potentially misleading in some cases, it is incumbent on the defendant to request a clarification or modification of the instruction in the trial court to preserve the issue for appeal. (*People v. Samaniego* (2009) 172 Cal.App.4th 1148, 1163.) Thus, Johnson's instructional error claim has been forfeited.

Johnson counters that an appellate court has discretion to consider a forfeited claim. (AOB 69, citing *People v. Williams* (1998) 17 Cal.4th 148, 161, fn. 6.)

> To consider on appeal a defendant's claims of error that were not objected to at trial "would deprive the People of the opportunity to cure the defect at trial and would 'permit the defendant to gamble on an acquittal at his trial secure in the knowledge that a conviction would be reversed on appeal.' "

(*In re Seaton* (2004) 34 Cal.4th 193, 198, quoting *People v. Rogers* (1978) 21 Cal.3d 542, 548; see also *People v. Partida* (2005) 37 Cal.4th 428; *People v. Scott* (1994) 9 Cal.4th 331, 353 [purpose of waiver rule is "to reduce the number of errors committed in the first instance and preserve the judicial resources otherwise used to correct them"].) Having deprived the trial court and the prosecutor of the opportunity to modify or clarify CALCRIM No. 400 as suggested on appeal, Johnson forfeited his instructional error claim and there is no reason to excuse the forfeiture.

B. There Was No Instructional Error

In *McCoy*, this Court held, "[O]utside of the natural and probable consequences doctrine, an aider and abettor's mental state must be at least that required of the direct perpetrator," and explained:

> "To prove that a defendant is an accomplice ... the prosecution must show that the defendant acted 'with knowledge of the criminal purpose of the perpetrator *and* with an intent or purpose either of committing, or of encouraging or facilitating commission of, the offense.' [Citation.] When the offense charged is a specific intent crime, the accomplice must 'share the specific intent of the perpetrator'; this occurs when the accomplice 'knows the full extent of the perpetrator's criminal purpose and gives aid or encouragement with the intent or purpose of facilitating the perpetrator's commission of the crime.' [Citation.]" [Citation.] *What this means here, when the charged offense and the intended offense—murder or attempted murder—are the same, i.e.,*

when guilt does not depend on the natural and probable consequences doctrine, is that the aider and abettor must know and share the murderous intent of the actual perpetrator.

(*McCoy, supra,* 25 Cal.4th at p. 1118, quoting *People v. Prettyman* (1996) 14 Cal.4th 248, 259, and *People v. Beeman* (1984) 35 Cal.3d 547, 460 [footnote omitted and emphasis in last sentence added].)

Here, Johnson was prosecuted and the jury instructed on the theory of aiding and abetting the intended crime of murder, rather than the natural and probable consequences doctrine with some non-homicide target offense. (17 CT 4378-4379 [CALCRIM No. 401]; compare CALCRIM No. 403 which jury was not given.) Accordingly, the jury was required to find Johnson had the specific intent to kill to be liable as an aider and abettor, the "equally guilty" language of CALCRIM No. 400 was proper in his case, and there was no instructional error.

C. The Alleged Error Was Harmless

Notwithstanding the correctness of CALCRIM No. 400, Johnson's claim can also be readily dismissed on harmless error grounds. An instruction which improperly describes or omits an element of the defense "falls within the broad category of trial error" subject to the harmless error test for constitutional violations provided in *Chapman v. California* (1967) 386 U.S. 18, 24 [87 S.Ct. 824, 17 L.Ed.2d 705] (*Chapman*). (*People v. Flood* (1998) 18 Cal.4th 470, 503.) Under *Chapman*, reversal is required unless "it appears beyond a reasonable doubt that the error did not contribute to this jury's verdict." (*Id.* at p. 504.)

"One situation in which instructional error removing an element of the crime from the jury's consideration has been deemed harmless is where the defendant concedes or admits that element." (*People v. Flood, supra,* 18 Cal.4th at p. 504.) Johnson admitted to McLachlan that he wanted Lamb to

shoot Miller "head on" in the face when they were in the alleyway. (4 RT 1582.) In his prior testimony in the penalty phase of the Lamb/Rump trial, Johnson further admitted that he "take[s] care of business," he would kill "anyone like [Miller] that doesn't abide by the rules," and he considered Miller "a dead man" after his Fox interview. (4 RT 1701-1703.) Since Johnson previously admitted a preconceived intent to kill, the alleged error in CALCRIM No. 400 was harmless beyond a reasonable doubt.

Harmless error will also be found where a factual question posed by an omitted or erroneous instruction "was necessarily resolved adversely to the defendant under other, properly given instructions." (See *People v. Wright* (2006) 40 Cal.4th 81, 98, citing *People v. Sedeno* (1974) 10 Cal.3d 703, 721, disapproved on other grounds in *People v. Breverman* (1998) 19 Cal.4th 142, 165 [noting that principle has been applied in evaluating prejudice of various instructional errors]; see also *People v. Holloway* (2004) 33 Cal.4th 96, 140.) Such would be the case here if there were any error.

In addition to murder, Johnson was charged with and convicted of conspiracy to commit murder in violation of section 182, subdivision (a)(1). (1 CT 54-56; 17 CT 4430, 4531.) The jury was instructed accordingly. (17 CT 4387-4392 [CALCRIM No. 563].) The instruction specifically required the People to prove "[t]he defendant intended to agree and did agree with one or more individuals to intentionally and unlawfully kill [.]" (17 CT 4387.)

All conspiracies to commit murder are conspiracies to commit first degree murder. (*People v. Cortez* (1998) 18 Cal.4th 1223, 1231-1232.) As this Court explained in *Cortez*,

> [I]t logically follows that where two or more persons conspire to commit murder – i.e., intend to agree or conspire, further intend to commit the target offense of murder, and perform one or more overt acts in furtherance of the planned murder – each has acted

> with a state of mind "functionally indistinguishable from the mental state of premeditating the target offense of murder." [Citation.] The mental state required for conviction of *conspiracy* to commit murder necessarily establishes premeditation and deliberation of the target offense of murder – hence all murder conspiracies are conspiracies to commit first degree murder, so to speak.

(*Id.* at p. 1232, citing *People v. Swain* (1996) 12 Cal.4th 593, 608-609 [emphasis in original].)

Thus, the jurors' guilt verdict on the conspiracy to commit murder charge necessarily shows that they found Johnson intended to kill Miller with premeditation and deliberation and resolved the alleged deficiency in CALCRIM No. 400 against Johnson under other properly given instructions. Accordingly, there are two grounds upon which to find any instructional error harmless beyond a reasonable doubt irrespective of the merits of Johnson's claim, and the judgment should be affirmed.

