IN THE SUPREME COURT OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

LAM THANH NGUYEN,

Defendant and Appellant.

S076340

(Orange County Superior Court No. 95WF0682)

DEATH PENALTY CASE

APPELLANT'S REPLY BRIEF

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INTRODUCTION

As Appellant's Opening Brief sought to show, this case is remarkable in at least three regards. First, despite what might be inferred from the total number of convictions, the individual counts are all based upon thin foundations, as they depend upon highly questionable identification evidence. Second, the judgment in this case is subject to an extraordinarily high number of serious appellate challenges. Third, under any plausible application of relevant law to the prosecution-favorable evidence adduced at trial, one of the murder convictions — a prerequisite to death-eligibility — is based on a shooting that was not a crime at all but an act of self-defense. Nothing in the Respondent's Brief affects these overall perspectives in the least.[1]

A. Organization of This Brief, and Introduction to Appellant's Reply to Respondent's Statements of the Facts

The organization of this brief follows that of the Appellant's Opening Brief ("AOB"), with one notable exception: the Statement of Facts. Normally, briefs in a criminal appeal contain a statement of the trial facts at the beginning of the brief, as did the AOB here. In the Respondent's Brief ("RB"), however, an unconventional approach is taken. Respondent's Statement of Facts contains only a very skeletal, conclusory characterization of the extensive guilt-phase evidence. (RB 2-6.) Respondent saves its detailed discussion for later. Its summary of the evidence related to Counts 6 and 7 (relating to the February 5, 1995 killing of Sang Nguyen) appears in its argument that no prejudice resulted from the error raised as appellant's first

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[1] The instant ARB responds to those contentions in the RB that require further discussion for a proper determination of the issues. The ARB does not respond to issues that appellate counsel believes were adequately addressed in the AOB, and no waiver or concession is intended as to any non-response herein.

claim. (RB 12-29; see AOB 82-95.) And respondent's summaries of the evidence as to all of the remaining counts are located together at the outset of the RB's response to appellant's challenge to the sufficiency of the evidence to support the convictions in Counts 13 and 14 (pertaining to the May 6, 1995 killing of Tuan Pham). (RB 61-112.)

In view of the placement of respondent's discussions of the evidence, appellant, here in the Appellant's Reply Brief (ARB), will take a somewhat unconventional approach to replying to those discussions. With one exception, the ARB will reply to respondent's evidentiary discussions when we address each individual incident. Thus, for example, appellant's replies to respondent's summary of the evidence with respect to Counts 6 and 7 (the Sang Nguyen killing) and Counts 13 and 14 (the Tuan Pham killing) will be addressed in this ARB when we address those specific incidents. (See ARB §§ I.1.C, pp. 12 et seq., and II.1, pp. 73 et seq., *post.*) The one exception to this involves Counts 11 and 12, related to the killing of Duy Vu, of which appellant was acquitted. Since, for obvious reasons, no appellate issues were raised in the AOB with regard to these not-guilty verdicts, we reply to respondent's factual recitation related to these counts in the next subsection of this Introduction, Subsection B.

As will be discussed in detail hereafter, respondent's various statements of facts contain two permeating deficiencies. First, respondent always presents the facts in the light most favorable to the prosecution. An approach of that general sort can be appropriate in response to a claim of insufficient evidence, but it is inappropriate when, for example, the question is whether an error was prejudicial. This matter is discussed in detail in Section I.1.C.1, pp. 14 et seq., *post.*

Second, even when appellant is raising a claim of insufficient evidence (*Jackson v. Virginia* (1979) 433 U.S. 307), the appellate court "must resolve

the issue in the light of the *whole* record — i.e., the entire picture of the defendant put before the jury — and may not limit [its] appraisal to isolated bits of evidence selected by the respondent." (*People v. Johnson* (1980) 26 Cal.3d 557, 577, original emphasis, internal quotation marks omitted.[2]) Thus, while "the appellate court must view the evidence in a light most favorable to respondent and presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence[,] . . .[t]he court does not, however, limit its review to the evidence favorable to the respondent." (*Id.* at pp. 576-577, internal quotation marks omitted.) Respondent's summaries of the evidence consistently run afoul of these principles.

B. Appellant's Reply to Respondent's Statement of Facts with Regard to Counts 11 and 12 (the Killing of Duy Vu), of Which Appellant Was Acquitted

Respondent discusses at some length the evidence relating to Counts 11 and 12 (the shooting of Duy Vu), but it does so with a focus that is slanted excessively in favor of the prosecution. (RB 88-98.) Appellate counsel are supposed to "summariz[e] all of the operative facts, not just those favorable to their clients." (*Lewis v. County of Sacramento* (2001) 93 Cal.App.4th 107, 113.) Respondent's discussion of Counts 11 and 12 does not meet this standard.

