

SUPREME COURT COPY

In the Supreme Court of the State of California

**THE PEOPLE OF THE STATE OF
CALIFORNIA,**

Plaintiff and Respondent,

v.

CARLOS MARVIN ARGUETA,

Defendant and Appellant.

CAPITAL CASE

Case No. S150524

**SUPREME COURT
FILED**

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Los Angeles County Superior Court
Case No. BA261252
The Honorable Curtis B. Rappe, Judge

Frank A. McGuire Clerk

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DEATH PENALTY

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STATEMENT OF THE CASE

In an amended information filed by the Los Angeles County District Attorney, appellant and codefendant Enrique Gonzalez were charged in count 1 with the murder of Jorge Lua. (Pen. Code, § 187, subd. (a)).¹ It was further alleged as to count 1 that the murder was committed by drive by shooting. (§ 190.2, subd. (a)(21).) As to count 2, appellant was charged with the attempted murder of Francisco Amezcua (§§ 664/187, subd. (a)); in count 3, with the attempted murder of Carlos Zepeda (§§ 664/187, subd. (a)); and in count 4, with the murder of Gregory Gabriel (§ 187, subd. (a)). It was further alleged as to count 4 that the offense contained multiple murders. (§ 190.2, subd. (a)(3).) As to count 5, appellant was charged with the attempted murder of Girnet Hart (§§ 664/187, subd. (a)); in count 6, with the attempted murder of Rene Jimenez (§§ 664/187, subd. (a)); in count 7, with the attempted murder of Marvin Emmanuel (§§ 664/187, subd. (a)); in count 8, with the attempted murder of Camille Johnson (§§ 664/187, subd. (a)); in count 9, with the attempted murder of Roberto Carrillo (§§ 664/187, subd. (a)); and in count 10 with the attempted murder of Miguel Ramos (§§ 664/187, subd. (a)). It was further alleged as to all counts that a principal was armed with a firearm pursuant to section 12022, subdivision (a), and that appellant personally and intentionally discharged a firearm within the meaning of section 12022.53, subdivision (c). (3CT 670-676.)

Appellant and Gonzalez pleaded not guilty and denied the allegations. (3CT 683-684; 4CT 691-692.) Their cases were severed for trial, and the prosecution submitted a letter indicating that the death penalty would be

¹ Unless stated otherwise, all further statutory references are to the Penal Code. Codefendant Gonzalez is not a party to this appeal.

sought for appellant. (3CT 684-685; 4CT 694-695, 717-726, 776-784, 878, 880, 887.)

On August 16, 2006, the prosecutor filed a notice to amend the information to include the following additional factors in aggravation: 1) circumstances of the charged crimes pursuant to section 190.3, subdivision (a), (b) and (c); 2) criminal activity involving the use of force or violence; and 3) assault on another inmate. (4CT 919-923.)

On September 5, 2006, jury selection commenced. (5CT 1000.) On September 11, 2006, after hearing argument, the court granted the prosecution's motions in limine to admit into evidence writings and other items recovered from appellant's home. (15CT 4304-4305.) On September 26, 2006, pursuant to stipulation by the parties, the court declared a mistrial and discharged the jury. (5CT 4312-4313.) On September 26, 2006, a second jury was impaneled and appellant's trial commenced. (28 CT 8267-8268.)

Appellant was found guilty of two counts of first degree murder (counts 1, 4), and seven counts of attempted murder (counts 2, 3, and 5-9). (29CT 8356-8365, 8368-8373). The drive-by-shooting and multiple murder special circumstances as to these counts were also found to be true. (29CT 8365.) On counts 4-8, the jury found the allegations of personal discharge of a firearm to be true. (29CT 8359-8563.) On counts 1, 3, and 9, the allegations of personal discharge of a firearm were found to be not true. The great bodily injury enhancements on counts 9 and 10 were dismissed. (28CT 8288; 29CT 8356-8358, 8364.) The jury deadlocked as to Count 10, the court declared a mistrial and dismissed this count in the furtherance of justice. (29CT 8374.)

On October 30, 2006, the penalty phase trial commenced. (29CT 8377.) On November 3, 2006, the jury reached a verdict of life without the

possibility of parole (“LWOP”) on count 1 and a verdict of death as to count 4. (29CT 8432-8433, 8436-8437.)

Defense counsel filed a motion to set aside the death verdict or grant a new trial. (29CT 8539-8543.) The court denied appellant’s motions. On the same day, the trial court sentenced appellant to death on count 4. As to the remaining counts, the trial court sentenced appellant to life without the possibility of parole on count 1, and consecutive terms of life plus 25 years on counts 2, 3, and 4-9. (29CT 8568-8550, 8603-8614; 30CT 8619-8627.)

The court ordered appellant to pay a \$10,000 restitution fine (§ 1202.4), and a parole revocation fine (§ 1202.45) in the same amount was imposed and stayed. The court granted appellant 2,050 days of presentence custody credits, consisting of 1,783 days of actual custody and 267 days of conduct credit. (58CT 16571-16590.)

This appeal from the judgment of death is automatic. (§ 1239, subd. (b).)

STATEMENT OF FACTS

I. GUILT PHASE EVIDENCE

A. Prosecution Evidence

1. The Crimes

a. February 13-14, 2004: First Degree Murder of Jorge Lua (Count 1), Attempted Murders of Francisco Amezcua (Count 2) and Carlos Zepeda (Count 3)

On the afternoon of February 13, 2004, Francisco Amezcua was with his cousin, Jorge Lua, and a friend, Carlos Zepeda, at Amezcua’s house. (8RT 1275-1277.) Later that evening, Amezcua agreed to take Lua home in his white Datsun. (8RT 1277.) Lua was in the front passenger seat, and Zepeda was in the back seat. (8RT 1277-1278.)

While driving down Manchester Avenue, Amezcua pulled over to the curb near the intersection of Raymond and Manchester to talk to a group of girls. (8RT 1279.) The girls ignored them and walked away. (8RT 1279-1280.) At that time, Amezcua heard two gunshots and witnessed a crowd of approximately 20 people in front of a nearby nightclub scatter and run in different directions. (8RT 1280-1281.) Amezcua tried to “pull back” his vehicle and drive away. When he reversed his car, Amezcua backed into a “small red car” that was parked behind him. (8RT 1282.) Amezcua motioned for the driver to “move back” so he did not have to drive forward into the gunfire. Amezcua could see two individuals in the vehicle, later identified as appellant and co-defendant Gonzalez. Both appellant and Gonzalez were illuminated by an overhead street light, and Amezcua identified them as “Mexican.” He also described appellant’s face as being “chubby” or “round,” and recalled his “bald” head. (8RT 1282-1285, 1288-1290, 1300.)

In response, appellant raised his hands and mouthed “what the fuck” to Amezcua. (8RT 1285-1286.) The red car stayed in place, and Amezcua was forced to pull his vehicle forward. (8RT 1287.) As he did so, Amezcua heard the sound of “bullets piercing metal” and glass shattering. He realized that the shots were going through the rear of his own vehicle. (8RT 1290-1292.) Amezcua ducked, but the “tapping” from the bullets hitting his vehicle continued as the red car came into position directly next to Amezcua on the driver’s side. (8RT 1292-1294.)

After the shooting stopped, Amezcua, Lua, and Zepeda checked each other for injuries. Everyone indicated that they were “okay” and Amezcua proceeded to drive home. During the drive, Lua indicated that something “hurt” and Amezcua heard him gasping for air. (8RT 1294-1296.) Amezcua continued driving, but by the time they reached his house, Lua was dead. (8RT 1296.)

On February 14, 2004, at approximately 1:28 a.m., Los Angeles Police Department Officer Greg Garcia and his partner, Officer Sanchez, were called to East 84th Place. (8RT 1252-1254.) Upon their arrival, Officer Garcia saw a white Datsun 510 vehicle with bullet holes in the "rear quarter panel." The rear window was also shattered. (8RT 1254.) Amezcua and Zepeda were standing on the curb, while Lua lay on the ground nearby. Lua was bleeding heavily, and Fire Department personnel administered medical treatment. Lua was transported to the hospital, where he was pronounced dead. (8RT 1387.)

Officer Garcia interviewed Amezcua and Zepeda. A Scientific Investigation Division ("S.I.D.") photographer and several detectives marked the bullet holes in the Datsun and impounded the vehicle. (8RT 1258, 1261.) In addition to the shattered rear window, there were bullet holes on the driver's side, a bullet hole in the rear bumper, two exit bullet holes on the quarter panel of the passenger side, and grazed metal or a "skipped round" on top of the trunk. (8RT 1259.)

Deputy Medical Examiner David Whiteman performed the autopsy on Jorge Lua. (8RT 1386.) Whiteman was able to determine that Lua had suffered from two gunshot wounds. (8RT 1388.) The fatal gunshot wound was to the abdomen. (8RT 1388.) Death would have occurred within a couple of minutes from when the bullet entered Lua's body. (8RT 1390.) The second, nonfatal bullet went through Lua's right shoulder and upper arm prior to exiting, damaging only skin and muscle. (8RT 1390.) Whiteman was unable to determine the caliber of the projectile from the wound. (8RT 1391.) A toxicology screen on Lua showed prior use of marijuana, but that he was not under the influence of any drugs or alcohol on the date he died. (8RT 1398.)

On February 20, 2004, Criminalist Diane Paul of the S.I.D. firearms unit performed a bullet path analysis on Amezcua's 1973 white Datsun 510.

(9RT 1439.) Paul identified five separate bullet entries on the driver's side of the vehicle. (9RT 1440; Peo. Exh. No. 48-A-F.) Using trajectory rods, Paul was able to determine that two of the bullets had entered the driver's side, passed through the interior of the vehicle from the rear compartment, and continued through the driver's and front passenger's seats. (9RT 1447-1451, 1455; Peo. Exh. Nos. 49-B, 49-D.) Additional bullet entries and impacts were located at the rear of the Datsun. (9RT 1456-1462; Peo. Exh. No. 50-A-G.) Altogether, Paul concluded that there had been 18 possible primary impacts, and at least nine shots. (8RT 1466.)

Los Angeles Police Detective Michelle Esquivel was the lead detective on the February 14, 2004, crime scene. Esquivel testified that in addition to Lua, there were five surviving victims and "at least five" shooters around the social club that night. (9RT 1471-1472.) Police recovered two revolver handguns from the area. (9RT 1473.) The shooting that caused Lua's death was deemed to be an "isolated incident" that was unrelated to the other shootings that night. This determination was based on interviews with Amezcua, the location of the shell casing from the crime scene, and the bullets recovered from Lua's body. (9RT 1475; 13RT 2068-2069.)

Zepeda was not able to identify either occupant in the red car. (9RT 1477.) Amezcua initially made tentative identifications, and on March 19, 2004, he positively identified appellant from a photographic lineup. (9RT 1495, 1510-1511, 1521.) Amezcua was also able to identify Gonzalez from a photographic lineup (9RT 1497), in addition to the red Toyota Celica vehicle used in the shooting (9RT 1498-1499).

b. February 14-15, 2004: First Degree Murder of Gregory Gabriel (Count 4), Attempted Murders of Girnet Hart (Count 5), Rene Jimenez (Count 6), Marvin Emmanuel (Count 7), and Camille Johnson (Count 8)

On February 14, 2004, 12-year-old Gregory Gabriel was given permission by his mother to spend the night at his best friend's (14-year-old Marvin Emmanuel) house. (10RT 1648.) Gabriel and Emmanuel had planned to attend a Valentine's Day party after Emmanuel's parents were asleep. At approximately 10:30 p.m., Emmanuel's 17-year-old brother Kareem drove the boys to pick up 15-year-old Camille Johnson and her 13-year-old sister, Girnet Hart. (10RT 1650.) Kareem dropped the group of four off at the corner of 57th and Western Avenue. He told them he would return later after picking up additional people. (9RT 1578, 1652.)

Emmanuel immediately noticed that the individuals waiting outside the club were "older" and Hispanic. (10RT 1653.) He commented to Gabriel that there were "too many Mexicans." (10RT 1674.) Gonzalez, who was standing nearby, overheard Emmanuel's remark and walked over. Gonzalez appeared angry and asked, "Which of you fools was talking about Mexicans?" (10RT 1657, 1686.) Gabriel, Emmanuel, Johnson, and Hart denied saying anything. (9RT 1582, 10RT 1657.) Gonzalez then asked if they were "gangsters" and referred to the gang or tagging group later determined to be the one he and appellant belonged to -- "T.C.A." (9RT 1582-1583; 10RT 1663-1664, 1688, 1689; 11RT 1885.) Hart was afraid and thought there was going to be a fight. She ran across the street to a phone booth and pretended to make a call. (9RT 1582, 1587.)

Gonzalez motioned to appellant, who was standing across the street. (10RT 1659, 1690.) As appellant walked over, he pulled out a black submachine gun from the inside of his leather jacket. Appellant held the

gun with two hands. Gonzalez told him, "These fools was talking about Mexicans." He also informed appellant that the group "don't know T.C.A." (10RT 1694-1695.) Appellant and Gonzalez both appeared upset. Appellant first pointed the gun at Johnson. (10RT 1695.) Johnson asked appellant if he was going to shoot her. Appellant smiled and said, No." He then aimed the gun at Emmanuel and Gabriel. (10RT 1697.)

A security guard and another man came over. (10RT 1666, 1698.) The security guard told appellant to put the gun away. (10RT 1666, 1698.) Hart rejoined the group when she saw Gonzalez and appellant had turned to leave. (9RT 1590-1591.) When the security guard walked back toward the nightclub, Gabriel, Emmanuel, Johnson, and Hart followed behind him. (10RT 1667, 1699.) They walked together, with their backs to Gonzalez and appellant. (10RT 1668.)

Seconds later, appellant fired multiple gunshots toward the retreating group of adolescents. (9RT 1592; 10RT 1668-1669, 1700.) "Sparks" were "flying all across from every direction." (10RT 1704.) The bullets were still "flying" when Johnson and Emmanuel finally made it into the nightclub. Once inside, they were separated. (10RT 1700-1701.) Emmanuel ran into the bathroom with Hart, who was pulling on his shirt. Emmanuel saw that Hart had a bullet hole in her stomach and was bleeding profusely. (10RT 1670.) Hart then collapsed on the floor. (9RT 1594.) Emmanuel left Hart in the company of other nightclub patrons to look for Gabriel. He found him bleeding on the ground outside the front of the nightclub. Gabriel had been shot twice in the back. (10RT 1636, 1671-1672.)

Rene Jimenez was a DJ at the nightclub that night. (9RT 1612.) When he tried to exit the front entrance of the club around the same time Hart, Johnson, Emmanuel, and Gabriel sought to enter, he saw two Hispanic men, each holding a gun. One gun was "large" and looked like a

machine gun. The other was a smaller handgun. (9RT 1614-1616.) When Jimenez saw this scene he turned around; however, appellant had already started shooting, and Jimenez was shot twice in the chest area. (9RT 1617.) Jimenez tried to run back inside but was shot three more times in his back. (9RT 1619.)

Gabriel was taken to the hospital and received medical treatment. (10RT 1638.) He was later pronounced dead as a result of his bullets wounds. (10RT 1637.) Hart suffered two gunshot wounds to the abdomen (9RT 1596), and Jimenez suffered five gunshot wounds to the chest and back area (9RT 1617-1619). Jimenez and Hart each required numerous surgeries and endured long hospital stays. (9RT 1598, 1622.) The police found 21 nine-millimeter shell casings clustered in one area at the scene of the shooting. (9RT 1555-1556.)

**c. February 19, 2004: Attempted Murders
of Roberto Carrillo (Count 9) and
Miguel Ramos (Count 10)**

Los Angeles Police Department Detective Kirby Carranza was the lead investigator on an unrelated criminal case that involved appellant's younger brother, Johnny Argueta. Johnny was being prosecuted for a serious felony that was committed on or about April 3, 2003. (11RT 1734-1735.) Appellant had attended Johnny's preliminary hearing and several subsequent court sessions, including on February 17, 2004, when Johnny was held to answer. (11RT 1738-1739.) During these court appearances, appellant harassed and intimidated several witnesses before and during their testimony. He also confronted them in the hallway and made "hand signs." (11RT 1742-1743, 1746-1751.)

Miguel Ramos was one of the witnesses who testified at Johnny Argueta's preliminary hearing. (11RT 1740.) Ramos' friend, Robert Carrillo, accompanied him to court for "support." (11RT 1773.) On

February 19, 2004, Carrillo was “hanging out” with Ramos and some other friends in the “Smiley Hauser” area of West Los Angeles. (11RT 1775-1779.) Sometime that afternoon, Carrillo saw a red car drive by with “faded” paint, “pop up” lights, a rear spoiler, and mismatched rims. Carrillo also noticed this car had a tribal design decal on the driver’s side door and a “Noz” sticker on the front fender. (11RT 1778-1779, 1800-1805.) Fifteen minutes later, Carrillo and Ramos left to pick up party supplies from a nearby store. (11RT 1780-1781.) While Ramos was driving, Carrillo saw the red car pass by in the opposite direction and make a U-turn to follow them. (11RT 1782-1786.) Ramos accelerated his vehicle and the red car gave chase for approximately 15 blocks. (11RT 1787-1792.) During the drive, Carrillo felt a sting and “heat” sensation coming from his upper back. Carrillo also heard glass shattering. When he turned around, he saw that the back window of his car was “in pieces.” (11RT 1792- 1793.) Ramos continued to drive, with the red car following them. Ramos made a sharp turn directly in front of an oncoming SUV before finally losing control of his vehicle and crashing. (11RT 1794-1795.) The red car “flew” by them and Carrillo instructed Ramos to “make a run for it.” (11RT 1796-1797.)

Carrillo unbuckled his seat belt and ran. When he turned around, he saw that Ramos, unable to take off his seatbelt, was stuck inside the vehicle. Ramos eventually broke free, and he and Carrillo ran to hide behind a nearby parked vehicle. (11RT 1798-1799.) After a few minutes, they continued to flee on foot to Carrillo’s sister’s house. (11RT 1799.) Once there, Carrillo’s sister found a hole in his shirt where a bullet had come into contact with and burned part of Carrillo’s skin. (11RT 1806-1808, Peo. Exh. 134 [shirt].) Police later recovered a single nine-millimeter casing from the roadway where the shooting occurred. (11RT 1844.)

Jesus "Jessie" Molina was married to Carrillo's sister. On February 19, 2004, he was at home playing video games with his friends "Alex" and "Tony." Alex received a call on his cellular phone from Carrillo, who informed Alex that people were shooting at them. The call was "cut off" abruptly, causing Molina to go into "panic mode." He was accompanied by his friends to the front of his house to see if they could find Carrillo. (11RT 1849-1850.) Three or four minutes later, Molina saw Ramos and Carrillo coming up the street. They were "running for their lives" and appeared "panicked" and "very shaky." (11RT 1851-1852.) When Carrillo approached Molina he lifted up his shirt and showed him a large "knot" or "big bump" on his back. The wound looked like a burn mark and felt "hot" to touch. Molina instructed Carrillo to go inside and have Carrillo's sister look at it. (11RT 1853.)

Molina stayed outside for another four or five minutes before going inside to talk to Carrillo. Carrillo explained that a red car had been chasing and shooting at them. Molina returned outside to see if there was any new "activity." At that time, he saw a red vehicle pass by and crash into the driver's side of his landlord's truck. Molina approached the vehicles because he was concerned about his landlord and wanted to check if he was okay. At that time, Molina was able to observe two Hispanic men in the red car. The passenger was "heavy set," with short hair and a mustache. (11RT 1858-1859.) Molina subsequently positively identified appellant as the person he saw sitting in the passenger seat. (11RT 1862-1866; Peo. Exh. Nos. 19, 110, 111.)

2. The Investigation

Los Angeles Police Department Detective Eric Baker was assigned as the lead investigator on the February 14, 2004, Lua homicide. (11RT 1882-1884.) During his investigation, Detective Baker learned that the casings from this crime scene matched the casings that were recovered from the

February 15, 2004, Gabriel homicide crime scene. (11RT 1882-1885.) Detective Baker was also informed that a possible suspect had the first name "Carlos," and was affiliated with a gang or tagging crew with the initials "T.C.A." (11RT 1885-1886.) On February 26, 2004, Detective Baker received further information from Detective Carranza that a shell casing had been recovered from the February 19, 2004, crime scene that also matched the casings found on February 14 and 15, 2004. (11RT 1887-1888.)

On February 26, 2004, at approximately 4:30 p.m., Detectives Baker and Carranza secured a search warrant for appellant's residence located at 1627 West 38th Place. (11RT 1890; Peo. Exh. 115.) During pre-search surveillance, officers saw appellant and Gonzalez leave the residence. (11RT 1890-1893.) After their departure, a specialized gang unit searched the room that appellant's family members indicated belonged to him. (11RT 1894-1895.) Various writings and a paintball mask were seized from this room. (9RT 1895; Peo. Exh. Nos. 124, 125.) A speaker box and a skateboard that were spray painted with the initials "T.C.A." were discovered in a converted garage at the back of the house. A "shoulder stock" that connects to a gun, additional writings with the letters "T.C.A.," a digital photograph of a submachine gun (believed to be the one used in the shootings), magazine clips, six fliers for various parties, and a February 23, 2004, impound notice for a two-door, red, 1982 Toyota Celica were also recovered. (11RT 1897-1900; Peo. Exh. Nos. 118, 121, 127.)

The writings found in appellant's bedroom were discovered in two envelopes that contained assorted notepapers and cards. The first eight-and-a-half-by-eleven yellow envelope contained four-inch by four-inch pieces of note paper and a card with a sticky back material that had numbers written on it. (12RT 1925; Peo. Exh. Nos. 125, 128.) The first notecard read:

Bullet proof love just started. Got to much to stay don't know where to start straight loco in the hood. Always thinkin what gonna happen next what if I'm next or what if my lil bro for fuckin up but not to clear his name by.

(12RT 1926, Peo. Exh. No. 125.) The front side of the second notecard read:

To clear his name by NE [any] means necessary got to much love for him, if N2 goes then World War 3 just started cuz I'm gonna go out like a G7 blastin NE [any] one – bullets gonna fly everywhere some will live only to die another day many will fear me many will know – many will roll with me if not with them I guess I'm going out solo.

(12RT 1927-1928; Peo. Exh. No. 125.) The back side of the second notecard read: "Too X Crazy X AYE." (12RT 1930; Peo. Exh. No. 125.) A third notecard read:

Always thinkin got to much on my mind damn I'm goin crazy paranoid like a mothafucka don't know who got so many enemies can't even keep track of them so I just clip NE [any] mothafucka that steps up to me. [¶] Got to move all obstacles out my way got things to do in my life there's money out there that belongs in my pocket enemies that belong six feet under people say a lot of shit about my hood by ain't doing nothing so shut the fuck up before my fuckin dog bites you in the ass.

(12RT 1933-1934; Peo. Exh. No. 128.) A fourth notecard contained a list of names which were later determined to be several of the named victims and witnesses in appellant's brother Johnny Argueta's case. (11RT 1752-1755; Peo. Exh. No. 125, 128.) In addition, several pieces of loose paper in the envelopes contained the following language:

Step back let a real G step to the mike and drop a verse always stayed true to the game I'm as real as it comes I'm gonna be the next mothafucking king even though nobody believes me can't nobody see me you want to be me but you can't I guess that's why you all hate me but I don't give a fuck cause I'm still here and I'm still reapin my hood to the fullest and for those who don't know [T.C.A.] is what I'm bangin.

(12RT 1934-1935; Peo. Exh. No. 128.)

Just a couple lowked [sic] up G's trying to come up in this crazy world of are's got money on my mind 24/7 gonna get it NE [any] way I can. Bust a liq [sic] here bust a liq [sic] there not given a fuck as long as I got something in my pocket as long as the bills are getting pay on time everything is coo [sic]. [¶] Always reapin the – [unintelligible] to the fullest cause L.A. is my city West Side T.C.A. is what I'm banging so back the fuck up before I buck buck buck on you fuckin dummies it ain't no joke no more got to kill everyone dissin my hood cause I got my [dawg] next to me and if you want to hear him bark then step up to me. Hear you dissin but you foo's aint doing shit get ready to hear me bark mothafucking boom.

(12RT 1935; Peo. Exh. No. 128.)

Coming from the city of the lokes mothafuckers where bitches and snitches get killed [every] fuckin day and the blocks are filled with crackheads.

(12RT 1936; Peo. Exh. No. 128.)

Just a couple of young gangstas on a search for something to complete us. Lit did we know that one day we would all meet and become the familia that we now are. [¶] We all are down in are [sic] own ways. We knew that the lame fucks all would hate and try to put a stop to are [sic] familia. [¶] But little did they know that can't nobody every put a stop to us cause we L.A.'s most craziest and lowked [sic] up G's fixing and running shit like it should be. [¶] Always protecting the block and servin them dummies cause lame fucks belong six feet under with the magets [sic]. [¶] Always staying true to the game never slippin always rollin one deep cuz you leva's always tryin to jump us got to dump on dummies. [Words in margin indicate: "Add to another song."] [¶] I told you once and I'm tellin you again you snitches keep on talking and . . . I'm gonna make sure that beak of your stays shut for good.

(12RT 1937; Peo. Exh. No. 128.)

We all were raised in the same hood didn't know each other till we started reapin [sic] the same click. Now we Los Angeles most craziest familia doin whatevea [sic] it takes to stay in the game. Never leavin a trace that's how true G's make it in life. Straight reapin [sic] my familia where ever I'm at not given a

fuck cause that's how true G's get there [sic] fame. Li did you dummies know that crazy ass familia ain't no joke. [¶] You dummies can't even handle us because we straight making you funny dummies run and duck and cover just like the rats you are. [¶] Got my buddy ready to blast on NE dumb ugly snitch. [¶] You foo's to scared and you actin like you gonna do something bitch please why you lyin to yourself can't even [unintelligible] no sense and shit.

(12RT 1937-1938; Peo. Exh. No. 128.)

Look at all you snitches pointing fingers and shit but what you foo's gonna get from that. Let me tell you. Nothing but kaos [sic] headed your way cause I might be dumb but I got hurt mothafucker. Away play my game to the end [in the margin]. Going back but I got hurt motherfucker got bullets for years and as long as I got that gonna bust everyday motherfucker. [P] The only thing stopping me from killing you is a Judge but when they gone when you least expect it gonna kill you and your whole family and anyone reapin [sic] the dumb hood of yours cause Westside T.C.A. ain't no game. You foo's can't hit that quit bottom.

(12RT 1938-1939; Peo. Exh. No. 128.)

A search of Gonzalez's residence also recovered material referencing "T.C.A." However, none of the material referenced "snitches" or "blasting on people." (12RT 1943.) In addition, there was no evidence recovered from the Gonzalez residence to connect him with the submachine gun depicted in the photographs that were recovered from appellant's house (and believed to have been the gun appellant used in the shootings). (12RT 1942.)

Los Angeles Police Department Criminalist and firearms analyst Rafael Garcia examined the cartridge casings, bullets, and bullet fragments from the Lua, Gabriel, and Carrillo shootings. (13RT 2062-2066.) Garcia determined that the nine-millimeter casings from the Lua, Gabriel, and Carrillo shootings were all fired from the same weapon, possibly an "uzi" or submachine gun, which was designed to be fired either from the shoulder

or the hip. (13RT 2072, 2080-1286; Peo. Exh. No. 136.)² Garcia was familiar with a Sten Mark submachine gun like the one depicted in the photographs recovered from appellant's home. Garcia indicated that this weapon was designed to fire nine-millimeter caliber rounds of ammunition. He was also aware that the Sten Mark was not a "typical" weapon because the majority of production occurred during World War II. (13RT 2087-2088.)

Los Angeles County District Attorney's Bureau of Investigation Senior Investigator John Thompson analyzed the photograph and gun stock recovered from appellant's home. Thompson was of the opinion that the weapon depicted in the photograph was a Sten Mark III submachine gun. (13RT 2093-2099; Peo. Exh. Nos. 118 [photograph]; 120 [non-working replica of Sten Mark III] 121 [gun stock].) He was aware that this type of weapon was able to combine the "automatic firing" of a machine gun with the ammunition of a regular pistol. (13RT 2099, 2100-2101.) In addition, the gun can be loaded with more than 32 bullets and fire at a "cyclic rate," allowing the user to hold the trigger down and fire 500 rounds per minute. (13RT 2114.)

Several detectives interviewed appellant and Gonzalez in separate rooms after their arrest. (11RT 1901-1902; Peo. Exhs. 129 [audio tape], 130 [transcript].)³ Detectives Baker and Williams interviewed appellant, while Detective Carranza interviewed Gonzalez. (11RT 1902.) Appellant

² Los Angeles Police Department Senior Criminalist Starr Sachs also examined a coroner bullet from the Lua case and bullet evidence recovered from the Gabriel case. From this evidence, she was able to determine that the bullets were fired from the same firearm. (13RT 2083-2084.)

³ A redacted version of these interviews were played for the jury. (9RT 1907-1908; Peo. Exh. Nos. 129, 130; 10RT 1922, Peo. Exh. Nos. 131, 132.)

was shown the photograph of the Sten Mark weapon that was recovered from his residence and a photograph of Gabriel after he was deceased. (11RT 1902-1903, Peo. Exhs. 118, 130-131.) Appellant admitted being on the scene of the February 14, 2004, shooting, but denied that he had been the shooter. (12RT 1919; Peo. Exh. No. 130.) Appellant claimed the gun in the photograph belonged to his friend "Juan," but later said that it belonged to "Eric Lopez." (11RT 1924-1925.)

Approximately an hour into appellant's interview, Detective Carranza passed by the room appellant was in and appellant asked to speak with him. (11RT 1905.) Detective Carranza initially questioned appellant about the February 19, 2004 shooting. Appellant readily admitted that he was the driver of the red car involved in that incident, but indicated that Gonzalez had been the passenger and shooter. (11RT1905-1906; 3 Supp. Clerk's Transcript [hereinafter SCT] 75-88, 103; Peo. Exh. Nos. 130 [tape-recorded interview], 131 [transcript].) When Detective Carranza told appellant that he had been identified as the passenger and Gonzalez as the driver, appellant stated that this was not possible because Gonzalez could not drive. (3SCT 86-89; Peo. Exh. No. 130.) After a break from the interview to allow appellant to see his family, appellant admitted that he was in the red car that was responsible for the Lua shooting. (3SCT 100-104.) Appellant explained that he and Gonzalez had returned to their car after someone started shooting at them at a party. As they attempted to leave, Amezcua's vehicle backed up into appellant's car. Because of this, appellant maintained that it was Gonzalez who picked up the submachine gun and started shooting at Amezcua's vehicle. (3SCT 99-104.)

On February 14, 2004, appellant was with Gonzalez and his cousin "Luis." (3SCT 107.) Gonzalez had gone to check on the cost of a Valentine's Day Party when he summoned appellant over and instructed him to "bring the strap." Gonzalez said a "Black guy" had made a racial

comment about “Mexicans.” Appellant brought the Sten Mark III weapon across the street. When he pulled the trigger, bullets came “flying out.” (3SCT 108.)

On February 19, 2004, appellant was driving with Gonzalez in the Smiley Hauser area when he saw Carrillo, whom he recognized from his brother’s court case. (3SCT 108.) While appellant followed Carrillo’s vehicle, Gonzalez fired a shot at the car. (3SCT 110-111.)

B. Defense Evidence

Los Angeles Police Department Forensic Specialist Sandra Claiborne compared eight fingerprints lifted from appellant’s impounded red Toyota Celica. (15RT 2372-2373.) The prints inside the passenger side window matched Gonzalez and a person named Javier Perez. None of the prints belonged to appellant. (15RT 2377-2379, 2384.)

Los Angeles Police Officer Leonardo Olea responded to the scene of the shooting on February 19, 2004. (15RT 2389.) During his investigation on scene, Olea spoke with two different witnesses, neither of which was Molina. (15RT 2390.)

Just prior to the shooting, Carlos Zepeda and Amezcua were rolling a “blunt” and trying to talk to “some girls.” (14RT 2285.) After they were hit by bullets, Zepeda had turned around to look at the red car behind them. (14RT 2288.) Zepeda did not see anyone making gestures, nor did he hear Amezcua say “what the fuck.” (14RT 2289-2290.)

Los Angeles Police Department Detective Theodore Hammond was working as the night watch supervisor on February 14, 2004. Hammond interviewed Amezcua directly after the shooting. (16RT 2451-2453.) The interview lasted approximately twelve minutes. Amezcua indicated that he not able to identify anyone from the red car, but had observed that the occupants were “Mexican.” (16RT 2453-2355, 2475.)

William Harris had lived with his grandmother on 38th Place for approximately five months prior to February of 2004. Appellant and his family lived in a house directly across the street. Harris often saw appellant with Gonzalez, and he had often witnessed Gonzalez get off at the bus stop near appellant's home. He had never seen Gonzalez drive any vehicle. (16RT 2477-2480.)

On February 19, 2004, Melecio Espain lived on Carlin Street. (14RT 2304.) Espain was outside on the sidewalk in front of his house when a red Toyota Celica sped by and came "very close" to hitting his neighbor, Vernon Hunter's truck. (11RT 2303-2306.) Espain saw two people in the back seat and one person in the driver's seat of the vehicle. At the time, there was a group of Hispanic men standing outside. Espain did not know Molina and was unable to say if he had been one of the men in that group. (14RT 2312-2313.)