D. Johnson Fails to Demonstrate Ineffective Assistance of Counsel

The Sixth Amendment to the United States Constitution and article I, section 15 of the state constitution guaranty criminal defendants the right to effective assistance of counsel. (*People v. Bonin* (1989) 47 Cal.3d 808, 833.) The burden of proving ineffective assistance of trial counsel lies with the defendant challenging the judgment. (*People* v. *Haskett* (1990) 52 Cal.3d 210, 248.) Johnson fails to satisfy that burden insofar as his instructional error claim has been forfeited.

Under the two-prong test articulated in *Strickland* v. *Washington* (1984) 466 U.S. 668 [104 S.Ct. 2052, 80 L.Ed.2d 674] (*Strickland*), the defendant must demonstrate deficient performance as well as prejudice. (*Id.* at pp. 687-695.) The standard is the same under the federal and state constitutions. (*People* v. *Osband* (1996) 13 Cal.4th 622, 700.)

The first prong of *Strickland* is deficient performance. To establish deficient performance, Johnson must show trial counsel's representation fell "below an objective standard of reasonableness." (*People v. Bolin, supra,* 18 Cal.4th at p. 333.) However, review of trial counsel's performance "must be highly deferential" and include a "strong presumption" that the defendant received reasonable professional assistance of counsel. (*Strickland, supra,* 466 U.S. at pp. 689-690.)

The alleged deficiency must be assessed " 'under the circumstances as they stood at the time that counsel acted or failed to act.' " (*People v. Scott* (1997) 15 Cal.4th 1188, 1212, quoting *People v. Ledesma* (1987) 43 Cal.3d 171, 216.) "Although deference is not abdication [citation], courts should not second-guess reasonable, if difficult, tactical decisions in the harsh light of hindsight." (*Ibid.*) If the record on appeal does not contain an explanation for the challenged action or omission, the reviewing court must reject a claim of deficient performance unless counsel failed to provide an explanation when asked or there could be no satisfactory explanation for counsel's conduct. (*People v. Vines* (2011) 51 Cal.4th 830, 876; *People v. Osband, supra,* 13 Cal.4th at pp. 700-701.)

The second prong of *Strickland* is prejudice. (*People v. Davis* (1995) 10 Cal.4th 463, 515-516 [even if representation deficient, defendant must still demonstrate prejudice].) Johnson must show a "reasonable probability that counsel's omission resulted in a less favorable verdict" (*People v. Wash* (1993) 6 Cal.4th 215, 271) or "so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result" (*Strickland, supra,* 466 U.S. at p. 686). A defendant alleging ineffective assistance "must establish prejudice as a demonstrable reality, not simply speculation as to the effect of the errors or omissions of counsel." (*In re Cox* (2003) 30 Cal.4th 974, 1015 [internal quotation marks and citations omitted].)

The reviewing court need not reach the question of deficient performance if the defendant fails to demonstrate prejudice. (See *Strickland, supra,* 466 U.S. at p. 697.) "If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed." (*Ibid.*; see *In re Fields* (1990) 51 Cal.3d 1063, 1079.)

As discussed above, CALCRIM No. 400 was a proper instruction as given because Johnson was not prosecuted under the natural and probable consequences doctrine of aiding and abetting. Thus, any objection or motion to modify the instruction to delete or replace the "equally guilty" language would have been meritless. Failure to make a meritless motion or objection cannot constitute deficient performance. (See, e.g., *People v. Lucero* (2000) 23 Cal.4th 692, 731; *People v. Coddington* (2000) 23 Cal.4th 529, 625, overruled on other grounds in *Price v. Superior Court* (2001) 25 Cal.4th 1046, 1069, fn. 13; *People v. Ochoa* (1998) 19 Cal.4th 353, 463; *People v. Kipp* (1998) 18 Cal.4th 349, 373; *People v. Jones* (1998) 17 Cal.4th 279, 309.)

" 'Failure to object rarely constitutes constitutionally ineffective legal representation.' " (*People v. Gray* (2005) 37 Cal.4th 168, 209, quoting *People v. Boyette* (2002) 29 Cal.4th 381, 424.) Johnson thus fails to satisfy the first prong of *Strickland.*

Johnson also fails to satisfy the second *Strickland* prong since, as discussed above, he previously admitted a preconceived intent to kill and the jury necessarily resolved any alleged defect in CALCRIM No. 400 against him through the properly given conspiracy instructions. Accordingly, Johnson's ineffective assistance of counsel claim should be rejected and the judgment affirmed.

IV. THE PRIOR MURDER SPECIAL CIRCUMSTANCE AS APPLIED IN JOHNSON'S CASE IS CONSTITUTIONAL

Johnson claims the true finding on the prior murder special circumstance as applied to him is unconstitutional because the underlying murder of Cory Lamons occurred two years after the capital murder of Scott Miller charged in the current case. Johnson contends the special circumstance must thus be stricken even though he was convicted of the Lamons murder in a prior proceeding. (AOB 75-78.)

Johnson's claim is without merit. "[N]numerous decisions of this [C]ourt have concluded the controlling factor under the express language of section 190.2(a)(2) is whether '[t]he defendant was *convicted previously* of murder in the first or second degree.' [Citation] The 'order of the commission of the homicides is immaterial.' " (*People v. Rogers* (2013) 57 Cal.4th 296, 343 [emphasis in original], quoting *People v. Hendricks* (1987) 43 Cal.3d 584, 596, and citing *People v. Hinton* (2006) 37 Cal.4th 839, 879; *People v. Gurule* (2002) 28 Cal.4th 557, 636; *People v. McLain* (1988) 46 Cal.3d 97, 107-108; *People v. Grant* (1988) 45 Cal.3d 829, 848.) Since the special circumstance was in effect at the time of the current capital murder and already construed to encompass all murders committed by the defendant, there is no due process or ex post facto violation. (*People v. Hinton, supra,* 37 Cal.4th at p. 879.)

Johnson acknowledges, "This [C]ourt has repeatedly held that a murder may qualify as a prior murder special circumstance when it occurs later in time than the killing charged as capital murder," and explains that the "issue is briefed in abbreviated form in accordance with *People v.*

Schmeck (2005) 37 Cal.4th 240, 303-304."[63] (AOB 75 & fn. 20.) Johnson does not identify any new authority or arguments not considered in the above-cited cases. (AOB 75-78.) Accordingly, there is no reason to revisit or reconsider the issue, and the special circumstance true finding should be affirmed.

V. JOHNSON FORFEITED HIS CLAIM REGARDING THE VICTIM IMPACT TESTIMONY OF CORY LAMONS' MOTHER; VICTIM IMPACT EVIDENCE RELATED TO PRIOR VIOLENT CONDUCT UNDER SECTION 190.3, SUBDIVISION (B), IS ADMISSIBLE AND CONSTITUTIONAL; AND ANY ALLEGED ERROR WAS HARMLESS

Johnson claims the trial court committed reversible error in the penalty phase by admitting over his objection the victim impact testimony from Cory Lamons' mother. He argues the evidence was improper and violated his state and federal constitutional rights because it did not relate to the circumstances of the capital offense, thus exceeding the permissible scope of victim impact testimony under *Payne v. Tennessee* (1991) 501 U.S. 808 [111 S.Ct. 2597, 115 L.Ed.2d 720]. (AOB 79-96.)