The prosecution's case against appellant with regard to the Duy Vu killing rested upon the testimony of Jeanette Mandy. Mandy was the sole eyewitness to the shooting, and she was also the only person who at any time purported to identify appellant as Duy Vu's shooter. (See AOB 48-50.) Mandy described a confrontation between Duy Vu and two men, one shorter and stockier and the other described by her as thinner and "taller." (12 RT

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[2] In this brief, as in the AOB, all emphases are added by appellant unless indicated otherwise.

2367, 2370, 2371.) It was the "taller" man who fired the shots that hit Duy. On the night of the shooting, Mandy estimated the shooter to be between 5'10" and 6' tall. (12 RT 2391, 2408.) At trial, Mandy testified that she had had "a very good opportunity on the day of the shooting to determine the height of the shooter" and that he was between 5'9" or 5'10" and 6' tall,[3] a description that was grossly inconsistent with appellant's height (5'2").

In its brief, respondent does not mention either Mandy's testimony about how tall the shooter was or her characterization of the shooter as the "taller" man. Instead, respondent tiptoes through the record as if walking barefoot on hot coals. Perhaps the simplest way to see how respondent has dealt with the rest of Mandy's identification testimony — beyond disregarding her height estimate and her characterization of the shooter as the "taller" individual — is to quote the RB and to insert the relevant facts that respondent omits. What follows is quoted from RB 91, with our insertions in italics and bold-faced font (and with some of respondent's punctuation marks changed):

> "Mandy identified appellant as the shooter ***on direct examination.*** (12 RT 2373.) ***However, on cross-examination, when appellant stood up and Mandy was asked if he was the 5'9" to 6' person she had seen, Mandy testified, 'Judging from where I'm sitting now, the angle I'm sitting at, I would say no.' (12 RT 2401.)*** . . . .
>
> "Mandy recalled drawing composite pictures of the suspects (People's Exhs. 61 and 62) with People's Exhibit 61 representing the shooter. (12 RT 2388.) Mandy recalled viewing close to 100 loose photographs and two six packs at the police station. (People's Exh. 60; 12 RT 2388-2389.) She recalled identifying People's Exhibits 60-A and 60-B ***(from the loose photographs)*** as the photos which looked most like the two suspects. (12 RT 2389.) She recalled identifying People's Exhibit 60-A (a photo of appellant) as the photo looking most like shooter (12 RT 2389-2390), ***but Mandy was not positive (12 RT 2335-2336, 2400). She viewed a photo lineup containing appellant's***

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[3] 12 RT 2391, 2408.

photograph, but she did not identify anyone as the shooter. (12 RT 2338) And she attended the live lineup on May 31 but picked out someone other than appellant. (12 RT 2409-2410.) She recalled identifying appellant as the shooter at the preliminary hearing (12 RT 2390), ***but her identification had not been certain at that time, either (12 RT 2401, 2406).***"

As can be seen, respondent has cherry-picked Mandy's testimony. It has omitted her description of the shooter's height, her failure to select appellant's photo from a six-pack, her selection of some else at the live lineup, her uncertainty when she did refer to appellant in court, and her trial testimony that, upon seeing appellant stand up, he was not the shooter.[4]

Although Ms. Mandy was the indispensable prosecution witness as to Counts 11 and 12, as many as seven others may have seen the shooter outside the laundry and were able to give partial descriptions of him. Respondent's summaries of these witnesses' testimony are of a piece with its treatment of Mandy's testimony. Thus, respondent says that Scott Dalton described the man as "a 19 to 20 year-old Asian male [wearing] a brown jacket" (RB 92), but respondent omits that Dalton also said that the man was 6 feet tall and that he "doubt[ed]" that appellant was that person. (12 RT 2420, 2421.) Similarly, respondent writes that Juan Hernandez described an "Asian, 19 to 21 years old" " wearing a long brown leather jacket almost to his knee" (RB 92), but respondent declines to note that Hernandez said the man was "tall," about 5'10" in height, and was "definitely not" appellant. (11 RT 2279, 2285, 2287.)

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[4] Following its summary of the evidence as to the killing of Duy Vu, respondent, in attempting to explain appellant's acquittal on this charge, does note that "the witnesses to the shooting described the shooter as taller than appellant" (RB 95), but respondent does not identify any of these witnesses by name, offer any detail, or make clear that Ms. Mandy was among those who testified that the shooter was much taller than appellant.

Nor does respondent mention that Susan White said the shooter was 6 feet tall (20 RT 3862), that Sara Benigno put his height at between 5'10" and 6' (21 RT 3920), and that at the May 31st lineup, Johnny Gammoh and Mary Martina identified someone other than appellant (20 RT 3770-3771 & 3776-3777, 21 RT 3924-3925).

Thus, respondent has failed to "summariz[e] all of the operative facts, not just those favorable to their clients," and it has failed to present "the whole record — i.e., the entire picture of the defendant put before the jury." (*Lewis v. County of Sacramento*, *supra*, 93 Cal.App.4th at p. 113; *People v. Johnson*, *supra*, 26 Cal.3d at p 577, original emphasis.)