Forensic psychologist Robert Shomer reviewed police reports, photo lineups, and the testimony arising from the Lua and Carrillo shootings. (12RT 2488-2490.) Shomer explained that high stress situations can diminish facial recognition and interfere with a person's ability to be accurate about facial recognition and eyewitness identification. (16RT 2492-2493.) In particular, when a weapon is present, a person is likely to focus on the weapon rather than the face of an individual. (16RT 2494.) When given the facts of the Lua shooting as a hypothetical, Shomer opined that during this "fight or flight" situation, it is "highly improbable" that a person would get a good enough look at the shooter that could later lead to an accurate identification. (16RT 2513-2514.) He also opined that any identification through a windshield or "slanted surface," could "mask the amount of detail [one] could take in." (16RT 2516-2517.)

C. Prosecution Rebuttal Evidence

On February 19, 2004, 71-year-old Vernon Hunter was preparing to reverse his Chevy truck into his driveway from the street when a small red car nearly collided with his vehicle. The red car continued to speed up the street at a “very fast” rate. (15RT 2322-2325.) Hunter thought he saw three persons in the vehicle, one in the back and two in the front. (15RT 2325.) Hunter spoke to Molina after the collision. Molina said that he had witnessed the near collision and was able to identify the individuals in the red car. (15RT 2325-2332.)

II. PENALTY PHASE EVIDENCE

A. Prosecution Evidence

John Thompson took the stand a second time as a firearms expert and testified regarding the demonstration that took place on September 12, 2004, wherein he fired the Sten Mark III weapon in semi-automatic and fully automatic modes. Thompson fired the weapon a total of twenty-one times on each setting. (19RT 2840-2841.) Thompson acknowledged that a video recording was made of the demonstration. (19RT 2841; Peo. Exh. No. 142.) This videotape was played for the jury (19RT 2841), and the court instructed that Thompson’s comments which accompanied the footage were not to be considered for their truth, but were “simply like labels” to depict what took place in each phase of the video. (19RT 2841.)

Yunue Ramirez’s younger brother was Jorge Lua. Ramirez took care of Lua and their other three siblings. (19RT 2845.) Lua was “friendly” and “always had a joke.” He was caring with kids, and very loveable to his mother. Lua was fun to be around and always had a smile on his face. (19RT 2845-2846.) When Lua was shot and killed by appellant, he had a four-year old son and his girlfriend was seven months pregnant with his second child. Both sons are named “Jorge.” (19RT 2846.) Lua’s parents

were unable to testify or come to appellant's trial because it is "too painful" for them. Jorge's mother and father are now "depressed most of the time." (19RT 2850.) Ramirez was responsible for telling Lua's oldest son about this father's death. She explained that Lua was an "angel" now and that his son was not going to be able to see or talk to him again. (19RT 2851.)

Marvin Emmanuel lived across the street from Gabriel. They were best friends and spent entire weekends together playing games, watching television, and riding their bikes. (19RT 2855-2856.) Gabriel called Emmanuel's mother "Mom," and Emmanuel's family considered Gabriel more like a "relative" than a friend. On the night he was killed, Gabriel was at Emmanuel's house the entire day, and he had finally received permission from his parents to spend the night. Gabriel's death had a deep impact on Emmanuel and is something he will never forget. Emmanuel also suffers from nightmares. He did seek counseling after the shooting but he did not find anything helpful. Emmanuel's relationship with his mother has suffered because he finds it hard to talk to her about the shooting. His grades have also "dropped" because he has stopped attending his classes. (19RT 2856-2859.) Emmanuel experiences feelings of immense guilt about the comment he made the night Gabriel was shot, observing that there were "too many Mexicans" at the nightclub. He takes full responsibility for "caus[ing]" Gabriel's death and misses his friend a lot. (19RT 2861.)

Charlene Myers is Gabriel's older sister. (19RT 2863-2864.) They had shared a room in their parent's home until she moved out at age nineteen. (18RT 2864.) Gabriel was always very "helpful" and loved to put things together. Occasionally, when they had their younger nephew stay with them, Gabriel got up to cook him breakfast, dress, and feed him. He would also take the trash out and clean up the yard for his mother. (18RT 2865.) Gabriel was the "technology" expert in the family and

helped Myers and their parents with all of their computer issues. (18RT 2865-2866.) Myers parents were both very strict and had only allowed Gabriel to spend the night at Emmanuel's house because he lived across the street. This was the first and only time Gabriel had been allowed to sleep over at someone else's house. (18RT 2868.) Their family has not been the same since Gabriel died. Gabriel's mother initially refused to eat and got so skinny and sick that she had to cut all of her hair off. (18RT 2869.) Gabriel's father will not talk about his son's death, and his relationship with their mother is now strained because he blames her for allowing Gabriel to stay over at Emmanuel's house. Their father had dreams of taking Gabriel back to their home country of Belize. Everything Gabriel's father had done in his life he had done for his son, and now he did not have a son or anything to look forward to. (18RT 2870.) The family no longer celebrates birthdays or holidays because Gabriel was their "baby" and they feel "lost" without him. (18RT 2866, 2872-2873.)

Lennox Crawford is Gabriel's older brother. Crawford found Gabriel to be easy going, "very inquisitive," and always wanting to "learn as much as possible." (18RT 2876.) Gabriel had voiced dreams of attending a private Catholic high school in Los Angeles and continuing college at the University of Southern California to study medicine. (18RT 2876.) Crawford's seven year-old son still talks about Gabriel everyday. (18RT 2879.) The entire family traveled together to Belize to bury Gabriel in the village his father was from. (18RT 2880.)

Gregorio Gabriel, Gabriel's father, took "great pride and joy" in his only son, though he admittedly was very strict and had the philosophy of "it's my way or no way." (18RT 2881-2882.) Gregory was interested in computers and electronics. He called himself the "fixer-up man" and liked to repair things and change the oil in his mom's car. Gabriel helped his father build a garage, which included being responsible for all the

measurements and using a skill saw. (18RT 2885-2886.) Prior to his death, Gregorio had sent Gabriel to Belize each summer. On occasion, Gabriel would live among the Mayan and Ketchi Indians that resided there. (18RT 2883.) However, in the United States, Gregorio had a rule that Gabriel was not to sleep over anywhere else. He was very strict with Gabriel because he “knew what was happening out of the street because there are bad people out there.” (18RT 2884.) On their annual trips to Belize, Gregorio would put Gabriel on an airplane and drive the more than three-thousand miles alone because Gregorio felt “one of us [had] to stay live to take care of [the family].” (18RT 2884.)

On February 13, 2004, in the early morning hours before the night of the shooting, Gregorio returned home at 1:00 a.m. He was told by his wife that Gregory had gone to sleep over at Emmanuel’s house across the street. She had assured him that Emmanuel and his family were “good people,” and she told Gregorio that Gabriel would be “safe” there. (18RT 2887.) Gregorio and his wife had a “big, drawn out argument” until four in the morning. When Gregory returned home at 7:00 a.m., they worked on kitchen and bathroom renovations together until approximately 6:00 p.m. Gregorio then had plans for Gregory to go over to a relatives house and teach them to “burn C.D.’s” because he and his wife had plans to go out for Valentines Day. However, Gabriel informed his father that his mother had given him permission to again go over to Emmanuel’s house that night for a sleep over. (18RT 2889.)

At 8:00 p.m., Gregorio watched his son walk across the street to Emmanuel’s house. At 3:00 a.m. the next morning, he received the call that Gabriel had been shot. (18RT 2890.) Gregorio and his wife traveled to the scene of the shooting and eventually to the hospital where they found Gabriel dead, “with all these tubes coming out of his mouth.” (18RT 2893.) Gregorio has many days when he feels like lying down and never getting

up. He misses his son and will “never, ever feel the same.” Gregorio feels like his life was taken away too, and he no longer has a life to live. (18RT 2893-2894.) His marriage is “bad” and “on the brink of coming to an end.” (18RT 2898.)

Ella Crawford, Gabriel’s mother, described Gabriel as a “fun-loving kid that loved family, loved his friends, would give anything for his family and friends.” (18RT 2903-2904.) The family depended on Gabriel because he knew about computers and electronics. He would also help with vacuuming, washing the dishes, and taking out the trash. Gabriel had built many things with his father. Crawford was the one who had taught Gabriel how to use the skill saw. On the weekend of Valentines Day, Gabriel had called Crawford to ask permission to sleep over at Emmanuel’s house. Crawford told him she would have to speak with Emmanuel’s mother first. When Crawford called, Emmanuel’s mother said that Gabriel was welcome in their home, adding that he was one of the “few kids we allow into our home.” (18RT 2909.) Crawford felt confident from observing their family over the time that they had lived across the street that Gabriel would be safe in their home. Thus, she allowed Gabriel to stay over at Emmanuel’s on Friday night. When Gabriel returned safely the next morning, Crawford felt more confident and allowed him to sleep over again the following night. (18RT 2910-2913.) Crawford and Gregorio went out to a Valentine’s Day function that night. At approximately 2:00 or 2:30 a.m., they received the call from the police. Before the police could arrive at the house to speak with them in person, Emmanuel’s mother came over. She told Gregorio and Crawford that the kids had snuck out and Gabriel had been shot. (18RT 2915.) Crawford and Gregorio traveled to the location Gregory was shot. Once there, another officer at the scene informed them that Gabriel did not survive the shooting. (18RT 2917.)

Crawford and Gregorio insisted on going to the hospital that Gabriel had been taken to. Gregorio asked to see Gabriel, and when he returned to Crawford she knew that Gabriel was "gone" because Gregorio fell to the ground. Crawford then also insisted on seeing Gabriel. Crawford observed that Gabriel was just "laying there" on a hospital table with no movement. She recalled how Gabriel was such a "hyper" child and could not keep still, even in his sleep. Thus, the stillness in his death had a profound effect on her. (18RT 2918.)

Gabriel's body was transported to Belize for burial because Gregorio and Crawford had planned to eventually return and live there. Although Crawford has two other children, she feels that there is "nothing" here for her anymore, and she is just "existing," because she died with her son. (18RT 2919-2921.)

Over one thousand people came to Gabriel's funeral service. Several of Gabriel's friends were on suicide watch after his death because they expressed that they could not live without him. (18RT 2922-2924.)

Prior to the three shooting incident in February of 2004, on January 15, 2004, at approximately 2:45 p.m., Officer Juan Pereida was working on bicycle patrol with his partner, Officer Mendoza, in the West Los Angeles area. The officers observed three individuals, including appellant, inside a parking structure. Officer Mendoza approached them and said, "What's up, guys." One of the individuals, identified as Javier Perez, looked "surprised." Perez immediately reached for his waistband, where Officer Pereida could see a large bulge. (19RT 2932-2934.) The officers ordered the individuals to turn around and put their hands up. Because of Perez's suspicious actions, Officer Pereida believed he was potentially harboring a weapon and he was concerned that the incident could turn lethal and involve force or great bodily injury against them. (19RT 2935.) The individuals complied, and were handcuffed and searched for weapons.

Officers from the West Los Angeles Gang Unit arrived on scene and informed Officers Pereida and Mendoza that they had been conducting surveillance of the area. A sawed-off shotgun was recovered from Perez's waistband. (19RT 2936-2937; Peo. Exh. No. 168.) A semi-automatic "chrome handgun" was found on appellant, with one bullet in the chamber. He also had a "black glove" concealed in his pants. (19RT 2937, 2956-2957; Peo. Exh. No. 167.) Perez and appellant were taken into custody. (19RT 2938.)

Los Angeles Police Department Gang Detail Officer Noel Macpoc was given the chrome handgun recovered from appellant that day. Officer Macpoc discovered the magazine clip was missing. However, he found a single bullet in the chamber and determined that the gun was ready to be fired. (19RT 2959-2963.) Officer Paul Correlejo had arrived with Officer Macpoc and later inspected the sawed off shotgun recovered from Perez. Officer Macpoc discovered five rounds in the weapon and determined it was also fully operable. (19RT 2966-2967.)

B. Defense Evidence

Marta Calderon, appellant's aunt, always knew appellant as a "very good boy." (19RT 2973-2974.) When appellant was twelve or thirteen, Calderon would take him to school because his mother and father were working "all the time." Appellant was very affectionate and respectful to adults. (19RT 2976-2977.) Calderon was surprised to learn of appellant's convictions because she never saw any change in his behavior and felt he was always "sweet." (19RT 2977-2978.) Calderon urged the jury to be "compassionate" toward appellant. (19RT 2981.)

Jennifer Argueta, appellant's younger sister, had lived with appellant her entire life prior to his arrest. (19RT 2985-2986.) Their family endured "bad" economic conditions when she was little because their father was still in El Salvador and their mother was forced to work multiple jobs. When

their father came to live with them, he worked in construction. However, he was an alcoholic and was often violent toward their mother. (19RT 2990-2991.) Appellant was Jennifer's role model and "perfect" to her. He would help Jennifer with "everything" and was "smart." Appellant also helped their cousins with their homework and loved children. (19RT 2993-2994.) At some point, appellant started smoking marijuana and was always sleeping and eating. (19RT 2995.) Around the time that appellant was arrested, his drug use had increased and Jennifer observed him smoking practically all the time. (19RT 2996.) He also appeared depressed. Jennifer knew Gonzalez as appellant's good friend and felt he was a bad influence on appellant. (19RT 2997.)

Carlos Argueta, Sr., ("Carlos") appellant's father, moved from El Salvador to the United States when he was approximately twenty-years-old. (19RT 3008-3009.) When appellant was a child, Carlos would travel back to El Salvador for several months to visit his ill father. (19RT 3010.) Carlos drank beer when appellant was a child and at times he would yell at his wife and children. On occasion, he would also "become physical" with his wife, causing appellant to "get angry." (19RT 3011.)

At the time of trial, Carlos had quit drinking and attended the Alcoholics Anonymous program. (19RT 3010-3011.) After Johnny Argueta was arrested, Carlos did not see any change in appellant's behavior. (19RT 3013.) Prior to appellant's arrest, however, Carlos did observe a significant change in appellant, wherein he would sleep a lot, and smoke cigarettes and drink beer. (19RT 3013.) Carlos also witnessed appellant smoke marijuana, act erratically, and he was aware that appellant had been in possession of weapons. (19RT 3016.)

Appellant's mother, Dora Argueta ("Dora"), described him as a "normal" child with good character. (19RT 2028-3029.) Appellant would help out at home and do his homework when told. As he approached

adolescence, appellant became “a little depressive.” (19RT 3029.) At around the age of fourteen, appellant would sleep a lot and did not want to get out of bed. (19RT 3030.) Dora found a bag of marijuana in appellant’s room, and observed on occasion that his eyes were “very shiny and red.” (19RT 3034.) When appellant was sixteen or seventeen years old, Dora tried to take him to see a psychologist for depression, but he refused to attend the sessions. (19RT 3035.) Three or four months prior to the shootings, appellant witnessed Carlos hit Dora. (19RT 3033.) At that time, appellant would also sleep for long periods of time and not eat. (19RT 3035.) He also claimed to be seeing things and told Dora that he had raped his sister. (19RT 3035-3036.) Dora had always thought of appellant as “sweet,” but at the time of trial she “[didn’t] know anymore.” (19RT 3037.)

Appellant’s friend Julie Prado had known him since the age of fourteen or fifteen. They had attended Alexander Hamilton High School together. (20RT 3070.) Prado always found appellant to be a great person. He was very polite, respectful, and family oriented. (20RT 3071-3072.) Prado never witnessed appellant be violent. She was familiar with the group “T.C.A.,” and described it as “just adolescents, hanging around after school.” (20RT 3072.) The only illegal activities she was aware were committed by T.C.A. members was “tagging” or graffiti by spray painting. (20RT 3072.)

In the past, Prado had observed appellant drink and smoke marijuana. At times, he would be very talkative, and then appear very depressed. (20RT 3073.) Prado also knew Gonzalez, and described him as the “bigger one of the group.” Prado did not like to be around Gonzalez and found that he was influential on appellant. (20RT 3074.) When Prado returned from attending her first year in college, appellant had a different group of friends than they had in high school. He also appeared more angry, sad, and depressed. (20RT 3076.)

Youth Counselor Oscar Romero met the Argueta family, including appellant, at Holy Spirit Church in September of 2000. Appellant came to the church for approximately two years to participate in regular social youth programs and confirmation services. (20RT 3092.) Appellant also volunteered in the church's confirmation program, was very responsible, and always partook in various social service activities. (20RT 3093.)

Psychiatrist and neuropharmacologist Frank Henry Gawin testified about his training and experience with pharmacology, the study of the effects of drugs on individuals. (20RT 3105-3106.) Primarily, drugs enhance a person's experience of "pleasure," but this experience is always accompanied with "disinhibition," and an impairment of judgment. (20RT 3108.) Gawin opined that all major drugs, including marijuana, have an effect on maturity and if used regularly during adolescence, can cause "developmental arrest," or the stopping of the function of maturity at the point in time when the substantial drug use occurred. (20RT 3109.)

Based on the hypothetical of a person who is "suddenly hyperactive" and moves around "substantially," but within a few hours is depressed, Gawin opined that this behavior occurs with "psychomotor stimulants" such as cocaine and crack, but also include a group of drugs called "amphetamines" that include methamphetamines and other agents. (20RT 3110-3112.) Based on a second hypothetical, where a person does not sleep for two or three days and then sleeps for several days thereafter, Gawin found this behavior to be indicative of drug use, specifically "intoxicants" or "psychomotor stimulants," but noted that it can also occur with alcohol and other drugs. (20RT 3111.) Gawin described the abuse of these types of drugs when an individual re-administers the drug to sustain a feeling of "euphoria" and the application of these drugs in "binge" cycles that last typically for three-and-half days, but can last up to fourteen days. After a "binge" the individual will "crash" if unable to replenish the drug

supply, often resulting in a significant change of mood or depression. (20RT 3112.) In addition, the individual will often sleep for a significant amount of time to make up for the sleep that was lost during the “binge” or euphoric stage in the drug use cycle. (20RT 3113.)

Gawin also noted that hallucinations are indicative of multiple drugs, but can also occur without drug use as a result of multiple medical disorders, or by product of the application of regular therapeutic drugs by doctors. (20RT 3114.) In the instance of paranoid hallucinations, Gawin stated the root cause is most likely psychomotor stimulants. (20RT 3115-3116.)

Gawin testified that the drug “Ecstasy” can have methamphetamine-like properties but also create “emotional hallucinations,” such as a connection with friends. These type of drugs have the capability of making a person more vulnerable to the influence of others. (20RT 3118-3119.) In addition, Gawin was of the opinion that domestic unrest, stress, and ease of availability make one more susceptible to drug use. (20RT 3116-3119.)

C. Prosecution Rebuttal Evidence

On January 29, 2005, Defense Investigator Daniel Mendoza interviewed members of the Argueta family. At that time, Vanessa Argueta stated that appellant’s friends “looked nice” and were not “cholos” or gang members. (20RT 3137.) Vanessa did not mention Gonzalez, and stated that she had only seen appellant use drugs one time. (20RT 3137.) Dora Argueta stated that appellant had never received any psychological treatment. She indicated that she had considered treatment, but never actually taken appellant to any type of doctor. (20RT 3138.) Dora also told Mendoza that appellant was sad and depressed because of his weight, and two years prior to his arrest, he had stopped going to church because he was lazy. (20RT 3138.) Carlos Argueta told Mendoza that appellant’s friends,

including Gonzalez, were nice kids. He also indicated that he had never had any problems with them. (20RT 3138.)

On April 3, 2003, Detective Kirby Carranza went to the Argueta house to arrest Johnny Argueta. (20RT 3139-3140.) With appellant present, Detective Carranza searched the house for evidence of drugs or narcotics. This search included appellant's bedroom and the converted garage. Detective Carranza was unable to find anything. (20RT 3140.) At the time, appellant did not exhibit any unusual behavior. (20RT 3140.)

On January 15, 2004, Detective Carranza was assigned to investigate appellant's arrest for possessing a loaded and concealed weapon. (20RT 3142.) At that time, Detective Carranza did not observe any behavior to indicate that appellant was under the influence or abusing drugs, and no drug paraphernalia or evidence of drugs were recovered from his body or belongings. (20RT 3142.) Detective Carranza also witnessed appellant's appearance in court for Johnny Argueta's preliminary and other court hearings. During those occasions, appellant did not exhibit any signs of being under the influence. (20RT 3144-3145.) On February 23, 2004, Detective Carranza searched appellant's impounded vehicle and did not find any evidence of drugs or drug paraphernalia. Likewise, on February 25, 2006, when appellant was placed under arrest, Detective Carranza was able to spend several hours talking with appellant, and did not observe any evidence of being under the influence. (20RT 3145-3146.)

ARGUMENT

I. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN ADMITTING THE WRITINGS OBTAINED FROM APPELLANT'S RESIDENCE

Appellant contends the trial court prejudicially erred in admitting evidence the "rap lyric" writings obtained from his bedroom because the probative value of this evidence was substantially outweighed by the

danger of undue prejudice. In addition, appellant argues the prosecution erroneously proffered this evidence as to counts Four through Eight to portray him as having an “indiscriminate homicidal predisposition.” (AOB 40-59.) Respondent disagrees. The evidence was relevant to the issue of appellant’s motive and intent, and to demonstrate deliberation and premeditation. Moreover, the probative value of this evidence substantially outweighed any prejudicial effect. Finally, any error was harmless under any standard.

A. Factual and Procedural Background

On February 15, 2004, appellant committed the murder and attempted murders enumerated in Counts Four through Eight. On February 26, 2004, following a search of appellant’s residence, various handwritten documents were found by Los Angeles Police Department Officers in a bedroom family members indicated to be appellant’s. These writings evidenced, among other things, appellant’s membership and allegiance to the “tag banging crew” called “T.C.A.” (9RT 1891-1895.)

On August 21 and 24, 2006, the prosecutor filed motions in limine to admit these writings and to allow expert testimony from a gang officer to explain their relevancy. (4CT 925-939, 942-983.)⁴ The prosecution argued that this evidence was probative to the issues of identity because appellant and Gonzalez identified themselves to the February 15 victims by

⁴ The writings were submitted as Exhibits Nos. 38 and 45. Exhibit No. 38 included 11 pages of “rap lyrics” and drawings depicting Argueta’s beliefs on “snitches,” persons “dissin [his] hood,” his love of guns, and his allegiance to T.C.A. (4CT 948, 950, 954, 957-958.) Exhibit No. 45 included a note card with a list of named witnesses and victims in appellant’s brother’s case. (4CT 948.) These exhibits were subsequently renumbered at trial as Exhibit Nos. 125 and 128. Detective Erik Baker read the writings included in these Exhibits aloud during his testimony and they were subsequently admitted into evidence. (10RT 1926-1940.)

referencing their gang “T.C.A.” In addition, they accused the victims of “disrespecting” T.C.A., and appeared upset that the victim’s did not know about their gang. (4CT 942, 955-958.) The prosecution also reasoned that the evidence was relevant under Evidence Code sections 1101, subdivision (b), and 1250, to appellant’s motive, intent, plan and/or design, and his deliberation and premeditation as they related to the murder and attempted murder counts. (4CT 925-939, 940-961.) Appellant filed an opposition, alleging the evidence was barred by Evidence Code sections 352 and 210. (4CT 988-997.)

On September 11, 2004, the court heard the motions and allowed the parties to argue. (3RT 255-258.) After indicating that the portion of the motion relating to expert testimony from a gang expert would not be included (based on defense counsel’s agreement and stipulation that he would not go into any of the prior identifications made by Emmanuel and Johnson), the prosecutor stated:

We are still standing by our motion to seek introduction of the items recovered during the search warrant under the theory of section 1250 of the Evidence Code and under [Evidence Code] section 1101(b) to prove intent, deliberation, and premeditation.

(3RT 255- 256.) When the court inquired whether the prosecution sought to introduce this evidence “as to *all* counts” (3RT 256) the prosecutor replied, “Yes. That’s correct.” (3RT 256.) Defense counsel argued that the evidence lacked foundation, and was irrelevant and “highly inflammatory.” (3RT 258-260.)

The trial court ruled that the evidence was admissible under sections 1250 and 1101, subdivision (b) of the Evidence Code, concluding that the relevance of this evidence was outweighed by any prejudice. In particular, the court acknowledged that the writings were a “fairly significant piece of evidence showing premeditation and deliberation” (3RT 264.) In addition,

the court found that the jury could make “logical distinctions” and would not “misuse” this evidence. (3RT 270.)

At a subsequent hearing, after presentation of the evidence, the trial court heard discussion relating to the proposed limiting instruction on the “gang evidence,” which included the writings evidence at issue here. The prosecutor sought to clarify that the People’s prior motion did not limit the evidence to only bear on motive, and the court did not grant it as such. (12RT 1961.) Specifically, the prosecutor indicated,

I had asked that the evidence be allowed in to show motive, intent, identity, deliberation, and premeditation and I believe when the Court granted the People’s motion that that was the intent behind the Court’s ruling.

(12RT 1961.) The trial court asked to view the transcripts from the September 18, 2004, proceedings. At that time, defense counsel specified that it did not “have a problem” with the evidence being introduced as to Counts Four through Ten, and would not contest admission as to any of the counts if specific intent and premeditation were added. (12RT 1964.) The prosecutor agreed to this request. The Court stated that it would only instruct the jury that the evidence would be limited to Counts Four through Ten. However, the court indicated that how this evidence could be applied, would be “delineated by the Court in detail in it’s [*sic*] final instructions.” (12RT 1965.)

After this evidence was introduced, the trial court gave several limiting instructions, including:

You may consider evidence of gang activity only as to Counts Four through Ten and only for the limited purpose of deciding whether [t]he defendant had a motive to commit the crimes charged; OR . . . [t]he defendant acted with intent, deliberation or premeditation . . . OR [a]s evidence that the defendant was the perpetrator of the crimes charged.

You may also consider this evidence when you evaluate the credibility or believability of a witness and when you consider the facts and information relied on by an expert witness in reaching his or her opinion. [¶] You may not consider this evidence for any other purpose. You may not conclude from this evidence that the defendant is a person of bad character or that he has a disposition to commit crime.

(29CT 8350.)

You'll get further instructions on this during my final instructions at the end of the case but at this point you've heard some gang evidence and I just want to make it clear that that is to be considered by you only with respect to counts Four through Ten. [¶] Is everybody clear on that? [¶] And you'll get further instructions about how to use such evidence but for the time being I want you to know it only goes to those counts, Four through Ten.

(12RT 1965-1966.)

At the conclusion of the guilt phase, the trial court instructed the jurors with CALCRIM No. 303, that "[if], during trial, certain evidence was admitted for a limited purpose then you may consider that evidence only for that purpose and no other." (29CT 8329.)

B. Relevant Law

"Only relevant evidence is admissible, and all relevant evidence is admissible unless excluded under the federal or California Constitution or by statute." (*People v. Scheid* (1997) 16 Cal.4th 1, 13, citing Evid. Code, §§ 350, 351; *People v. Crittenden* (1994) 9 Cal.4th 83, 132; *People v. Babbitt* (1988) 45 Cal.3d 660, 681; see also Evid. Code, § 210.) "The test of relevance is whether the evidence tends logically, naturally, and by reasonable inference to establish material facts such as identity, intent, or motive." (*People v. Heard* (2003) 31 Cal.4th 946, 973, internal quotation marks and citation omitted; see also Evid. Code, § 210.) The trial court has

broad discretion in deciding the relevance of evidence. (*People v. Smithey* (1999) 20 Cal.4th 936, 973; *People v. Scheid*, *supra*, 16 Cal.4th at p. 13.)

A trial court's admissibility determination may not be reversed on appeal unless the defendant shows that the court exercised its discretion in an "arbitrary, capricious, or patently absurd manner" which resulted in a "manifest miscarriage of justice." (Evid. Code, § 353, subd. (b) [verdict shall not be set aside based on the erroneous admission of evidence unless the error resulted in a miscarriage of justice]; see also *People v. Rodriguez* (1999) 20 Cal.4th 1, 9-10.) A "miscarriage of justice" should be declared only when the reviewing court, after an examination of the entire record, is of the opinion that it is reasonably probable that a result more favorable to the defendant would have been reached in the absence of the alleged error. (Cal. Const., art. VI, § 13; Evid. Code, § 353, subd. (b); *People v. Earp* (1999) 20 Cal.4th 826, 878; *People v. Watson* (1956) 46 Cal.2d 818, 836.)

"[T]he ordinary rules of evidence do not impermissibly infringe on the accused's constitutional right to present a defense" and courts retain "a traditional and intrinsic power to exercise discretion to control the admission of evidence in the interests of orderly procedure and the avoidance of prejudice." (*People v. Lawley* (2002) 27 Cal.4th 102, 155 [citations and internal quotation marks omitted]; *Estelle v. McGuire* (1991) 502 U.S. 62, 73 [112 S.Ct. 475, 116 L.Ed.2d 385 ["Beyond the specific guarantees enumerated in the Bill of Rights, the Due Process Clause has limited operation"]]; see also *People v. Jones* (1998) 17 Cal.4th 279, 305; *People v. Mincey* (1992) 2 Cal.4th 408, 440; *People v. Hall* (1986) 41 Cal.3d 826, 834.)

Evidence Code section 1101, subdivision (a) generally prohibits the admission of a prior criminal act against a criminal defendant "when offered to prove his or her conduct on a specified occasion." Subdivision (b) of the statute, however, provides that such evidence is admissible "when

relevant to prove some fact (such as motive, opportunity, intent, preparation, plan, knowledge . . .).” (*People v. Cole* (2004) 33 Cal.4th 1158, 1194.) In *People v. Thompson* (1980) 27 Cal.3d 303, overruled on other grounds in *People v. Rowland* (1992) 4 Cal.4th 238, 260, the California Supreme Court held:

As with other types of circumstantial evidence, . . . admissibility [of other crimes evidence] depends upon three factors: (1) the materiality of the fact sought to be proved or disproved; (2) the tendency of the uncharged crime to prove or disprove the material fact; and (3) the existence of any rule or policy requiring the exclusion of relevant evidence.

(*People v. Thompson, supra*, 27 Cal.3d. at p. 315; see also *People v. Gray* (2005) 37 Cal.4th 168, 202; *People v. Ewoldt* (1994) 7 Cal.4th 380, 404; *People v. Rowland, supra*, 4 Cal.4th at p. 261; *People v. Robbins* (1988) 45 Cal.3d 867, 879, overruled on another ground in *People v. Jennings* (1991) 53 Cal.3d 334, 387, fn. 13.)

Under Evidence Code section 352, a trial court has “broad discretion” in determining whether to exclude relevant evidence if its probative value is *substantially* outweighed by the probability that its admission will create a substantial danger of undue prejudice. (*People v. Ayala* (2000) 24 Cal.4th 243, 282.) “In applying section 352, ‘prejudicial’ is not synonymous with ‘damaging.’” (*People v. Coddington* (2000) 23 Cal.4th 529, 588, overruled on other grounds in *Price v. Superior Court* (2001) 25 Cal.4th 1046, 1069, fn. 13.) Instead, the “prejudice” referred to in Evidence Code section 352 is that which “uniquely tends to evoke an emotional bias against a party as an individual, while having only slight probative value with regard to the issues.” (*People v. Garceau* (1993) 6 Cal.4th 140, 178; *People v. Karis* (1988) 46 Cal.3d 612, 638; see also *People v. Zapien* (1993) 4 Cal.4th 929, 958 [“the statute uses the word [prejudice] in its etymological sense of

prejudging a person or cause on the basis of extraneous factors,” internal quotation marks and citations omitted].)

Moreover, a trial court’s decision to admit or exclude evidence pursuant to Evidence Code section 352 must be upheld on appeal absent “clear abuse,” which is defined as “exceeding the bounds of reason.” (*People v. Rodriguez* (1994) 8 Cal.4th 1060, 1124.) Appellate courts rarely find an abuse of discretion under Evidence Code section 352. (*People v. Ramos* (1982) 30 Cal.3d 553, 598, fn. 22, reversed on other grounds in *California v. Ramos* (1983) 463 U.S. 992 [103 S.Ct. 3446, 77 L.Ed.2d 1171].)

C. The Trial Court Acted Well within Its Broad Discretion in Admitting the Seized Writings

1. The Seized Writings Evidence Were Admissible under Evidence Code Section 1101, Subdivision (b)

Initially, respondent submits that it is well established that a defendant’s plea of not guilty places all of the elements of each offense at issue. In particular, the prosecution carries the burden to prove each of those elements beyond a reasonable doubt. This includes appellant’s intent, premeditation, and deliberation. (*Estelle v. McGuire*, *supra*, 502 U.S. at p. 69; *People v. Caitlin* (2001) 26 Cal.4th 81, 146; *People v. Daniels* (1991) 52 Cal.3d 815, 857-858; *People v. Umana* (2006) 138 Cal.App.4th 625, 638-639; *People v. Sales* (2004) 116 Cal.App.4th 741, 749.) Here, as acknowledged by the court and defense counsel at trial (3RT 260-261), the prosecution was entitled to prove its case. (See, e.g., *People v. Steele* (2002) 27 Cal.4th 1230, 1243-1244.)