Johnson's victim impact claim is forfeited because he objected on different grounds in the trial court. Notwithstanding forfeiture, the testimony of Lamons' mother was properly admitted under section 190.3,

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[63] *People v. Schmeck, supra,* 37 Cal.4th 240, abrogated on another ground as stated in *People v. McKinnon* (2011) 52 Cal.4th 610, 637-638, provides for an abbreviated form to present "routine or generic claims that [this Court] repeatedly [has] rejected and are presented to this [C]ourt primarily to preserve them for review by the federal courts. . . . when the defendant does no more than (i) identify the claim in the context of the facts, (ii) note that [this Court] previously [has] rejected the same or a similar claim in a prior decision, and (iii) ask [this Court] to reconsider that decision." (*Id.* at p. 304.)

subdivision (b) ("factor (b)"), it was constitutional, and any alleged error in admitting her testimony was harmless.

A. The Claim Was Forfeited

Prior to trial, the prosecutor filed a motion which included a request to present victim impact evidence related to both the capital murder and Johnson's prior violent criminal activity. (1 CT 228, citing *People v. Demetrulias* (2006) 39 Cal.4th 1, 39 (*Demetrulias*).) Defense counsel filed a response to the prosecutor's motion which stated in relevant part:

> The impact that a crime has on a victim's mental state is not admissible absent its relevance to prove that the crime fits within the guidelines set forth by 190.3 (b). Furthermore if the Court is inclined to allow this evidence it should be strictly limited to the actual victim of the crime itself. In the *Demetrulias* case cited in the People's moving papers the victim himself testified as to his physical and mental condition. Any testimony by relatives or friends would be tenuous and outside the purview of the statute and applicable case law.

(15 CT 3774.)

During the court hearing on pretrial motions, defense counsel submitted on his moving papers, arguing, "I believe the way the law reads is that they are talking about the impact to the specific victim," and "I believe to be applicable in this situation it has to be the victim, the way I read it, the victim of a crime, what's the impact on that person" under factor (b). (2 RT 1003-1004.) Counsel explained,

> Whereas somebody who is robbed or raped or something else like that, there is a scarring, a mental scarring that occurs, whether or not they are scared to walk through a parking lot, or go into a mall, whatever the case may be, which I agree would be admissible, but wouldn't be applicable in this case.

(2 RT 1004.)

Thereafter, the prosecutor represented to the court that he intended to call only Miller's and Lamons' mothers as victim impact witnesses in the penalty phase, even though Nordeen's brother and Miller's son and brother were also on the witness list. (2 RT 1006-1007.) The court overruled the defense objection without prejudice to raising it again at trial if the victim impact evidence were to be different than the offer of proof in the pretrial motion, there is insufficient foundation for the testimony or there were other Evidence Code section 352 issues. (2 RT 1007-1008.)

On appeal, Johnson abandons the argument raised below that only victims themselves can provide victim impact testimony, and now contends on statutory and constitutional grounds that the scope of victim impact evidence is limited to the circumstances of the capital offense regardless of who provides such testimony. (AOB 79-96.) The claim on appeal has been forfeited.

In order to preserve a challenge to the admission of trial evidence for appeal purposes, a party must comply with Evidence Code section 353.[64] (*People v. Ramos* (1997) 15 Cal.4th 1133, 1171.) That section states:

> A verdict or finding shall not be set aside, nor shall the judgment or decision based thereon be reversed, by reason of the erroneous admission of evidence unless:
>
> (a) There appears of record an objection to or a motion to exclude or to strike the evidence that was timely made and so stated as to make clear the specific ground of the objection or motion; and
>
> (b) The court which passes upon the effect of the error or errors is of the opinion that the admitted evidence should have been excluded on the ground stated and that the error or errors complained of resulted in a miscarriage of justice.

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[64] This may be done through a "properly directed motion in limine" in which the party obtains an "express ruling" from the trial court. (*People v. Ramos, supra,* 15 Cal.4th at p. 1171.)

(Evid. Code, § 353.)

This Court has "consistently held that the 'defendant's failure to make a timely and specific objection' on the ground asserted on appeal makes that ground not cognizable" on appeal. (*People v. Seijas* (2005) 36 Cal.4th 291, 302, quoting *People v. Green* (1980) 27 Cal.3d 1, 22.)

> "Although no 'particular form of objection' is required, the objection must 'fairly inform the trial court, as well as the party offering the evidence, of the specific reason or reasons the objecting party believes the evidence should be excluded, so the party offering the evidence can respond appropriately and the court can make a fully informed ruling.' [Citation.]"

(*People v. Valdez* (2012) 55 Cal.4th 82, 130, quoting *People v. Zamudio* (2008) 43 Cal.4th 327, 354.)

In the trial court, Johnson did not object to the testimony of Lamons' mother on the ground that victim impact evidence is limited to the circumstances of the capital offense. (AOB 79-96.) He has thus forfeited this claim and should not be permitted to raise it for the first time on appeal. (See *People v. Chatman* (2006) 38 Cal.4th 344, 397 [defendant "did not object on that basis at trial, and he may not make that argument on appeal"].)

B. The Evidence Was Admissible and Constitutional

"The circumstances of uncharged violent crimes, including the impact on victims of those crimes, are made expressly admissible by section 190.3, factor (b)." (*People v. Virgil* (2011) 51 Cal.4th 1210, 1276, citing *People v. Bramit* (2009) 46 Cal.4th 1221, 1241; see also *People v. Brady* (2010) 50 Cal.4th 547, 581-582; *Demetrulias, supra,* 39 Cal.4th at p. 39; *People v. Mendoza* (2000) 24 Cal.4th 130, 186.) This includes "evidence of the emotional effect of defendant's prior violent criminal acts on the victims of

those acts." (*People v. Price* (1991) 1 Cal.4th 324, 479.) The testimony of Lamons' mother was therefore admissible.[65]

The victim impact testimony admitted under section 190.3, subdivision (b), was also constitutional. This Court has "repeatedly held that the admission of evidence about the impacts of a capital defendant's other violent criminal activity does not violate the state or federal Constitutions. (*People v. Virgil, supra,* 51 Cal.4th at p. 1276, citing *People v. Price, supra,* 1 Cal.4th at p. 479, *People v. Clark* (1990) 50 Cal.3d 583, 628-629, and *People v. Karis* (1988) 46 Cal.3d 612, 641.)