Respondent concludes its review of the evidence related to Counts 11 and 12 with a three-page discourse that (1) proposes four reasons that the "jurors most likely acquitted appellant" of these offenses, (2) attempts to explain away two (but only two) of these reasons, and (3) reiterates various inferences the prosecutor sought to draw that supposedly "linked appellant to the Duy Vu shooting." (RB 95-98.) Appellant believes only one of these matters warrants a reply: respondent's efforts to explain away the height discrepancies. Those efforts flout common sense.

The shooter wore a brown jacket, and police found a brown jacket at the Amarillo Street residence where the prosecution claimed appellant lived. Jeanette Mandy was shown a photograph of the Amarillo Street jacket, and as respondent admits, she "stated that was not the jacket worn by the shooter because the jacket worn by the shooter was longer and had a string in the waste [sic] area." (RB 91. See 12 RT 2397-2398, 20 RT 3870-3871.) At trial, appellant donned the Amarillo Street jacket, and it was not particularly long and much too big for him. (See 20 RT 4270-4271, 4283-4284.) According to respondent, however, this ill-fitting jacket explains the discrepancy between appellant's actual height and the witnesses' descriptions

of the shooter's height. First, respondent postulates that since appellant was 20 pounds heavier at trial than when arrested, the jacket "would have fallen almost to appellant's knees . . . at the time of the shooting." (RB 96.) And second, "the oversize jacket explained why appellant seemed taller to the eyewitnesses that he actually was." (RB 97.)

Both contentions defy common knowledge and experience. Losing 20 pounds would not noticeably change the level at which the bottom hem of a jacket would fall. After all, losing 20 pounds does not change a person's height. And wearing an oversized jacket makes a person appear *shorter* than he really is, not taller.[5]

In sum, and even putting aside the problems with its basic approach to the record, respondent's efforts to "explain" the height discrepancy are flawed as a matter of common sense.

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[5] These points are drawn from common knowledge, but they can be readily verified. "A loose fit on a short man actually emphasizes his petite frame." (*Dressing Taller: 10 Tips for Short Men* (June 7, 2011), viewable at http://artofmanliness.com/2011/06/07/dressing-taller-short-men/ (as of 10/24/11). See also Rovny, *Fashion Tips For Short & Tall Men*, viewable at http://www.askmen.com/fashion/fashiontip/31_fashion_advice.html (as of 10/25/11) ["Tips for Shorter Men . . . Clothes need to fit perfectly; wearing something tight or loose will emphasize your physical flaw."].)

And when it comes to leather jackets in particular, the advice for men under 5'8" is to "[g]o for trimmer bodies and trim sleeve styles to help lengthen your body." (Au, *Tips for dressing your short and stylish guy* (6/13/06), viewable at http://today.msnbc.msn.com/id/13265966/ns/today-fathers_day_gifts_grilling_gadgets_and_more/t/tips-dressing-your-short-stylish-guy/ (as of 10/24/11).)

GUILT-PHASE ISSUES AND ARGUMENTS

THE MURDER COUNTS
(Counts 6-7 and Counts 13-14)

I.
COUNTS 6 & 7
(relating to the February 5, 1995 shooting death of Sang Nguyen)

On February 5, 1995, Sang Nguyen, a Cheap Boys gang member, was shot to death outside of the Dong Khanh Restaurant in Westminster. The issue at trial was whether appellant was the shooter. No physical evidence tied him to the crime, and the only independent eyewitness — the only one with no ties to Sang or the Cheap Boys or any other gang — identified someone other than appellant as the shooter. The inculpatory evidence came from two of Sang's dinner companions, gang members or associates who, although they had independently told mutually corroborating stories that did not implicate appellant, eventually came up with entirely new versions of events and claimed to have seen appellant do the shooting. In the AOB, appellant has raised numerous challenges to his convictions related to this shooting, Counts 6 and 7. (AOB 82-122.)

1. COUNTS 6 & 7 MUST BE REVERSED BECAUSE OF THE IMPROPER ADMISSION OF ALLEGED EXPERT TESTIMONY AS TO WHAT EXCUSES ARE MOST COMMONLY OFFERED BY PURPORTEDLY RELUCTANT WITNESSES TO GANG CRIMES COMMITTED AT RESTAURANTS

At trial, the prosecution was allowed to elicit testimony from its gang expert, Detective Mark Nye, to the effect that, in his experience, when people "don't want to cooperate" with police who are investigating gang crimes in cafés and restaurants, the "most common excuse" given is, "'I was in the bathroom at the time.'" (17 RT 3324-3325.) As appellant argued in the AOB,

this testimony, relying as it did upon speculative mind-reading, was irrelevant, unreliable, and inadmissible for multiple reasons. (AOB 82-92.) Appellant has also argued that, in light of the particular facts of this case and the context in which the error occurred, a reversal of the judgment is required as to Counts 6 and 7. (AOB 92-95.)

Respondent disagrees that error occurred or that any error was prejudicial. (RB 7-29.) Respondent is wrong on both accounts.