Moreover, appellant did not dispute at trial that he pulled the trigger during the incident on February 14-15, 2004. However, he did claim that he was only doing “what he was told” by the older Gonzalez, and that he was not aware of the firepower of the weapon he wielded. Thus, as pointed

out by the prosecutor, certain evidence such as the witness “hit list” was highly probative to the issues of motive and intent, in light of the fact that appellant was “hotly disputing [his identity as the shooter] in the February 19 incident (counts 9, 10).” (3RT 264.) In particular, Ramos, the victim named in count 10, was one of the witnesses who testified at appellant’s brother, Johnny Argueta’s, preliminary hearing. In addition, Carrillo, the victim named in count 9, accompanied Ramos to court. (11RT 1740, 1773.) Moreover, appellant had attended Johnny’s preliminary hearing and several subsequent court sessions, including on February 17, 2004, when Johnny was held to answer. (11RT 1738-1739.) Notably, appellant harassed and intimidated several witnesses before and during their testimony, confronted them in the hallway, and directed “hand signs” at them. (11RT 1742-1743, 1746-1751.)

It is well established that a defendant’s gang-oriented rap lyrics can be admitted to show, *inter alia*, his intent and motive to engage in a gang attack. (*People v. Zepeda* (2008) 167 Cal.App.4th 25, 35; *People v. Olguin* (1994) 31 Cal.App.4th 1355, 1373.) In *Zepeda*, the Court of Appeal held that trial court had properly admitted two rap songs because “[t]he evidence was probative of defendant’s state of mind and criminal intent, as well as his membership in a criminal gang and his loyalty to it. The songs showed that defendant’s gang had the motive and intent to kill Sureños.” (*People v. Zepeda, supra*, 167 Cal. App. 4th at p. 25, 35.) It so held despite the fact that the evidence of motive and intent was “anticipatory.” (*Ibid.* [“This evidence, although anticipatory, was explicitly relevant to the charges against defendant”].)

Here, the rap lyrics evidence plainly articulate appellant’s intent to clear his brother Johnny’s name by “[any] means necessary,” indicating “what if my little bro for fuckin up but not to clear his name by.” (12RT 1926-1927; Peo. Exh. No. 125.) The lyrics also stated “bitches and snitches

get killed [every] fuckin day (12RT 1936)”; “I told you once and I’m tellin you again you snitches keep on talking and . . . I’m gonna make sure that beak of your[s] stays shut for good (12RT 1937)”; and

Look at all you snitches pointing fingers and shit but what you foo’s gonna get from that. Let me tell you. Nothing but kaos [sic] headed your way cause I might be dumb but I got hurt mothafucker. Away play my game to the end [in the margin]. Going back but I got hurt motherfucker got bullets for years and as long as I got that gonna bust everyday motherfucker. [¶] The only thing stopping me from killing you is a Judge but when they gone when you least expect it gonna kill you and your whole family and anyone reapin [sic] the dumb hood of yours cause Westside T.C.A. ain’t no game. You foo’s can’t hit that quit bottom.

(12RT 1938-1939; Peo. Exh. No. 128.) This evidence was clearly relevant and admissible to show appellant’s intent when seeking out and firing at the car occupied by Ramos and Carrillo.

The “rap lyric” and handwritten notes evidence was also relevant on counts 4 through 8 to show appellant’s commitment and loyalty to the “gang life,” in particular the pride he felt for T.C.A., whom he referenced in the seized writings as his “familia” (11RT 1937-1938; Peo. Exh. No. 128). (See e.g., *People v. Lang* (1989) 49 Cal.3d 991, 1013 [statements by a defendant, including rap lyrics, can show requisite criminal intent].) In addition, the writings evidence illustrated appellant’s hatred of any perceived “rivals,” and was relevant to appellant’s intent, state of mind, and his possible motive for the shootings. (*People v. Rodriguez* (1986) 42 Cal.3d 730, 756-757 [murder defendant’s threat against victim is relevant to prove intent and a generic threat is admissible to show defendant’s homicidal intent].) As compared with some of the other issues addressed by Evidence Code section 1101, subdivision (b), the “least degree of similarity (between the uncharged act and the charged offense) is required in order to prove intent.” (*People v. Robbins* (1988) 45 Cal.3d 867, 880.)

Thus, to be admissible to show intent, the prior conduct and the charged offense need only be “sufficiently similar to support the inference that defendant probably harbored the same intent in each instance.” (*People v. Yeoman* (2003) 31 Cal.4th 93, 121; accord, *People v. Ewoldt*, *supra*, 7 Cal.4th 380, 402.)

Here, the writings were highly relevant to appellant’s intent at trial in reference to the first-degree murder of Gregory Gabriel enumerated in count 4, and the attempted murders in counts 5-8. An particular, as mentioned above, appellant alleged he lacked intent to kill or premeditation. He also asserted that he had just “followed through” with instructions from co-defendant Gonzalez. (*People v. Lang*, *supra*, 49 Cal.3d at pp. 1013-1016 [defendant’s generic threat that he would “waste any mother fucker that screws with me” admissible to show intent]; *People v. Spector* (2011) 194 Cal.App.4th 1335, 1394 [“Evidence of a *generic threat* is admissible ‘where other evidence brings the actual victim within the scope of the threat,’” quoting *People v. Rodriguez*, *supra*, 42 Cal.3d at p. 757, italics added in *Spector*]; see also Evid. Code § 1101, subd. (b); *People v. Kelley* (1967) 66 Cal. 2d 232, 242-243 [other crimes evidence is admissible in cases where the proof of defendant’s intent is ambiguous, as when he admits the acts and denies the necessary intent because of mistake or accident].)

In addition, this evidence put appellant’s otherwise inexplicably violent response in context and helped to explain how he could perceive Emmanuel’s statement and lack of acknowledgement of his gang as “disrespect” and so easily resort to violence. The jury could reasonably have inferred from the circumstances at the time, coupled with appellant’s statements in his writings, that he bore significant animus toward persons disrespecting his gang whom he referenced as his “familia” (family). In particular, with Counts 4-8, the evidence helped to explain how and why

appellant escalated the confrontation with Emmanuel, Gabriel, Johnson, and Hart to a “gang-related” situation where he felt “forced” to retaliate on behalf of Gonzalez by shooting the juveniles. Also, to explain the notion that appellant had arguably fired the weapon to “save face” and maintain his gang’s principles of intimidation, retaliation, and respect. (11RT 1936-1939 [“we L.A.’s most craziest and lowked [sic] up G’s fixing and running shit like it should be [a]lways protecting the block and servin them dummies cause lame fucks belong six feet under with the magets [sic] [l]il did you dummies know that crazy ass familia ain’t no joke [y]ou dummies can’t even handle us because we straight making you funny dummies run and duck and cover just like the rats you are Westside T.C.A. ain’t no game [y]ou foo’s can’t hit that quit bottom”]; Peo. Exh. No. 28.)

This factual scenario also lends support to the conclusion that appellant acted with malice aforethought, and casts significant doubt on his claim that the shooting was accidental. To the contrary, the statements made in his writings expressed an intent to kill, including:

I’m gonna go out like a G7 blastin NE [any] one – bullets gonna fly everywhere some will live only to die another day many will fear me many will know – many will roll with me if not with them I guess I’m going out solo.

(12RT 1927-1928; Peo. Exh. No. 125.)

Got to move all obstacles out my way got things to do in my life there’s money out there that belongs in my pocket enemies that belong six feet under people say a lot of shit about my hood by ain’t doing nothing so shut the fuck up before my fuckin dog bites you in the ass.

(12RT 1933-1934; Peo. Exh. No. 128.)

[B]ack the fuck up before I buck buck buck on you fuckin dummies it ain’t no joke no more got to kill everyone dissin my hood cause I got my [dawg] next to me and if you want to hear

him bark then step up to me. Hear you dissin but you foo's aint doing shit get ready to hear me bark mothafucking boom.

(12RT 1935; Peo. Exh. No. 128.)

Got my buddy ready to blast on NE dumb ugly snitch. [¶] You foo's to[o] scared and you actin like you gonna do something bitch please why you lyin to yourself . . .

(12RT 1937-1938; Peo. Exh. No. 128.)

Going back but I got hurt motherfucker got bullets for years and as long as I got that gonna bust everyday motherfucker. [¶] The only thing stopping me from killing you is a Judge but when they gone when you least expect it gonna kill you and your whole family and anyone reapin [sic] the dumb hood of yours cause Westside T.C.A. ain't no game.

(12RT 1938-1939; Peo. Exh. No. 128.) Reasonable minds could infer that appellant's statements in these writings reflected his anger and animus leading up to the shootings and demonstrated malice aforethought.

Appellant's statements in the writings also reflected his loyalty and the importance of respect for T.C.A.:

I'm as real as it comes I'm gonna be the next mothafucking king . . . I guess that's why you all hate me but I don't give a fuck cause I'm still here and I'm still reapin my hood to the fullest and for those who don't know [T.C.A.] is what I'm bangin.

(12RT 1934-1935; Peo. Exh. No. 128.)

West Side T.C.A. is what I'm banging so back the fuck up before I buck buck buck on you fuckin dummies it ain't no joke no more got to kill everyone dissin my hood . . .

(12RT 1935; Peo. Exh. No. 128.) From these statements, the jury could have readily concluded that, just as appellant depicted he would do in his rap lyrics to persons who "disrespected T.C.A." he intended in this instance -- punish Emmanuel, Gabriel, Johnson and Hart with deadly force.

Finally, the rap lyrics were relevant to rebut appellant's claim that he was just a "victim" of the older Gonzalez, and was only following

Gonzalez's instructions when he shot at the victims. The rap lyrics contained in these seized writings paint a contrary picture of appellant, who, although younger to Gonzalez, was by no means "innocent" or unfamiliar with gang lifestyle. In fact, the handwritten lyrics set forth an intent to "kill everyone dissin [appellant's] hood" (11RT 1935; Peo. Exh. No. 128), and to "[a]lways protec[t] the block . . . servin them dummies cause lame fucks belong six feet under with the magets [*sic*]." (11RT 1937; Peo. Exh. No. 128.) In addition, his writings described a desire to, "mak[e] you funny dummies run and duck and cover just like the rats you are." (11RT 1937-1938). Certainly, the trial court's reasoned decision to admit this evidence could not be called arbitrary, capricious, or patently absurd. Thus, there was no abuse of discretion under Evidence Code section 1101, subdivision (b), to admit the writings evidence to show appellant's motive, intent, and premeditation and deliberation as to all counts.

**2. The Writings Were More Probative Than
Prejudicial under Evidence Code Section 352**

Similarly, none of the writings were "unduly prejudicial" within the meaning of section 352. (*People v. Karis, supra*, 46 Cal.3d at p. 638; see also *People v. Zapien, supra*, 4 Cal.4th at p. 958.) To the extent that the rap lyrics were "prejudicial," it is because they were probative of appellant's intent, as well as his motive. (*People v. Karis, supra*, 46 Cal.3d at p. 638 ["The highly prejudicial nature of the evidence lay not in the fact that the jury might consider it as reflecting a propensity on defendant's part to commit murder, but in its value in identifying defendant as the perpetrator of the crimes and demonstrating his motive and mental state"].) As the court in *People v. Olguin supra*, 31 Cal.App.4th 1355, held in an almost identical similar situation:

This was a crime alleged to be gang related. Gang membership was obviously important, and evidence tending to show it was highly relevant. The mere fact the lyrics might be interpreted as

reflective of a generally violent attitude could not be said “substantially” to outweigh their considerable probative value. It looks to us like the trial court got it right; certainly it has not been shown there was any abuse of discretion.

(*People v. Olguin*, *supra*, 31 Cal.App.4th at 1373, internal citation omitted.)

The crimes enumerated in Counts 1-4 occurred on February 14, 2014, when appellant approached a group of unarmed teenagers, and aimed and shot a submachine gun weapon directly at them. This violent response by appellant was apparently in reaction to Emmanuel’s comment about “Mexicans,” which had offended Gonzalez. In addition, both Gonzalez and appellant appeared “upset” about the group’s ignorance of their gang, T.C.A. The crimes enumerated in Counts 5-7 occurred the day prior, when appellant littered Amezcua’s vehicle with nine bullets, killing front seat passenger Jorge Lua. The crimes enumerated in Counts 9 and 10 occurred several days later, when appellant hunted down Ramos, a testifying witness from his brother’s preliminary hearing, and Carrillo, who had accompanied Ramos to court. A high-speed chase ensued, and a bullet that traveled through the seat of Ramos’ vehicle eventually wounded Carrillo. From this evidence, it is difficult to discern how the “rap lyrics” and other writings evidence were particularly inflammatory. Any “prejudice” or emotional response arose from the very nature of the crimes themselves. Appellant has failed to show “clear abuse” in allowing such evidence. (*People v. Rodrigues*, *supra*, 8 Cal.4th at p. 1124.)

3. Evidence Code Section 1250 Supports the Admission of the Writings under These Circumstances

In addition to Evidence Code section 1101, subdivision (b), the prosecutor sought to admit the rap lyrics under Evidence Code section 1250 (3RT 256-258) “to prove the declarant’s state of mind . . . at that time. . . .” (*People v. Ortiz* (1995) 38 Cal.App.4th 377, 389 [state of mind hearsay

exception provides for admissibility of only those statements of the declarant that “relate to a condition of mind or emotion existing at the time of the statement”].)

Appellant contends that the prosecution “shifted its theory of admissibility” on Counts Four through Eight, from gang evidence to this “generic threats evidence,” without satisfying the required analysis to admit this type of evidence. In addition, he argues the prosecution falsely represented that the evidence would be used as “gang-affiliation evidence” when instead it was proffered as proof of “propensity to kill and free-floating homicidal intent.” (AOB 50-53.) He is mistaken.

As detailed above, the evidence was directly relevant to appellant’s state of mind, particularly with reference to the premeditation and deliberation elements of the first-degree murder and attempted murder charges. The prosecution’s references to these writings during argument did not change their admissibility, and the relevance and foundational requirements of this evidence were satisfied during the hearings on the motions in limine and subsequent discussion. (See *People v. Gamache* (2010) 48 Cal.4th 347, 371 [prosecutors are given wide latitude during argument].)

Although appellant now claims the prosecutor “clearly distinguished its use of the writings as section 1101(b), evidence with respect to Counts Four through Ten from its more limited use of the ‘snitch’ writing as ‘generic threats’ evidence with respect to Counts Nine and Ten” (AOB 48-49), the representation made to the court was quite the opposite. The prosecutor made abundantly clear on several occasions that the introduction of this evidence pursuant to Evidence Code sections 1250 or 1101, subdivision (b), was not specifically narrowed to any particular count. Instead, the representation was that the People sought to introduce this evidence collectively as to *all* counts to show “intent, motive, identity,

deliberation, and premeditation.” (12RT 1964.) Only after consideration of this representation did the trial court find the evidence to be relevant and admissible, stating: “I don’t think that the relevance is substantially outweighed by any undue prejudice in this matter.” (3RT 270.)

Although appellant relies on *People v. Karis*, *supra*, 46 Cal.3d 612, to allege the trial court did not examine whether the statements made by appellant in the writings comported with the requirements of propensity or indiscriminate generic threat evidence (AOB 51), and claims the majority of the writings were irrelevant (AOB 52), *Karis* does not assist him. In *Karis*, a defendant convicted of murder and rape challenged the admissibility of his statement to a friend that he would not hesitate to eliminate witnesses if he committed a crime. He argued the statement should have been excluded because there was no showing it was made under circumstances indicating its trustworthiness, and he claimed it did not reflect an intent to commit a crime. As a result, the defendant argued the state-of-mind hearsay exception was unavailable and the statement was unduly prejudicial. (*Id.* at pp. 636-637.)

The Supreme Court found the statement admissible, noting that nothing suggested the statement was made in circumstances indicating a lack of trustworthiness. Moreover, the court noted that the statement was highly probative and made during a social visit to a friend during which defendant had no motive to lie or exaggerate, and in which he was under no compulsion to speak. “As evidence of motive, it could be circumstantial evidence of identity. It could also be circumstantial evidence that when he shot [the victims], he intended to kill, harbored malice, and killed . . . with deliberation and premeditation.” (*Id.* at p. 636.) The Court also found the statement was not unduly prejudicial because its probative value was so high, especially given that the statement was made just three days before the crime was committed. (*Id.* at p. 637.)

Similarly, here, the evidence actually contained numerous references to appellant's attitude toward those he perceived were disrespecting his "hood," or "familia," i.e., T.C.A. In particular, with reference to the February 15 shooting, the lyrics stated an intent to "clip [any] mothafucka that steps up to me" (11RT 1933-1934; Peo. Exh. No. 128), and a promise to do "whateva it takes to stay in the game," including "straight making you funny dummies run and duck and cover just like the rats you are." (11RT 1937-1938; Peo. Exh. No. 128.) In addition, appellant acknowledged his "crazy paranoia," articulated a belief that he had "so many enemies can't even keep track so I just clip NE [any] mothafucka that steps up to me," penned a determination to "move all obstacles out of my way," and expressed the specific intent to "kill everyone dissin my hood," while indicating, "L.A. is my city West Side T.C.A. is what I'm banging so back the fuck up before I buck buck buck on you fuckin dummies . . ." (11RT 1933-1935; Peo. Exh. No. 128.)

These writings, found soon after appellant was arrested, evidenced a general intent to ensure the respect and acknowledgement of his "familia," T.C.A., and as in *Karis*, were made under circumstances indicating trustworthiness. In particular, when appellant penned these lyrics he had no motive to lie or exaggerate, and was under no compulsion to speak. (*People v. Karis*, *supra*, 46 Cal.3d at pp. 636-637.) Thus, similar to *Karis*, the evidence here was highly relevant and properly admitted in the trial court.

Appellant's arguments that the writings were not dated and contained "obvious differences in handwriting," making their probative value "slight" (AOB 39), go to their weight, not their admissibility. Evidence Code section 1250 provides that a declarant's out-of-court *hearsay* statements are admissible to prove the *declarant's* state of mind. Thus, providing the declarant's state of mind is the issue. (*People v. Cash* (2002) 28 Cal.4th

703, 727; Evid. Code, § 1250, subd. (a)(1).) As explained in *People v. Ortiz*, *supra*, 38 Cal.App.4th 377:

The evidence admitted under section 1250 is hearsay; it describes a mental or physical condition . . . and is received for the truth of the matter stated. [Citation.] If offered to prove the declarant's state of mind, the statement may be introduced without limitation, subject only to [Evidence Code] section 352. However, the declarant's state of mind must be at issue in the case.

(*Id.* at p. 389; accord *People v. Cox* (2003) 30 Cal.4th 916, 962; *People v. Hall* (1986) 41 Cal.3d 826, 834, fn. 3 [victim's out-of-court statement was not hearsay when offered as circumstantial evidence of the victim's state of mind rather than to prove the truth of the statement].)

Here, the lyrics were found in a bedroom indicated by family members to be appellant's. Notably, several of the writings made references to appellant's brother's February 2004 felony case, the same month as the shootings. (11RT 1926; Peo. Exh. No. 125.) Thus, as acknowledged by appellant (AOB 52), the writings were sufficiently "time-bracketed" to maintain their relevancy.

Likewise, appellant's link to this evidence was not tenuous. Notably, there was no evidence introduced at trial that the room belonged to anyone else, that someone else had access to the room, or that another individual had possibly authored them. (See *People v. Gibson* (2001) 90 Cal.App.4th 371, 382-383 [two manuscripts found in the defendant's home and hotel room were adequately authenticated as the defendant's because they were found at her place of residence and "no evidence showed that these items belonged to anyone else"].)

In any event, the writings evidence here was being offered to demonstrate appellant's intent prior to the three shootings and to show premeditation and deliberation. As non-hearsay, this evidence was only subject to exclusion under Evidence Code section 352. As above, the

writings were more probative than prejudicial under this section. (See Arg.I.C.2., *supra*.)

Finally, some courts have upheld the admission of writings or song lyrics not written by the defendant. In *People v. Jones* (1971) 19 Cal.App.3d 437, the defendant was charged with rescuing a prisoner in lawful police custody and related offenses. (*Id.* at pp. 441-443.) The court upheld the admission of a handwritten note, written by another, as relevant evidence of the defendant's guilt because it was both found in the defendant's possession and "its contents dealt with" the charged crimes. (*Id.* at p. 449.) Based on all the foregoing, the writings evidence was properly admitted under the circumstances of this case. Appellant's assertions to the contrary should be rejected.

D. Any Possible Error Was Harmless

Regardless, even if the trial court erred in admitting the evidence, the error did not rise to the level of a constitutional due process violation. "Absent fundamental unfairness, state law error in admitting evidence is subject to the traditional *Watson* test: . . . whether it is reasonably probable the verdict[s] would have been more favorable to the defendant absent the error.'" (*People v. Covarrubias* (2011) 202 Cal.App.4th 1, 21, fn. omitted, quoting *People v. Partida* (2005) 37 Cal.4th 428, 439; see *People v. Lepolo* (1997) 55 Cal.App.4th 85, 92 [defendant's "bare-bones assertions fall short of sustaining his heavy burden of showing that the trial court acted unreasonably in admitting the evidence, and this resulted in a manifest miscarriage of justice," citations omitted].)

As outlined above, the trial court admonished the jury that the gang evidence was limited to deciding whether appellant had a motive or acted with intent, deliberation, premeditation, or that appellant was the perpetrator, and that they were not to conclude by this evidence that

appellant was a person of bad character or had the disposition to commit a crime. (29CT 8350.) The trial court also specifically instructed that appellant could not be convicted based on his out of court statements (29CT 8334; 21RT 3229); “[i]f during the trial certain evidence was admitted for a limited purpose then you may consider that evidence only for that purpose and for no other” (21RT 3235); and “[n]othing that the attorneys say is evidence” (29CT 8322-8323). This Court must presume the jury followed the court’s instruction. (*United States v. Olano* (1993) 507 U.S. 725, 740 [113 S. Ct. 1770, 123 L. Ed. 2d 508] [“[We] presum[e] that jurors, conscious of the gravity of their task, attend closely the particular language of the trial court’s instructions in a criminal case and strive to understand, make sense of, and follow the instructions given them.”]; *People v. Thomas* (2011) 51 Cal.4th 449, 489.) Nothing in the record suggests the jury here did otherwise.

Second, the prosecution presented overwhelming evidence as to all counts, of appellant’s premeditation and intent apart from the writings evidence. This included the fact that appellant had used the same Sten Mark III weapon just the day before to gun down an unarmed Jorge Lua by riddling Amezcua’s white Datsun with nine bullets. In addition, appellant had admitted that he was at the scene of all the three shootings, and his claim that he fired the gun “accidentally” on February 15 was not credible, given the testimony by Thompson regarding the steps required to fire the weapon. In addition, Johnson, Hart, and Emmanuel, testified that, without any instruction from Gonzalez, appellant had walked directly up to the victims, pulled out the gun, and pointed it at Johnson. In addition, Johnson and Emmanuel stated that appellant appeared “angry.” Finally, appellant fired at Johnson, Hart, Emmanuel, and Gabriel while their backs were turned and they were unsuspecting of his return.

Third, there were numerous permissible inferences the jury could draw from the evidence, and there was no detailed discussion of the appellant's particular misdeeds, nor of those committed by the T.C.A. crew. (Cf. *People v. Albarran* (2007) 149 Cal.App.4th 214, 230.) Furthermore, the evidence was not of such a nature as to have caused a fundamentally unfair trial. In fact, defense counsel was able to cross-examine Detective Baker in depth regarding the writings. In particular, defense counsel elicited from Detective Baker that the only evidence the police had to link appellant to the writings was the location where they were found (a bedroom believed to be appellant's), and that a handwriting analysis had not been performed to see if these writings were authored by the same person. In addition, Detective Baker admitted that a notebook with "similar type writings" was recovered from Gonzalez's home, and that a handwritings analysis had not been performed to compare this notebook to the writings made attributable to appellant. (12RT 1954-1955.)

In addition, during closing argument, defense counsel was able to argue that the "rap lyrics" evidence was not like a "Dear John letter." Instead, he characterized the rap lyrics portion of the writings evidence as "artistic," even categorizing them as "poetry." (17RT 2655.) Defense counsel also proposed that Gonzalez, as a frequent overnight guest at appellant's home, could have just as easily been the author. (17RT 2655-2656.)

As discussed above, the prejudicial impact of the disputed evidence was no more than that which results from relevant, inculpatory evidence. (Arg. I.B., *supra*.) By contrast, the evidence of appellant's guilt was truly overwhelming on all counts and showed that appellant engaged in a cold and deliberate three-day crime spree, wherein he shot and killed Lua, Gabriel, and wounded several others. Appellant's weapon of choice during these incidences was a submachine gun that was capable of firing 500

rounds per minute. There is no reasonable probability he would have obtained a more favorable verdict merely because this evidence was excluded. Thus, any error in admitting the evidence was harmless.

Appellant's claim that the trial court's admission of the evidence violated his federal constitutional rights to due process and a fair trial is likewise meritless. (AOB 57-59.) The application of the ordinary rules of evidence generally does not impermissibly infringe upon a defendant's constitutional rights. (*People v. Prince* (2007) 40 Cal.4th 1179, 1229.) If a trial court commits an error, which renders a defendant's trial arbitrary and fundamentally unfair, it has violated the defendant's federal due process rights. (*Estelle v. McGuire*, *supra*, 502 at pp. 62, 70; *Jammal v. Van de Kamp* (9th Cir. 1991) 926 F.2d 918, 920; see *Chapman v. California* (1967) 386 U.S. 18, 24 [87 S. Ct. 824, 17 L. Ed. 2d 705] [determination of prejudice where a federal right is implicated].) A trial court's admission of evidence constitutes such a due process violation only if there are no permissible inferences the jury may draw from the admitted evidence. (*People v. Steele*, *supra*, 27 Cal.4th at p. 1246; *People v. Albarran*, *supra*, 149 Cal.App.4th at p. 229.) Here, the writings evidence demonstrated that appellant had more than adequate knowledge of guns, criminal gang activity, and viewed any disrespect of his gang or "familia" as a reason to resort to deadly violence and provided a motive for the shootings, in particular, the February 19 incident. Thus, even under the stringent *Chapman* standard, any error was harmless beyond a reasonable doubt.

Finally, appellant argues that the alleged error in the admission of this evidence "inevitably and irrationally skewed the jury's perception of appellant's moral culpability by portraying him, unfairly, as posing an undifferentiated homicidal risk to the entire world," which denied appellant a fair penalty determination and the heightened reliability required by the Eighth Amendment." (AOB 58.) However, appellant has failed to

demonstrate a reasonable probability (see *People v. Noriega* (2010) 48 Cal.4th 517, 525), or possibility (*People v. Brown* (1988) 46 Cal.3d 432, 447), that without this writings evidence, the jury would have reached a different verdict at either the guilt or penalty phase of trial, especially in light of the nature of the crimes. (See Arg.I.C.2., *supra*.) Thus, there was no federal constitutional violation. This claim fails.

II. THE TRIAL COURT’S EXCLUSION OF THE TAPE-RECORDED MEETING BETWEEN APPELLANT AND HIS FAMILY WAS PROPER AND ANY ERROR IN THE ADMISSION OF EVIDENCE WAS HARMLESS UNDER ANY STANDARD

Next, appellant claims the trial court’s decision to admit a version of his police interview into evidence that redacted the “emotional meeting” with his family constituted a violation of Evidence Code section 356. In addition, appellant argues the exclusion of this portion of the interview denied him a “viable counter-argument to the inference of intent to kill, lack of remorse, and consciousness of guilt,” thereby violating his state and federal constitutional rights. (AOB 60-73.) However, as detailed below, Evidence Code section 356 did not compel admission of the unrelated and separate meeting between appellant and his family members. In any event, any error was not prejudicial.

A. Appellant’s Post-Arrest Tape-Recorded Interview and Transcripts

At trial, the prosecution sought to play a recording and introduce transcripts of a redacted version of appellant’s police interview for the jury. This version did not include an approximately ten-minute long meeting between appellant and his immediate family members. (9RT 1625.) However, appellant’s requests to see his family and promises to then tell the truth were left in. (3SCT 96-98.) The trial court was provided with copies of both the redacted and unredacted versions of the tape recording. (10RT 1627.) The prosecutor argued that the meeting with appellant’s

family included “just a lot of crying,” did not contain “any statement that pertains to the issues on the case,” and was not “relevant or probative of any issues . . .” (10RT 1711.) Defense counsel countered:

To me the relevance is the state of mind, Your Honor, because counsel is basically arguing that [appellant] lied and denied throughout the - - both tapes and even when he was making admissions, which were highly incriminating, he still was denying and lying on certain issues.

So I think the state of mind of [appellant] is in question here as to, you know, what would be motivating him to say one thing versus another at that point in time.

(10RT 1711.) The prosecutor responded:

[T]he court should be aware that [appellant] maintained his denials of any involvement in the shooting from the first tape, which is the first transcript, the entire fifty-four pages, up until the second interview, the second transcript, up to page 27 and it isn't until after all of that that he then has this session with his family. [¶] So whatever state of mind he may have had during that session would not bear on the fact that for hours he maintains his denials on his involvement. [¶] I believe that [defense] counsel really just wants to get this before the jury as a sympathy factor and that's the very reason why I took it out of the tape or proposed to redact it.

(10RT 1712.) Defense counsel responded that appellant was “very concerned” about his family, and the jury should be allowed to see the entirety of what appellant was “thinking and feeling.” (10RT 1713.) He proffered that this portion of the interview was admissible under Evidence Code section 356, and *People v. Arias* (1996) 13 Cal.4th at page 92. (10RT 1715-1716.) Defense counsel also stated that although large portions of the meeting were in Spanish, they could be “easily” translated for the jury. (10RT 1717.) The court inquired how the “sobbing” and “family tal[k]” could help the jury resolve the truthfulness of appellant's statements. Defense counsel responded that the contention would be that after appellant

met with his family “he told the truth,” and arguably the jury could “listen to . . . and make their own assessment [of] whether or not at this point there was some change in [appellant’s] mind. (10RT 1718-1719.) This colloquy followed:

THE COURT: [I]f I were [the prosecutor] I would let you play it. I mean, I think it helps her as much as it helps you just from an emotional standpoint. But that’s not the test under 356, whether somebody can pull at somebody’s heartstrings. They can argue he’s a great actor, blah, blah, blah, blah, but that’s not what 356 calls for [T]he exact language is the act, declaration, conversation or writing and does it help make it understood. And that’s the part I’m having trouble with is does this help make understood something that is said later.

(10RT 1720-1721.)

DEFENSE COUNSEL: That is the test and the language I quoted from [*People v.*] *Arias* . . . [which] states that portions that we seek to introduce must have some bearing upon or connection with the admission of the evidence and it does. It clearly does. [¶] If this happened at the complete end of the interview

THE COURT: Not just have some bearing. It’s necessary to make it understood.

DEFENSE COUNSEL: Well, I’m quoting – I’m taking that from the holding in *Arias*. But all I’m saying is if this conversation

THE COURT: The facts in *Arias* aren’t even close to this.

DEFENSE COUNSEL: No, but I’m just talking – I’m taking – if this conversation had taken place at the end of the interview, that’s one thing, but to take place right between the point when he’s going one way to the point that he’s going the other way they have to understand why; otherwise, it’s in a complete vacuum.

THE COURT: Well, this is a pretty common situation where, you know, Detectives let a suspect talk to family members and so forth

DEFENSE COUNSEL: [I] think there is also a 352 analysis here which is, you know, we're playing this tape, part of the conversation, so what is the prejudicial effect of that? [¶] If it were played in its entirety how does that prejudice the People in this case? [¶] I don't think it does.

THE COURT: Well, again, as I say, I don't think you get there unless you first get over the 356 hurdle because even if you get over the 356 hurdle I suppose –

DEFENSE COUNSEL: Well, if she doesn't play – let's say she plays it in her redacted form here. If we were to offer to play that other portion in our case in chief then we'd be faced with that situation. The court – at that time it wouldn't be a 356 issue. It would be a 352 issue. And my point is at that point I think we would be allowed to bring it in because it would be probative and it's not prejudicial so we can do it either way. [¶] I think for the purposes of economy and making sense of what is on the tape it's better just to play the whole tape at once.

(10RT 1721-1723.) Thereafter, the prosecutor expressed her disagreement that if the redacted portion of the transcript came into the People's case in chief then the defense could introduce it in their case in chief. Instead, the prosecutor stated that the trial court's focus under 356 and the cases construing the statute was "whether the portion being sought to be introduced by the defense bears . . . on the same subject or which are necessary for understanding of the statements already introduced." (10RT 1723.) The prosecutor argued that as evidenced in *People v. Arias*, section 356 is not applied "mechanically." Instead, the prosecutor reasoned,

if one party plays a portion and another party gets the other remainder of the conversation you still have to look to see if it's competent and it's relevant on the portions introduced. It's the defendant's burden to prove relevance and I don't think that they've done that here.

(10RT 1723-1724.) The prosecutor also clarified that the redacted portion contained, "basically the family sobbing and crying and talking about praying, believing in God," and stated [t]hat has nothing to do with any

statements [appellant] made regarding his involvement or his denial of his involvement in the crimes.” (10RT 1724.) She further argued that the jury was privy to the fact that there was a break in appellant’s conversation with the detectives to meet with his family, and the family meeting “play[] on the jury’s sympathy” while having no bearing on any portions of the interview the prosecution sought introduce. Thus, the prosecutor concluded the evidence was prejudicial under Evidence Code section 352. (10RT 1725.) Defense counsel added that he believed appellant’s mother urged him to “tell the truth” during their conversation. (10RT 1726.) The trial court advised defense counsel to get a translation of the conversation to determine whether this statement had been made. However, the court concluded:

[M]y general sense right now is that most of this that’s in the transcript, if not all of it, I just don’t see how it comes within the test here, that it’s necessary to make it understood. [¶] And, like I say, tell the truth and God will take care of you or something like that at least it’s arguable, it’s not definitive, that’s at least enough to go to the jury. But I don’t think to sit and listen to all the crying and sobbing helps them understand.