Johnson acknowledges that "the prohibition against victim impact evidence at the sentencing phase of a capital trial has largely been overruled and thus is not barred by the federal constitution," but requests that this Court reconsider its "prior decisions to the extent that they are inconsistent with federal constitutional principles." (AOB 91.) Johnson's argument for reconsideration is primarily based on decisions from the Supreme Courts of Illinois, Nevada and Tennessee. (AOB 91-95, citing *People v. Hope* (1998) 184 Ill.2d 39, 49-52, 702 N.E.2d 1282, 1287-1289; *Sherman v. State* (1998) 114 Nev. 998, 1012-1014, 965 P.2d 903, 913-914; *State v. Nesbit* (Tenn. 1998) 978 S.W.2d 872, 892; *State v. Bigbee* (Tenn. 1994) 885 S.W.2d 797, 811-812.)

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[65] Out of the many decisions of this Court addressing the issue of factor b victim impact testimony, Johnson complains that *People v. Benson* (1990) 52 Cal.3d 754, 797, did not discuss a contrary holding in *People v. Boyde* (1988) 46 Cal.3d 212, 247. (AOB 80-81.) However, "[a]n appellate court is not required to address all of the parties' respective arguments, discuss every case or fact relied upon by the parties, distinguish an opinion just because a party claims it is apposite, or express every ground for rejecting every contention advanced by every party." (*People v. Garcia* (2002) 97 Cal.App.4th 847,853, citing *Lewis v. Superior Court* (1999) 19 Cal.4th 1232, 1263-1264.)

This Court has "considered these out-of-state cases and concluded they do not support a claim that the admission of victim impact evidence regarding prior crimes violates the federal Constitution."[66] (*People v. Virgil, supra,* 51 Cal.4th at p. 1276, citing *People v. Davis* (2009) 46 Cal.4th 539, 618.) Thus, as in *Virgil*, "defendant offers no compelling reason to depart from [this Court's] settled views," the victim impact evidence under section 190.3, subdivision (b), was properly admitted, and the judgment should be affirmed. (*Ibid.*)

C. The Alleged Error Was Harmless

Notwithstanding forfeiture and the merits of Johnson's claim, any alleged error in admitting the testimony of Lamons' mother was harmless. The erroneous admission of victim impact testimony in the penalty phase of a capital trial is reviewed for harmless error under the *Chapman* harmless beyond a reasonable doubt standard. (See *People v. Nelson* (2011) 51 Cal.4th 198, 221; *People v. Russell* (2010) 50 Cal.4th 1228, 1265.) In this context, *Chapman* means "no reasonable possibility" that the error affected the penalty phase verdict.[67] (*People v. Williams* (2013) 56 Cal.4th 165, 196; *People v. Abel* (2012) 53 Cal.4th 891, 939; *People v. Booker* (2011) 51 Cal.4th 141, 193; *People v. Davis, supra,* 46 Cal.4th at p. 618; *People v. Kelly* (2007) 42 Cal.4th 763, 799.)

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[66] The second Tennessee Supreme Court case cited by Johnson, *State v. Bigbee, supra,* 885 S.W.2d 797, was not addressed directly in *People v. Virgil, supra,* 51 Cal.4th at p. 1276.) However, *Bigbee* was cited as the authority for the holding in *State v. Nesbit, supra,* 978 S.W.2d at p. 891, fn. 11, which was considered by this Court.

[67] The "reasonable possibility" standard for penalty phase errors first articulated in *People v. Brown* (1988) 46 Cal.3d 432, 448, " ' "is the 'same in substance and effect' as the beyond-a –reasonable-doubt test for prejudice articulated in *Chapman* [citation]" [Citation.]' " (*People v. Gonzales* (2011) 51 Cal.4th 894, 953, quoting *People v. Dykes* (2009) 46 Cal.4th 731, 786.)

Where there is "overwhelming evidence in aggravation" independent of the erroneously admitted victim impact evidence, the error is harmless under *Chapman.* (See *People v. Russell, supra,* 50 Cal.4th at p. 1265.) Such is the case here.

Johnson was responsible for the murder of three men and admitted to killing two more people. (8 RT 2620-2621.) The manners in which Johnson killed Lamons and Nordeen were shockingly brutal, repeatedly striking Lamons in the head with a claw hammer while he was screaming for mercy (7 RT 2412-2414) and bashing Nordeen's head in with various objects until his eye sockets were broken into multiple pieces, his skull was fractured in several places and brain tissue was torn (6 RT 2171-2172, 2233, 2192-2193). Johnson had no legitimate or mitigating reasons for murdering any of his victims, explaining that Miller was killed for violating the PENI gang code (8 RT 2541), he killed Lamons due to a drug debt and because he stole something from some women (8 RT 2588), and he killed Nordeen because he did not like him and felt Nordeen had received too low of a sentence (8 RT 2572).

Johnson engaged in additional crimes of violence against Troutman (6 RT 2158-2162) and Brandolino (6 RT 2132-2139), and posed a threat of great violence by recklessly driving through a residential neighborhood to evade Officer Dare (6 RT 2292-2297). Johnson demonstrated that prison was no obstacle to his penchant for violence, having cut or beaten several fellow inmates. (6 RT 2144, 2269-2271, 2278-2280, 2303-2405, 2311-2313, 2328-2330.) Johnson threatened and orchestrated violence in the community while incarcerated (18 CT 4600-4604, 4619-4621, 4629-4639, 4683, 4711-4717, 4720-4722, 4725-4727), and even admitted in his prior testimony that he "probably" "put out a hit" to have people he did not like killed while in custody (7 RT 2465-2466).

The evidence presented in mitigation was unconvincing. The defense testimony that Johnson was very respectful of women (4 RT 1564-1565; 8 RT 2554) was undermined by his victimization of Ms. Brandolino (6 RT 2132-2140) and his references to women as "bitches" (18 CT 4731-4733). The testimony of Williams and Suzanne Miller about Johnson's "gentle," "kind and respectful" side (4 RT 1566; 6 RT 2260-2261) was meaningless in light of Johnson's statement to Dr. Flores that "I can be your best friend or your worst nightmare" (7 RT 2357-2358).

Psychological tests showed Johnson was a psychopath, who exercised free will in his choices, never expressed regret for his crimes, and discussed his prior criminal conduct "with aplomb." (7 RT 2351, 2381, 2386-2387, 2390-2394.) The evidence in aggravation was nothing short of overwhelming compared to any mitigation.

Moreover, the testimony of Lamons' mother was tragically predictable. "Even without the victim impact testimony, the evidence of the prior crimes themselves left little doubt about the impact of those crimes on defendant's victims." (*People v. Davis, supra,* 46 Cal.4th at p. 618.)