A. The Merits

As the AOB pointed out, Detective Nye's challenged testimony presented two propositions: (1) that, when a gang crime occurs at a café or restaurant, those persons who claim to have been in the bathroom are giving an "excuse" — i.e., are not telling the truth — and (2) that the reason for giving the excuse is that they do not want to cooperate with the police. Respondent appears to contend that neither proposition was "an opinion" but merely was an objective description of Nye's "personal experience investigating gang crimes." (RB 9.) This is plainly incorrect. Nye's testimony that people were making "common excuses"[6] when they claimed to be in the bathroom — that the people were lying — was manifestly a conclusion drawn by Nye. It was *an opinion* about the veracity of those persons' statements. Similarly, Nye's claim that he knew the *reason* for the "excuses" was also a personal conclusion. It was his *opinion* about those persons' motivations, about what was going on in their minds. These were not objective descriptions of observable facts, as respondent suggests. (Law Revision Commission Comments to Evid. Code, Div. 7 [encompassing Evid. Code, §§ 800-870] ["The word 'opinion' is used [in Div. 7] to include all

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[6] RB 11.

opinions, inferences, conclusions, and other subjective statements made by a witness."].)

It is established that police officers do not "qualify . . . as experts in judging truthfulness," nor are they "qualified to testify about the motivations or cognitive processes of those whose behavior [they] observe[]." (*People v. Sergill* (1982) 138 Cal.App.3d 34, 39; *People v. Robbie* (2001) 92 Cal.App.4th 1075, 1087.) And testimony as to "a generalized tendency of some groups of witnesses to lie, unrelated to the credibility of the specific witnesses in issue," is similarly "irrelevant." (*People v. Johnson* (1993) 19 Cal.App.4th 778, 785.) Although these cases were cited repeatedly in the AOB, respondent does not address them, obviously because they cannot be reconciled with respondent's arguments. (See also *People v. Castaneda* (2011) 51 Cal.4th 1292, 1336 ["'expert's opinion may not be based "on assumptions of fact without evidentiary support, or on speculative or conjectural factors . . . ."'"], quoting *People v. Richardson* (2008) 43 Cal.4th 959, 1008, further internal citations omitted.)

Respondent also asserts that "Nye based his challenged testimony on matters perceived by or personally known to him, or made known to him at or before the hearing." (RB 11.) However, personal conclusions about veracity and motivation do not amount to matters "perceived by or personally known to . . . or made known to" Nye. (See Evid. Code, § 801, subd. (b).) If they did, then nothing would prevent Nye or some future "expert" from getting on the witness stand and opining that, in his or her experience, the most common thing defendants do when they testify — or when they are interrogated by police — is to tell false stories to avoid admitting their guilt.

It is telling that respondent does not offer a single case that would specifically support the admission of Detective Nye's challenged testimony. Indeed, other than citing cases for general propositions that are largely

undisputed, respondent merely cites one decision that distinguishes one of the cases that appellant cited. The AOB quoted *People v. Melton* for its holding that an investigator is not "an expert on judging credibility, or on the truthfulness of persons who provide him with information in the course of investigations." (See *People v. Melton* (1988) 44 Cal.3d 713, 744, quoted at AOB 87, 89.) In its brief, respondent says *People v. Padilla* (1995) 11 Cal.4th 891, 947, "distinguish[ed]" *Melton* (see RB 11-12), but nothing in *Padilla* "distinguished" *Melton* with respect to the language upon which appellant relied, and respondent does not explain its purported distinction further. Thus, the primary case authorities cited by appellant (*Sergill*, *Robbie*, *Johnson*) remain unaddressed by respondent, and the remaining case is not even arguably distinguished on the basis respondent proposes.

Padilla is irrelevant in any event, for it involved the scope of the prosecution's right to examine an officer who had been asked by the defense about a witness' "reputation for being untruthful." (See 11 Cal.4th at p. 947.) That context has nothing to do with the current issue.

Respondent may be implying that there is some difference between an expert opinion about the credibility of "a particular witness's veracity at trial" (RB 11) and an expert opinion about the credibility of persons who do not appear as witnesses at the trial. If this is respondent's point, however, respondent does not explain what the difference would be, and neither *Padilla* nor logic would support it.

Respondent later alludes to the prosecutor's contention below that the "most common excuse" testimony was a response to appellant having elicited from Detective Nye the fact that Trieu Binh ("Temper") Nguyen and Linda Vu had told Nye on the night in question that Trieu Binh had been in the bathroom and that neither had seen the shooting. (RB 12, citing 16 RT 3233-3239.) But a party cannot dispense with the rules of evidence just because

testimony unfavorable to it has been brought out by the other side. The door is not thereby opened to the admission of irrelevant, unreliable, and unduly confusing and misleading evidence.