I understand why you want it in and why she wants it out tactically but, like I say, I think it can be a two-edged sword. You haven’t had enough time to research this admittedly and I did have familiarity with the area because I looked on my computer – I do little case summaries as cases come down and I found two or three cases but they were factually so different that I just didn’t find anything like this where there was a consultation with the family and the court discussed it but that’s not to say it’s not there.

(10RT 1717-1727.) Thereafter, the court and counsel engaged in discussion concerning the prosecution’s preparation of copies of the redacted and non-redacted versions of the transcript. The court then issued a tentative ruling to allow the redacted version of the transcript to be admitted into evidence, concluding:

[I]'m not unsympathetic if there is something that helps explain because as you listen to this, obviously, it's going to be an issue for the jury as to whether they believe he ever told the complete truth and I do think if the family was making comments to him about that that it would probably at least be enough to take that portion to the jury.

(10RT 1729.)

At the next court appearance, defense counsel did not attempt to introduce an English translation of appellant's meeting with his family, nor did he continue to argue that appellant's exchange with his mother during the meeting included her pleadings to "just tell the truth." (10RT 1726.) Instead, he advised the trial court:

[W]e researched the 356 issue. We've got nothing on point and we're willing to submit it on the previous hearing.

(10RT 1731.) At that time, the Court stated that its prior ruling to admit the redacted version of the interview would stand. (10RT 1732.)

The jury was given transcribed copies of the redacted version of appellant's interview. The audio recording of the interview was played during Detective Baker's direct examination testimony. (11RT 1905-1909; 12RT 1910-1915, 1921-1923; Peo. Exh. Nos. 129, 131 [tape recordings], No. 130, 132 [transcripts].) The jury was instructed on CALCRIM No. 362, consciousness of guilt based on false statements. (19RT 2729.)

B. Applicable Law

Evidence Code section 356 reads:

Where part of an act, declaration, conversation, or writing is given in evidence by one party, the whole on the same subject may be inquired into by an adverse party; when a letter is read, the answer may be given; and when a detached act, declaration, conversation, or writing is given in evidence, any other act, declaration, conversation, or writing which is necessary to make it understood may also be given in evidence.

Evidence Code section 356 is known as California's "statutory version of the common law rule of completeness." (*People v. Parrish* (2007) 152 Cal.App.4th 263, 269, fn. 3.) The statute provides that when one party puts into evidence one part of a conversation or statement, the remainder of the conversation or statement is admissible under Evidence Code section 356 ""provided the other statements have some bearing upon, or connection with, the admission or declaration in evidence . . . ""

(*People v. Zapien* (1993) 4 Cal.4th 929, 959.)

Thus, Evidence Code section 356 only permits introduction of statements on the same subject or which are necessary for the understanding of the statements already introduced. (*People v. Maury* (2003) 30 Cal.4th 342, 419.)

"The purpose of [Evidence Code section 356] is to prevent the use of selected aspects of a conversation, act, declaration, or writing, so as to create a misleading impression on the subjects addressed. [Citation.] Thus, if a party's oral admissions have been introduced in evidence, he may show other portions of the same interview or conversation, even if they are self-serving, which 'have some bearing upon, or connection with, the admission . . . in evidence.'"

(*People v. Arias* (1996) 13 Cal.4th 92, 156; see also *People v. Lewis* (2008) 43 Cal.4th 415, 458, overruled on other grounds as stated in *People v. Black* (2014) 58 Cal.4th 912, 919-920; *People v. Williams* (2006) 40 Cal.4th 287, 319; *People v. Harrison* (2005) 35 Cal.4th 208, 239.)

However, application of Evidence Code section 356 hinges on the requirement that the two portions of a statement be "on the same subject" and the proponent must show "some connection between the matters." (*People v. Zapien, supra*, 4 Cal.4th at p. 959; *People v. Hamilton* (1989) 48 Cal.3d 1142, 1174 ["In the event a statement admitted in evidence constitutes part of a conversation or correspondence, the opponent is entitled to have placed in evidence all that was said or written by or to the

declarant in the course of such conversation or correspondence, provided the other statements have *some bearing upon, or connection with*, the admission or declaration in evidence. . . .”].)

Additional statements may be excluded if they do not clarify or explain the redacted statement or where the additional statements have marginal probative value and the proponent of the evidence will not be seriously prejudiced by their exclusion. (See e.g., *People v. Von Villas* (1992) 10 Cal.App.4th 201, 271.) “[A] trial court has broad exclusion to exclude evidence it deems irrelevant, cumulative, or unduly prejudicial or time-consuming. (Evid. Code, § 352.)” (*People v. Pride* (1992) 3 Cal.4th 195, 235.)

C. The Trial Court’s Exclusion of the Family Meeting Was Proper

Contrary to appellant’s assertions, Evidence Code section 356 simply does not apply to the circumstances at bar. Appellant’s interview with multiple detectives at the police station concerning the details of the crimes committed by appellant were not part of the separate conversation with appellant’s family concerning primarily “praying, believing in God.” (10RT 1729.) Appellant claims that the family meeting was “intertwined” with appellant’s statements to detectives concerning the crimes, because the “heightened emotional tone of the meeting, not just the words spoken, provided the context the requests, promises, and admissions the jury was allowed to hear.” (AOB 68, 72-73.) To the contrary, appellant’s detail of the crimes and eventual confession was complete in and of itself – appellant’s “heightened emotion tone” was not necessary to understand his statements to detectives. In short, appellant’s statements to family members and vice versa were hearsay and not admissible pursuant to Evidence Code section 356. Thus, they were properly excluded under the rules of evidence.

In any event, even under Evidence Code section 356, appellant's separate meeting with his family members did not qualify as an "integral part" of the police interview. Specifically, the subject matter of appellant's family meeting did not relate to the same subject as any the other portion of the interview the prosecutor introduced. In particular, the interview with Detectives prior to and following the family meeting centered on the details of the crimes and whether appellant was the person who fired the weapon on February 13, 14, 15 and 19, 2004. In contrast, neither appellant nor any member of his family referenced the shooting, discussed his guilt or innocence, or urged appellant to tell the truth during their brief interaction. Instead, this meeting consisted of an emotionally charged exchange that was inadmissible hearsay, and as discussed *infra*, had the potential for prejudice to the prosecution that far outweighed any probative value.

Notably, defense counsel was unable to introduce a Spanish interpretation of what they alleged to be appellant's mother's words "urging him to "tell the truth" or "cooperate" during the redacted portion of the family interview. Instead, as pointed out by the prosecutor, the meeting consisted of a bunch of "sobbing" that would do nothing more than play on the sympathies of the jurors. (10RT 1717-1727.) Thus, even applying the precepts of Evidence Code section 356, the trial court reasonably concluded that the meeting with appellant's family members was not necessary to clarify any portion of the redacted interview the prosecution sought to introduce. Accordingly, it was properly excluded. (*People v. Hamilton, supra*, 48 Cal.3d at p. 1174; see *People v. Maury* (2003) 30 Cal.4th 342, 419 ["Section 356 permits introduction of statements "on the 'same subject' or which are necessary for the understanding of the statements already introduced".]) Moreover, defense counsel was free to argue that appellant was "vulnerable" and subject to the influences of the older Gonzalez.

Finally, the redacted version of appellant's interview was not ambiguous and did not paint a misleading portrait of appellant. On this record, appellant has failed to show an abuse of discretion. (*People v. Lewis, supra*, 43 Cal.4th at p. 458; *People v. Gambos* (1970) 5 Cal.App.3d 187, 192.)

This evidence was also properly excluded by the trial court under Evidence Code section 352. As pointed out by the prosecution, it was prejudicial "for the jury to hear appellant crying with his family, all this sobbing. It pulls at their heartstrings It plays on the jury's sympathy." (10RT 1725.) As the prosecutor argued and the trial court impliedly agreed with, this evidence was unduly prejudicial to the prosecution as it bore the risk of evoking an emotional response and/or sympathy from the jury. Both the People and the defense are entitled to a fair trial.

In sum, the trial court did not abuse its discretion in determining that the redacted portion of the interview was irrelevant and unnecessary to prevent the jury from having a false impression of the other portions of the recorded interrogation. In any event, the trial court's determination that the evidence was unnecessary to understand any of appellant's prior or subsequent statements to Detectives, was not an abuse of discretion. (See *People v. Pride, supra*, 3 Cal.4th at p. 235 [trial court's determination of admissibility under § 356 reviewed only for abuse of discretion]; *People v. Williams* (1975) 13 Cal.3d 559, 565 [§ 356 subject to qualification that court may exclude portions of conversation not relevant to those introduced]; *People v. Perry* (1972) 7 Cal.3d 756, 787 [same]; *Sprague v. Equifax, Inc.* (1985) 166 Cal.App.3d 1012, 1035-1036.) Finally, the jury was made aware that appellant requested to see his family and promised to then tell the truth if his request was granted. Nothing more was required to make the police interview or appellant's subsequent admissions understood.

D. In Any Event, Any Error in the Admission of This Evidence Was Harmless

Even assuming *arguendo* that the trial court somehow erred, the error was harmless. (*People v. Arias, supra*, 13 Cal.4th at pp. 156-157.) As outlined by the court and prosecution, the jury was already privy to the redacted transcript. This version included appellant's request to, and the fact that he received, permission to meet with his family members, and to his promise to tell the truth once the meeting took place. (10RT 1717-1721; 3SCT 96-98.) At trial, the court indicated that it was "clear" from the redacted version of the interview that appellant had asked for, was promised, and received, a break from the interview with Detectives to see his family (10RT 1718), and that after meeting with his family, his story changed. In addition, the trial court reiterated that the meeting with appellant's family did not include any discussion on the facts of the case, nor did it have any relevancy or explain any part of the interview that came prior to, or subsequent, to the meeting. (10RT 1718-1719.)

Moreover, as set forth previously, the evidence of appellant's guilt was overwhelming. (See Arg. I.C.2., *supra*.) As to counts 4-8, appellant's intent to kill was evidenced by his calculated ease in maneuvering the weapon as he approached the group of teens, including his use of the weapon to threaten Johnson face-to-face before turning it on Emmanuel and Gabriel. In addition, Emmanuel, Hart, and Johnson were able to positively identify appellant as the shooter. The fact that appellant had repeatedly denied involvement in the shootings, and claimed that he was just "doing what he was told to" by the older Gonzalez, in addition to his confession some time after the family meeting took place, were still before the jury. Furthermore, trial counsel was free to argue that after meeting with his family, appellant told the truth. Accordingly, is not reasonably probable that appellant would have received a more favorable result but for the

inclusion of the excised portion of the family meeting. (*People v. Arias*, *supra*, 13 Cal.App.4th at p. 157.) Appellant's assertions to the contrary should be rejected.

III. THE TRIAL COURT'S COMPLAINED-OF COMMENTS WERE PROPER AND DID NOT CONSTITUTE JUDICIAL MISCONDUCT; IN ANY EVENT, ANY CONCEIVABLE ERROR WAS HARMLESS UNDER ANY STANDARD

Next, appellant contends that his waiver of the right to confront and cross-examine witnesses was invalid because the trial court "impermissibly influenced" and "misadvised" him regarding the consequences of this waiver. Specifically, appellant claims the stipulation by defense counsel to forego the cross-examination of two witnesses from the Gabriel homicide regarding their prior misidentifications constituted a violation of his state and federal constitutional rights. (AOB 74-87.)

A. Factual Background

Shortly after the shooting on February 14, 2004, Camille Johnson and Marvin Emmanuel were shown photographic lineups that did not include appellant or co-defendant Gonzalez. At that time, both Johnson and Emmanuel tentatively picked individuals other than appellant as the possible shooter. (9RT 1562-1663.) During trial, the prosecutor and defense counsel discussed entering into a stipulation, whereby in exchange for the prosecution not putting on a gang expert, defense counsel would not discuss these witnesses having made these prior tentative "misidentifications." (9RT 1563-1564.) This agreement included giving up the right to cross-examine the witnesses in both the guilt and penalty phase on the misidentifications; foregoing the right to introduce evidence of those photographic lineups and any photo identification report; or being able to confront and cross-examine Emmanuel on his initial belief that he

had seen appellant hand a gun to Gonzalez prior to the shooting. (9RT 1563-1564.)

On September 28, 2006, defense counsel indicated that he would accept the proffered stipulation. (9RT 1530.) The prosecutor advised that a waiver from appellant was necessary in order to avoid “I.A.C. later on, stating, “[t]his is solely a strategic decision being made on the part of the defense.” (9RT 1529-1530.) The trial court responded:

[I]’m not so worried about the I.A.C. claim because it’s clearly a tactical decision. What I’m worried about it’s [*sic*] a tactical decision that involves, in part, waiving your right to confrontation so I think that is the waiver that really needs to be taken. If you want to cover something else, that’s fine, but, you know, that would be my concern. [¶] Because only [appellant] can really waive confrontation.

(9RT 1530.) Thereafter, this colloquy followed:

THE COURT: [Appellant], do you understand what the [prosecutor] has just said the agreement between her and counsel is?

APPELLANT: Yes.

THE COURT: Have you had as much time as you need to discuss this – the reasons for and the reasons against doing this with your attorneys?

APPELLANT: No.

THE COURT: I’m sorry?

APPELLANT: No.

THE COURT: Well, I think counsel better . . .

DEFENSE COUNSEL: I’ll try it again.

THE COURT: What I want you to understand is there are plusses and minuses. In other words, you gain some things by doing this and you lose some things by doing it. [¶] And as I understand it – and counsel will correct me if I’m wrong – this is a tactical decision on their part. [¶] And if I understand from

what I know basically – and I’m looking at [defense counsel] – your client has made statements that he was there and did the shooting; correct?

DEFENSE COUNSEL: Yes, Your Honor.

THE COURT: And so I take it you’re [sic] tactical reason is you’re really not giving up anything on the issue since he already admitted but in return you’re keeping out evidence from a gang expert; is that the crux of it?

DEFENSE COUNSEL: That’s the general crux of it.

THE COURT: Yeah. I understand there is a little bit more but I just want him to understand that you have pros and cons. In other words, you gain some things by doing this you lose some things by doing it. But that’s a tactical decision. [¶] And what you should understand is that you have the right to confront and cross-examine all of the witnesses against you including these witnesses. In other words, you have the right not only to be present physically when these witnesses testify but during that time to have your attorneys cross-examine them about anything relevant to the case including this. [¶] And, obviously, if the attorneys agree not to go into this to that extent you’re giving up your right to confront and cross-examine witnesses. [¶] Do you understand that or do I need to explain it more to you?

APPELLANT: I understand that.

THE COURT: Okay. And, again, the choice is yours because the right to confront and cross-examine witnesses is personal to you. [¶] As to most decisions in a trial it’s the attorney’s choice to make tactical decisions. [¶] This is kind of tactical and it’s kind of constitutional insofar as your right to confront and cross-examine witnesses. [¶] Do you understand that?

APPELLANT: Yes.

THE COURT: But on this you’re really going to have the last call so take a few minutes with your attorneys. If there is anything you need to have them explain to you they can do it at this point

(9RT 1565-1567.)

After defense counsel took a break to confer with appellant, they indicated that they were ready to proceed. This colloquy followed:

THE COURT: [Appellant], you've had a chance to speak with [defense counsel] about this issue. [¶] Are you satisfied now that you understand what it is that they propose and the [prosecutor] has proposed?

APPELLANT: Yes.

THE COURT: And do you concur with their decision to proceed in this manner?

APPELLANT: Yes.

THE COURT: And do you specifically give up your right to confront and cross-examine the witnesses on this particular issue of prior misidentifications?

APPELLANT: Yes.

(9RT 1566.) Thereafter, counsel joined in, and the trial court accepted, the waiver. (9RT 1566-1567.)

B. Appellant's Confrontation and Judicial Misconduct Claims Are Waived

First, appellant has waived any confrontation clause claim. Appellant's counsel not only failed to make any objection on confrontation clause grounds below, but affirmatively agreed to enter into the stipulation to forego cross-examination regarding these prior "misidentifications." Notably, this stipulation followed a period of several weeks to consider the offer. In exchange, the prosecution agreed to forego testimony by a gang expert.⁵ (8RT 1564-1565.) A claimed violation of one's rights under the

⁵ In the event appellant's argument can also be construed as a claim of ineffective assistance based on these circumstances, the bar for proving ineffective assistance of counsel is high, clearing it "is never an easy task." (*Padilla v. Kentucky* (2010) 559 U.S. 356 [130 S.Ct. 1473, 176 L.Ed.2d 284].) To prevail on a claim of ineffective assistance of counsel, a
(continued...)

confrontation clauses of the state and federal Constitutions is forfeited on appeal if not raised in the trial court. (*People v. Tafoya* (2007) 42 Cal.4th 147, 166; *People v. Seijas* (2005) 36 Cal.4th 291, 301.) This issue has not been preserved for appeal.

Likewise, a litigant generally forfeits a claim of judicial misconduct by failing to contemporaneously object and request an admonition unless neither could have cured the prejudice. (*People v. Sturm* (2006) 37 Cal.4th 1218, 1237; see also *People v. Snow* (2003) 30 Cal.4th 43, 78 [failure to object or seek jury admonition regarding alleged judicial bias waives issue on appeal].) Since appellant did not raise a single objection to the trial court's comments, the futility exception does not apply. (See, e.g., *People v. Hill* (1998) 17 Cal.4th 800, 821 [the futility exception typically arises when the court has overruled the defendant's objections in a manner that suggests any further objections would be useless]; cf. *People v. Abbaszadeh* (2003) 106 Cal.App.4th 642, 648 [lack of objection excused where trial judge instructed prospective jurors to lie on voir dire, thus rendering the defendant's trial fundamentally unfair].) Moreover, the failure to raise an objection to the trial court's alleged "advisory" precludes consideration of this claim here.

(...continued)

defendant must establish his counsel's performance was below an objective standard of reasonableness and that there is a reasonable probability that but for counsel's unprofessional errors, the result of the trial would be different. (*People v. Seaton* (2001) 26 Cal.4th 598, 696, citing *Strickland v. Washington* (1984) 466 U.S. 668 [104 S.Ct. 2052, 80 L.Ed.2d 674].) A reasonable and informed tactical decision made by defense counsel in light of the facts apparent at the time of trial and founded upon investigation and preparation does not constitute ineffective assistance of counsel. (*In re Hall* (1981) 30 Cal.3d 408, 426.) Here, defense counsel made clear on the record that the agreement to forego cross-examination on these prior "misidentifications" was a tactical decision. (9RT 1529-1530, 1566.)

C. In Any Event, the Trial Court's Advisory Was an Exercise of Judicial Neutrality and Appellant's Waiver Was Valid

1. The Applicable Law

The principles of judicial conduct during trial are well established. The trial judge is required "to control all proceedings during the trial, and to limit the introduction of evidence and the argument of counsel to relevant and material matters, with a view to the expeditious and effective ascertainment of the truth regarding the matters involved." (§ 1044.)

However, a judge should be careful not to throw the weight of his judicial position into a case, either for or against the defendant. A court commits misconduct if it persistently makes discourteous and disparaging remarks so as to discredit the defense or create the impression it is allying itself with the prosecution. (*People v. Carpenter* (1997) 15 Cal.4th 312, 353.) Further, a trial court cannot become an advocate for either party under the guise of commenting on the evidence or examining witnesses or casting aspersions or ridicule on witnesses. (*People v. Perkins* (2003) 109 Cal.App.4th 1562, 1567.)

However, only one instance of judicial misconduct may constitute prejudicial error if egregious, particularly when the judge exhibits bias directly toward the defendant. (See, e.g., *People v. Byrd* (1948) 88 Cal.App.2d 188, 192; see also *People v. Perkins, supra*, 109 Cal.App.4th at pp. 1571-1573 [repeated questions of defendant by court sought to develop and amplify prosecution evidence in the manner of partisan advocacy amounting to prejudicial misconduct].)

Appellate courts "determine the propriety of judicial comment on a case-by-case basis in light of its content and the circumstances in which it occurs." (*People v. Cash* (2002) 28 Cal.4th 703, 730.) "The role of a reviewing court 'is not to determine whether the trial judge's conduct left

something to be desired, or even whether some comments would have been better left unsaid. Rather, we must determine whether the judge's behavior was so prejudicial that it denied [the defendant] a fair, as opposed to a perfect, trial.'" (*People v. Harris* (2005) 37 Cal.4th 310, 347, quoting *People v. Snow* (2003) 30 Cal.4th 43, 78.)

2. The Trial Court's Remarks Did Not Constitute Misconduct Nor Did They Violate Appellant's Confrontation Rights

Here, the incident about which appellant complains does not rise to the level of misconduct, let alone prejudicial judicial misconduct. Specifically, appellant argues that the trial court offered "tactical advice that appellant was giving up nothing he had not already admitted, [and] in return was keeping out evidence from a gang expert." (AOB 80.) In addition, appellant claims the trial court "articulated only the plusses, leaving appellant with the impression that there were no minuses," based on an inaccurate assessment of the relative probative value of the misidentifications versus the gang expert's limited testimony; and, that contrary to the premise of the court's statements, the misidentification evidence was not probative only on the question of identity. Instead, appellant argues that same evidence could have been used to discredit the witnesses' testimony as it related to appellant's demeanor and intentions. (AOB 80-81.)

First, it is unclear how appellant concludes that the trial court "improperly influenced" appellant's waiver by "directly advising" him that he was "not really giving up anything," and reaching the conclusion that this "advice" was "misinformed." (AOB 74-75.) Instead, the trial court's referenced comments were actually addressed at *defense counsel*, not appellant, as follows:

THE COURT: What I want you to understand is there are pluses and minuses. In other words, you gain some things by

doing this and you lose some things by doing it. [¶] And as I understand it – and counsel will correct me if I’m wrong – this is a tactical decision on their part. [¶] And if I understand from what I know basically – and I’m looking at [defense counsel] – your client has made statements that he was there and did the shooting; correct?

DEFENSE COUNSEL: Yes, Your Honor.

THE COURT: And so I take it you’re tactical reason is you’re really not giving up anything on the issue since he already admitted but in return you’re keeping out evidence from a gang expert; is that the crux of it?

DEFENSE COUNSEL: That’s the general crux of it.

(9RT 1567.) Thus, this alleged “misleading one-sided advisement regarding the tactical benefit of the stipulation” (AOB 85) was actually not an “advisement” at all, let alone an advisement *directed* at appellant. Instead, the trial court addressed defense counsel, apparently to clarify the agreement to the stipulation was a “tactical choice.” (9RT 1567.) Yet even if it was directed at appellant, the trial court clearly stated that there were “minuses” and that appellant would “lose some things” by stipulating.

Second, as conceded by appellant (AOB 80), he admitted being the shooter on February 14-15, 2004 (counts 4-8). In addition, Johnson, Emmanuel, and Hart testified that appellant approached them while pulling out the Sten Mark III weapon, he appeared angry, and pointed the gun at Johnson, and then Gabriel and Emmanuel in a threatening manner. The evidence also showed that appellant’s weapon on choice, the Sten Mark III, was capable of discharging multiple rounds in rapid succession, and appellant fired on his victims when they had their backs turned and were retreating away from him. Thus, there was clearly little, if any benefit in the cross-examination of Johnson and Emmanuel regarding their initial prior misidentification of someone other than appellant as the shooter. Instead, appellant’s intent was inferred from the surrounding circumstances

and the jury certainly could have concluded that his actions displayed as such.

Moreover, other than appellant's conclusory statement that "this [misidentification] evidence could have been used to discredit the witnesses' testimony as it related to appellant's demeanor and intentions" (AOB 81), his argument fails to articulate how eliciting any prior misidentification evidence would have assisted him in light of the aforementioned circumstances. Moreover, this concession that he was the shooter, when weighed against the prospect of potentially damaging gang expert testimony regarding T.C.A. and the possible gang motive behind the shooting, arguably benefitted appellant.

In addition, as articulated above, the trial court was indeed careful to explain the "plusses and minuses" of appellant's waiver. In particular, the trial court acknowledged that this advisement was based on defense counsel's indication to the court that appellant acquiesced to firing the weapon on February 14-15, 2014. Specifically, appellant was told he would "gain some things" and "lose some things" from this particular waiver, and that there were "pros and cons" to this decision. The trial court also indicated that appellant had the right to confront and cross-examine witnesses, which was "personal to [appellant]," and stated that this waiver would act to "specifically give up [appellant's] right to confront and cross-examine the witnesses on this particular issue of prior misidentifications" Finally, the trial court advised appellant, "[o]n this you're really going to have the last call so take a few minutes with your attorneys." (9RT 1566.) This colloquy with appellant did not constitute "improper influence," a one-sided misadvisement, nor did it communicate the court had a "favorable view" of the stipulation. As confirmed by both defense counsel and the prosecutor, appellant's attorneys based this stipulation on a "tactical decision." (9RT 1567.) However, as acknowledged by the trial court and

communicated on the record, appellant was the final decision-maker, acknowledging that this waiver would effectively forego appellant's right to confront and cross-examine Johnson and Emmanuel. (9RT 1566-1567.)

Notably, defense counsel represented to the trial court that the primary use of the misidentifications for appellant's case would be to rebut the assertion that appellant was the shooter that night. Because defense counsel confirmed that appellant would instead admit to being the shooter on February 14-15, 2004, the trial court was left to merely clarify the basis for this "tactical decision" on the part of defense counsel. Under the circumstances, the trial court did not exhibit any bias or improperly influence appellant under these circumstances. (*People v. Melton* (1988) 44 Cal.3d 713, 735 [a court may comment on the evidence as long as the remarks are "accurate, temperate, and scrupulously fair".])

In sum, the trial court's comments regarding appellant's waiver were part and parcel of the court's decision-making process regarding the approval of the stipulation. In addition, they addressed appellant's understanding of his waiver of the right to confront and cross-examine these witnesses. (See *People v. Mayfield* (1997) 14 Cal.4th 668, 739, 755 ["it is not merely the right but the duty of a trial judge to see that the evidence is fully developed before the trier of fact and to assure that ambiguities and conflicts in the evidence are resolved insofar as possible"].) Thus, the comments made by the trial court regarding appellant's waiver were proper. His assertions to the contrary should be rejected.

Appellant also argues however, that there was no direct evidence and "scant circumstantial evidence" apart from the nature of the weapon appellant used to demonstrate that he fired with the intent to kill. (AOB 82.) Thus, appellant claims that absent the "impeachment" of these two witnesses, the jury had no reason to apply the expert testimony of Shomer

or to contest the eyewitness testimonies of Emmanuel and Johnson, who recalled that appellant looked “angry” prior to firing on them. Appellant also relies on *People v. Collins*, *supra*, 26 Cal.4th at page 311, to further claim that the trial court “overstepped the bounds of neutrality when it spoke for defense counsel in explaining the illusory tactical value of the stipulation.” (AOB 84.)

In *Collins*, the trial court gave the necessary advisements before taking the waiver of a jury trial, but also made statements to the defendant prior to taking the waiver that ““there might well be a benefit in [waiving a jury trial]. Just by having waived jury, that has some effect on the court.”” (*People v. Collins*, *supra*, 26 Cal.4th at p. 302, italics omitted.) The court indicated it was not specifying any particular benefit but confirmed that there would be ““some benefit.”” (*Id.* at p. 302.) This Court concluded that the trial court’s promise of ““some benefit”” was an improper inducement, which rendered the waiver involuntary. (*Id.* at pp. 304, 312.) Specifically,

the objective of the trial court’s comments was to obtain defendant’s waiver of a fundamental constitutional right that, by itself (when defendant elects to go to trial), is not subject to negotiation by the court. In effect, the trial court offered to reward defendant for refraining from the exercise of a constitutional right. [Citations.] The circumstance that the trial court did not specify the nature of the benefit by making a promise of a particular mitigation in sentence, or other reward, does not negate the coercive effect of the court’s assurances The inducement offered by the trial court to defendant, to persuade him to waive his fundamental right to a jury trial, violated defendant’s right to due process of law.

(*People v. Collins*, *supra*, 26 Cal.4th at p. 309, fn. omitted.)

Collins is distinguishable from the instant case, as the present case did not involve the waiver of the right to a jury trial, and the trial court did not promise appellant any benefit for this waiver. To the contrary, the court took a considerable amount of time to explain to appellant that there were

both positives and negatives to this waiver, and continually cautioned that there were “pros and cons,” to appellant’s decision. (9RT 1565-1567.) Moreover, as stated above, when the trial court commented, “You’re really not giving up anything on the issue since [appellant] already admitted [being the shooter],” the trial court was actually addressing *defense counsel*, clarifying that this was the “crux” of the “tactical decision” to enter into the stipulation, and the comment was correct. (9RT 1567.) Thus, as noted above, this particular portion of the trial court’s statement should not be considered an “advisement” of appellant at all, let alone a “misleading advisement,” because the trial court was merely delineating the strategic decision of defense counsel. More importantly, appellant’s argument ignores the fact that prior to his waiver, the trial court gave him an opportunity to consult with trial counsel and ask any questions he had. (9RT 1565-1567.) Based on all the foregoing, there was no state or federal constitutional violation. Appellant’s assertions to the contrary should be rejected.

D. In Any Event, Any Conceivable Error Was Harmless Under Any Standard

Even assuming the trial court erred as a matter of state law, the error did not rise to the level of a federal constitutional violation. Due process was not violated, “[b]ecause the trial court merely rejected some evidence concerning a defense; it did not preclude defendant from presenting a defense.” (*People v. McNeal* (2009) 46 Cal.4th 1183, 1203.) The confrontation clause was not violated, because “defendant can[not] show that the prohibited cross-examination would have produced ‘a significantly different impression of [the witnesses’] credibility’ [citation]” (*People v. Hamilton* (2009) 45 Cal.4th 863, 943.) Thus, whether the error prejudiced appellant should be evaluated by examining whether the other evidence of guilt was so overwhelming that it is not reasonably probable

that at least one juror would have declined to convict appellant had the jury not learned of the prior misidentifications. (*People v. Watson* (1956) 46 Cal.2d 818, 836; *Cone v. Bell* (2009) 556 U.S. 449, 453 [129 S. Ct. 1769, 173 L. Ed. 2d 701].)

As discussed above, the probative value of the prior misidentification evidence to the issue of appellant's intent was minimal at best. Appellant admitted to being the shooter, and eyewitness testimony regarding appellant's demeanor and behavior during the incident, in addition to testimony regarding the nature of the weapon appellant used, did not support his contention that the firing of the weapon was accidental. Accordingly, it is not reasonably likely that, if the evidence had been admitted, appellant would have received a more favorable verdict. For the same reasons, even assuming error of a constitutional magnitude occurred, it was harmless beyond a reasonable doubt.

IV. APPELLANT HAS FORFEITED ANY CHALLENGE TO THE KILL ZONE INSTRUCTION; IN ANY EVENT, THE JURY WAS PROPERLY INSTRUCTED ON THE KILL ZONE THEORY

Next, appellant contends that CALJIC No. 8.66.1, the standard jury instruction on the kill zone theory, contains "significant and prejudicial" defects. According to appellant, CALJIC No. 8.66.1, as given, critically misled the jury by improperly suggesting that a defendant can be convicted of the specific intent crime of attempted murder merely by subjecting individuals other than the intended target to a risk of fatal injury. He also contends that the term "kill zone" is an unnecessarily inflammatory "military expression," that gives rise to the "image of mass wartime casualties," unduly favors the prosecution, and is an inappropriate "neutral" jury instruction. (AOB 88-96.) Respondent disagrees.

As a preliminary matter, appellant has forfeited this claim by failing to object at trial. In any event, the facts of this case encompass precisely

the situation the “kill zone” instructions were designed to address (*People v. Adams* (2008) 169 Cal.App.4th 1009, 1019-1023; see *People v. Campos*, *supra*, 156 Cal.App.4th at pp. 1241-1243) and the jury was properly instructed as such. Finally, any error was harmless.

A. Procedural Background

The jury was instructed by the trial court that in order to find appellant guilty of attempted murder, the prosecution was required to prove, beyond a reasonable doubt, that appellant harbored “a definite and unambiguous intent to kill.” (17RT 2741.) The jury was also instructed that, in order to find that the attempted murder was “willful, deliberate, and premeditated” it must find that it was preceded and accompanied by “a cold, calculated decision to kill” that was the result of “carefully weigh[ing] the considerations for and against his choice and knowing the consequences decided to kill.” (17RT 2743-2744.)

The jury was instructed on concurrent intent, as follows:

A person who primarily intends to kill one person may also concurrently intend to kill other persons within a particular zone of risk. This zone of risk [is] termed the kill zone. The intent is concurrent when the nature and scope of the attack while directed at a primary victim are such that it is reasonable to infer that the perpetrator intended to kill the primary victim by killing everyone in the victim’s vicinity. Whether a perpetrator actually intended to kill the victim either as a primary target or as someone within the zone of risk is an issue to be decided by you.

(17RT 2742-2743; 29CT 8343-8344.) The jury was further instructed that all the instructions given were not necessarily applicable to the case (29CT 8321), and on the jury verdict forms language was included to indicate that the jurors had necessarily found that the attempted murders of Amezcua, Zepeda, Carillo, Hart, Jimenez, Emmanuel, and Johnson were committed “willfully, deliberately, and with premeditation within the meaning of section 664, subdivision (a). (29CT 8357-8364.)