Furthermore, the factor (b) victim impact evidence consisted only of the testimony of a single witness, Lamons' mother; and that testimony was extremely brief, comprising merely four pages of Reporter's Transcript. (7 RT 2442-2445.) Brevity of the challenged victim impact testimony is another basis for finding the error harmless. (See, e.g., *People v. Redd* (2010) 48 Cal.4th 691, 732; *People v. Panah* (2005) 35 Cal.4th 395, 495.) Accordingly, there is no reasonable possibility that the testimony of

Lamons' mother affected the penalty verdict, the alleged error was harmless, and the judgment should be affirmed.[68]

VI. JOHNSON FORFEITED HIS PROSECUTORIAL MISCONDUCT CLAIM; THERE WAS NO MISCONDUCT; THE ALLEGED ERROR WAS NOT PREJUDICIAL; AND THERE WAS NO INEFFECTIVE ASSISTANCE OF COUNSEL

Johnson claims the prosecutor committed misconduct in penalty phase closing argument by addressing the jurors individually rather than as a group, defense counsel was ineffective for failing to object to the alleged misconduct, and the error was so prejudicial that it requires reversal of the penalty verdict. (AOB 97-104.) All of Johnson's contentions are meritless.

The prosecutorial misconduct claim was forfeited because there was no objection, assignment of misconduct or request for admonition in the trial court where any error could have been readily remedied. Notwithstanding forfeiture, it was not misconduct to emphasize each juror's individual responsibility to arrive at an appropriate penalty determination. Moreover, the prosecutor's rhetorical question repeated to each of the twelve jurors was the equivalent of addressing the jury as a whole. Furthermore, the alleged error was harmless. For the same reasons, there was no ineffective assistance of counsel. Accordingly, the judgment should be affirmed.

A. Relevant Proceedings

Near the end of his penalty phase closing argument, the prosecutor stated to the jury: "Justice will be served when those who are not injured

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[68] Because there was no error or prejudice, Johnson cannot show deficient performance and prejudice for purposes of any ineffective assistance of counsel claim he may seek to raise in response to the forfeiture.

by crime feel as indignant as those who are. That's when justice is served. When people who are not directly injured by the crime feel as indignant as those that are." (9 RT 2724.) Addressing them as "Sir" or "Ma'am," the prosecutor then asked each of the twelve jurors in rhetorical fashion, "How about you," and whether he or she was indignant yet. (9 RT 2723-2724.)

Thereafter, the prosecutor argued:

> Enough is enough. Do you feel what Bonnie and Calvin and Bruce and grandma feel? Do you feel what Sharon and her daughter feel?
>
> Don't say yes, because you don't unless you lost a daughter or a son. You don't. Put a value on it. Put a value on it. Is it enough yet?
>
> Put a value on that. Is it enough yet?
>
> That's his partial trail of blood and horror.
>
> Enough is enough. He forfeited the right to live, and he so richly deserves the ultimate punishment.

(9 RT 2724.) Defense counsel made no objection to the argument.[69] (9 RT 2723-2725.)

B. The Claim Was Forfeited

"To preserve the issue of prosecutorial misconduct on appeal, the defendant must both object *and* request a curative admonition unless such admonition would have failed to cure any prejudice." (*People v. Lopez* (2013) 56 Cal.4th 1028, 1073 [emphasis in original].) In addition, a defendant must "request an assignment of misconduct" to preserve the claim for appeal. (*People v. Young* (2005) 34 Cal.4th 1149, 1188.)

As any other prosecutorial misconduct claim, a defendant claiming misconduct in closing argument must give the trial court "an opportunity to attempt to alleviate the potential harm caused by the prosecutor's action." (*People v. Fuiava* (2012) 53 Cal.4th 622, 691, citing *People v. Boyette*,

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[69] Johnson concedes defense counsel did not object. (AOB 101.)

supra, 29 Cal.4th at p. 432.) Thus, " 'a defendant must make a timely objection and ask the trial court to admonish the jury to disregard the prosecutor's improper remarks or conduct, unless an admonition would not have cured the harm.'" (*People v. Thomas* (2012) 54 Cal.4th 908, 937, quoting *People v. Davis, supra,* 46 Cal.4th at p. 612.) If no such objection and request for admonition is made, the misconduct claim is forfeited. (See *People v. Dykes, supra,* 46 Cal.4th at p. 769; *People v. Hamilton* (2009) 45 Cal.4th 863, 956; *People v. Brown* (2003) 31 Cal.4th 518, 553; *People v. Navarette* (2003) 30 Cal.4th 458, 513.)

As stated, there was no objection in the trial court to the argument which Johnson now claims was misconduct. Consequently, no assignment of misconduct or curative admonition was requested. If there was error, an objection and assignment of misconduct would not have been futile since it would have halted and discredited the prosecutor's argument.[70] Moreover, an admonition to the jurors to disregard the prosecutor's remarks as improper would have cured any potential prejudice from the alleged misconduct. Accordingly, Johnson's claim of prosecutorial misconduct in penalty phase closing argument is forfeited.

Instead of objecting and requesting an assignment of misconduct and admonition in the trial court, Johnson has waited to raise his prosecutorial misconduct claim for the first time on appeal after receiving unfavorable verdicts.

> "Because we do not expect the trial court to recognize and correct all possible or arguable misconduct on its own motion [citations], defendant bears the responsibility to seek an admonition if he believes the prosecutor has overstepped the bounds of proper comment, argument, or inquiry."

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[70] Johnson agrees that an objection "would have diffused" the alleged misconduct. (AOB 102.)

(*People v. Wilson* (2008) 44 Cal.4th 758, 800, quoting *People v. Visciotti* (1992) 2 Cal.4th 1, 79.) Johnson deprived the trial court of the opportunity to correct the error he now claims on appeal. Therefore, his misconduct claim has been forfeited.

C. There Was No Misconduct

" 'A prosecutor's conduct violates the Fourteenth Amendment to the federal Constitution when it infects the trial with such unfairness as to make the conviction a denial of due process.' " (*People v. Doolin* (2009) 45 Cal.4th 390, 444, quoting *People v. Morales* (2001) 25 Cal.4th 34, 44, and citing *Darden v. Wainwright* (1986) 477 U.S. 168, 181 [106 S.Ct. 2464, 91 L.Ed.2d 144], and *Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 643 [94 S.Ct. 1868, 40 L.Ed.2d 431].) "Under California law, a prosecutor who uses deceptive or reprehensible methods of persuasion commits misconduct even if such actions do not render the trial fundamentally unfair." (*Ibid.*, citing *People v. Cook* (2006) 39 Cal.4th 566, 606.)

"[W]hen the claim focuses upon comments made by the prosecutor before the jury, the question is whether there is a reasonable likelihood that the jury construed or applied any of the complained-of remarks in an objectionable fashion." (*People v. Morales, supra,* 25 Cal.4th at p. 44, citing *People v. Ayala* (2000) 23 Cal.4th 225, 283-284.) " 'In conducting this inquiry, we "do not lightly infer" that the jury drew the most damaging rather than the least damaging meaning from the prosecutor's statements.' " (*People v. Dykes, supra,* 46 Cal.4th at p. 772, quoting *People v. Frye*[71] (1998) 18 Cal.4th 894, 970; see also *People v. Wilson* (2005) 36 Cal.4th 309, 338; *People v. Young, supra,* 34 Cal.4th at p. 1192.)

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[71] *People v. Frye, supra,* 18 Cal.4th 894, was disapproved on another ground in *People v. Doolin, supra,* 45 Cal.4th at p. 421, fn. 22.