B. Alleged Forfeiture of Federal Constitutional Claims

Respondent asserts that appellant's federal constitutional claims should be forfeited because they are "being made for the first time in this Court." (RB 10.) However, as this Court has repeatedly held, a constitutional claim is *not* forfeited on appeal when "the new arguments do not invoke facts or legal standards different from those the trial court was asked to apply, but merely assert that the trial court's act or omission, in addition to being wrong for reasons actually presented to that court, had the legal consequence of violating the Constitution." (*People v. Gutierrez* (2009) 45 Cal.4th 789, 809.[7]) Indeed, this principle is set forth in the very cases respondent cites, though respondent does not mention it. (See *People v. Geier* (2007) 41 Cal.4th 555, 610-611; *People v. Halvorsen* (2007) 42 Cal.4th 379, 408 fn. 7.) The principle applies to the constitutional claims at issue here, and respondent does not claim otherwise. (See also, e.g., *People v. Carey* (2007) 41 Cal.4th 109, 126-127 [Evid. Code, § 352 objection preserves constitutional claims on appeal]; *People v. Coddington* (2000) 23 Cal.4th 529, 632 [similar].)

C. Prejudice

By any objective assessment, the prosecution's case against appellant with regard to the killing of Sang Nguyen was a close one: (1) no physical evidence tied appellant to the crime; (2) the lone independent eyewitness —

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[7] Quoting *People v. Carasi* (2008) 44 Cal.4th 1263, 1289 footnote 15 and *People v. Boyer* (2006) 38 Cal.4th 412, 441 footnote 17. Accord, e.g., *People v. Verdugo* (2010) 50 Cal.4th 263, 277 footnote 5; *People v. Loker* (2008) 44 Cal.4th 691, 704 footnote 7; *People v. Lewis* (2006) 39 Cal.4th 970, 990 footnote 5.

the only one with no ties to Sang, the Cheap Boys, or any other gang and who had no reason to favor the defense — identified someone other than appellant as the shooter, described the shooter as considerably taller than appellant, and failed to identify appellant either in a photo lineup or in court; (3) on the night of Sang's death, the other witnesses — Sang's dinner companions — not only denied seeing the shooting, but each independently told the police that Trieu Binh ("Temper") Nguyen was in the restaurant's bathroom at the time (and all but one placed Binh Tran there, as well); and (4) these other witnesses started changing their stories only after Trieu Binh had had weekly phone conversations with Khoi Huynh, one of the Cheap Boys' "shot callers." (See AOB § I.1.C, pp. 92-93.)

The case was, obviously, a very close one, and with the inadmissible testimony from Detective Nye going directly to the key question of the credibility of the dinner companion eyewitnesses, the question of prejudice should be easy to resolve, under both the federal and state constitutions. (*Chapman v. California* (1967) 386 U.S. 18; *People v. Watson* (1956) 46 Cal.2d 818. See also, e.g., *People v. Gonzales* (1967) 66 Cal.2d 482, 494 [in close case, "any substantial error tending to discredit the defense, or to corroborate the prosecution, must be considered as prejudicial."]; *People v. Lawson* (2005) 131 Cal.App.4th 1242, 1249 [similar].)

Respondent, of course, argues that any error in allowing the admission of Detective Nye's challenged testimony was harmless. Respondent does not — and cannot — allege that the evidence against appellant was overwhelming or that the error was irrelevant to the central issue of witness credibility. Rather, the claim is that "appellant cannot show that different verdicts would have been reasonably probable had the trial court excluded the challenged testimony." (RB 13. See also RB 29 [similar].) Respondent supports this claim with a lengthy discussion of the evidence, a discussion that

is not only improperly prosecution-favorable but is also frequently inaccurate. (RB 13-29.)

1. Respondent's Approach to the Question of Prejudice Is Wrong at a Fundamental Level

First, respondent's approach to the question of prejudice is fundamentally defective. Respondent discusses the evidence exactly as if the question were whether there is substantial evidence to support the convictions, when actually the questions are whether there is "a *reasonable chance*, more than an *abstract possibility*" that a different outcome would have occurred in the absence of the error[8] and whether respondent can "prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained."[9]

Using its prosecution-centric approach, respondent offers excuses or explanations in an attempt to brush away evidence that is defense-favorable or prosecution-adverse, and it deals with contested evidence as if this Court were required to adopt the version most favorable to the prosecution. Thus, for example, respondent downplays the testimony of Charles Hall (the witness with no ties to the Cheap Boys) by asserting that "[o]ne can understand why" Hall made no in-court identification of appellant. (RB 18.) And respondent simply proclaims, ipse dixit, that the other witnesses — the dinner companion witnesses — were "lying" in their original statements to the police and "gave credible explanations" at trial for having done so (RB 19, 21, 23, 24, 29). Similarly, when addressing the fact that Trieu Binh ("Temper") Nguyen gave different versions of events to the police even after he changed his story about being in the bathroom, respondent offers, in part, the explanation that "Trieu's

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[8] *College Hospital v. Superior Court* (1994) 6 Cal.4th 704, 715, original emphases.

[9] *Chapman v. California*, 386 U.S. at page 24.

first language was Vietnamese" and the detective was speaking to him in English. (RB 25.)