B. Appellant's Claim Is Forfeited

“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.” (*People v. Andrews* (1989) 49 Cal.3d 200, 218.) This rule does not apply when the trial court gives an instruction that is an incorrect statement of the law. (*People v. Hudson* (2006) 38 Cal.4th 1002, 1012; *People v. Smithey* (1999) 20 Cal.4th 936, 976, fn. 7; *People v. Frazer* (2003) 106 Cal.App.4th 1105, 1116, fn. 5.) However, if a claim of instructional error affects the substantial rights of the defendant, an appellate court may consider the issue in spite of the failure to object. (*People v. Ramos* (2008) 163 Cal.App.4th 1082, 1087; *People v. Andersen* (1994) 26 Cal.App.4th 1241, 1249.) “Ascertaining whether claimed instructional error affected the substantial rights of the defendant necessarily requires an examination of the merits of the claim - - at least to the extent of ascertaining whether the asserted error would result in prejudice if error it was.” (*People v. Anderson, supra*, Cal.App.4th at p. 1249.)

Appellant does not assert in his opening brief that he objected at trial to the use of CALJIC No. 8.66.1. (AOB 88-96.) Indeed, the record shows no objection to the instruction or request that the language be modified or clarified in any way. (16RT 2559-2585; 17RT 2586-2633, 2743, 2764-2766.) Appellant's failure to object to the instruction in the trial court should be deemed a forfeiture of the issue because in this case, as will be described more fully below, the instruction did not affect his substantial rights.

C. Standard of Review

Appellate courts review claims of instructional error de novo. (*People v. Posey* (2004) 32 Cal.4th 193, 218.) “In considering a claim of instructional error we must first ascertain what the relevant law provides, and then determine what meaning the instruction given conveys. The test is whether there is a reasonable likelihood that the jury understood the instruction in a manner that violated the defendant’s rights.” (*People v. Andrade* (2000) 85 Cal.App.4th 579, 585.) The correctness of jury instructions is to be determined from the entire charge of the court, not from a consideration of parts of an instruction or from a particular instruction. (*People v. Musselwhite* (1998) 17 Cal.4th 1216, 1248.)

D. Substantive Law – The Kill Zone

“[A]ttempted murder requires the specific intent to kill and the commission of a direct but ineffectual act toward accomplishing the intended killing. [Citations.]” (*People v. Smith* (2005) 37 Cal.4th 733, 739.) “[T]he intent required for attempted murder can be satisfied not only by the intent to kill a particular person, but also by ‘a generalized intent to kill someone.’ [Citation.] Indeed, ‘a person who intends to kill can be guilty of attempted murder even if the person has no specific target in mind.’ [Citation.]” (*People v. Ervine* (2009) 47 Cal.4th 745, 789.) A person may intend to kill a specific victim or victims and at the same time intend to kill anyone in a particular zone of harm or kill zone under a concurrent intent theory. (*People v. Stone* (2009) 46 Cal.4th 131, 136.)

The “kill zone” instruction is derived from the case of *People v. Bland* (2002) 28 Cal.4th 313 (*Bland*), in which the California Supreme Court upheld a conviction for the murder of an intended victim and the attempted murder of two car passengers struck by a “flurry of bullets” that Bland and a cohort fired at a fleeing car driven by the intended victim. (*Id.* at pp. 318,

330-331.) This Court explained that attempted murder is not established unless the defendant specifically intended to kill the alleged victim. (*Id.* at p. 328.) However, the fact that a defendant wanted to kill a particular target does not preclude finding that he also, concurrently, intended to kill others present in what was termed the “kill zone.” (*Id.* at p. 329.) As this Court explained:

The intent is concurrent . . . when the nature and scope of the attack, while directed at a primary victim, are such that we can conclude the perpetrator intended to ensure harm to the primary victim, by harming everyone in that victim’s vicinity. For example, an assailant who places a bomb on a commercial airplane intending to harm a primary target on board ensures by this method of attack that all passengers will be killed. Similarly, consider a defendant who intends to kill A and in order to ensure A’s death, drives by a group consisting [of] A, B, and C, and attacks the group with automatic weapon fire or an explosive device devastating enough to kill everyone in the group. The defendant has intentionally created a “kill zone” to ensure the death of his primary victim. When the defendant escalated his mode of attack from a single bullet aimed at A’s head to a hail of bullets or an explosive device, the factfinder can infer that, whether or not the defendant succeeded in killing A, the defendant concurrently intended to kill everyone in A’s immediate vicinity to ensure A’s death. . . . Where the means employed to commit the crime against a primary victim create a zone of harm around that victim, the factfinder can reasonably infer that the defendant intended that harm to all who are in the anticipated zone

(*People v. Bland, supra*, 28 Cal.4th at pp. 329-330.)

Bland also points out,

[t]his concurrent intent theory is not a legal doctrine requiring special jury instructions Rather, it is simply a reasonable inference the jury may draw in a given case: a primary intent to kill a specific target does not rule out a concurrent intent to kill others.

(*People v. Bland, supra*, 28 Cal.4th at p. 331, fn. 6.) CALJIC No. 8.66.1 was formulated in response to *Bland*.

The kill zone theory thus imposes attempted murder liability “where the defendant intentionally created a kill zone in order to ensure the defendant’s primary objective of killing a specific person or persons despite the recognition, or with acceptance of the fact, that a natural and probable consequence of that act would be that anyone within that zone could or would die. Whether or not the defendant is aware that the attempted murder victims were within the zone of harm is not a defense, as long as the victims actually were within the zone of harm. [Citation.]” (*People v. Adams* (2008) 169 Cal.App.4th 1009, 1023.)

For example, in *People v. Vang* (2001) 87 Cal.App.4th 554, 563-565, the defendants sprayed occupied houses with wall-piercing bullets. “The fact they could not see all of their victims did not somehow negate their express malice or intent to kill as to those victims who were present and in harm’s way, but fortuitously were not killed.” (*Id.* at pp. 563-564.) Thus, the term “kill zone” is merely shorthand for concurrent intent. (*People v. Bland, supra*, 28 Cal.4th at p. 331, fn. 6.)

E. The “Kill Zone Theory” Contained in CALJIC No. 8.66.1 Was Correctly Given to the Jury

Appellant contends that CALJIC No. 8.66.1, the “kill zone instruction,” is “highly inappropriate,” “inherently inflammatory,” and favors the prosecution by lightening the burden of proof. (AOB 88, 92-95.) Appellant also contends that inherent in CALJIC No. 8.66.1 is the use of a “battlefield metaphor connoting mass casualties,” and “unavoidable inflammatory associations with the catastrophic casualties of war.” (AOB 94.) In addition, he argues that the use of the term “kill zone” compromises the instruction’s “neutrality” and unduly favors the prosecution. (AOB 88, 94-95.) Appellant’s contentions are meritless.

Purportedly erroneous instructions are reviewed in the context of the entire charge to determine whether it is reasonably likely the jury

misconstrued or misapplied the challenged instruction. (*Estelle v. McGuire supra*, 502 U.S. at p. 72. “A single instruction to a jury may not be judged in artificial isolation, but must be viewed in the context of the overall charge.” (*Boyde v. California* (1990) 494 U.S. 370, 378 [110 S.Ct. 1190, 1198, 108 L.Ed.2d 316]; see also *People v. Burgener* (1986) 41 Cal.3d 505, 538 [under California law, correctness of jury instructions determined from entire charge of the court].) Here, contrary to appellant’s assertions (AOB 93-94), the use of the term “kill zone” is a neutral description of a legal concept and does not serve to inflame the jury or favor the prosecution by diluting the individualized intent requirement.

For example, in *People v. Campos* (2007) 156 Cal.App.4th 1228, 1244, the defendant also argued that the term “kill zone,” like the terms “execution style” or “serial killer,” were argumentative and inflammatory, and therefore inappropriate in a neutral instruction. The facts in *Campos* presented a classic kill zone situation. Campos and his cohorts fired a barrage of bullets into a vehicle occupied by three people. Two victims died, one did not. (*Id.* at p. 1233.) On appeal, the defendant in *Campos* contended that the kill zone instruction was argumentative. An instruction is “argumentative” when it recites facts drawn from the evidence in such a manner as to constitute argument to the jury in the guise of a statement of law. (*People v. Rice* (1976) 59 Cal.App.3d 998, 1004.) “A jury instruction is [also] argumentative when it is “of such a character as to invite the jury to draw inferences favorable to one of the parties from specified items of evidence.” [Citations.]” (*People v. Lewis* (2001) 26 Cal.4th 334, 380, quoting *People v. Hines* (1997) 15 Cal.4th 997, 1067-1068.)

Neither description applies here. CALJIC No. 8.66.1 merely employs the term, “kill zone” or “zone of risk.” It does not invite inferences favorable to either party, nor does it integrate the facts of the case as an argument to the jury. Other “disparaging terms,” including “flight”

(CALJIC No. 2.52), “suppression of evidence” (CALJIC No. 2.06) and “consciousness of guilt” (CALJIC No. 2.03) have been used in approved, longstanding CALJIC instructions. (*People v. Campos, supra*, 156 Cal.App.4th at p. 1244.) Thus, the instruction given by the trial court was proper.

Furthermore, the jury was instructed by the trial court that it must “[p]ay careful attention to all of these instructions and consider them together.” (29CT 8320; 17RT 2741-2744.) It was also instructed that in order to convict appellant of attempted murder, it must find that the attempted murders were done “willfully, and with deliberation and premeditation,” and determine that after “carefully weigh[ing] the considerations for and against his choice and, knowing the consequences, [appellant] decided to kill.” (29CT 8344.)

Moreover, the first and final sentences of CALJIC No. 8.66.1 also refer to the intent to kill. (29CT 8343-8344.) The first sentence explains that the intent to kill one person may extend to encompass an intent to kill other persons in the “zone of risk.” The final sentence in the instruction reminds the jury that it is required to determine whether appellant “actually intended to kill the victim, either as a primary target or as someone within the “zone of risk.” (29CT 8343-8344.) Viewed in the context of the entire charge, therefore, it is not reasonably probable the jury construed the references in CALJIC No. 8.66.1 of an “intent to kill each victim,” as “implying that [appellant] firing into the area must invariably carry with it the intent to kill.” (AOB 95.)

Instead, as noted, CALJIC No. 8.66.1 explains that, “A person who primarily intends to kill one person *may also concurrently intend to kill other persons within a particular zone of risk.* . . . The intent is concurrent when the nature and scope of the attack . . . are such that it is reasonable to infer the perpetrator *intended to kill the primary victim by killing everyone*

in that victim's vicinity." (29CT 8343-8344, italics added.) Thus, the instruction makes clear that under a kill zone theory, the defendant must *intend to kill* the other, non-targeted persons, albeit as a means of killing the targeted person. CALJIC No. 8.66.1 also expressly informed the jury that "[w]hether a perpetrator actually *intended to kill the victim*, either as a primary target *or as someone within the zone of risk* is an issue to be decided by you." (29CT 8344, italics added.) This language again educated the jury that they must determine whether appellant *intended to kill*, even if they found the victim was merely "someone within the zone of risk" rather than a "primary target."

In sum, CALJIC No. 8.66.1 instructed the jurors that attempted murder required the specific intent to kill the victim (29CT 8344), while other instructions charged the jurors to read all the instructions as a whole (29CT 8320). Moreover, the verdict forms contained the specific intent language as to each victim, that appellant had been found to have committed willful, deliberate and premeditated murder. Based on these express references to the requisite specific intent to kill appearing within CALJIC No. 8.66.1, the other instructions as a whole, and the terms referenced on the jury verdict forms, it is not reasonably likely the jury misconstrued or misapplied the instruction.

F. Appellant was not prejudiced by use of CALJIC No. 8.66.1.

In light of the extremely aggravating facts presented to the jury - and the fact that nothing mitigated the crime - it is not reasonably probable that had the complained-of language in the kill zone instruction been omitted, it would have resulted in a different outcome. Indeed, any error could not be deemed prejudicial under any standard of review. (*People v. Palmer* (2005) 133 Cal.App.4th 1141, 1157 ["misdirection of the jury, including incorrect, ambiguous, conflicting, or wrongly omitted instructions that do not amount

to federal constitutional error, are reviewed under the harmless error standard articulated in *People v. Watson*, *supra*, 46 Cal.2d at p. 836]; see *People v. Campos*, *supra*, 156 Cal.App.4th at p. 1244 [applying the *Watson* standard to a challenge to “kill zone” instruction, finding that any possible error was not prejudicial].)

Here, appellant’s intent to kill *all* of the named victims could *clearly* be inferred from the evidence before the jury, under the kill zone theory or otherwise. At the behest of appellant’s friend Gonzalez, he approached the group of young, Black youth that included Gabriel, Emmanuel, Hart, and Johnson, from across the street. Upon his approach, he took out and was ready to wield the concealed and loaded Sten Mark III automatic weapon. This occurred just prior to Gonzalez’ indication to appellant that Emmanuel had made what Gonzalez perceived to be an offensive racial remark. Gonzalez also reported the group’s “ignorance of T.C.A.” Hart recalled that appellant had approached the group while simultaneously pulling the black submachine gun out from inside his leather jacket and holding it with both hands. (9RT 1694-1695.)

Minutes later, without hesitation, appellant sprayed bullets into a crowd gathered outside the nightclub that included the group of four teenagers, fatally wounding 13-year-old Gregory Gabriel and leaving several others with serious injuries. (8RT 1592, 1598; 9RT 1637-1638, 1668-1672, 1700-1701.) On this evidence, the jury almost certainly would have found intent by appellant to kill in each instance, even absent the kill zone theory.

Moreover, assuming the instruction was unnecessary, there was no harm in the jury hearing it because they were instructed with CALJIC No. 17.31, which told them that some instructions given might be unnecessary:

Some of these instructions may not apply, depending on your findings about the facts of the case. Do not assume just because

I give a particular instruction that I am suggesting anything about the facts. After you have decided what the facts are, follow the instructions that do apply to the facts as you find them.

(29CT 8321.) Thus, if the jury decided based on the evidence that a “kill zone” did not exist, it would have deemed the instruction unnecessary and disregarded it. For all of these reasons, appellant was not prejudiced by the inclusion of CALJIC No. 8.66.1.

V. APPELLANT’S ALTERNATIVE CHALLENGE TO THE KILL ZONE INSTRUCTION IS MERITLESS

Next, appellant contends the “modified” kill zone instruction in the language of CALJIC No. 8.66.1 “lightened the prosecution’s burden of proof.” (AOB 97-111.) He argues that the instruction given, which included the original CALCRIM No. 600 instruction, modified by the trial court on the concurrent intent element to rely on language taken from CALJIC No. 8.66.1, did not instruct the jury on all the elements of concurrent intent. Thus, appellant alleges he could have been convicted of the attempted murder charges enumerated in counts 5-8 based on implied malice or transferred intent theories. (AOB 101.) Appellant also argues that there was no proof or identification of a primary victim, and the trial court’s use of “vicinity” instead of “zone of risk” served to “expan[d] the universe of possible victims based on a purely geographical consideration.” (AOB 101-106.) His arguments are without merit.

A. Appellant’s Claim Is Forfeited

As set forth above, defense counsel raised no objection to the version of the kill zone instruction given at trial. (See Arg.IV.B., *supra*.) Accordingly, appellant has forfeited this challenge. (See, e.g., *People v. Campos*, *supra*, 156 Cal.App.4th at p. 1236 [defendant’s challenge to the clarity and completeness of CALCRIM No. 600 was forfeited by failure to

raise objection in the trial court]; see also *People v. Valdez* (2004) 32 Cal.4th 73, 137 [claim that instruction not supported by substantial evidence forfeited by the failure to object at trial].)

B. In Any Event, the Jury Was Properly Instructed

Assuming this Court decides to review this claim (§ 1259; *People v. Smithey* (1999) 20 Cal.4th 936, 976-977, fn. 7), the jury instruction was proper. In reviewing claims of instructional error, a reviewing court decides whether there is a reasonable likelihood that the jury misconstrued or misapplied the terms of the instruction. (*People v. Clair* (1992) 2 Cal.4th 629, 663.) The correctness of jury instructions is to be determined from the entire charge of the court, not from a consideration of parts of an instruction, or from a particular instruction. (*People v. Musselwhite, supra*, 17 Cal.4th at p. 1248.) In determining whether instructional error is prejudicial, the California Supreme Court has declared that the reviewing court may reverse a conviction “only if, “after an examination of the entire cause, including the evidence” [citation], it appears “reasonably probable” the defendant would have obtained a more favorable outcome had the error not occurred.” (*People v. Lasko* (2000) 23 Cal.4th 101, 111.)

Here, the jury was instructed as follows:

A person who primarily intends to kill one person may also concurrently intend to kill other persons within a particular zone of risk. This zone of risk is termed the kill zone. The intent is concurrent when the nature and scope of the attack while directed at a primary victim are such that it is reasonable to infer that the perpetrator intended to kill the primary victim by killing everyone in the victim's vicinity. Whether a perpetrator actually intended to kill the victim either as a primary target or as someone within the zone of risk is an issue to be decided by you.

(17RT 2742-2743.) This instruction incorporates language from CALCRIM No. 600, and CALJIC No. 8.66.1. CALCRIM No. 600 sets forth:

The defendant is charged [in Count _____] with attempted murder. [¶] To prove that the defendant is guilty of attempted murder, the People must prove that: [t]he defendant took at least one direct but ineffective step toward killing (another person/ [or] a fetus) . . . AND . . . [t]he defendant intended to kill (that/a) (person/ [or] fetus). [¶] A direct step requires more than merely planning or preparing to commit murder or obtaining or arranging for something needed to commit murder. A direct step is one that goes beyond planning or preparation and shows that a person is putting his or her plan into action. A direct step indicates a definite and unambiguous intent to kill. It is a direct movement toward the commission of the crime after preparations are made. It is an immediate step that puts the plan in motion so that the plan would have been completed if some circumstance outside the plan had not interrupted the attempt. [¶] A person who attempts to commit murder is guilty of attempted murder even if, after taking a direct step toward killing, he or she abandons further efforts to complete the crime, or his or her attempt fails or is interrupted by someone or something beyond his or her control. On the other hand, if a person freely and voluntarily abandons his or her plans before taking a direct step toward committing the murder, then that person is not guilty of attempted murder A person may intend to kill a specific victim or victims and at the same time intend to kill everyone in a particular zone of harm or "kill zone." In order to convict the defendant of the attempted murder . . . the People must prove that the defendant not only intended to kill . . . but also either intended to kill . . . or intended to kill everyone within the kill zone. If you have a reasonable doubt whether the defendant intended to kill . . . on concurrent-intent theory . . . or intended to kill . . . by killing everyone in the kill zone, then you must find the defendant not guilty of the attempted murder The defendant may be guilty of attempted murder even if you conclude that murder was actually completed

CALJIC No. 8.66.1 sets forth:

A person who primarily intends to kill one person, may also concurrently intend to kill other persons within a particular zone of risk. [This zone of risk is termed the "kill zone."] The intent is concurrent when the nature and scope of the attack, while directed at a primary victim, are such that it is reasonable

to infer the perpetrator intended to kill the primary victim by killing everyone in that victim's vicinity. [¶] Whether a perpetrator actually intended to kill the victim, either as a primary target or as someone within a ["kill zone"] [zone of risk] is an issue to be decided by you.

Appellant claims, however, that this modified instruction did not convey that the prosecution "had the burden of proving the predicates of concurrent intent beyond a reasonable doubt." Instead, he argues the instruction, as given, "allowed a conviction of attempted murder based on nothing more than a 'reasonable inference' as to the element of intent" (AOB 102.) As outlined above (Arg.IV.D., *supra*), "[i]n determining the correctness of jury instructions, we consider the instructions as a whole." (*People v. Campos, supra*, 156 Cal.App.4th at p. 1237.) "An instruction can only be found to be ambiguous or misleading if, in the context of the entire charge, there is a reasonable likelihood that the jury misconstrued or misapplied its words." (*Ibid.*)

Attempted murder requires proof of a direct but ineffectual act done towards killing another human being and the specific intent to unlawfully kill another human being. (*People v. Herrera* (1999) 70 Cal.App.4th 1456, 1466–1467 [citing CALJIC No. 8.66 with approval].) Unlike the mental state for murder, which does not require an intent to kill but only a conscious disregard for life, "[a]ttempted murder requires the specific intent to kill" (*People v. Smith* (2005) 37 Cal.4th 733, 739, internal citation marks omitted.) The doctrine of "transferred intent," transferring the intent to kill an intended target to an unintended victim, applies to murder but not to attempted murder. (*People v. Bland, supra*, 28 Cal.4th at pp. 320–321, 331.) However, a concurrent intent can be found when there is a "kill zone" created, or "when the nature and scope of the attack, while directed at a primary victim, are such that [one] can conclude the perpetrator intended to ensure harm to the primary victim by harming everyone in that victim's

vicinity.” (*People v. Bland* (2002) 28 Cal.4th at p. 329, internal citation marks omitted.) In addition, “the act of firing toward a victim at a close, but not point blank range, ‘in a manner that could have inflicted a mortal wound had the bullet been on target’ has also been found to support an inference of intent to kill.” (*People v. Smith, supra*, 37 Cal.4th at p. 741, internal citation marks omitted.)

In the present case, there was evidence that appellant targeted at least three people in the group of four teenagers. Appellant first pointed the gun at Johnson (10RT 1695), but then focused his attention of Gabriel and Emmanuel, who had made the comment that had offended Gonzalez (10RT 1697). Moreover, the prosecutor directly argued that Emmanuel and Gabriel were the *primary* victims of the February 14, 2004 shooting, stating”

When [appellant] aimed that gun at [Emmanuel] and Gregory after [Johnson] asked him if he was going to shoot her [appellant] expressed intent to kill those two boys. [¶] *Those were his primary victims.* [¶] But he didn’t care who else he was going to take out when he sprayed twenty-one bullets to take out those two boys.

(17RT 2601, italics not in original.) She further argued that Hart, Johnson, and Jimenez fell within appellant’s “kill zone.” (17RT 2601.) Thus, the jury could have reasonably inferred that, by spraying bullets down the sidewalk in front of the nightclub, appellant created a zone of risk, intending to kill every person in that vicinity. Then, the jury could have found that Hart and Johnson, as members of the original group when appellant approached, and Jimenez, the nightclub’s disc-jockey, were in that zone of risk, and, by targeting Emmanuel and Gabriel, Hart, Johnson, and Jimenez became foreseeable victims within this zone. Consequently, appellant’s argument that the trial court erred in instructing the jury with CALJIC No. 8.66.1 should be rejected.

Furthermore, as noted in *People v. Bland, supra*, 28 Cal.4th at page 331, footnote 6, the kill zone instruction is not legally required, but instead describes an inference the jury *could* draw. (See e.g., *People v. Stone, supra*, 46 Cal.4th at pp. 137-138 [current pattern jury instructions such as CALCRIM No. 600 discuss the kill zone theory, but the instruction is not required and is instead left to the trial court's discretion]; *People v. McCloud* (2012) 211 Cal.App.4th 788, 798 [“jury instructions on the kill zone theory are *never* require[d]”].) Because the jury was properly instructed elsewhere on the elements of attempted murder, including the requirement of the specific intent to murder the person whose attempted murder was charged, the instruction was superfluous. (*People v. Stone, supra*, 46 Cal.4th at p. 138; *People v. Bland, supra*, 28 Cal.4th 313; *People v. Campos, supra*, 156 Cal.App.4th at p. 1243.)

For example, the kill zone instruction given to the jury clearly outlined that the jurors were required to determine whether appellant possessed the requisite intent to kill. (29CT 8343-8344.)⁶ Specifically, the instructions as a whole differentiated the requisite intents needed to support the attempted murder counts from those needed to support the assault counts. For example, the trial court's instructions directed the jurors that for appellant to be guilty of attempted murder, the jury must find he committed the act with a “a definite and unambiguous intent to kill.” (17RT 2743-2744; 29CT 8343.) Additionally, the trial court used CALCRIM No. 601, instructing the jury that as to the attempted murder

⁶ Appellant's argument that the trial court's instruction was “flawed as a matter of law” because it relieved the prosecution of the burden of identifying or proving there was a primary victim in Counts Five through Eight is addressed in detail below. (See Arg.V.I., *infra*.)

counts and accompanying special allegations charged, the prosecution had the burden to prove that “the attempted murder[s] [were] done willfully, and with deliberation and premeditation,” including “carefully weigh[ing] the considerations for and against his choice, and, knowing the consequences, decided to kill. A person premeditated if he decided to kill before acting. (29CT 8344.) The instruction also advised that the prosecution had the burden of proving this allegation “beyond a reasonable doubt” and “[i]f the People have not met this burden, you must find this allegation has not been proved.” (17RT 2744-2745; 29CT 8320.) Finally, the jury was instructed with CALCRIM No. 220, which states:

The fact that a criminal charge has been filed against the defendant is not evidence that the charge is true. You must not be biased against the defendant just because he has been arrested, charged with a crime or brought to trial. A defendant in a criminal case is presumed to be innocent. This presumption requires that the People prove each element of a crime and any special allegation beyond a reasonable doubt.

Whenever I tell you the People must prove something, I mean they must prove it beyond a reasonable doubt. Proof beyond a reasonable doubt is proof that leaves you with an abiding conviction that the charge is true. The evidence need not eliminate all possible doubt because everything in life is open to some possible or imaginary doubt.

In deciding whether the People have proved their case beyond a reasonable doubt, you must impartially compare and consider all the evidence that was received throughout the entire trial. Unless the evidence proves the defendant guilty beyond a reasonable doubt, he is entitled to an acquittal. You must find him not guilty.

(17RT 2707-2708; 29CT 8322.) Thus, in the context of the entire set of instructions, there is little if any possibility the jury misapplied the instruction or believed it could convict appellant of the attempted murder without finding intent on each count. (See *People v. Musselwhite*, *supra*,

17 Cal.4th at p. 1248 [considered in totality, the instructions were adequate].)

The trial court's use of the CALJIC No. 8.66.1 language of "vicinity" instead of "zone of risk" (AOB 101-106), does not compel a contrary conclusion. This sentence constitutes a definition, not a presumption. Furthermore, as outlined above, the fourth sentence of the instruction confirms this by advising the jury: "Whether a perpetrator actually intended to kill the victim, either as a primary target or as someone within a zone of risk, is an issue to be decided by you." (29CT 8344.) Moreover, taken in context, the terms "vicinity" and "zone of risk" were used synonymously in the modified instruction, and the jury never expressed any confusion or requested clarification of either of these terms. Appellant's assertions to the contrary should be rejected.

C. Any Instructional Error Was Harmless

To the extent appellant has somehow preserved and established instructional error, it should be reviewed under the *Watson* standard. (See, e.g., *People v. Campos*, *supra*, 156 Cal.App.4th at p. 1244; *People v. Palmer*, *supra*, 133 Cal.App.4th at p. 1157.) Given the evidence in this case, it is not reasonably probable that appellant would have obtained a more favorable result absent any defect in the challenged instruction, especially since the instruction clearly admonished the jury that it could not find appellant guilty of attempted murder unless it found that he had the requisite intent to kill everyone in the kill zone, either as a primary victim or someone within the zone of risk. (17RT 2743; *People v. Palmer*, *supra*, 133 Cal.App.4th at p. 1157; see also *People v. Wallace* (2008) 44 Cal.4th 1032, 1076 [superfluous instruction was harmless]; *People v. Crew* (2003) 31 Cal.4th 822, 829 [same].)

In addition, as outlined above, the instructions required the jury to find each attempted murder was "done willfully and with deliberation and

premeditation.” (17RT 2743-2744.) Finally, the evidence of an intent to kill as to each victim was overwhelming, under the “kill zone” theory or otherwise: appellant brazenly walked up and repeatedly fired 21 rounds from a submachine gun at Emmanuel, Gabriel, Johnson, Hart, and anyone else who was in close proximity to the crowd coming and going to the nightclub, including Jimenez. (See Arg.IV.D., *supra*.) On this evidence, the jury would most certainly have found that appellant intended to kill everyone in this “kill zone.” (See *People v. Smith*, *supra*, 37 Cal. 4th at p. 743 [evidence that defendant purposefully discharged a lethal firearm at victims directly in his line of fire can support an inference that he acted with the intent to kill both].) Moreover, the jury found that the attempted murder of each victim was willful, deliberate, and premeditated, which required the jury to conclude as to each victim that appellant had “a definite and unambiguous intent to kill” when he acted. (29CT 8343-8344; CALRIM Nos. 600, 601.) Thus, any instructional error was harmless.

People v. Chun (2009) 45 Cal.4th 1172, 1200, relied on by appellant, does not compel a contrary conclusion. As acknowledged by appellant, *Chun* is distinguishable from the instant case. (AOB 107-108.) Nonetheless, appellant relies on *Chun* to allege that prejudice can be determined from the “reasonable assumption” that the jurors relied on the kill zone theory in relation to Counts Five through Eight. (AOB 107-109.) However, the premise of this argument is based on the incorrect assumption that the prosecution did not identify Emmanuel and Gabriel as appellant’s primary targets. As detailed above, the prosecutor specifically argued that Emmanuel and Gabriel were the primary victims of the February 14, 2004 shooting. (17RT 2601; see Arg.V.B., *supra*.)

Still, appellant alleges that “it cannot be concluded that a juror who relied on the kill zone or concurrent intent theory, as instructed, necessarily found beyond a reasonable doubt that appellant had the separate intent to

kill each alleged attempted murder victim.” Instead, appellant concludes that the attempted murder convictions could have been based on “conscious-disregard-for-life malice” rather than the “strict impossibility test” articulated in *Chun*. (AOB 108-109.) He is mistaken.

As enumerated above, the evidence was such that beyond a reasonable doubt, a rational jury would have found that appellant deliberated and premeditated the attempted murders enumerated in Counts Five through Eight. By returning guilty verdicts on the attempted murder counts, the jury found that appellant intended either to kill Hart, Jimenez, Emanuel, or Johnson. The verdict forms specifically indicated that that jury found appellant guilty of “willfully, deliberately, and with premeditation” attempting to murder in Counts 5-8, meaning the jurors had in fact found that appellant had the requisite mens rea for attempted first degree murder, and additionally, to have personally discharged a firearm during the attempted murders. (29CT 8360-8363.) In addition, the jury was specifically instructed on premeditation and deliberation with CALCRIM No. 601. (29CT 8344.) Moreover, the instructions, as given, clearly informed the jury that for the kill zone theory to apply, the circumstances of the attack must have allowed an inference that the defendant intended to kill a specific person, and at the same time, intended to kill any other person who happened to be in the victim’s “zone of risk.” (17RT 2742-2743; Arg.IV.D., *supra*, see *People v. Bland*, *supra*, 28 Cal.4th at pp. 329-330 [where the means employed to commit the crime against a primary victim create a zone of harm around that victim, the fact-finder can reasonably infer that the defendant intended that harm to all who are in the anticipated zone].)

The circumstances that existed in the late hours of February 14, 2004, into the early hours of February 15, 2014, included appellant’s confrontation with Gabriel and Emmanuel while they were standing

together with Hart and Johnson in front of a busy nightclub. Appellant later began shooting at this same group when they were walking closely together with their backs turned to him. In addition, Johnson testified that at the time when appellant's bullets "flew," they were close to the entrance of the nightclub, where employees like Jimenez and other patrons were congregated. Accordingly, the kill zone instruction given was not inflammatory or constitutionally defective, nor did it lighten the prosecution's burden of proof. Instead, the jury was properly instructed and reasonably relied on the kill zone theory in convicting appellant of attempted murder on counts 5-8. (See Args.IV.D-E.; V.B., *supra*.)

Even under the more stringent *Chapman* standard enumerated in *Chun*, this Court does not have to determine if the verdicts reflect that the jury actually determined that appellant deliberated and premeditated the attempted murder. Rather, the entire record may be reviewed to determine whether it is clear beyond a reasonable doubt that a rational jury would have made the necessary findings of premeditation and deliberation absent the error. (See *People v. Cross* (2008) 45 Cal.4th 58, 69-71 [instructional error as to the elements of an offense requires reversal only when the reviewing court concludes beyond a reasonable doubt that the error contributed to the verdict]; *People v. Chiu* (2014) 59 Cal.4th 155, 167.)

In *Chun*, this Court was able to determine from other aspects of the verdict and the evidence that the jury *actually* made the omitted finding, concluding that "[i]f other aspects of the verdict or the evidence leave no reasonable doubt that the jury made the [necessary] findings ... , the erroneous ... instruction was harmless." (*People v. Chun, supra*, 45 Cal.4th at p. 1205.) However, because *Chun* did not involve an erroneous instruction that obviated the need for the jury to make a finding as to an element of an offense, but rather involved a record from which the court

was able to determine that the jury *actually* made the omitted finding, the harmless error standard applied in that case has no application here.

In any event, given the *Chun* court's recognition that there were additional ways to determine harmless error (*People v. Chun, supra*, 45 Cal.4th at p. 1203), *Chun* is consistent with the respondent's position that this Court does not have to determine if the verdicts reflect that the jury actually determined that appellant deliberated and premeditated the attempted murder. (See *People v. Harris* (1994) 9 Cal.4th 407, 419, fn. 7; *People v. Guiton* (1993) 4 Cal.4th 1116, 1130-1131;.) Rather, the entire record may be reviewed to determine whether it is clear beyond a reasonable doubt that a rational jury would have made the necessary findings of premeditation and deliberation absent any error. Based on the evidence presented here, including the references to these terms on the written jury verdict forms (29CT 8360-8363), the instructions given, and the circumstances underlying the nightclub shooting (see Arg.IV.D., *supra*), the jury verdict would have been the same absent any error.