In closing argument, the " 'prosecutor is given wide latitude to vigorously argue his or her case and to make fair comment upon the evidence, including reasonable inferences or deductions that may be drawn from the evidence.' " (*People v. Dykes, supra,* 46 Cal.4th at p. 768, quoting *People v. Ledesma* (2006) 39 Cal.4th 641, 726.) While a prosecutor "may not mislead the jury," he or she "has a broad range within which to argue the facts and the law." (*People v. Daggett* (1990) 225 Cal.App.3d 751, 757-758.)

There was no misconduct in violation of either the state or federal constitution in this case. Foremost, Johnson's complaint about addressing the jurors individually fails to appreciate that the prosecutor's remarks were made in penalty phase closing argument.

As instructed in the penalty phase, each of the jurors was required to assign his or her own moral and sympathetic value to the aggravating and mitigating circumstances, decide for herself or himself whether the aggravating or mitigating factors existed, individually assign "whatever weight he or she believes is appropriate" for a factor, and personally consider whether the aggravating factors outweigh the mitigating so substantially as to warrant a death sentence. (19 CT 4841-4843 [CALCRIM No. 766].) In contrast to the prosecutor's remarks here, an argument which "may have lessened the jurors' sense of responsibility to individually arrive at an appropriate penalty determination" would have been improper. (See *People v. Walker* (1988) 47 Cal.3d 605, 647, citing *People v. Milner* (1988) 45 Cal.3d 227, 255-256.) Thus, to the extent the prosecutor impressed each juror with his or her personal and individual responsibility to arrive at an appropriate penalty by addressing them separately, the argument was proper.

Respondent recognizes that this Court held in *People v. Wein* (1958) 50 Cal.2d 383 (*Wein*), overruled on another ground in *People v. Daniels*

(1969) 71 Cal.2d 1119, 1140, that "arguments should be addressed to the jury as a body and the practice of addressing individual jurors by name during the argument should be condemned rather than approved" in penalty phase closing argument. (*Id.* at p. 395.) However, the opinion in *Wein* does not describe the offending argument or articulate the context in which the prosecutor addressed individual jurors by name. (See *id.* at pp. 395-396.)

In *People v. Freeman* (1994) 8 Cal.4th 450, this Court extended the *Wein* rule to bar counsel from quoting voir dire statements from individual jurors in penalty phase closing argument. (*Id.* at pp. 517-518, quoting *Wein* and citing *Neumann v. Bishop* (1976) 59 Cal.App.3d 451, 473.) The concern in *Neumann* was "any implication of rapprochement" with individual jurors. (*Neumann v. Bishop, supra,* 59 Cal.App.3d at p. 474.)

The prosecutor's argument in this case did not violate this principle. As stated, the prosecutor was essentially impressing upon each juror his or her obligation to personally and individually weigh the aggravating and mitigating factors in deciding on an appropriate penalty. The prosecutor was not attempting to flatter or curry favor with any individual juror by quoting or addressing the juror by name. Rather, by *addressing each of the twelve jurors in generic fashion with the same rhetorical question*, the prosecutor was in effect addressing the jury as a whole.

In addition to *Wein*, Johnson seeks to rely on *People v. Sawyer* (1967) 256 Cal.App.2d 66, 78; *People v. Davis* (1970) 46 Ill.2d 554, 560, 264 N.E.2d 140, 143; and *State v. Ryerson* (1955) 247 Iowa 385, 392-393, 73 N.W.2d 757, 762. (AOB 99-100.) However, the prosecutor in *Sawyer* addressed jurors individually on twelve different occasions (*People v. Sawyer, supra,* 256 Cal.App.2d at p. 78); the prosecutor in *Davis* played upon "personal circumstances and fears" of individual jurors, the details of which were omitted from the opinion (*People v. Davis, supra,* 46 Ill.2d at p.

560, 264 N.E.2d at p. 143); and the prosecutor in *Reyerson* pointedly asked four jurors who were parents whether they would like the idea of their children being supplied alcohol and getting into a car accident as occurred in the case (*State v. Ryerson, supra,* 247 Iowa at p. 592, 73 N.W.2d at p. 761). No such misconduct occurred here. Accordingly, *Sawyer*, *Davis* and *Ryerson* are materially distinguishable and do not assist Johnson's claim.

Even if the prosecutor's argument technically violated the *Wein* rule, it clearly did not rise to the level of conduct which " 'infects the trial with such unfairness as to make the conviction a denial of due process' " or constitute "deceptive or reprehensible methods of persuasion." (See *People v. Doolin, supra,* 45 Cal.4th at p. 444.) Accordingly, there was no misconduct under either the federal or state constitution, and the judgment should be affirmed.[72]

D. The Alleged Error Was Harmless

Notwithstanding Johnson's forfeiture of any challenge on appeal and the propriety of the prosecutor's penalty phase argument, any alleged error was harmless. To assess prejudice from improper penalty phase argument, this Court applies the "reasonable possibility" test of *People v. Brown, supra,* 46 Cal.3d at p. 448. (*People v. Gonzales, supra,* 51 Cal.4th at p.

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[72] It was also proper for the prosecutor to ask the jurors to consider the feelings of Miller's and Lamons' surviving family members. This Court has repeatedly "held that it is proper at the penalty phase for a prosecutor to invite the jurors to put themselves in the place of the victims and imagine their suffering." (*People v. Slaughter* (2002) 27 Cal.4th 1187, 1212; see *People v. Roybal* (1998) 19 Cal.4th 481, 530, fn. 17.) "[J]ust as a prosecutor may ask the jurors to put themselves in the shoes of the victim, a prosecutor may ask the jurors to put themselves in the place of the victim's family to help the jurors consider how the murder affected the victim's relatives." (*People v. Jackson* (2009) 45 Cal.4th 662, 692 [finding no misconduct].) Johnson does not challenge this aspect of the prosecutor's argument. (See AOB 97-104.)

953.) "Thus, we must decide whether there is a reasonable possibility that the jury would have returned a different penalty verdict absent the" alleged misconduct. (*Ibid.*)

It is notable that, albeit under various harmless error standards, all of the cases upon which Johnson relies for his misconduct claim found error in addressing jurors individually to be non-prejudicial. (See *Wein, supra,* 50 Cal.2d at pp. 395-397; *People v. Sawyer, supra,* 256 Cal.App.2d at p. 78-79; *People v. Davis, supra,* 46 Ill.2d at p. 560, 264 N.E.2d at p. 143; *State v. Ryerson, supra,* 147 Iowa at pp. 392-393, 73 N.W.2d at p. 762; see also *People v. Freeman, supra,* 8 Cal.4th at p. 518 [finding quote of juror harmless]; *Neumann v. Bishop, supra,* 59 Cal.App.3d at p. 474 ["In content the remark appears harmless"].)