This one-sided approach to the question of prejudice permeates respondent's discussion of the issue, but it is fundamentally the wrong approach. "There is, as former Chief Justice Roger Traynor has observed, 'a striking difference between appellate review to determine whether an error affected a judgment and the usual appellate review to determine whether there is substantial evidence to support a judgment.'" (*People v. Arcega* (1982) 32 Cal.3d 504, 524, quoting Traynor, The Riddle of Harmless Error 26-27 (1970).) "In appraising the prejudicial effect of trial court error, an appellate court does not halt on the rim of substantial evidence or ignore reasonable inferences favoring the appellant." (*People v. Butts* (1965) 236 Cal.App.2d 817, 832.) Rather, the reviewing court looks to the whole record, including defense-favorable evidence and including problems with the prosecution's witnesses. (*People v. Russell* (2006) 144 Cal.App.4th 1415, 1433 [*Watson* prejudice found because evidence not "so overwhelming that a rational jury could not reach a contrary result"]; *People v. Randle* (2005) 35 Cal.4th 987, 1004 [reversal where "the evidence was . . . susceptible of the interpretation" favoring the defense]; *People v. Giardino* (2000) 82 Cal.App.4th 454, 467 [*Watson* prejudice found "because the evidence supports conflicting conclusions"]; *People v. Arcega,* 32 Cal.3d at p. 524 [reversal called for where evidence "is open to the interpretation" that defendant not guilty of charged offense].)

Essentially the same approach is taken when, as here, there is federal constitutional error. "The question is whether, on the whole record . . . the error . . . [is] harmless beyond a reasonable doubt." (*Rose v. Clark* (1986) 478 U.S. 570, 583, internal quotation marks omitted.) Two Supreme Court decisions are particularly illustrative: *Neder v. United States* (1999) 527 U.S.

1 and *Delaware v. Van Arsdall* (1986) 475 U.S. 673. In *Neder*, the High Court held that an error could be found harmless under *Chapman* if the matter to which the error pertained was "uncontested and supported by overwhelming evidence, such that the jury verdict would have been the same absent the error." (*Neder*, 527 U.S. at p. 17; see also *id.* at p. 19 [asking "whether the record contains evidence that could rationally lead to a contrary finding with respect to" the matter in question].) Similarly, in *Van Arsdall*, which involved the improper denial of a defendant's opportunity to impeach a witness, the Court held that "[t]he correct inquiry is whether, *assuming that the damaging potential of the cross-examination were fully realized*, a reviewing court might nonetheless say that the error was harmless beyond a reasonable doubt." (475 U.S. at p. 684.)

Obviously, since the correct prejudice inquiry does "not . . . ignore reasonable inferences favoring the appellant" but requires an assessment of whether the prosecution's case was "so overwhelming that a rational jury could not reach a contrary result," whether "the evidence supports conflicting conclusions" or whether there was "evidence that could rationally lead to a contrary finding" to the one sought by the prosecution, an appellate court cannot assess prejudice by looking solely to prosecution-favorable evidence in the record or drawing only prosecution-favorable inferences.

Indeed, respondent's approach to the evidentiary record and to the credibility questions posed by that record invites a violation of appellant's Sixth and Fourteenth Amendment rights to due process, to trial by jury trial, and to present a defense. For example, to counter the defense contention that the changed dinner companion stories were the product of a Cheap Boy effort to frame appellant, respondent states as fact that Trieu Binh Nguyen and Linda Vu, the two dinner companions who at trial identified appellant as the shooter, were no long members of the Cheap Boys or the Cheap Boys affiliated female

gang on the date of the shooting. (RB 14, 17, 20 [Trieu Binh Nguyen]; RB 14, 17-18 [Linda Vu].) As support for this repeated factual assertion, respondent simply cites the witnesses' own testimony and/or pretrial statements claiming to have withdrawn from the gang prior to that date. (*Ibid.*) But, even ignoring the record-specific reasons for doubting these gang-withdrawal claims (see Subsection 2.c., pp. 22 et seq., *post*), the jury was not obligated to believe either witness's claim to have left the gang. (See, e.g., *Beck Dev. Co. v. Southern Pac. Transp.* (1996) 44 Cal.App.4th 1160, 1204 ["so long as the trier of fact does not act arbitrarily and has a rational ground for doing so, it may reject the testimony of a witness even though the witness is uncontradicted."]. See also, e.g., *People v. Hoang* (2006) 145 Cal.App.4th 264 275-276 ["The jury was entitled to disbelieve defendant's testimony that he did not know the individuals in the other car".); *People v. Johnson* (1980) 26 Cal.3d 557, 579 [similar].)