VI. THE KILL ZONE INSTRUCTION DID NOT RELIEVE THE PROSECUTION OF ITS BURDEN, OR THE JURY OF ANY FACT-FINDING, ON THE ATTEMPTED MURDER COUNTS

Next, appellant alleges it was erroneous to give the kill zone instruction as to Counts Five through Eight because there was no evidence that he aimed at a particular target. He argues that the alleged error was prejudicial because the trial court's "truncated" or "generic" version of the kill zone instruction did not differentiate the attempted murder charges, thereby relieving the prosecution of its burden to prove, and the jury to find, a precise target; or requiring the finding of an "individualized intent to kill" as to each victim. Appellant also urges this Court to reconsider its decision in *People v. Stone, supra*, 46 Cal.4th at page 131; or in the alternative, he argues that *Stone* was inapplicable at the time of his trial and

should not be applied retroactively here. (AOB 112-121.) Respondent disagrees. As outlined above, appellant's instructional claim has been forfeited, and in any event, the evidence at trial supported it. In addition, the prosecution identified two primary targets, and the instruction properly articulated the kill zone theory. Moreover, as instructed, the jury was not discharged of any fact-finding, nor was the prosecution relieved from its burden to prove appellant committed the attempted murders beyond a reasonable doubt. Finally, any alleged instructional error was harmless.

A. Relevant Background

As outlined above, the jury was instructed with the requirement of finding a "definite and unambiguous intent to kill" for attempted murder (17RT 2741-2744; 29CT 8343), in addition to the law on concurrent intent (17RT 2742-2743; 28CT 8343-8344). (See also Arg.IV.B., *ante.*) During closing argument, the prosecutor argued that the facts relevant to the attempted murder counts, in particular appellant's premeditation and deliberation, were evidenced by the "monster" weapon appellant brought to the nightclub party on February 14, 2004. In particular, this weapon was designed to "take out as many targets as possible with one spray of bullets" and was loaded with at least twenty-one bullets. (17RT 2597.) In addition, the prosecutor asserted that, because of appellant's particular weapon of choice, he would have had to engage in several deliberate steps prior to firing on Hart, Johnson, Emmanuel, Gabriel, and the other patrons and employees standing in front of the nightclub. These steps included holding the weapon with both hands, removing the safety mechanism on the weapon, and choosing whether to operate the gun in full or semi-automatic mode. (17RT 2596.)

The prosecutor also detailed the fact that appellant held the gun six inches away from Johnson's face, and when she asked if appellant was going to shoot her, appellant simply "smiled." (17RT 2597-2598.)

Immediately thereafter, appellant pointed the weapon at Emmanuel and Gregory, who was crying. He also witnessed Hart, an original member of the four, return from across the street to “pray.” (17RT 2598.) Appellant only backed down when the nightclub’s security guard sought to intervene and told appellant to put the gun away, commenting that Emmanuel and Gabriel were just “kids.” (17RT 2598.) When the security guard departed, Hart, Johnson, Emmanuel, and Gabriel also turned their backs to leave. At that moment, appellant returned and stood in one place while unloading bullets down the sidewalk in front of the nightclub. At trial, the prosecution argued that appellant’s actions created a “kill zone,” where “everyone who fell within [this] zone [was] a victim.” Moreover, the prosecutor did enumerate that Emmanuel and Gabriel were appellant’s “primary victims.” (17RT 2601.) She also went on to specify that when appellant aimed the gun at Emmanuel and Gregory (after Johnson asked him if he was going to kill her), he expressed a non-verbal intent to kill *them*. The prosecutor specified: “[*appellant*] *didn’t care who else he was going to take out when he sprayed twenty-one bullets to take out those two boys.*” (17RT 2601, italics added.)

In addition, the prosecution argued that no one in the “kill zone” was safe from appellant’s terror, including Johnson and Hart, in addition to Jimenez, who exited the nightclub just seconds prior to when appellant started firing, and was struck five times by bullets while trying to retreat back inside. (17RT 2599-2602.) The prosecutor argued that appellant was then also guilty of the attempted murders of Emmanuel, Jimenez, Hart, and Johnson, the victims named in Counts Five through Eight, because they were “well within [appellant’s] kill zone.” (17RT 2600.) The jury found appellant guilty of these attempted murders, and found true the allegation that the attempted murders were willful, deliberate, and premeditated. (29CT 8360-8364.)

B. Appellant's Instructional Claim Is Forfeited

As outlined above, this alleged instructional error is waived by appellant's failure to object. (Arg.IV.B., *supra*; see § 1259; see also *People v. Mitchell* (2008) 164 Cal.App.4th 442, 465 ["failure to object to instructional error forfeits the objection on appeal unless the defendant's substantial rights are affected"].)

The instruction did not affect appellant's substantial rights as the "concurrent intent" or "kill zone" theory "is not a legal doctrine requiring special jury instructions, as is the doctrine of transferred intent. Rather, it is simply a reasonable inference the jury may draw in a given case: a primary intent to kill a specific target does not rule out a concurrent intent to kill others." (*People v. Bland, supra*, 28 Cal.4th at p. 331, fn. 6; accord, *People v. Stone, supra*, 46 Cal.4th at p. 137.) Therefore, this claim has been forfeited and should not be considered. (See e.g., *People v. Campos, supra*, 156 Cal.App.4th at p. 1236 [challenge to the trial court's instruction on concurrent intent, CALCRIM No. 600, forfeited].)

C. The Jury Was Properly Instructed with the Kill Zone Instruction

In any event, the trial court has a duty to instruct on the general principles of law relevant to the issues raised by the evidence. (*People v. Earp* (1999) 20 Cal.4th 826, 885.) As outlined above, an appellate court reviews claims of instructional error de novo. (*People v. Posey, supra*, 32 Cal.4th at p. 218; see also *People v. Alvarez* (1996) 14 Cal.4th 155, 217 ["an appellate court reviews a trial court's instruction independently"].) In determining whether error was committed by giving or not giving an instruction, it is important to consider the instructions as a whole and to assume the jurors are intelligent persons capable of understanding and correlating all instructions given. (*People v. Guerra* (2006) 37 Cal.4th 1067, 1148; *People v. Musselwhite, supra*, 17 Cal.4th at p. 1248.)

As outlined above (Arg. IV.C., *supra*), attempted murder requires the specific intent to kill and the commission of a direct but ineffectual act toward accomplishing the intended killing.” (*People v. Smith, supra*, 37 Cal.4th at p. 739.) In addition, if a defendant targets one particular person, under some facts a jury could find the defendant also, concurrently, intended to kill other, non-targeted persons. (*People v. Stone, supra*, 46 Cal.4th at p. 137, citing *People v. Bland, supra*, 28 Cal.4th at p. 329.) “[A] person who intends to kill can be guilty of attempted murder even if the person has no specific target in mind. An indiscriminate would-be killer is just as culpable as one who targets a specific person.” (*People v. Stone, supra*, 46 Cal.4th at p. 140.) And, while a “[d]efendant’s guilt of attempted murder must be judged separately as to each alleged victim” (*People v. Bland, supra*, 28 Cal.4th at p. 331), “this is true whether the alleged victim was particularly targeted or randomly chosen” (*People v. Stone, supra*, 46 Cal.4th at p. 140). There is no requirement that the jury find that the defendant had a specific intent to kill a particular victim. (*Id.* at p. 141; *People v. Vang* (2001) 87 Cal.App.4th 554, 564; *People v. Herrera* (1999) 70 Cal.App.4th 1456, 1467.)

As referenced above, the prosecution did in fact identify Emmanuel and Gabriel as the primary targets of appellant’s shooting spree in front of the nightclub. Thus, the kill zone theory and concurrent intent analysis outlined in *Bland* was directly applicable to the circumstances of the February 14-15, 2004, shooting. (See Arg. V.B., *supra*; *People v. Bland, supra*, 28 Cal.4th at p. 331.)

Next, under *Bland*, where the evidence establishes that the shooter used lethal force *designed and intended to kill everyone in an area around the targeted victim* (i.e., the ‘kill zone’) as the means of accomplishing the killing of that victim, a shooter may be convicted, and a rational jury could conclude, beyond a reasonable doubt, that an intent to kill was

demonstrated not only for the targeted victims, but all others in the zone of fatal harm. (See *People v. McCloud*, *supra*, 211 Cal.App.4th at p. 797; see also *People v. Adams* (2008) 169 Cal.App.4th 1009, 1023 [the concurrent intent doctrine permits specific intent to kill to be established when a primary victim is targeted by intentionally creating a zone of harm and the attempted murder victims were within that zone].)

Specifically, appellant confronted Gabriel, Emmanuel, Hart, and Johnson while they were grouped together in front of the nightclub. When appellant later began shooting at them, the group had been walking closely together with their backs turned to him. Appellant's hail of bullets came so rapidly that when Jimenez exited the club, he was hit twice in the chest. When he immediately turned to flee, three more bullets struck his back. (9RT 1614-1619.)

Johnson also stated that she had been walking with Gabriel and Emmanuel, albeit slightly ahead, and had reached a pay phone near to the entrance of the nightclub when the shooting started. (10RT 1698.) Notably, this case involved not only *Bland*'s "hail of bullets," but a shooting at very close range. (10RT 1669; *People v. Bland*, 28 Cal. 4th at p. 330.) Under these circumstances, the jury could reasonably have found appellant harbored a concurrent intent to kill Hart, Jimenez, Emmanuel, and Johnson when he unleashed his barrage of gunfire at the retreating backs of Gabriel and Emmanuel, knowing that others were in the immediate vicinity.

Moreover, as stated before, the kill zone theory permits a jury to find the intent to kill based on the nature and scope of the attack or the method employed. Here, it was rational, based on the evidence, to find appellant chose to kill everyone in the front of that nightclub as a means of killing Gabriel and Emmanuel, the targets he had chosen to unleash his fury and frustration on. (See *People v. McCloud*, *supra*, 211 Cal.App.4th at p. 798.)

Indeed, appellant had singled out Gabriel and Emmanuel upon his approach and indicated by positioning his weapon on them after Johnson inquired if appellant was going to shoot her, that Emmanuel and Gabriel were appellant's intended targets. (9RT 1696-1698.) Johnson even recounted at trial that she observed Gabriel cry and Emmanuel look "afraid" while huddled "close together," as a result of appellant's actions. (10RT 1697.)

Appellant argues that the instruction was inapplicable however, and should not have been given. He contends *Stone* and its "expanded theory of specific intent," particularly the proposition that an undifferentiated intent to kill someone, without more, can satisfy the separate determination of intent requirement in attempted murder, should only be applicable to the specific facts in *that* case. (AOB 116-119.) Appellant thereby urges this Court to rely on an "alternative interpretation" of *Bland* than what was articulated in *Stone*, and *People v. Perez* (2010) 50 Cal.4th 222, 225. (AOB 119-120.)

In *Stone*, the defendant fired at a group of ten people. (*People v. Stone, supra*, 46 Cal.4th at p. 135.) The information singled out one of those ten people as the alleged attempted murder victim. (*Id.*) The named victim testified that he did not think the defendant pointed the gun at anyone in particular, and the gun "had not been pointed 'directly' at him, but it was 'near' him." This victim also stated that he believed it was fired just to scare him and the others in the group," and that he "really [didn't] think [the defendant] was trying to shoot anybody.'" (*Id.*) Based on the evidence, the prosecutor conceded to the jury during argument that "he had not proven that defendant intended specifically to kill [the alleged attempted murder victim] rather than *someone* in the group of ten persons. He argued, however, that an intent to kill someone, even if not specifically [the alleged attempted murder victim,] was sufficient for the jury to find

defendant guilty of the attempted murder” (*Id.* at p. 139.) This Court concluded that the allegation “that defendant intended to kill [the alleged attempted murder victim] was problematic given that the prosecution ultimately could not prove that defendant targeted a specific person rather than simply someone within the group and acknowledged that it would have been sufficient to allege that the defendant attempted to murder a member any member of the group. (*Id.* at p. 141.) Thus, after *Stone*, an attempted murder conviction can be valid even when a specific victim is not identified as the defendant’s “target,” as this Court found that an identifiable primary victim is not necessary because “[t]he mental state required for attempted murder is the intent to kill *a* human being, not a *particular* human being.” (See *People v. Stone, supra*, 46 Cal.4th at p. 134.)

Other than the fact that this case is dissimilar to *Stone*, in that appellant’s shooting rampage was argued at trial to be aimed at particular targets (17RT 2597-2602), as given here, the kill zone instruction did not eliminate the requirement of the jury to find that appellant harbored the specific intent to kill the named victims, Emmanuel and Gabriel. Rather, it gave the jury two options for finding intent to kill. Either appellant intended to kill the four named victims, or he intended to kill people in the group that included the named victims. (See *People v. Anzalone* (2006) 141 Cal.App.4th 380, 392-393.) The jury was free to decide otherwise, i.e., that appellant did not intend to aim at any one of the attempted murder victims and instead, as the defense theorized, “accidentally” fired the weapon or, was not aware of its firing capabilities. (*People v. Bland, supra*, 28 Cal.4th at p. 331, fn. 6 [the kill zone theory “is not a legal doctrine requiring special jury instructions . . . [r]ather, it is simply a reasonable inference the jury may draw in a given case”]; accord, *People v. McCloud, supra*, 211 Cal.App. 4th at pp. 802-803.)

Appellant also contends that the reasoning in *Stone* should not apply retroactively to the attempted murder statute. (AOB 125-127.) However, as argued above, *Stone* is inapplicable to the instant case because, unlike in *Stone*, here, the prosecutor specifically identified Emmanuel and Gabriel as the two primary targets with reference to Counts 4-8. (17RT 2602.)

In any event, any application of the *Stone* holding in this case did not unforeseeably enlarge criminal liability because the decision in *Stone* was an interpretation of existing law, rather than the overruling of controlling authority or a sudden, unforeseeable enlargement of a statute. (*People v. Bland, supra*, 28 Cal.4th at pp. 326-330 [acknowledging that California courts had previously applied the concept of concurrent intent, even if they had not used that exact terminology]; see *People v. Vang* (2001) 87 Cal.App.4th 554; *People v. Gaither* (1959) 173 Cal.App.2d 662.)

Finally, appellant's intent to kill Emmanuel, Gabriel, Hart, Johnson, and Jimenez was established by the evidence. As outlined above, the 2002 decision in *Bland* established that the intent to kill can be found for persons other than a "particular target," and express malice can be inferred by the method used to commit the crime. (*People v. Bland, supra*, 28 Cal.4th at p. 330; *People v. Lashley* (1991) 1 Cal.App.4th 938, 945-946 [the nature and scope of an assault, the weapon chosen, the manner in which the weapon was used, the actual consequences of the assault case all provide evidence of the intent to kill necessary for attempted murder] .)

Here, the jury drew a reasonable inference based on the number of shots fired, the direction and where the shots were fired from, the use of a lethal weapon, and the location of appellant and his targets, all of which supported the proposition that appellant created a kill zone. From this evidence, the jury could reasonably infer that by firing a flurry of shots at the group of victims, appellant intended to kill. And, the nature of the attack was such that the jury could reasonably infer he also intended to kill

everyone in that particular location in order to assure that he killed Emmanuel and Gabriel, who had enraged him because of their perceived disrespect. Moreover, Hart, Johnson, and Jimenez were “foreseeable victims” even if appellant was not aware Hart had rejoined the group from across the street, or that Jimenez had exited the nightclub. (AOB 126.)

For example, in *People v. Vang, supra*, 87 Cal.App.4th at pp. 563-565, the defendants shot at two occupied houses. The Court of Appeal affirmed attempted murder charges as to everyone in both houses - 11 counts - even though the defendants may have targeted only one person at each house, stating:

[T]he jury drew a reasonable inference, in light of the placement of the shots, the number of shots, and the use of high-powered, wall-piercing weapons, that defendants harbored a specific intent to kill every living being within the residences they shot up. . . . The fact they could not see all of their victims did not somehow negate their express malice or intent to kill as to those victims who were present and in harm's way, but fortuitously were not killed.

(*Id.* at pp. 563- 564, italics added; see also *People v. Gaither* (1959) 173 Cal. App. 2d 662, 666-667 [defendant mailed poisoned candy to his wife; convictions for administering poison with intent to kill affirmed as to others who lived at the residence even if not a primary target].)

In sum, under the circumstances that existed here, a reasonable jury could have had an interpretation of the evidence that would support the specific intent to kill under a kill zone theory, with Gabriel and Emmanuel as the primary targets, and Johnson, Hart, Emmanuel, and Jiminez as within the kill zone that appellant created.

D. In Any Event, any Alleged Error Was Harmless

Even without the kill zone, the evidence supports the jury's finding. For attempted murder, the prosecution has to prove the defendant attempted to kill certain victims. (See Arg.V.B., *supra*.) Here, as in most cases, intent must be inferred from the defendants' actions and the circumstances of the crime. (See *People v. Smith* (2005) 37 Cal.4th 733, 741.) "The act of firing toward a victim at a close, but not point blank, range 'in a manner that could have inflicted a mortal wound had the bullet been on target in the first instance is sufficient to support an inference of intent to kill . . .'" (*Ibid.*, quoting *People v. Chinchilla* (1997) 52 Cal.App.4th 683, 690.)

Here, appellant fired numerous rounds at the backs of Gabriel and Emmanuel, who were standing close together and in close proximity to Hart, Johnson, and other individuals outside the nightclub. This included employees like Jimenez that used the front entrance to enter and exit from the premises, in addition to the security guard who had just intervened on behalf of the group. Under *Smith*, appellant's firing at these victims from close range, with a barrage of bullets and in a confined area, created circumstances that could have resulted in *any* individual's death. Furthermore, the lack of any provocation "leads to an inference that an attack was the result of a deliberate plan rather than a 'rash explosion of violence.'" (*People v. Miranda* (1987) 44 Cal.3d 57, 87, disapproved on other grounds in *People v. Marshall* (1990) 50 Cal.3d 907, 933, fn. 4; *People v. Miller* (1990) 50 Cal.3d 967, 993.) Thus, the underlying circumstances in counts 5-8, provided sufficient evidence for the jury to find that appellant intended to kill anyone close to Gabriel and Emmanuel, even apart from the kill zone theory.

E. There Was No Cumulative Error

Appellant asserts that the cumulative effect of the errors asserted herein require reversal. (AOB 127-128.) Because, as explained above, all of appellant's claims are without merit, his claim of cumulative error must be rejected as well. (*See People v. Bolin* (1998) 18 Cal.4th 297, 335 ["defendant contends that even if harmless individually, the cumulative effect of the trial errors mandates reversal. Because we have rejected all of his claims, we perforce reject this contention as well"].)

VII. THERE WAS SUBSTANTIAL EVIDENCE TO SUPPORT THE ATTEMPTED MURDER CONVICTIONS OF HART AND JIMENEZ

Next, appellant claims that the evidence was insufficient to support his attempted murder convictions of Hart and Jimenez. In particular, he argues that being "unaware" of Jimenez and Hart's presence when he fired the gun precludes liability, since there was no evidence that he intended to kill them. (AOB 129-131.) Viewing the evidence in the light most favorable to the verdict, the conviction must stand.

A. Relevant Factual Background

Counsel entered into a stipulation that Girnet Hart, the attempted murder victim named in Count 5, was admitted to Los Angeles County U.S.C. Medical Center on February 15, 2004, with a gunshot wound to the lower back. The bullet entered through the lower back and exited through the lower right flank in the front. Hart underwent two surgeries to repair damage to her colon. (10RT 1632-1633.) Rene Jimenez, the attempted murder victim named in Count 6, was admitted to the same hospital on February 15, 2004, with five gunshot wounds. Two bullets entered through the front chest at the scapula, one bullet entered through the right nipple, and the other two bullets entered through the back at the left flank. Both required approximately one month long hospital stays. (10RT 1633.)

At the conclusion of the prosecution's case, defense counsel filed a section 1118.1 motion for acquittal on count 6, arguing that the evidence did not establish a specific intent to kill Jimenez established from the evidence. Specifically, defense counsel stated that Jimenez was not in the original targeted group with Johnson, Hart, Gabriel, and Emmanuel. (13RT 2141-2142.) This colloquy followed:

THE COURT: It was a little bit fuzzy where they all were. They were walking down the sidewalk trying to get in the entrance and [Jimenez] came out the entrance. [¶] [I]’m not the trier of fact but I’m determining whether there is enough that the trier of fact could make that determination. [¶] Under the kill zone concept couldn’t they make that determination?

DEFENSE COUNSEL: Well, I think that would be the only applicable theory but I think based upon the state of the evidence there is insufficient evidence to sustain that [¶]
[¶]

[I] think for the kill zone theory to apply there has to be some very specific evidence as to where the individuals were, where the shots were fired towards and whether or not this person was in that zone. I just don’t think the evidence supports that.

THE COURT: Well, again, I want to emphasize I’m not the trier of fact but the impression I had from the evidence . . . was that the gun was basically sprayed down the sidewalk in the direction of the entrance of the club and that [J]imenez came out of the door and basically was engulfed in that spray of bullets.

(13RT 2142-2143.) The court also pointed out the fact that the jury could determine from the evidence that appellant was operating a fully automatic weapon. In addition, Johnson had testified that there were bullets going past her ears and off the walls and sidewalk, hitting spots that would indicate that they were “sprayed” and not fired “with any great pinpoint aim.” (13RT 2143.) The court invited counsel to “draw [his] attention” to

something contrary in the evidence. Defense counsel declined, stating:
“No. I’m just citing the totality of the evidence.” (13RT 2143.)

B. Relevant Law

Where a defendant challenges the sufficiency of the evidence upon which a judgment is based, the proper test on appeal is whether substantial evidence supported the conclusion of the trier of fact that the evidence proved guilt beyond a reasonable doubt. (*Jackson v. Virginia* (1979) 443 U.S. 307, 319 [99 S. Ct. 2781, 61 L. Ed. 2d 560]; *People v. Kraft* (2000) 23 Cal.4th 978, 1053.) Put another way,

In reviewing a challenge to the sufficiency of the evidence, [this Court does] not determine the facts [itself]. Rather, [it] ‘examine[s] the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence evidence—that is reasonable, credible and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.’ [Citations.] [The Court] presume[s] in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence. [Citation.] [¶] The same standard of review applies to cases in which the prosecution relies primarily on circumstantial evidence and to special circumstance allegations. [Citation.] ‘[I]f the circumstances reasonably justify the jury’s findings, the judgment may not be reversed simply because the circumstances might also reasonably be reconciled with a contrary finding.’ [Citation.] [This Court does] not reweigh evidence or reevaluate a witness’s credibility. [Citation.]” [Citation.]

(*People v. Whisenhunt* (2008) 44 Cal.4th 174, 200.) As such,

[i]f the circumstances reasonably justify the trier of fact’s findings, the opinion of the reviewing court that the circumstances might also be reasonably reconciled with a contrary finding does not warrant a reversal of the judgment.

(*People v. Bean* (1988) 46 Cal.3d 919, 932-933, citing *People v. Hillery* (1965) 62 Cal.2d 692, 702.)

As outlined above, the crime of attempted murder requires evidence that the defendant had a specific intent to kill (*People v. Stone, supra*, 46 Cal.4th 131, 136), and the doctrine of transferred intent does not apply to attempted murder. (*People v. Bland, supra*, 28 Cal.4th at p. 317.)

However, the law recognizes the possible reality that a defendant who performs a deadly act against a group of people that includes a primary target may have concurrently intended to kill the primary target and also everyone else within the “kill zone.” (*People v. Bland, supra*, 28 Cal.4th at pp. 329-330.)

Thus, a trier of fact is permitted to find that the intent to kill a so-called “non-targeted” victim was “concurrent” with the intent to kill a targeted victim “when the nature and scope of the attack, while directed at a primary victim, are such that [the trier of fact could reasonably] conclude the perpetrator intended to ensure harm to the primary victim by harming everyone in that victim’s vicinity.” (*People v. Bland, supra*, 28 Cal.4th at p. 329.) This “kill zone” theory of intent does not apply however, where there is no evidence showing a defendant used a means of killing that inevitably would result in the death of others within a “kill zone.” (*People v. Stone, supra*, 46 Cal.4th at p. 138.)

C. The Attempted Murder Convictions of Hart and Jimenez Were Proper under the Kill Zone Theory; in any Event, Even Absent This Theory, There Was Substantial Evidence to Support the Verdicts

As detailed above, where attempted murder is charged both as to a primary target and as to others in the kill zone, with multiple shots being fired, the mental state necessary is the intent to kill *a* human being, not the intent to kill *a specific* human being. (*People v. Stone, supra*, 46 Cal.4th at pp. 131, 134.) Here, the jury drew a reasonable inference based on the number of shots fired, the direction the shots were fired, the use of a lethal weapon, and the location of appellant and his targets, all of which

supported the proposition that appellant created a kill zone by attempting to kill Emmanuel and Gabriel. From the evidence, the jury could reasonably infer that by firing a flurry of shots at the group of victims, appellant intended to kill. And, from the circumstances preceding the attack, the jury could reasonably infer appellant intended to kill Gabriel and Emmanuel, and that in doing so, appellant had the concurrent intent to kill everyone in their vicinity, including Hart and Jimenez.

The manner of the attempted killing here is probative of appellant's intent. Certain acts of aggression, by their very nature, suggest an intent to kill. (See *People v. Chinchilla*, *supra*, 52 Cal.App.4th at p. 690 ["firing toward a victim at close, but not point blank, range 'in a manner that could have inflicted a mortal wound had the bullet been on target is sufficient to support an inference of intent to kill'"]; *People v. Lashley*, *supra*, 1 Cal.App.4th at p. 945 [shooting at point-blank range "undoubtedly creates a strong inference that the killing was intentional"].)

Here, before appellant fired his gun, he appeared "angry" and pointed the gun directly at Johnson, before training it on a cowering Gabriel, and Emmanuel. The very use of a firearm is an indication of the user's intent to inflict the ultimate injury. In addition, under these circumstances, appellant not only used a gun, he sprayed the area in front of the nightclub with 21 bullets, killing Gabriel and inflicting serious injury on Hart and Jimenez. Indiscriminate shooting of multiple rounds in the area of the target suggests appellant's intention to kill his victims, as does the fact that he inflicted the death of Gabriel and serious injury on several others.

The crux of appellant's claim here is that his act of firing twenty-one shots at a group of individuals gathered in front of a nightclub failed to demonstrate that he harbored a specific intent to kill victims like Hart and Jimenez who were allegedly "unknown" to appellant when he fired the gun. (AOB 129-131.) By this claim, appellant appears to suggest that the

evidence showed that he merely fired the gun “randomly and wantonly” into or near the crowd of people, that happened to include Gabriel and Emmanuel, whom he had just had an altercation with regarding Emmanuel’s perceived disrespectful comment about “Mexicans.” The jury obviously found otherwise however, and the facts support its verdict.

Indeed, the facts are succinct yet compelling. No evidence was offered to undercut the force of the inference of appellant’s intent. Based upon the People’s evidence, appellant acted with the intent to kill when, from close range, he fired his gun twenty one times at the departing backs of Emmanuel and Gabriel, who were walking closely behind Johnson and Hart toward the busy nightclub. (10RT 1668.) The evidence clearly demonstrates that Hart and Jimenez were in appellant’s direct line of fire, i.e., in the “vicinity” or “kill zone.” Specifically, Johnson experienced a “continual spray” of bullets and testified that bullets flew past her ears, between her legs, and near her feet as she attempted to flee. Jimenez was also shot directly in the chest and back area when he attempted to retreat back inside the club. (10RT 1668-1669; see *People v. Lashley, supra*, 1 Cal.App.4th at p. 943 fn. 2, 945.)

Appellant’s act of intentionally discharging his firearm multiple times in front of a busy nightclub supports the inference that he had the requisite intent to kill anyone in the “kill-zone.” (*People v. Smith, supra*, 37 Cal.4th at p. 744; *People v. Lee* (1987) 43 Cal.3d 666, 679.) That Hart, Jimenez and others escaped death due to appellant’s poor marksmanship does not necessarily establish that appellant harbored “a less culpable state of mind” at the time of the shooting. (*People v. Smith, supra*, 37 Cal.4th at p. 741 [evidence that the defendant purposefully discharged a lethal firearm at the victims, both of whom were seated in the vehicle, one behind the other, can support an inference of an intent to kill both]; see also, e.g., *People v. Vang, supra*, 87 Cal.App.4th at pp. 563–565 [evidence was sufficient to support

attempted murder convictions of inhabitants of residences even though defendants could not see all of their victims because defendants sprayed wall-piercing bullets at residences].) Moreover, as outlined above, appellant's knowledge of Hart and Jimenez being within the zone of harm is not a requirement to finding appellant had the intent to kill them. (See *People v. Stone*, *supra*, 46 Cal.4th at p. 139; *People v. Vang*, *supra*, 87 Cal.App.4th at p. 364.)

Finally, as above, even absent an application of *Stone* to these facts, the jury could reasonably have found the intent to kill them. Here, appellant approached the group in front of the nightclub that included Gabriel, Emmanuel, Hart, and Johnson from across the street, while their backs were turned, a vantage point in which he would have been reasonably aware that there were numerous other individuals clustered around the entrance and outer sidewalk area in front of the nightclub. Hart had been an original member of the group of four individuals that appellant had interacted with, and Jimenez, an employee of the nightclub. Both were both foreseeable targets under the circumstances of appellant's zealous shooting, especially since appellant fired forward at the victims while their backs were turned. In other words, even though the victims couldn't initially see where the shots were coming from, appellant could clearly see anyone he was shooting at and who was in the immediate vicinity. The likelihood of missing Hart, Johnson, or others like Jimenez, who happened to be in the immediate vicinity, was further reduced by the fact that appellant fired twenty-one bullets in rapid succession into this busy urban setting.

In fact, the evidence adduced at trial showed that bullet casings from the February 14-15, 2004 shooting were found clustered at the corner of 57th and Western, an indication that appellant stood in one place and sprayed down the sidewalk at anyone in the "kill zone" surrounding the

front entrance of the nightclub. Based on this, the jury could reasonably conclude that in shooting Hart and Jimenez, who were in the line of fire when appellant aimed at the retreating backs of Emmanuel and Gabriel, appellant had such a minimal possibility of hitting these two boys without hitting others in their immediate area that he concurrently intended to kill not only these boys, but also both Hart and Jimenez. (*People v. Vang, supra*, 87 Cal.App.4th at p. 556-558 [defendants drove by two residences spraying bullets into them found guilty of eleven counts of attempted murder].)

As such, viewing the People's evidence in the light most favorable to the judgment, even absent the prosecution's identification of Gabriel and Emmanuel as appellant's primary targets, the jury could reasonably conclude under the circumstances here, that appellant intended to kill *someone* when he aimed and repeatedly fired his gun twenty-one times at the nearby crowd gathered in front of the nightclub. This was all that was required, and the jury was properly instructed on the "kill zone" theory, and necessarily found Jimenez and Hart within that zone of harm. Appellant's argument essentially invites this Court to impermissibly reweigh the evidence. (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206.) The Court should decline such invitation. As demonstrated above, ample evidence supports appellant's convictions for attempted murder. Appellant's contrary claims must fail.

**VIII. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION
WHEN IT ALLOWED THE PROSECUTOR TO ADMIT THE
VIDEOTAPE EVIDENCE OF THE STEN MARK III WEAPON**

Next, appellant contends the trial court erroneously permitted the videotape depicting firearms expert John Thompson shooting a Sten Mark III submachine gun to be played for the jury because it was irrelevant and had considerable potential to confuse and inflame the jury under Evidence

Code section 352. Specifically, appellant argues that the footage did not accurately depict the conditions at the crime scene, was not offered as “good faith” rebuttal evidence, and was cumulative. (AOB 132-150.) Appellant also maintains that the introduction of this evidence violated his constitutional rights, specifically his due process rights to a fair trial, and his Eight Amendment “heightened reliability” requirement. Finally, appellant argues these alleged violations were prejudicial. (AOB 149.) On the contrary, the trial court properly allowed the evidence. The videotaped demonstration depicting the characteristics of the Sten Mark III weapon was relevant and not misleading. For those same reasons, the inclusion of this evidence did not violate appellant’s constitutional rights, and there was no prejudice.

A. Relevant Proceedings Below

At the penalty phase, in its case in chief, the prosecutor sought to introduce the videotape depicting Thompson’s “demonstration” of the characteristics and firing capabilities of the Sten Mark III in conjunction with his expert testimony. After hearing defense counsel’s objections, the trial court held an Evidence Code section 402 hearing. (18RT 2822-2828; Evid. Code, § 402 [when the existence of a preliminary fact is disputed, court may hold a hearing to determine truth or falsity of foundational facts].) At that time, the prosecutor indicated that it was necessary for the jury to be privy to a demonstration of the firepower of this submachine gun as the weapon was “very unique.” The prosecutor also specified that this type of evidence was relevant when considering “factors in aggravation under [section 190.3, factor (a)].” (17RT 2809, 2812-2813, 2820; Peo. Exh. No. 142.)