In determining the prejudicial effect of improper penalty phase argument, the error should be considered in context of the aggravating evidence, the significance of the offending comment in the prosecution argument as a whole, and the balancing effect of the defense in closing argument. (See *People v. Welch* (1999) 20 Cal.4th 701, 762.) As discussed in Argument V(C), *ante*, the Lamons and Nordeen murders were particularly brutal and the evidence in aggravation was nothing short of overwhelming while the evidence offered in mitigation was unconvincing and even if credited, paled by comparison. Accordingly, there is not a reasonable possibility that the prosecutor's rhetorical remarks in penalty phase argument affected the verdict, the alleged error was harmless, and the judgment should be affirmed. (See *People v. Gonzales, supra,* 51 Cal.4th at p. 953 ["rhetorical flourishes" by prosecutor in penalty phase argument harmless in light of egregious facts of the capital murder].)

E. Johnson Fails to Demonstrate Ineffective Assistance of Counsel

As explained above, it was not misconduct for the prosecutor to impress upon the jurors their personal and individualized responsibilities in arriving at a penalty verdict. Thus, defense counsel was not deficient for failing to object to the argument. To the contrary, an objection would have risked relieving the jurors of that heavy personal burden to Johnson's detriment.

Also, as shown above, it is not reasonably probable that Johnson would have received more favorable verdicts in the absence of the prosecutor's rhetorical comments. Since Johnson cannot satisfy his burdens of showing deficient performance and prejudice, his ineffective assistance claim should be rejected. (See *Strickland, supra,* 466 U.S. 668 at pp. 687-695; *People v. Wash, supra,* 6 Cal.4th at p. 271.)

VII. THERE WAS NO CUMULATIVE EFFECT OF GUILT OR PENALTY PHASE ERRORS WARRANTING REVERSAL

Johnson argues the cumulative effect of the guilt and penalty phase errors claimed on appeal requires reversal of the judgment. (AOB 105-106.) The claim is meritless.

This Court has recognized that multiple trial errors may have a cumulative effect. (*People v. Hill* (1998) 17 Cal.4th 800, 844-848; *People v. Holt* (1984) 37 Cal.3d 436, 458-459.) In a "closely balanced" case, this cumulative effect may warrant reversal of the judgment "where it is reasonably probable" that it affected the verdict. (*People v. Wagner* (1975) 13 Cal.3d 612, 621.)

If the reviewing court rejects all of a defendant's claims of error, it should reject the contention of cumulative error as well. (*People v. Anderson* (2001) 25 Cal.4th 543, 606; *People v. Bolin, supra,* 18 Cal.4th at p. 335.) Where "nearly all of [a] defendant's assignments of error" are

rejected, this Court has also declined to reverse based on cumulative error.[73] (*People v. Bradford* (1997) 14 Cal.4th 1005, 1057.)

As discussed in Arguments I through VI, *ante*, there were no errors in either the guilt or penalty phase. Even assuming for purposes of argument a technical violation of the *Wein* rule in penalty phase argument, there would be nothing to aggregate. (See, e.g., *People v. Sattiewhite* (2014) 59 Cal.4th 446, 491 [one possible trial court error]; *People v. Bennett* (2009) 45 Cal.4th 577, 618 ["single erroneous evidentiary ruling"]; *People v. Koontz, supra,* 27 Cal.4th at p. 1094 [single non-prejudicial instructional error in guilt phase]; *People v. Hughes, supra,* 27 Cal.4th at p. 407 ["one possible significant error" at penalty phase]; *People v. Jones, supra,* 17 Cal.4th at p. 315 [single "ministerial error in imposing an incorrect sentence" on non-capital count]; *People v. Williams* (1997) 16 Cal.4th 153, 228-229 [single instructional error].) Accordingly, there can be no cumulative error and the judgment should be affirmed.

VIII. CALIFORNIA'S DEATH PENALTY STATUTE IS CONSTITUTIONAL

Johnson challenges the constitutionality of California's death penalty statute in general and as applied in his case, acknowledging that each of his claims has consistently been rejected by this Court. (AOB 107-143.) As Johnson presents no new arguments or persuasive reasons to revisit these issues, respondent urges this Court to reaffirm its prior holdings finding

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[73] " '[A] defendant is entitled to a fair trial, but not a perfect one,' for there are no perfect trials. [Citations.]" (*Brown v. United States* (1973) 411 U.S. 223, 231-232 [93 S.Ct. 1565, 36 L.Ed.2d 208]; see also *People v. Bradford, supra,* 14 Cal.4th at p. 1057; *People v. Cooper* (1991) 53 Cal.3d 771, 839.)

California's death penalty statute, relevant instructions and sentencing scheme constitutional.[74]

Johnson claims section 190.2 is impermissibly broad because it fails to meaningfully narrow the types of first degree murders eligible for the death penalty. (AOB 109-110.) This claim has repeatedly been rejected. (*People v. Sattiewhite, supra,* 59 Cal.4th at p. 489; *People v. Cowan* (2010) 50 Cal.4th 401, 508; *People v. Verdugo* (2010) 50 Cal.4th 263, 304; *People v. Williams, supra,* 49 Cal.4th at p. 469.)

Johnson claims factor (a) of section 190.3 is impermissibly overbroad because it permits the jurors to consider "the circumstance of the crime" without limitation, thus allowing arbitrary and capricious imposition of the death penalty. (AOB 111-113.) This Court has previously rejected this claim. (*People v. Sattiewhite, supra,* 59 Cal.4th at p. 490; *People v. Foster* (2010) 50 Cal.4th 1301, 1362-1364; *People v. Russell, supra,* 50 Cal.4th at p. 1274; *People v. Jennings, supra,* 50 Cal.4th at pp. 688-689; *People v. Lomax* (2010) 49 Cal.4th 530, 593.)

Johnson claims California's death penalty statute is unconstitutional because it does not require the jury to find beyond a reasonable doubt that the factors in aggravation existed, unanimously agree on the presence of aggravating factors, or find beyond a reasonable doubt that the factors in aggravation outweigh those in mitigation in order to impose a death sentence. (AOB 115-129.) These claims have repeatedly been rejected. (*People v. Sattiewhite, supra,* 59 Cal.4th at pp. 489-490; *People v. Howard* (2010) 51 Cal.4th 15, 39; *People v. Foster, supra,* 50 Cal.4th at p. 1367;

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[74] Johnson summarily presents his claims in "abbreviated fashion." (AOB 107.) Likewise, rather than burden this Court with arguments that have repeatedly been presented in past cases, respondent will simply cite to recent cases which have rejected the claims and arguments raised by Johnson.

People v. Russell, supra, 50 Cal.4th at p. 1272; *People v. Lynch* (2010) 50 Cal.4th 693, 766; *People v. Verdugo, supra,* 50 Cal.4th at p. 304; *People v. Williams, supra,* 49 Cal.4th at p. 470.)