Nor can this Court make such credibility determinations as a basis for finding that the erroneous admission of Detective Nye's opinion testimony did not improperly influence the jury's verdict. To do so would be to usurp the role of the jury and deprive appellant of his right to have a jury make credibility determinations and to accept or reject appellant's defense on the basis of properly admitted evidence. It is well established that appellant has a "Sixth Amendment right to have essential facts found by a jury beyond a reasonable doubt." (*Dillon v. United States* (2010) 130 S.Ct. 2683, 2692. See also, e.g., *Apprendi v. New Jersey* (2000) 530 U.S. 466, 483-484 [discussing "the [constitutional] requirements of trying to a jury all facts necessary to constitute a statutory offense, and proving those facts beyond reasonable doubt"]; *People v. Melton,* 44 Cal.3d at p. 735 [jury has the "exclusive function as the arbiter of questions of fact and the credibility of witnesses"].) The credibility of key witnesses such as those under discussion here was

clearly an "essential fact." Their credibility is thus a fact entrusted to the jury by constitutional rights to a jury and to due process. (See also *Cavazos v. Smith* (2011) ___ U.S. ___, 132 S.Ct. 2, 4 ["it is the responsibility of the jury — not the court — to decide what conclusions should be drawn from evidence admitted at trial."]; *Blakely v. Washington* (2004) 542 U.S. 296, 308 ["the Sixth Amendment . . . limits judicial power . . . to the extent that the claimed judicial power infringes on the province of the jury."]; *Pirtle v. Morgan* (9th Cir. 2002) 313 F.3d 1160, 1174 ["weighing of evidence and credibility determination is for the jury."]; *Barker v. Yukins* (6th Cir. 1999) 199 F.3d 867, 874-875 [Sixth Amendment "prohibit[s] judges from weighing evidence and making credibility determinations, leaving these functions for the jury. . . . It is neither the proper role for a state supreme court, nor for this Court, to stand in the place of the jury, weighing competing evidence and deciding that some evidence is more believable than others."]; *United States v. United States Gypsum* (1978) 438 U.S. 422, 446.)

Thus, respondent's lengthy one-sided and cherry-picked recital of the facts that a jury could (perhaps) have found is largely irrelevant to the task of evaluating the prejudicial impact of the error at issue here.

However, because respondent's discourse is potentially misleading and may divert the reader from the actual closeness of the case, appellant in the remaining subsections of his Claim 1 Reply will address many of the errors, omissions, and mischaracterizations that appear in Respondent's Brief and that prevent that brief from being a fair portrayal of the record with regard to the question of prejudice.

Because of the unusual length of respondent's argument, petitioner's reply must, unfortunately, be unusually lengthy as well. The length of the two sides' presentations, however, should not obscure the telling fact that respondent never even hints that the error here was harmless under a correct

approach to the prejudice issue. On this record, no such contention would be remotely tenable. This was a close case by any reasonable assessment, and the error went directly and pointedly to the key question of credibility. The error cannot be found to be harmless under any arguably proper standard.

2. Respondent's Discussion of the Factual Record Is Flawed in Multiple Ways

Respondent's prejudice argument is suffused with problems. Some are the result of respondent's fundamentally flawed approach. Some are not.

a. Charles Hall, the Lone Independent Witness

Charles Hall, the only witness with no ties to Sang Nguyen and the Cheap Boys, did not identify appellant in court or in a photographic lineup and in fact had selected someone else's picture from the photo lineup and gave a description of the perpetrator that was inconsistent with appellant. Respondent offers several reasons for downplaying the significance of Hall's evidence, all of which are wanting.

1. As for the difference between Mr. Hall's estimate of the perpetrator's height (5 feet, 10 inches) and appellant's height (5 feet, 2 inches), respondent says Hall "was just guessing about the gunman's height and did not know how much shorter the gunman was than himself." (RB 18, citing 11 RT 2100.) Respondent mischaracterizes Hall's testimony. The colloquy in question was as follows:

> "Q. You indicated he was Asian, in his early to mid twenties. Do you recall about how tall this person was?
>
> "A. My height or shorter.
>
> "Q. How tall are you?
>
> "A. Five ten.
>
> "Q. He was five ten or maybe a little shorter?

"A. Yeah.

"Q. About how much shorter?

"A. Hard to say.

"Q. Would it be an inch or two?

"A. Maybe.

"Q. *You're guessing now*, right?

"A. Yeah."

(11 RT 2100.)

As the above quotation shows, Hall was not guessing when he gave the 5-feet, 10-inches testimony. He was only guessing "now," i.e., when he was saying that "maybe" the perpetrator was an inch or two shorter than 5 feet, 10 inches. Hall was not "guessing about the gunman's height" except to this limited — and largely irrelevant — extent.

2. As for the photographic lineup in which Hall selected the photograph of one Bao Quoc Tran ten days after the shooting, respondent points to Hall's testimony that he was "sure that [he] said that [he was] not certain" and that he thought the photo "looked kind of like" the shooter. (RB 18; see 11 RT 2101, 2103.) Respondent fails to mention that, according to the officer who showed him the lineup, Hall pointed to Bao's photograph after a "pretty brief" time and said, "Looks like the guy who did the shooting." (23 RT 4460.) Hall made no additional statement about his identification but did put his signature above Bao's image and drew a line from the signature to the image. (23 RT 4460-4461, 4462; Exh. RR.) The jury was obviously entitled to find that the officer's testimony was the more accurate characterization of the lineup identification process.