Defense counsel objected, stating that the video was “far more prejudicial than probative,” and “not particularly relevant” because the weapon, although the same type, was not the actual one used in the

shootings. In addition, he argued the test was not conducted under similar conditions to the nightclub's shootings, and was cumulative of other evidence. (17RT 2810, 2815-2816.) After reviewing the footage, the trial court indicated that the videotape actually "minimized" the sound of firing from the Sten Mark III weapon and "if anything favors the defense." (18RT 2823.) In addition, the court found that this evidence was being offered to "flush out the circumstances of the offense," which included demonstrating how the rapid firing of this type of weapon might have impacted the victims as they fled from appellant. (18RT 2827.) This colloquy followed:

THE PROSECUTOR: [I] would add that it's relevant because, as I understand it, the defense will be calling an expert witness to testify that [appellant] was under the influence of various drugs on the night of the 15th or the early morning of the 15th and I think certainly seeing how this gun is operated and what it takes to operate and coordinate the actions to make this gun fire is going to be relevant even as to that issue.

THE COURT: [Defense counsel], is that correct?

DEFENSE COUNSEL: I submit it.

THE COURT: All right. I will permit it. And, if you want, I will give that limiting instruction that the jury is not to consider anything on the video for the truth of what is asserted but certainly as a label enabling them to tell when the gun is fired in certain modes.

(18RT 2827-2828.) Thus, the videotape was admitted under section 190.3, factor (a), as evidence of the "circumstances of the crime," including "how the crime itself might have impacted the victims as they fled down the street." (18RT 2827-2828.) In addition, as delineated by the prosecutor, the videotape was also being offered as anticipatory rebuttal evidence, in response to defense counsel's representation that a defense expert would testify that appellant was under the influence of various drugs when he shot

Gabriel, Hart, and Jimenez, presumably under factor (h) of section 190.3.⁷ The prosecutor argued that this impending testimony made “what it takes to operate and coordinate the actions to make this gun fire” a relevant issue. (18RT 2828.) Thereafter, the trial court proposed, and defense counsel agreed, to limit instruction on the use of the videotape. (18RT 2840-2841.

Thereafter, the videotape was played for the jury during Thompson’s direct examination. Thompson testified that on September 12, 2004, he conducted a weapon demonstration with the Sten Mark III in semi-automatic and fully automatic modes, each with twenty-one bullets in the clip during firing. (18RT 2840-2841; Peo. Exh. No. 142.) At that time, the court gave the jury the limiting instruction that the comments made by Thompson on the videotape were not to be considered for their truth. Specifically, the jury was instructed:

[I]nvestigator Thompson is making comments on this DVD as he goes along. You’re not to consider those for the truth of anything he says but simply like labels so that you will understand what is taking place during each phase of the video.

(18RT 2841.) Thompson’s testimony explained the conditions in which he conducted the firing demonstration, including operating the Sten Mark III gun in both semi-automatic and fully automatic modes, with twenty-one full-metal jacket nine-millimeter bullets in the clip each time. (18RT 2839-2842.) On cross-examination, defense counsel clarified that it took approximately two seconds to fire 21 rounds in fully automatic mode, and four seconds in semi-automatic mode. (18RT 2843.) Following trial, the

⁷ Section 190.3, factor (h) allows the trier of fact to take into account,

Whether or not at the time of the offense the capacity of the defendant to appreciate the criminality of his conduct or conform his conduct to the requirements of law was impaired as a result of mental disease or defect, or the affects of intoxication.

CALCRIM No. 332 instruction was given, which provided in pertinent part:

Witnesses were allowed to testify as experts and give opinions. You must consider the opinions, but you are not required to accept them as true or correct [Y]ou must decide whether information on which the expert relied was true and accurate. You may disregard opinion that you find unbelievable, unreasonable, or unsupported by the evidence.

(29CT 8402-8403, quoting CALCRIM No. 332.) In addition, the trial court advised the jury that if certain evidence was admitted for a limited purpose, it could only be considered “for that purpose and for no other.” (21RT 3235-3236.) It is presumed the jurors understood and followed the trial court’s instructions. (*People v. Holt* (1997) 15 Cal.4th 619, 662.)

Appellant’s sister, Jennifer Argueta, testified regarding appellant’s rampant drug use since the age of 17 or 18 and “depression” after their other brother was arrested. (19RT 2985-2996.) Appellant’s father, Carlos Argueta, Sr. described an incident where appellant exhibited abnormal behavior over a period of several days. At one point, Carlos found appellant out on the street in his “boxer” shorts. Appellant was “shouting” and claimed to see animals in the trees. (19RT 3014.) Carlos Sr. described a second incident where appellant did not sleep for two days after returning from a trip with his girlfriend. (19RT 3015.) Dora Argueta, appellant’s mother also indicated appellant had been depressed, and claimed he started to use drugs at the age of 14. Prior to his arrest, she claimed that she had tried for over a month to get him into a drug rehabilitation program. (19RT 3046-3047.)

Dr. Frank Gawin, a psychiatrist and neuro-pharmacologist testified regarding the effects of alcohol, marijuana, psychomotor stimulants and the drug Ecstasy on a person, including disinhibiting ones actions and the reduction in judgment. Gawin also stated that when drugs are used

consistently in adolescence, “developmental arrest” occurs. (20RT 3106-3109.) Gawin answered hypotheticals based on the testimony of appellant’s family members regarding appellant’s drug use and behavior, largely opining that the behavior of appellant was attributable to psychomotor stimulant drugs, wherein “binge cycles” can last for years. (20RT 3112-3114.)

Thompson’s videotape was played again during the prosecutor’s closing argument. (19RT 3180-3181.) At that time, the prosecutor addressed defense counsel’s proposed factors in mitigation, including appellant’s alleged “serious” drug use. The prosecutor pointed out that the defense had “failed” to prove such a scenario, citing conflicting testimony from family members as to when appellant’s drug use began, and moreover, the fact that appellant was not so impaired that he could not drive the vehicle during the Lua murder and “operate the machine gun.” (21RT 3172.) The prosecutor also stated that the use of the submachine gun can be an aggravating factor, referencing the videotape depiction of the “awesome firepower . . . this submachine gun had.” Finally, the prosecutor argued that the use of this type of weapon “increases the enormity of [appellant’s] crimes in this case.” (21RT 3182-3183.)

B. Relevant Law

In general, all relevant evidence is admissible. (Evid. Code, § 351.) Trial courts have broad discretion to admit evidence, and a court only abuses that discretion if it acts in an arbitrary, capricious or patently absurd manner that results in a manifest miscarriage of justice. (*People v. Jordan* (1986) 42 Cal.3d 308, 316; *People v. Albarran* (2007) 149 Cal.App.4th 214, 224-225; *People v. Bojorquez* (2002) 104 Cal.App.4th 335, 343.)

Evidence is characterized as “demonstrative” if it illustrates and clarifies a witness’ testimony because it is similar to some object connected with the crime. To be admissible, demonstrative evidence must satisfy two

requirements: first the evidence must be a reasonable representation of that which it is alleged to portray; and second, the evidence must assist the jurors in their determination of the facts of the case, rather than serve to mislead them. (*People v. Jones* (2011) 51 Cal.4th 346, 375; *People v. Barnett* (1995) 17 Cal.4th 1044, 1135-1136; *People v. Wiley* (1976) 18 Cal.3d 162, 177.)

Demonstrative evidence of a firearm, even if it is completely unrelated to the crime, is admissible to illustrate how the defendant might have wielded his firearm. The guns need not be identical. (*See, e.g., People v. Aguirre* (1958) 158 Cal.App.2d 304, 306-307 [positive identification of the type of gun used in a crime not necessary to lay sufficient foundation for a gun in evidence merely for purposes of illustration]; *People v. Stone* (1962) 213 Cal.App.2d 260, 266 [testimony that pistol used for demonstration in court “looked like” the one used in the crime was sufficient foundation].) Such demonstrations can be useful when the actual gun is never recovered. (*See People v. Reaves* (1974) 42 Cal.App.3d 852, 857-858 [prosecution introduced three guns not connected to the crime for comparison with gun defendant allegedly used in the crime, which was never recovered].)

This Court should review the trial court’s ruling on the admissibility of the evidence for abuse of discretion. (*People v. Scott* (2011) 52 Cal.4th 452, 491; *People v. Thornton* (2007) 41 Cal.4th 391, 444–445.) No abuse of discretion arises where the foreclosed line of inquiry is not likely to produce evidence relevant to the issues presented and the trial court, not the jury, determines at the outset whether evidence is relevant. (*People v. Dyer* (1988) 45 Cal.3d 26, 48, 50; *see e.g., People v. Brown* (2003) 31 Cal.4th 518, 545, fn. 9 [trial court did not violate confrontation clause in precluding impeachment with evidence of marginal relevance].)

C. The Trial Court Did Not Abuse Its Discretion in Admitting the Videotape

To be admissible in evidence, an audio or video recording must be authenticated. (Evid. Code, § 250 [defining “writing” to include recording], 1401 [requiring authentication of “writings”]; *People v. Rich* (1988) 45 Cal.3d 1036, 1086, fn. 12; *People v. Patton* (1976) 63 Cal.App.3d 211, 220.) The determination as to whether to admit a videotape requires a trial court to assess whether: “(1) the videotape is a reasonable representation of that which it is alleged to portray; and (2) the use of the videotape would assist the jurors in their determination of the facts of the case or serve to mislead them.” (*People v. Gonzalez* (2006) 32 Cal.4th 932, 952, citing, *People v. Rodrigues, supra*, 8 Cal.4th at p. 1114.)

Under California law, aggravating evidence must pertain to the circumstances of the capital offense (§ 190.3, factor (a)), other violent criminal conduct by the defendant (*id.*, factor (b)) or prior felony convictions (*id.*, factor (c)); only these three factors, and the experiential or moral implications of the defendant’s age (*id.*, factor (i)), are properly considered in aggravation of penalty. (See *People v. Wader* (1993) 5 Cal.4th 610, 657 [a majority of statutory sentencing factors can only be mitigating, citing cases so holding as to factors (d), (e), (f), (g), (h) and (k), and noting that whether factor (j) is exclusively mitigating is undecided]; *People v. Stanley* (1995) 10 Cal.4th 764, 831 [factor (i)].)

Of relevance here, victim-impact evidence is admissible at the penalty phase under section 190.3, factor (a), as a circumstance of the crime, provided the evidence is not so inflammatory as to elicit from the jury an irrational or emotional response untethered to the facts of the case.” (*People v. Pollock* (2004) 32 Cal.4th 1153, 1180; see *People v. Zamudio* (2008) 43 Cal.4th 327, 364-365; *People v. Taylor* (2010) 48 Cal.4th 574, 645–646.) In *Pollock*, this Court approved victim impact testimony from

multiple witnesses who were not present at the murder scene and who described circumstances and victim characteristics unknown to the defendant. (See also *People v. Boyette*, *supra*, 29 Cal.4th at pp. 440–441, 443–445; *People v. Hamilton* (2009) 45 Cal.4th 863, 926 [the circumstances of the crime under factor (a) not limited to the “immediate temporal and spatial circumstances” of the crime; “extend to that which surrounds the crime materially, morally, or logically”].)

Here, the videotape footage depicted the firing capability of a Sten Mark III, which the prosecutor noted was particularly relevant because this machine gun was “very unique,” and the characteristics of which would be largely unknown by a lay person. As the trial court acknowledged, this evidence was being offered to “flush out the circumstances of the offense,” which included how the firing of such a weapon might have impacted the victims as they fled from appellant, and also, demonstrated how long it took to fire 21 bullets in both automatic and semi-automatic modes, which the jury would not have seen and heard otherwise. (18RT 2827.) The videotape also corroborated Thompson’s testimony and assisted the jury’s understanding of it. (*People v. Riggs*, *supra*, 44 Cal.4th at p. 304; *People v. Bonilla* (2007) 41 Cal.4th 331, 354.)

In addition, it could have been considered error for the trial court to not allow this victim-impact evidence. This Court held in *Edwards* that courts should “allow evidence and argument on emotional though relevant subjects that could provide legitimate reasons to sway the jury to show mercy or to impose the ultimate sanction.” (*People v. Edwards* (1991) 54 Cal.3d 787, 836, internal citation and quotation marks omitted]; see *People v. Box* (2000) 23 Cal.4th 1153, 1200–1201 [“the trial court lacks discretion to exclude *all* factor (a) evidence on the ground it is inflammatory or lacking in probative value”; *People v. Salcido* (2008) 44 Cal.4th 93, 158 [in

a capital case, the court's discretion to exclude such evidence is more circumscribed at the penalty phase than at the guilt phase].)

In *People v. Taylor* (2001) 26 Cal.4th 1155, 1172, this Court held that victim-impact evidence was properly admitted because “[o]ur review of the record indicates the evidence was relevant and not so voluminous or inflammatory as to divert the jury’s attention from its proper role or invite an irrational response.” (See also *People v. Weaver* (2012) 53 Cal.4th 1056, 1081-1082 [factor (a) victim-impact testimony from witnesses who had not been present at the scene of the crime properly admitted by the trial court; not so inflammatory as to elicit from the jury an irrational or emotional response; evidence unremarkable given the nature of the crime].).) As in *Taylor* and *Weaver*, here, the videotape and accompanying testimony of Thompson was properly admitted as victim-impact testimony, despite the fact that Thompson was not present at the crime scene. Thus, the videotape was properly admitted under factor (a) of section 190.3. (*People v. Valencia* (2008) 43 Cal.4th 268, 300; see also *People v. Lewis and Oliver* (2006) 39 Cal.4th 970, 986–987, 1057.)

Appellant argues however, that there was “no effort to make the conditions of the firing demonstration similar to the conditions at the time of the February 15 shooting,” and consequently, the video was misleading to the jury. (AOB 138-139.) Respondent disagrees.

As outlined above, before experimental evidence such as a reconstruction video can be admitted into evidence, a foundation must be established. Typically, it must be shown that the experiment is relevant and was conducted under substantially similar conditions as those of the actual occurrence. (*Culpepper v. Volkswagen of America, Inc.* (1973) 33 Cal.App.3d 510, 521; see *People v. Bonin* (1989) 47 Cal.3d 808, 847 [admissibility depends on proof, with some particularity, of the qualifications of the individual testifying concerning the experimentation].)

However, it is entirely proper for a prosecutor to use objects similar to those connected with the commission of a crime for purposes of illustration, as long as the evidence is “useful for illustrative purposes and has no tendency to evoke an emotional bias against the defendant as an individual.” (*People v. Barnett* (1998) 17 Cal.4th 1044, 1135, 1136, citing *People v. Brown* (1958) 49 Cal.2d 577, 587; *People v. Roldan*, *supra*, 35 Cal.4th at p. 708; see *People v. Stone* (1963) 213 Cal. App.2d 260, 266 [pistol properly admitted as demonstrative exhibit where witness testified that the exhibit “looked like” the pistol used in crime].)

People v. Mayfield, 14 Cal.4th at page 668, is instructive, wherein the prosecution was allowed to introduce videotape evidence that showed various areas around the crime scene, which had been made only a few days earlier prior to its introduction and had been commissioned at the prosecution’s direction. At the time, defense counsel had objected that the videotape did not fairly and accurately represent the area depicted, and claimed the video was “kind of staged.” (*People v. Mayfield*, *supra*, 14 Cal.4th at p. 746, superseded by statute on other grounds in *Verdin v. Superior Court* (2008) 43 Cal.4th 1096 [claim that denial of severance motion violated equal protection forfeited].)

On appeal, defendant argued that the prosecution failed to establish that the videotape fairly and accurately represented the scene as it existed at the time of the charged offenses because it was made during daylight hours, whereas the relevant events occurred at night, and because it was made almost 18 months later. However, the Court of Appeal found that the videotape was admitted only to show the height and location of walls and fences and what could be seen by looking over them at certain locations, and the jury could determine any differences by comparing the videotape to photographs taken within hours or a few days after those events. The Court also found that the videotape did not purport to be, nor was it offered as, a

reconstruction of events. Accordingly, the court found that the videotape was sufficiently authenticated and admissible. (*People v. Mayfield, supra*, 14 Cal.4th at p. 748-749.)

The reasoning in *Mayfield* is applicable to the present case. Here, the prosecutor offered the videotape evidence depicting the firing demonstration of the same type of gun appellant used, a Sten Mark III, with the same amount of bullets (21), to show the steps required to fire such a weapon, and to exhibit the differences when firing the weapon in semi-automatic and fully automatic modes. This evidence was not available through the courtroom display of a non-working replica. (13RT 2101-2104.) As in *Mayfield*, here, the videotaped demonstration did not take place at night when the actual crime occurred because, as acknowledged by appellant (AOB 147), a duplication of events from the February 15 incident would have required a test shooting to occur late at night on a “major metropolitan thoroughfare,” in the “vicinity” of a crowded nightclub. Such a scenario was not reasonable or plausible due to the inherent danger involved.

In addition, as in *Mayfield*, the videotape evidence here was meant purely for demonstration, not a *simulation* or reenactment. Whatever uncertainty may have existed as to whether the victims actually ever saw appellant fire the weapon (AOB 147-148), or what mode the weapon was actually operated in, the demonstration evidence here accurately depicted the firing of the gun with 21 bullets, and what the prosecution purported to show by this evidence, i.e., what was required to operate the “unique” murder weapon, something which was best demonstrated by showing the jury, rather than simply describing it. That was all it purported to do. (See *People v. Carpenter, supra*, 15 Cal.4th at p. 386 [the physical conditions which existed at the time of the event in question need not be duplicated with precision]; see also *People v. Roldan, supra*, 35 Cal.4th at p. 709 [no

abuse of discretion to allow demonstration of “metal-on-metal clicking sound” Uzi firearm makes when it jams in effort to suggest that the sound heard by a witness was a similar Uzi firearm jamming even though actual weapon used in crime never located]; *People v. Barnett, supra*, 17 Cal.4th at pp. 1135-1136 [no abuse of discretion in allowing prosecution to show jury demonstrative fishing lure and knife, even though items were not identical to those used in crime, where no attempt was made to mislead the jury that the objects were anything other than demonstrative exhibits]; cf. *State v. Mitchell* (1990) 784 P.2d 568, 570 [no abuse of discretion in allowing jury demonstration of police car siren as illustrative evidence in prosecution for evading police officer despite absence of conditions testified to by defendant - loud engine noise, windows closed and car radio on - such “that the siren portrayal bore little, if any, similarity to the conditions of the pursuit”].) Appellant’s complaints about the video go to the weight of the evidence, not its admissibility, and the weight to be given the video are for the jury to decide. (See *People v. Guerra* (2006) 37 Cal.4th 1067, 1122.)

In addition, evidence offered as rebuttal to defense evidence in mitigation is not subject to the notice requirement of section 190.3 and need not relate to any specific aggravating factor. (*In re Ross* (1995) 10 Cal.4th 184, 206–207; § 190.3; *People v. Mitcham* (1992) 1 Cal. 4th 1027, 1072-1074 [rebuttal evidence is not subject to the notice requirement of section 190.3 and need not relate to any specific aggravating factor under section 190.3]; see also *People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 109; § 190.3.) As outlined above, defense counsel indicated that he would be calling an expert witness to testify that appellant was under the influence of various drugs on the night of February 15th. (18RT 2827-2828.) In response, the prosecutor stated that it was essential for the jury to see how a Sten Mark III gun is operated and the steps which needed to be taken in

order for it to be fired. (18RT 2827.) In particular, the prosecutor wished to present additional testimony by Thompson, and play the videotaped demonstration of his firing of the Sten Mark III weapon. This evidence related directly to defense counsel's stated intent to offer mitigating evidence concerning the potential effects of appellant's drug use, particularly his representation of anticipatory testimony relating to appellant's "slow response in some tests that is consistent with 'meth' use." (19RT 3054.)⁸

Furthermore, this evidence did not warrant exclusion under Evidence Code section 352 as it was presented without the use of any "deceptive [m]ethods of persuasion" and there is no reason why the demonstration would "evoke an emotional bias against [appellant] as an individual" or create any analogous danger warranting exclusion under Evidence Code section 352. (*People v. Barnett*, 17 Cal.4th at p. 1136; see *People v. Mills* (2010) 48 Cal.4th 158, 191–192 [a trial court's decision to admit evidence under section 352 will be upheld on appeal unless the prejudicial effect of the evidence clearly outweighs its probative value]; *People v. Moon* (2005) 37 Cal.4th 1, 34 [same].)

Instead, the presentation of the videotape demonstration of Thompson firing the Sten Mark III weapon was straightforward and there was no effort to deceive the jurors as to its significance. The jurors could easily determine whether the conditions depicted on the videotape were substantially similar to those present at the time of the shootings, and were made aware of the limited purpose of the videotape by the prosecutor, the Court, and Thompson. (17RT 2098; 18RT 2839-2842.)

⁸ The prosecutor eliminated a third rebuttal witness on reliance of defense counsel's representation that Dr. Gawin would not testify regarding appellant's personal drug history. (19RT 3050.)

Next, although appellant alleges the prosecutor did not “explain how being able to operate the weapon was responsive to any drug related mitigation evidence,” and claims she “knew [the] Sten Mark family of weapons is very easy to operate.” (AOB 143.) To the contrary, the prosecution strongly advocated for the importance of a demonstration showing what it would take a person to operate this weapon, including the coordination and steps required to make the gun fire. (18RT 2827-2828.) In addition, even if a firearms expert like Thompson believed the Sten Mark III to be a relatively “simple” or “easy” gun to operate (13RT 2115), this evidence was still relevant to any operation of the weapon while impaired. Even an arguably mundane and routine task such as driving a vehicle can easily become complex or require an immense amount of effort when one is under the influence of drugs or alcohol.

Appellant’s contentions that the prosecutor was “aware” that the videotape was “misleading” and “not a proper good faith rebuttal” (AOB 142-145) are likewise speculative and not supported by the evidence. In preparation for the penalty phase of appellant’s trial, the prosecutor was advised that a “Dr. Gawin” would testify for the defense regarding appellant’s “long habit” of drug and alcohol use. In addition, defense counsel made a point to call attention to the fact that appellant had made a police statement that was before the court, claiming that he was high and drinking alcohol on the nights of February 13, 14, and into the early morning hours of the 15th. (19RT 2944.) Defense counsel also informed the court that neuropsychologist would testify concerning testing and findings on appellant, including a conclusion that appellant possessed “some abnormality that is consistent with the use of methamphetamine.” (19RT 3051.) Specifically, defense counsel acknowledged:

[I]’m going to argue that [appellant’s] statement to the police that he was high and under the influence at the time of the

crimes is true without specifically what type of, you know, drugs he may have used that day or not. There is circumstantial evidence that he has a pattern of drug usage.

(19RT 3052.) Defense counsel also stated that the proposed testimony would show appellant's "slow response in some tests that is consistent with 'meth' use." (19RT 3054.) In response, the prosecutor indicated that she viewed this evidence as a "back-door approach to get in evidence [of appellant's drug history] without [his] having to testify."⁹ (19RT 2942-2943, 2950, 3051.)

Subsequently, appellant was able to present evidence from family members regarding his alleged drug problem, which his mother testified necessitated a doctor's evaluation (19RT 3040-3041), spurred her enrollment in AL Anon (for the "relatives of alcoholics"), and caused her to seek "rescue and prevention" help from a local church (19RT 3046-3047). Thus, even absent expert testimony regarding appellant's personal drug use, the videotape served to aide the prosecution's efforts to rebut evidence of a deficiency that existed at the time of the shootings. (*People v. Rodriguez, supra*, 42 Cal.3d at p. 792, fn. 24; see also *People v. Lewis, supra*, 46 Cal.4th at p. 1282 ["prosecutors . . . are not obliged to prove their case with evidence solely from live witnesses"].)

Finally, appellant argues that the videotape was cumulative, and merely repeated evidence the jurors had already heard. (AOB 146-147.) This argument misapprehends the videotape's role in the penalty phase. As outlined above, the firing demonstration was not offered as *substantive*

⁹ At that time, the trial court acknowledged that if appellant did not testify, Dr. Gawin's testimony would be hearsay and not come in substantively, which "sets up a 352 issue about whether there is undue danger the jury is going to take it substantively or . . . be able to follow a limiting instruction" (19RT 2942-2944.)

evidence, but as a tool to aide the jury in understanding the circumstances of the crime, and to rebut mitigating evidence on appellant's alleged impairment. As demonstrative evidence at this stage in the proceedings, it was appropriate for the videotape to be introduced and correspond to other evidence offered by the prosecution, including the testimonies of Thompson, Hart, Emmanuel, and Johnson. (See *People v. Williams*, *supra*, 16 Cal.4th at pp. 213-214.) In particular, the steps needed to fire the gun, what the gun sounded like when fired, the rate at which it fired a 21-round clip in semi-automatic and fully automatic modes, the power of the gun, and the sound of the gun were all things the jury could not visualize or hear without actually seeing and hearing the weapon being fired.

Based upon all of the above, the trial court properly exercised its discretion in allowing the videotaped demonstration evidence to be played to the jury at the penalty phase. This determination was not arbitrary or capricious. Therefore, the trial court's determination must be upheld. (*People v. Rodrigues*, *supra*, 8 Cal.4th at pp. 1124-1125.)

D. In Any Event, Appellant Cannot Demonstrate Prejudice

Assuming that this evidence was erroneously admitted as victim impact testimony, there is no reasonable probability that any error in the admission of the videotape could have affected the judgment in this case that would warrant reversal of the death penalty judgment. (*People v. Watson*, *supra*, 46 Cal.2d at p. 836; see, e.g., *People v. Brown* (1988) 46 Cal.3d 432, 446-448.) As explained above, the demonstration was a minor part of the prosecution's case that merely helped physically illustrate Thompson's testimony and assist in understanding the victim-impact testimonies of Johnson, Hart, and Emmanuel.

As acknowledged by appellant (AOB 146), the prosecutor never represented that the videotape was an accurate depiction of the February 15

shooting. In addition, the footage in question was relatively innocuous in comparison to the actual details from the shootings. As the trial court opined, the videotape actually “minimized” the sound of firing from the weapon and essentially “favor[ed] the defense.” (18RT 2823.) As noted above, the trial court also specifically admonished the jury regarding this evidence. (18RT 2841.)

Moreover, the prosecutor did not particularly dwell on the videotape demonstration or attempt to inflate its importance. Instead, she acknowledged during closing argument that the videotape only demonstrated the “awesome firepower” of the submachine gun appellant had wielded against his victims. Although at one point she ruminated, “[i]magine a human being at the end of the barrel,” this comment was in relation to the use of the submachine gun as a aggravating factor, “because it increases the enormity of [appellant’s] crimes,” including the injuries caused to the victim’s from the coroner’s photographs. (20RT 3181-3182.) This was not improper.

[P]enalty trials are different from guilt trials. Emotional appeals are allowed, and evidence that arouses emotions, including evidence of the suffering of the victims and their families, is generally admissible.

(*People v. Smith* (2005) 35 Cal.4th 334, 364.) Victim impact evidence relates “to the personal characteristics of the victim and the emotional impact of the crime on the victim’s family.” (*Payne v. Tennessee* (1991) 501 U.S. 808, 817 [115 L.Ed.2d 720, 111 S.Ct. 2597].)

A jury properly may consider the impact of the crime on the victim’s family. [Citation.] Such victim-impact evidence assists the jury in assessing ‘evidence of the specific harm caused by the defendant[’s]’ crime by ‘demonstrating the loss to the victim’s family and to society which has resulted from the defendant’s homicide.’ [Citation.] Accordingly, just as *a prosecutor may ask the jurors to put themselves in the shoes of the victim*, a prosecutor may ask the jurors the 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, italics added.) In addition, defense counsel was free to point out on cross-examination and during closing argument that the demonstration was not conducted under circumstances that were substantially similar to the nightclub shooting.

Finally, the videotaped demonstration was but a miniscule portion of the prosecution's case in aggravation. Even absent the videotape, the circumstances of appellant's actual crimes and his prior possession of a loaded semi-automatic handgun far outweighed any mitigation evidence. Likewise, any discrepancies went to the weight of this evidence, not the admissibility. (*People v. Guerra, supra*, 37 Cal.4th at p. 1122.) Based on all of the above, there is no reasonable possibility that the alleged error in the admission of evidence affected the verdict. (See, e.g., *People v. Heishman* (1988) 45 Cal.3d 147, 191.)

IX. THE COURT DID NOT USURP THE JURY'S FACT-FINDING IN ADMITTING EVIDENCE OF APPELLANT'S ARREST FOR BEING IN POSSESSION OF A WEAPON PURSUANT TO SECTION 190.3, SUBDIVISION (B)

Appellant contends that the trial court erred in admitting, as evidence of other crimes involving violence, his January 2004 arrest for being in possession of a handgun under section 190.3, factor (b). In particular, appellant argues that the only issue submitted to the jury was whether he unlawfully carried or possessed a loaded firearm, instead of whether the act involved force or violence. Therefore, appellant concludes that the trial court erroneously appropriated itself unilaterally to determine that the arrest involved an implied threat of force or violence. Appellant also urges this Court to reconsider its decision in *People v. Nakahara* (2003) 30 Cal.4th 705, 720, which characterizes whether an act involves the express or implied use of force or violence, or the threat thereof, as a legal question for

the court. (AOB 151-165.) Contrary to appellant's argument, the trial court correctly submitted the aggravating evidence under 190.3, subdivision (b) to the jury for consideration. In addition, as explained in *Nakahara*, the preliminary finding of aggravating evidence under factor (b) was a legal decision properly determined by the trial court. Finally, any conceivable error was harmless.

A. Factual Background

During the penalty phase, the prosecution introduced evidence pursuant to section 190.3, subdivision (b), which included appellant's arrest on January 15, 2004, for possession of a loaded weapon. (18RT 2828.) Defense counsel objected to the introduction of this evidence, stating that the facts of the arrest were not "sufficient to constitute a crime of violence." (18RT 2829.) The prosecutor argued that appellant's illegal possession of a stolen, loaded firearm, concealed on his person in the middle of the day, was enough for the jury to infer that appellant possessed the weapon for an illegal purpose, and demonstrated an implied threat of violence. (18RT 2832.) The prosecutor proffered that anticipated testimony would establish that upon seeing Officers Pereida and Mendoza, one of the two other persons who accompanied appellant, Javier Perez, "immediately went for his waistband" where the officers could see a "large bulge." In addition, the officers were later advised that the area was under surveillance because of a high incidence of shootings between rival gangs, and appellant's group was being surveilled in part, because he matched the description of a suspect in a recent shooting. (18RT 2833.)

The trial court took the matter under submission, and later concluded that appellant's prior arrest was admissible under section 190.3, subdivision (b). Specifically, the court indicated that "the real issue" was whether there existed "an implied threat to use force or violence" under the circumstances of appellant's possession of a stolen handgun. The court found that, similar

to the circumstances in *People v. Michaels* (2002) 28 Cal.4th at page 486, here, appellant and his companion Perez were simultaneously found with illegal weapons. In addition, the jury had determined that appellant used an illegal weapon in Count 4 as to the victim Gabriel, and in two other incidents as an “integral” aider and abettor. (19RT 2929-2930.) The trial court also pointed to additional evidence recovered from appellant’s residence such as the pictures found on appellant’s computer of what was believed to be the Sten Mark III weapon used in the shootings, an accompanying weapon magazine component, weapon stock, and the writings evidence, which included the “rap lyrics” material. The court specified that these items indicated a “propensity and readiness to use [weapons] for violence in the community.” (19RT 2930.) However, the court noted that despite its ruling, appellant was entitled to “present contrary evidence” and argue to the jury that the circumstances of this arrest did not involve an implied threat to use force or violence. (19RT 2930.)

Thereafter, Officer Juan Pereida testified that on January 15, 2004, at approximately 2:45 p.m., he was working with his partner, Officer Mendoza. While on bicycle patrol, the officers observed three individuals, including appellant, grouped together inside a parking structure. Officer Mendoza approached and said, “What’s up, guys.” One of the individuals, “Perez,” responded with a look of “surprise” and immediately reached for his waistband, where Officer Pereida could see a “large bulge.” (19RT 2932-2934.) The officers ordered appellant, Perez, and their third companion “Rosales,” to turn around and put their hands up. Because of the trio’s suspicious behavior, and Perez’s visible “large bulge,” Officer Pereida believed at least Perez was potentially harboring a weapon. As a result, he feared their interaction with the group could turn “lethal,” or involve force or great bodily injury against him as his partner. (19RT 2935.)

Officers from the West Los Angeles Gang Unit arrived on scene soon thereafter. They informed Officers Pereida and Mendoza that their unit had been conducting surveillance of appellant and his companions. In particular, they were monitoring the area following an increase in gang violence and illegal activity.

Subsequent to a pat-down search for weapons, a sawed-off shotgun was recovered from Perez's waistband. (19RT 2936-2937; Peo. Exh. No. 168.) A semi-automatic "chrome handgun" was found on appellant. He also had a "black glove" concealed in his pants. Appellant, Perez, and Rosales were taken into custody. (19RT 2937, 2956-2957; Peo. Exh. No. 167.)

Los Angeles Police Department Gang Detail Officer Noel Macpoc determined that the weapon appellant possessed was ready to be fired. (19RT 2959-2963.) Los Angeles Police Department Officer Paul Correlejo inspected the sawed-off shotgun recovered from Perez. He discovered five rounds in the weapon and determined it was also fully operable and ready to be fired. (19RT 2966-2967.)