Johnson invites this Court to reconsider these prior holdings in light of *Apprendi v. New Jersey* (2000) 530 U.S. 466 [120 S.Ct. 2348, 147 L.Ed.2d 435], and its progeny. (AOB 115, 118-123.) This has already been done in numerous recent cases, and the outcome remains unchanged. (*People v. Sattiewhite, supra,* 59 Cal.4th at pp. 489-490; *People v. Russell, supra,* 50 Cal.4th at pp. 1271-1272; *People v. Jennings, supra,* 50 Cal.4th at p. 689; *People v. Verdugo, supra,* 50 Cal.4th at pp. 304-305; *People v. Lomax, supra,* 49 Cal.4th at p. 594.)

Johnson claims California's death penalty statute is unconstitutional because it does not require written findings from the jury which are necessary for meaningful appellate review of the penalty verdict. (AOB 129-131.) This claim has previously been rejected by this Court. (*People v. Sattiewhite, supra,* 59 Cal.4th at p. 490; *People v. Howard, supra,* 51 Cal.4th at p. 39; *People v. Foster, supra,* 50 Cal.4th at pp. 1365-1366; *People v. Russell, supra,* 50 Cal.4th at p. 1274; *People v. Lynch, supra,* 50 Cal.4th at p. 766.)

Johnson claims California's capital sentencing scheme is unconstitutional because it does not allow for intercase proportionality review to guarantee against arbitrary and disproportionate application. (AOB 132-133.) This argument has consistently been rejected. (*People v. Sattiewhite, supra,* 59 Cal.4th at p. 490; *People v. Howard, supra,* 51 Cal.4th at p. 39; *People v. Foster, supra,* 50 Cal.4th at p. 1368; *People v. Russell, supra,* 50 Cal.4th at p. 1274; *People v. Lynch, supra,* 50 Cal.4th at p. 767.)

Johnson claims the use of unadjudicated criminal activity as an aggravating circumstance under section 190.3, factor (b), violates due

process. (AOB 134-135.) This argument has previously been rejected. (*People v. Martinez* (2009) 47 Cal.4th 399, 455; *People v. McWhorter* (2009) 47 Cal.4th 318, 378; *People v. Richardson* (2008) 43 Cal.4th 959, 1031; *People v. Morrison* (2004) 34 Cal.4th 698, 729; *People v. Ramos* (2004) 34 Cal.4th 494, 533.)

Johnson claims the list of "restrictive adjectives" such as "extreme" and "substantial" in section 190.3, factors (d) and (g), is unconstitutional because it impermissibly limits consideration of mitigating factors. (AOB 135.) This argument has repeatedly been rejected. (*People v. Martinez, supra,* 47 Cal.4th at p. 455; *People v. McWhorter, supra,* 47 Cal.4th at pp. 378-379 *People v. Morrison, supra,* 34 Cal.4th at p. 729-730; *People v. Ramos, supra,* 34 Cal.4th at p. 533; *People v. Cunningham* (2001) 25 Cal.4th at 926, 1041.)

Johnson claims the trial court's failure to identify which factors under section 190.3 are mitigating and restrict the jury's consideration of those factors precluded a fair and reliable penalty verdict. (AOB 135-138.) This Court has consistently rejected this claim. (*People v. Sattiewhite, supra,* 59 Cal.4th at p. 490; *People v. Martinez, supra,* 47 Cal.4th at p. 455-456; *People v. McWhorter, supra,* 47 Cal.4th at p. 378; *People v. Ramos, supra,* 34 Cal.4th at p. 533; *People v. Brown* (2004) 33 Cal.4th 382, 402.)

Johnson claims California's capital sentencing scheme violates equal protection because it affords non-capital defendants more procedural protections than capital defendants. (AOB 138-140.) This claim has repeatedly been rejected. (*People v. Sattiewhite, supra,* 59 Cal.4th at p. 490; *People v. Russell, supra,* 50 Cal.4th at p. 1274; *People v. Jennings, supra,* 50 Cal.4th at p. 690; *People v. Verdugo, supra,* 50 Cal.4th at p. 305; *People v. Lomax, supra,* 49 Cal.4th at p. 594.)

Johnson claims California's "regular use of the death penalty" is unconstitutional because it violates or falls short of international norms and

evolving standards of decency. (AOB 141-143.) This argument has consistently been rejected. (*People v. Howard, supra,* 51 Cal.4th at pp. 39-40; *People v. Foster, supra,* 50 Cal.4th at p. 1368; *People v. Lynch, supra,* 50 Cal.4th at p. 766; *People v. Jennings, supra,* 50 Cal.4th at p. 689.)

Although Johnson acknowledges that each of the claimed defects in California's death penalty scheme has previously been rejected, he contends that this Court has done so "without considering their cumulative impact or addressing the functioning of California's capital sentencing scheme as a whole." Arguing this "approach is constitutionally defective," Johnson asks this Court to reconsider each of his claims "in the context of California's entire death penalty system." (AOB 107.)

An identical argument was recently rejected in *People v. DeBose* (2014) 59 Cal.4th 177, 214.) This Court explained:

> As, however, California's death penalty scheme is not faulty in any of the respects described by defendant and none of the proposed safeguards for those alleged defects are constitutionally required, no constitutional violation appears even when the alleged defects are considered collectively.

(*Ibid.*, citing *People v. Lucero, supra*, 23 Cal.4th at p. 741.)

"California's capital sentencing scheme as a whole provides adequate safeguards against the imposition of arbitrary or unreliable death judgments." (*People v. Williams* (2008) 43 Cal.4th 584, 648.) All of Johnson's constitutional challenges to the death penalty should be rejected and the judgment affirmed.

CONCLUSION

Accordingly, for the reasons stated, respondent respectfully requests that the judgment be affirmed in its entirety.

Dated: October 20, 2014

Respectfully submitted,

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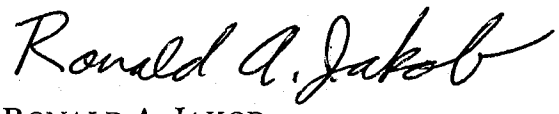

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CERTIFICATE OF COMPLIANCE

I certify that the attached Respondent's Brief uses a 13 point Times New Roman font and contains 25,950 words.

Dated: October 20, 2014

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SUPREME COURT COPY

SUPPLEMENTAL DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **People v. Billy Joe Johnson** Case No.: **S178272**

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 October 21, 2014, I served the attached **Respondent's Brief,** by placing a true copy thereof enclosed in a sealed envelope in the internal mail collection system at the Office of the Attorney General at 110 West A Street, Suite 1100, P.O. Box 85266, San Diego, CA 92186-5266, addressed as follows:

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SUPREME COURT
FILED

OCT 23 2014

Frank A. McGuire Clerk

Deputy

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 October 21, 2014, at San Diego, California.

L. Hernández
Declarant

L. Hernández
Signature

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DEATH PENALTY

DECLARATION OF SERVICE BY U.S. MAIL

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Signature

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