During discussion regarding jury instructions, defense counsel objected to the use of this prior arrest as factor (b) evidence, stating, "[w]e're basically against that instruction because I thought the point of it was that it was a violent act. He was convicted of a misdemeanor" (20RT 3065-3066.) The trial court explained, "Well, they're not proceeding under that factor. They're putting it as a crime of violence. We already argued that and you've got your record on that." (20RT 3066.) Defense counsel countered:

But I thought the crime of violence was the circumstances of having the gun and being with a fellow person that had a gun, not that he was violating the weapon's law.

(20RT 3066.) The trial court responded:

That's not my understanding of it because you have to give the reasonable doubt instruction and the elements of the crime and everything else.

(20RT 3066.)

Thereafter, the trial court instructed the jury as follows:

[T]he People allege as an aggravating circumstance that [appellant] committed the crime of unlawfully carrying a loaded firearm on his person on January 15[,] 2004, in violation of [s]ection 12031, subparagraph (a)(1). [¶] The People must prove that [appellant] committed the alleged crime. [¶] A defendant in a criminal case is presumed to be innocent of this crime charged as an aggravating circumstance. This presumption requires that the People prove each element of the crime charged as an aggravating circumstance beyond a reasonable doubt [¶] If you have a reasonable doubt whether [appellant] committed the alleged crime you may consider the evidence of that alleged crime as an aggravating circumstance.

To decide whether [appellant] committed the crime of carrying a loaded firearm on his person please refer to the separate instruction that I will give you on that crime. You do not all need to agree an alleged crime has been proved. If any juror individually concludes that an alleged crime has been proved that juror may give the evidence whatever weight he or she believes is appropriate. On the other hand, if any juror individually concludes that an alleged crime has not been proved that juror must disregard the evidence completely. [¶] You may not consider any other evidence of alleged criminal activity as an aggravating circumstance.

It is alleged that [appellant] committed the crime of unlawfully carrying a loaded firearm on his person. [¶] To prove that [appellant] is guilty of this crime the People must prove that, one, [appellant] carried a loaded firearm on his person, two, [appellant] knew that he was carrying a firearm and, three, at that time [appellant] was in a public place [¶]

A firearm is any device designed to be used as a weapon from which a projectile is expelled or discharged through a barrel by the force of any explosion or other form of combustion.

[¶] As used here, a firearm is loaded if there is an unexpended cartridge or shell in the firing chamber [¶] [¶]

The crime of unlawfully carrying a loaded firearm on his person as an aggravating circumstance in this case required proof of the union or joint operation of act and wrongful intent. [¶] That crime requires general criminal intent. To be guilty of this offense a person must not only commit the prohibited act but must do so intentionally or on purpose. It is not required, however, that the person intend to break the law. The act required is explained in the instruction for this crime.

(20RT 3220-3228; CALCRIM No. 2530.)

B. Applicable Legal Standards

In the penalty phase of a capital trial, evidence of prior violent conduct is admitted “to enable the jury to make an individualized assessment of the character and history of the defendant to determine the nature of the punishment to be imposed.” (*People v. Guerra, supra*, 37 Cal.4th at p. 1146, quoting *People v. Davis* (1995) 10 Cal. 4th 463, 544.) Thus, under section 190.3, factor (b), the trier of fact shall consider “[t]he presence or absence of criminal activity by the defendant which involved the use or attempted use of force or violence or the express or implied threat to use force or violence.” (*People v. Thomas* (2011) 52 Cal.4th 336, 363; *People v. Michaels* (2002) 28 Cal.4th 486, 535.) When such evidence is offered in aggravation, the trial court may accept “evidence that would allow a rational trier of fact to make a determination beyond a reasonable doubt as to [such] criminal activity.” (*People v. Ochoa* (1998) 19 Cal. 4th 353, 449, quoting *People v. Clair* (1992) 2 Cal. 4th 629, 676.)

Although “[p]ossession of a firearm is not, in every circumstance, an act committed with actual or implied force or violence” such that it would be admissible under factor (b), “[t]he factual circumstances surrounding the possession . . . may indicate an implied threat of violence.” (*People v. Bacon* (2010) 50 Cal.4th 1082, 1127; *People v. Jackson* (1996) 13 Cal.4th

1164, 1235.) Courts have repeatedly held that possession of a weapon in a custodial setting involves an implied threat of violence even when there is no evidence that the weapon was used or displayed in a threatening manner. (*People v. Michaels, supra*, 28 Cal.4th at p. 535.) In a noncustodial setting, an implied threat of force or violence may be found based on the circumstances surrounding the possession of the weapon. (*People v. Bacon, supra*, 50 Cal.4th at p. 1127; *People v. Dykes* (2009) 46 Cal.4th 731, 777.) A trial court's decision to admit evidence of prior criminal activity in the penalty phase is reviewed under the abuse of discretion standard. (*People v. Smithey* (1999) 20 Cal.4th 936, 991.)

C. As Properly Articulated in *Nakahara*, the Admissibility of Appellant's Weapons Possession Arrest under Section 190.3, Factor (b) Was a Legal Determination for the Trial Court

Appellant urges this Court to reconsider its well-established holding in *People v. Nakahara, supra*, 30 Cal.4th at page 720, which cannot be reconciled with appellant's assertions found herein. (AOB 157- 162.) His request should be rejected given his failure to present new grounds for doing so.

As acknowledged by appellant (AOB 157-159, 162), in *Nakahara* and other subsequent authority, this Court has consistently held that the determination of whether criminal acts pose a threat of violence is a *legal* question for the trial court. (See e.g., *People v. Lewis* (2008) 43 Cal.4th 415, 530; *People v. Gray* (2005) 37 Cal.4th 168, 235; *People v. Nakahara, supra*, 30 Cal.4th at p. 720; see also *People v. Ochoa* (2001) 26 Cal.4th 398, 453.) This determination is based on what this Court explained as a distinction between the "question whether the acts occurred," which it characterized as "certainly a factual matter for the jury," and "the characterization of those acts as involving an express or implied use of force or violence, or the threat thereof." This Court has repeatedly found that the

latter determination is a “legal matter,” which is properly evaluated by the trial court prior to submitting the evidence, if at all, to the jury. (See e.g., *People v. Nakahara*, *supra*, 30 Cal.4th at p. 720 [jury instructions like CALJIC No. 8.87 are not invalid “for failing to submit to the jury the issue whether the defendant’s acts involved the use, attempted use, or threat of force or violence”].)

In addition, although appellant alleges *Nakahara* and its progeny “offends the basic precepts of the Sixth and Eighth Amendments and due process held applicable to the penalty decision (AOB 152), case law refutes this claim. Once the trial court made the initial determination that the alleged offense involved implied or actual violence, each juror was then required to determine whether he was satisfied beyond a reasonable doubt that the incident had actually taken place before he could consider that evidence as an aggravating factor. (*People v. Millwee* (1998) 18 Cal.4th 96, 161, fn. 30.) The jury was likewise free to consider any evidence demonstrating that the incident had not been proved, or that there was an innocent explanation for the conduct. (*People v. Tuilaepa* (1992) 4 Cal.4th 569, 589.) This procedure comports with California Law and the United States Constitution.

Next, appellant argues that whether a criminal act involves force, violence or threat should be a factual issue for consideration by the jury, rather than a legal determination made “unilaterally” by the trial court. (AOB 155-162, *italics original*.) However, as delineated by this Court, “the sentencing function is inherently moral and normative, not factual; the sentencer’s power and discretion under [California’s death penalty law] is to decide the appropriate penalty for the particular offense and offender under all the relevant circumstances.” (*People v. Rodriguez*, *supra*, 42 Cal. 3d at p. 779.) This preliminary finding was a legal decision for the trial court, and did not violate defendant’s statutory or constitutional rights.

(See e.g., *People v. Lewis*, *supra*, 43 Cal.4th at p. 530 [whether criminal acts pose a threat of violence is a *legal* question for the trial court, and CALJIC No. 8.87 does not create an unconstitutional mandatory presumption]; *People v. Gray*, *supra*, 37 Cal.4th at p. 235; *People v. Nakahara*, *supra*, 30 Cal.4th at p. 720; see also *People v. Butler* (2009) 46 Cal.4th 847, 872.)

For example, in *Hildwin v. Florida* (1989) 490 U.S. 638, 640 [104 L.Ed.2d 728, 732, 109 S.Ct. 2055, 2057], the United States Supreme Court, in discussing the Florida death penalty, rejected the premise underlying the argument that appellant makes here: “[T]he existence of an aggravating factor here *is not an element of the offense* but instead is ‘a sentencing factor that comes into play only after the defendant has been found guilty.’” (*Ibid.*, quoting *McMillan v. Pennsylvania* (1986) 477 U.S. 79, 85-86 [91 L.Ed.2d 67, 76, 106 S.Ct. 2411], italics added.) Under the Florida statute involved in *Hildwin*, the judge, not the jury, made the factual determination of circumstances in aggravation. Nonetheless, the high court found no constitutional infirmity in this process, noting that “‘there is no Sixth Amendment right to jury sentencing, even where the sentence turns on specific findings of fact.’” (*Ibid.*, quoting *McMillan v. Pennsylvania*, *supra*, at p. 93].) In California too, the mitigating and aggravating circumstances are sentencing factors rather than elements of the capital offense. (See *People v. Rodriguez*, *supra*, 42 Cal.3d 730, 778.)

For the reasons stated above, appellant’s argument alleging that the question of whether an alleged crime involved force, violence, or threat is “not within the scope of either preliminary facts or of legal issues” is without merit. The trial court properly evaluated the section 190.3, factor (b) evidence, and this preliminary determination did not limit what the jury could consider. (See *People v. Tahl* (1967) 65 Cal.2d 719, 738 [“There is no requirement that the jury determine at the penalty trial what technical

crimes have been committed in order to consider such evidence.”]; see also *People v. Clair*, *supra*, 2 Cal.4th at p. 678.)

D. In Any Event, Even Assuming Error, It Was Not Prejudicial

State-law error bearing on penalty in a capital case is reviewed under the “reasonable possibility” standard of *People v. Brown* (1988) 46 Cal.3d 432, 446-448. (*People v. Clair*, *supra*, 2 Cal.4th at p. 678, fn. 11.) Federal constitutional errors, in contrast, are scrutinized under the ‘reasonable doubt’ standard of *Chapman v. California*, *supra*, 386 U.S. at p. 24. However, “the two tests are the same in substance and effect.” (*People v. Clair*, *supra*, 2 Cal.4th at p. 678, quoting *People v. Ashmus* (1991) 54 Cal.3d 932, 965.)

Here, under either standard, there was no harm in allowing this evidence to be presented. In particular, the abundance of other aggravating factors overwhelmingly supported death as the appropriate penalty – especially in light of the fact that appellant committed his crimes against defenseless individuals. As this Court has observed, “among the most significant considerations [in the jury’s assessment of punishment] are the circumstances of the underlying crime.” (*People v. Mitcham* (1992) 1 Cal. 4th 1027, 1062.) Thus, the admission of the prior arrest evidence “did not undermine the fundamental fairness of the penalty-determination process.” (*Id.* at p. 1063.)

Instead, the proper focus of the penalty phase was the circumstances of the crimes. Here, the possession arrest was marginally significant when compared with the aggravating circumstances attending the murders of Gabriel and Lua, and the attempted murders of Amezcua, Zepeda, Hart, Jimenez, Emmanuel, Johnson, and Carrillo with a machine gun. (*People v. Lewis II* (2008) 43 Cal.4th 415, 527 [error in the admission of evidence under section 190.3, factor (b) is reversible only if “there is a reasonable

possibility it affected the verdict,” a standard that is “essentially the same as the harmless beyond a reasonable doubt standard of *Chapman*]; see *People v. Panah* (2005) 35 Cal.App.4th 395, 492.)

In particular to the capital offense, the evidence showed that appellant sprayed bullets down the sidewalk in front of the nightclub where Gabriel, Emmanuel, Hart and Johnson had initially encountered him, from a weapon that was capable of firing in semi-automatic or fully automatic modes. As a result, Gabriel suffered from fatal gunshot wounds to the abdomen and back. (8RT 1596.) Hart and Jiminez (the nightclub’s disc-jockey who attempted to exit the premises just prior to appellant firing), sustained wounds to the stomach, chest, and back area. (8RT 1592, 1622; 9RT 1637-1638, 1668-1672, 1700-1701.) One day earlier, appellant was present and allegedly driving in the vehicle that was hit by the car driven by Amezcua and occupied by Lua. Thereafter, appellant maneuvered his vehicle along Amezcua’s and approximately nine rounds were unloaded on the vehicle, resulting in Lua’s death. (8RT 1287 -1294, 1296.) Less than one week later, appellant tracked down and engaged in high speed car pursuit of Ramos, a witness for the prosecution in his brother’s pending criminal case, and his friend Carrillo, who had accompanied Ramos to testify in court on a prior instance. Shots were also fired on this occasion, shattering the rear window of Ramos’ vehicle and grazing the flesh on Carrillo’s back. (11RT 1740-1743, 1773-1779, 1792-1797.) In light of the above, there is no reasonable possibility that the factor (b) evidence demonstrating that appellant possessed a handgun affected the verdict. (See *People v. Lewis II*, *supra*, 43 Cal.4th at p. 527.) Therefore, any conceivable error was harmless, and appellant is not entitled to relief.

**X. THE TRIAL COURT PROPERLY ADMITTED APPELLANT'S
PRIOR POSSESSION OF A HANDGUN OFFENSE UNDER SECTION
190.3 FACTOR (B) IN THE PENALTY PHASE TRIAL**

Next, appellant contends his possession of a handgun offense was erroneously admitted as "other violent crimes evidence" under section 190.3, factor (b), because there were insufficient facts to prove the crime involved force or violence. As a result, appellant alleges a violation of his state and federal due process rights, in addition to his fair and reliable penalty determination rights. (AOB 166-174.) The complained of criminal activity involved appellant's illegal possession of a firearm, which in and of itself demonstrated an implied intention to put the weapon to unlawful use. Therefore, the evidence was properly admitted. Even if error, it was harmless.

A. Factual Background

As detailed above, during the penalty phase, the prosecutor sought to admit evidence of appellant's possession of a handgun as aggravating evidence under section 190.3, factor (b). Defense counsel objected on the ground that the crime was a misdemeanor, and did not involve violence. The trial court allowed this evidence, finding the circumstances of appellant's arrest indicated "an implied threat to use force or violence." (See Arg.XI.A., *supra*.)

Officers Pereida, Macpoc, and Correlejo testified regarding the facts and circumstances of their January 15, 2004, encounter with appellant, including the following: after their initial approach, Perez looked "surprised" and immediately reached for his waistband where Officer Pereida could see a "large bulge"; Officer Pereida believed at least Perez was potentially harboring a weapon and was concerned the incident could turn "lethal" or involve force or great bodily injury; subsequently, loaded and fully operational weapons were found concealed on both Perez and

appellant, including a loaded revolver secreted in appellant's waistband that was later determined to be ready to be fired, with one bullet in the chamber. (19RT 2932-2967.) The jury was subsequently instructed with CALCRIM No. 2530, carrying a loaded firearm, in violation of section 12031, subdivision (a). (20RT 3220-3222.)

B. Relevant Law

As outlined above, section 190.3, factor (b), permits the introduction of evidence pertaining to the "presence or absence of criminal activity by the defendant which involved the use or attempted use of force or violence or the express or implied threat to use force or violence" (*People v. Thomas, supra*, 52 Cal.4th at p. 363; *People v. Michaels, supra*, 28 Cal.4th at p. 535). (See Arg. IX., B., *supra*.) In a noncustodial setting, an implied threat of force or violence may be found based on the circumstances surrounding the possession of the weapon. (*People v. Michaels, supra*, 28 Cal.4th at p. 535; *People v. Bacon, supra*, 50 Cal.4th at p. 1127; *People v. Dykes, supra*, 46 Cal.4th at p. 777.)

C. The Circumstances Underlying Appellant's Possession of a Stolen, Loaded Handgun Involved an Implied Threat of Force or Violence

In *People v. Michaels, supra*, 28 Cal.4th at p. 536, the defendant was discovered with a firearm concealed in the glove compartment of his parked vehicle and had been arrested for unlawful possession of knives on prior occasions. This Court found that the criminal character of the defendant's possession of these weapons, including the fact that similar knives had been used in charged offenses and that the concealed firearm had been employed in a robbery committed one day before the discovery of the weapon in the defendant's vehicle, concluded that the trial court properly admitted the prosecution's evidence for the purpose of demonstrating the defendant's commission of a prior crime involving the threat of violence. (*Id.*) In

addition, in a noncustodial setting, illegal possession of potentially dangerous weapons may “show[] an implied intention to put the weapons to unlawful use,” rendering the evidence admissible pursuant to section 190.3, factor (b). (*Id.* at p. 537.)

Here, appellant’s close companionship with Perez, who sparked Officer Pereida’s suspicion with Perez’s look of “surprise” upon their casual approach, coupled with Perez’s immediate reach for a “large bulge” concealed in his clothing, justified the contemporaneous search of appellant that produced the illegal weapon. Moreover, the circumstances of appellant’s arrest support an implied threat. His personal compliance and lack of individual suspicious behavior is of no consequence, and the prior arrest evidence was properly utilized during the penalty phase. (See *People v. Michaels*, *supra*, 28 Cal.4th at p. 536.)

People v. Dykes (2003) 46 Cal.4th 731, 777, is instructive. In *Dykes*, the defendant challenged the admission of penalty phase evidence concerning an incident in which he was discovered in illegal possession of a concealed weapon. *Dykes* argued that because the incident did not involve a threat or implied threat of violence within the meaning of section 190.3, factor (b), the admission of this evidence constituted a violation of the Eighth Amendment to the United States Constitution. It was stipulated that the defendant’s “detention and arrest ... were based on legal cause.” The arresting officer testified that at approximately 9:30 p.m., he exited from his vehicle and approached the defendant, who was wearing dark clothing, including a cap, “a dark puffy black jacket with a hood over his head, [and] . . . large black ski gloves” The officer directed the defendant to identify himself and noticed that he was “fidgeting.” In the absence of any request by the officer, defendant removed his cap and gloves and placed them on the roof of the patrol vehicle. The officer patted the defendant down for his own safety and noticed that one of

defendant's gloves contained a firearm. The weapon was a loaded and cocked .25-caliber semiautomatic firearm. One round was in the chamber of the weapon, and three rounds were in the clip. The officer testified that the incident was memorable, because he had not observed the weapon at the beginning of the encounter and "could have been shot." (*Id.* at p. 776.) This Court found that the jury legitimately could infer an implied threat of violence from all the circumstances, including the "criminal character of [the] defendant's possession," and determined that the concealment of the loaded and cocked weapon in a manner that rendered it available for instant, surprise use, and the defendant's use of a similar firearm in committing the present offense. (*Id.* at pp. 778-779.)

Similarly, here, appellant was found to possess a concealed, loaded and stolen handgun, in addition to a black glove, both of which were secreted in his waistband where they were hidden but could be easily accessed for immediate use. In addition, with Perez and a third companion, Rosales, appellant's group undisputedly outnumbered the initial two officers at the scene. (See Arg.IX.A., *supra*; 19RT 2929-2934, 2955-2962.)

Next, appellant's assertion that unlike in *People v. Michaels*, *supra*, 28 Cal.4th 486, *People v. Garceau* (1993) 6 Cal.4th 140, *People v. Dykes*, *supra*, 46 Cal.4th, the circumstances of his possession arrest relied "solely on the propensity evidence based on the subsequent shootings and seized writings," likewise fails. (AOB 170-171.) As set forth above, in *Dykes*, relying on the findings made in *Michaels*, it was established by this Court that an implied threat is demonstrated in a noncustodial context when the defendant is in possession of a concealed, illegal weapon. (*People v. Dykes*, *supra*, 46 Cal.4th at pp. 778-779; see also *People v. Garceau* (1993) 6 Cal. 4th 140, 203-204 [illegal possession of a machine gun, silencer, and concealable handguns properly admitted to demonstrate the implied threat to use force or violence]; *People v. Clair* (1992) 2 Cal. 4th 629, 676-677

[while committing a burglary, the defendant carried a knife that, although never used, was found to be “an implied threat to use the knife against anyone who might interfere”].)

In addition, as instructed by the trial court and stated above, appellant was free to, but chose not to, present evidence to show that his possession was for the purpose of self-protection, or the protection of someone else, not for criminal violence. (*People v. Ramirez, supra*, 50 Cal. 3d at p. 1187.) Moreover, the trial court was entitled to rely on the totality of this evidence, including the fact that this incident indicated a “propensity and readiness to use [weapons] for violence,” and supported an inference of an implied threat of force or violence under section 190.3, factor (b). (18RT 1930.)

Appellant alleges however, that the trial court’s “errors” were compounded by its failure to “properly assess the balance of relevancy and potential prejudice under Evidence Code section 352.” (AOB 171.) This evidentiary claim is forfeited, as defense counsel did not object to the prior arrest conviction on these grounds at trial. (See *People v. Partida, supra*, 37 Cal.4th at pp. 433–434.) Moreover, the testimony was relevant to Officers Pereida and Mendoza’s credibility and reliability as witnesses, and to whether appellant’s possession of the firearm carried an implied threat of violence within the meaning of section 190.3, factor (b). Thus, there was an implied weighing by the trial court and determination that the probative value of the evidence was not substantially outweighed by the probability that its admission would create substantial danger of undue prejudice.

Also, as demonstrated above, the evidence of appellant’s prior arrest for possession of a stolen, loaded handgun was not misleading, cumulative or unduly inflammatory. The prejudicial effect of the evidence was that it might lead the jury to believe that defendant had committed other murders,

or planned and had the propensity to do so. However, the prosecutor did not use this evidence to advance such a claim.

Finally, the trial court gave a limiting instruction, stating that the prosecution was required to prove beyond a reasonable doubt that appellant committed the section 12031, subdivision (a) violation; that appellant was presumed to be innocent; if an individual jury determines that crimes was committed, they may determine the weight to give this evidence or discredit it completely; the crime involved proof of wrongful intent (21RT 3221-3226); and that evidence admitted for a limited purpose can be considered for that purpose and no other (21RT 3235-3236.) The jury presumably followed these instructions. Given the relevance of the prior arrest as an aggravating factor, the trial court did not abuse its broad discretion in concluding the evidence was more probative than prejudicial. (*People v. Hawthorne, supra*, 46 Cal.4th at p. 103.)

D. Even If This Evidence Was Inadmissible, Any Error Was Harmless in Light of the Significant Evidence of the Murder and Attempted Murders

As above, any error in the admission of evidence under factor (b) is reversible only if “there is a reasonable possibility it affected the verdict.” (See Arg.IX.D., *supra*; *People v. Ochoa, supra*, 19 Cal.4th at p. 479; *People v. Bradford* (1997) 14 Cal.4th 1005, 1061.) Here, the trial court gave a limiting instruction pertaining to the prior arrest, stating that this evidence required the prosecution prove that appellant committed the alleged crime beyond a reasonable doubt, in addition to proof of the union or “joint operation of act and wrongful intent (20RT 3220-3228; CALCRIM No. 2530), which the jury presumably followed. In addition, given the relevance of the prior arrest as an aggravating factor, the trial court did not abuse its broad discretion in concluding the evidence was

more probative than prejudicial. (*People v. Hawthorne, supra*, 46 Cal.4th at p. 103.)

Moreover, as stated above, in light of the circumstances of the charged offenses and other aggravating evidence presented, including appellant's possession and use of a submachine gun weapon, and the numerous victims including 12-year-old Gabriel and Lua, both of whom suffered from fatal gunshot wounds. Therefore, there is no reasonable possibility that the jury's penalty decision was improperly affected assuming admission of this incident was error. (Arg.IX.D.,E., *supra*; *People v. Ochoa, supra*, 19 Cal.4th at p. 479.)

XI. APPELLANT'S NUMEROUS ATTACKS ON CALIFORNIA'S DEATH PENALTY SCHEME HAVE BEEN REPEATEDLY REJECTED BY THIS COURT, AS APPELLANT CONCEDES, AND THUS THESE CLAIMS AFFORD NO BASIS FOR RELIEF

Appellant's next contention is a series of sub-claims concerning the validity of California's death penalty scheme. Appellant admits that each sub-claim has previously been rejected by this Court, but raises them in a summary fashion, pursuant to *People v. Schmeck, supra*, 37 Cal.4th at pp. 303-305. (AOB 175-191.) Because he offers no persuasive reasons for this Court to reconsider its prior rulings, these claims should be denied.

In recent cases, this Court has confirmed its rejection of all the various challenges raised by appellant: (1) "The statute (§ 190.2) does not impose overbroad death eligibility, either because of the sheer number and scope of special circumstances which define a capital murder, or because the statute permits capital exposure for an unintentional felony murder" (AOB 175-176; *People v. Anderson* (2001) 25 Cal.4th 543, 601; see, e.g., *People v. Marks* (2003) 31 Cal.4th 197, 237; *People v. Box, supra*, 23 Cal.4th 1153, 1217; *People v. Ochoa, supra*, 19 Cal.4th at p. 479); (2) section 190.3, subdivision (a) is a proper aggravating factor, and permitting the jury to consider the "circumstances of the crime" within the meaning of section

190.3 in the penalty phase does not result in an arbitrary and capricious imposition of the death penalty (AOB 176-177; see *People v. Kennedy* (2005) 36 Cal.4th 595, 641; *People v. Brown* (2004) 34 Cal.4th 382, 401); (3) neither the Due Process Clause nor the Eighth Amendment requires that the jury be instructed that it must decide beyond a reasonable doubt that the aggravating factors outweigh the mitigating factors and that death is the appropriate penalty (AOB 178-179; *People v. Blair* (2005) 36 Cal.4th 686, 753); (4) capital sentencing is not susceptible to burdens of proof or persuasion because the exercise is largely moral and normative (AOB 180-181; *People v. Lenart* (2004) 32 Cal.4th 1107, 1136-1137; (5) unanimity with respect to aggravating factors is not required by statute or as a constitutional procedural safeguard (AOB 181-182; *People v. Taylor* (1990) 52 Cal.3d 719, 749; *People v. Prieto, supra*, 30 Cal.4th at p. 275); (6) any unadjudicated criminal activity is not required to be found true beyond a reasonable doubt a unanimous jury (AOB 183-184; *People v. Ward* (2005) 36 Cal.4th 186, 221-222; *People v. Anderson, supra*, 25 Cal.4th at pp. 584-585); (6) the phrase “so substantial” does not facilitate impermissibly broad sentencing discretion in violation of the Eighth and Fourteenth Amendments (AOB 184; *People v. Breaux* (1991) 1 Cal.4th 281, 316, fn. 14); (7) CALCRIM No. 766 does not violate appellant’s due process rights (AOB 184-185; *People v. Duncan* (1991) 53 Cal.3d 955, 978); (9) the instructions neither limited the consideration of mitigating evidence nor suggested that any particular number of jurors was required to find a mitigating circumstance (AOB 185-186; *People v. Philips* (2000) 22 Cal.4th 226, 239; *People v. Breaux, supra*, 1 Cal.4th at pp. 314-315); (10) an instruction on the presumption of life is not necessary in California capital cases (AOB 187; *People v. Arias, supra*, 13 Cal.4th at p. 92); (11) the failure to require written or other specific findings by the jury regarding aggravating factors is not a deprivation of federal due process and Eight

Amendment rights to meaningful appellate review (AOB 188; *People v. Russell, supra*, 50 Cal.4th at p. 1274; *People v. Bennett, supra*, 45 Cal.4th at p. 632; *People v. Loker* (2008) 44 Cal.4th 691, 755; *People v. Cook* (2006) 39 Cal.4th 566, 619; *People v. Williams, supra*, 40 Cal.4th at p. 337); (12) the jury instructions on aggravating and mitigating factors did not violate appellant's constitutional rights (AOB 188-189; *People v. Avila* (2006) 38 Cal.4th 491, 614); (13) the failure to delete inapplicable factors set forth in CALCRIM No. 763 did not violate appellant's Constitutional rights (AOB 189; *People v. Cook, supra*, 36 Cal.4th at p. 618); (14) an instruction that statutory mitigating factors were relevant solely to potential mitigators was not required (AOB 189; *People v. Hillhouse* (2002) 27 Cal.4th 469, 509); (15) inter-case proportionality review is not required in capital cases (AOB 190; *People v. Fierro* (1991) 1 Cal.4th 173, 253); (16) the California capital sentencing scheme does not violate the Equal Protection Clause (AOB 190-191; *People v. Manriquez* (2005) 37 Cal.4th 547, 590); and (17) California's use of the death penalty does not violate international norms of humanity and decency (AOB 191; *People v. Jennings, supra*, 50 Cal.4th at pp. 690-691; *People v. Bennett, supra*, 45 Cal.4th at p. 632; *People v. Mungia* (2008) 44 Cal.4th 1101, 1143 [“California’s status as being in the minority of jurisdictions worldwide that impose capital punishment, especially in contrast with the nations of Western Europe, does not violate the Eighth Amendment”]; *People v. Kelly, supra*, 42 Cal.4th at p. 801 [“a sentence of death that complies with state and federal constitutional and statutory requirements does not violate international law”]; *People v. Cook, supra*, 39 Cal.4th at pp. 619-620 [“international law does not bar imposing a death sentence that was rendered in accord with state and federal constitutional and statutory requirements”]; *People v. Moon, supra*, 37 Cal.4th at p. 48 [“Although defendant would have us consider that the nations of Western Europe no

longer have capital punishment, those nations largely had already abolished it officially or in practice by the time the United States Supreme Court, in the mid-1970's, upheld capital punishment against an Eighth Amendment challenge"].)

Appellant's repeatedly rejected challenges provide no basis for reversal of his judgment. His assertions to the contrary should be rejected.

XII. THERE WAS NO CUMULATIVE ERROR

Appellant's final contention is that the cumulative effect of errors during the guilt and penalty phases requires reversal of the death verdict. (AOB 192-194.) Respondent disagrees because there was no error, and, to the extent there was error, appellant has failed to demonstrate prejudice.

Moreover, whether considered individually or for their cumulative effect, the alleged errors could not have affected the outcome of the trial. (See *People v. Seaton* (2001) 26 Cal.4th 598, 675, 691-692; *People v. Ochoa*, *supra*, 26 Cal.4th at pp. 447, 458; *People v. Catlin* (2001) 26 Cal.4th 81, 180.) Even a capital defendant is entitled only to a fair trial, not a perfect one. (*People v. Cunningham* (2001) 25 Cal.4th 926, 1009; *People v. Box*, *supra*, 23 Cal.4th at pp. 1214, 1219.) The record shows appellant received a fair trial. His claims of cumulative error should, therefore, be rejected.

CONCLUSION

Accordingly, respondent respectfully requests that the judgment of death be affirmed.

Dated: March 16, 2015

Respectfully submitted,

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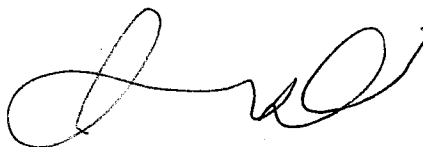
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CERTIFICATE OF COMPLIANCE

I certify that the attached **RESPONDENT'S BRIEF** uses a 13 point Times New Roman font and contains 48,927 words.

Dated: March 16, 2015

KAMALA D. HARRIS
Attorney General of California

A handwritten signature in black ink, appearing to read 'Tasha G. Timbadia', written in a cursive style.

TASHA G. TIMBADIA
Deputy Attorney General
Attorneys for Respondent

DECLARATION OF SERVICE

Case Name: **People v. Carlos Marvin Argueta**

Case No.: **S150524**

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 **March 16, 2015**, I served the attached **RESPONDENT'S BRIEF** by placing a true copy thereof enclosed in a sealed envelope in the internal mail system of the Office of the Attorney General at 300 South Spring Street, Suite 1702, Los Angeles, CA 90013, addressed as follows:

Nina Wilder
Deputy State Public Defender
State Public Defender's Office - Oakland
1111 Broadway, 10th Floor
Oakland, CA 94607
Counsel for Appellant Carlos Marvin Argueta

Patricia Musso
Los Angeles County District Attorney's Office
210 West Temple Street, Suite 18000
Los Angeles, CA 90012

The Honorable Curtis B. Rappe
Judge
Los Angeles County Superior Court
Clara Shortridge Foltz Criminal Justice Center
210 West Temple Street, Department 103
Los Angeles, CA 90012-3210

Michael G. Millman
Executive Director
California Appellate Project (SF)
101 Second Street, Suite 600
San Francisco, CA 94105

**Maria Elena Arvizo-Knight
Death Penalty Appeals Clerk
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Clara Shortridge Foltz Criminal Justice Center
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**Governor's Office
Attn: Legal Affairs Secretary
State Capitol, First Floor
Sacramento, CA 95814 E-15**

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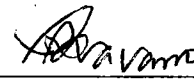
On **March 16, 2015**, I caused one electronic copy of the **RESPONDENT'S BRIEF** in this case to be served on the California Supreme Court by sending the copy to the Supreme Court's electronic service address pursuant to Rule 8.212(c).

On **March 16, 2015**, I caused original and thirteen copies of the **RESPONDENT'S BRIEF** in this case to be delivered to the California Supreme Court at 350 McAllister Street, First Floor, San Francisco, CA 94102-4797 by OnTrac B10269287708.

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 **March 16, 2015**, at Los Angeles, California.

Maria P. Navarro

Declarant



Signature