3. When, four months after the shooting, Hall was shown a photographic lineup that contained appellant's photograph, Hall did not select anyone as resembling the shooter but stated that he thought he could recognize the shooter from a side profile because he had only gotten a side profile view of the shooter. (23 RT 4461-4462.) Respondent emphasizes the "side profile" statement (RB 19) but fails to note that the police never attempted to show Hall a side-profile photograph thereafter, nor did they have him view appellant (or anyone else) in a live lineup, where Hall could have seen a profile in the flesh. And, it bears noting, the absence of a profile image had not prevented Hall from selecting Bao Quoc Tran's photograph in the first photographic lineup.

4. In court, Hall did not recognize anyone as the shooter (11 RT 2103), a fact that respondent attempts to dismiss by suggesting that we "should understand" that Hall "had never seen the gunman before the shooting" three years earlier. (RB 18.) However, given the considerably taller shooter that Hall had described, given Hall's identification of Bao Quoc Tran in the first photo lineup, and given Hall's failure to select appellant from the later photo lineup, a jury could readily have concluded that a far more plausible explanation for Hall's failure to identify appellant in court was that appellant did not resemble the shooter Hall had seen. And, it bears noting, the prosecution again made no attempt to have Hall look at appellant's profile.

b. <u>The Dinner Companion Witnesses and Respondent's Claim That They Gave "Credible Explanations" for "Lying" to the Police on the Night of the Shooting</u>

In addition to the testimony of Mr. Hall, the other difficult problem for respondent's harmlessness argument is that all four of the dinner-companion witnesses independently told police on the night in question that none of them had seen the shooting and that Trieu Binh Nguyen had been in the bathroom

at the time. Respondent's primary way of dealing with this problem is to contend that "[a]ppellant overstates the degree to which the police statements given by Sang's dinner companions undermined the prosecution's case." (RB 19.) This assertion is, on its face, difficult to credit. Respondent admits, for example, that Trieu Binh told police "he had been inside the bathroom at the time of the shooting." (*Ibid.*) Such a statement, if credited, would entirely undermine Trieu Binh's trial testimony that he was outside the restaurant and saw the shooting and the shooter. What respondent appears to be contending here is that the dinner companions were "lying" to police on the night of the shooting and that they "gave credible explanations" at trial for having done so. (RB 24.)

In the ensuing subsections, appellant will address the supposedly "credible explanations" that respondent relies on as to the various individual dinner companions. Now, appellant simply emphasizes that all of respondent's "credible explanations" — and, indeed, virtually all of respondent's harmless error arguments, here and in subsequent claims — suffer from the overriding flaw we have pointed out. They depend upon this Court taking a one-sided, sufficiency-of-the-evidence-type approach to the question of prejudice, an approach that is inconsistent with the Sixth and Fourteenth Amendments and with established state and federal law.

However, as we will now show, this Court cannot find give dispositive weight to the "credible explanations" under any reasonable approach.

c. Dinner Companion Trieu Binh ("Temper") Nguyen

Trieu Binh ("Temper") Nguyen was the first of the dinner-companion witnesses to change his story, and he was one of the two who came to identify appellant as the shooter.

1. Respondent states that Trieu Binh "was no longer a Cheap Boy gang member on February 5, 1995," the night of Sang Nguyen's killing. (RB 14.) Trieu Binh did so testify, effectively claiming that he had stopped being a Cheap Boy member just before that date (7 RT 1259, 1270), but the jury had ample reason to disbelieve his testimony. Not only did other witnesses describe him as a Cheap Boy even as of the time of trial (10 RT 1973 [Khoi Huynh], 11 RT 2198 [Linda Vu]), but in the months following the shooting, Trieu Binh discussed gang affairs in weekly phone calls with Cheap Boys "shotcaller" and "core member" Khoi Huynh (7 RT 1262-1263 [Trieu Binh], 17 RT 3316 [Det. Nye]). And when Trieu Binh first went to the police with his new story about having witnessed the shooting, Detective Nye asked him if he was coming forward "because you're a gang member," to which Trieu Binh responded, "Right."[10] (7 RT 1339-1340.)

2. Respondent argues that Trieu Binh "gave credible explanations" for his initial statements to the police, in which he had said he had not seen the shooting. (RB 24.) What were those "credible explanations"? According to respondent, they were Trieu Binh's testimonial claim that he had been "confused" at that time because "he was caught between the alternatives of (1) obeying gang subculture code by refusing to become a 'rat' and (2) helping his friend." (RB 24, 19-20, citing 7 RT 1346-1347.) Respondent is parroting the prosecutor's position below, but no jury was required to accept it, especially since it was not Trieu Binh's first or only "explanation" for his earlier statements. Under these circumstances, it is extremely improbable that any jury would have accepted the "explanation" relied on by

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[10] Even the prosecutor referred to the Cheap Boys as "your own gang" and "fellow gang members" when she questioned Trieu Binh. (7 RT 1348.) In addition, Trieu Binh had told Detective Nye on the night of the shooting that he, Binh Tran, and Sang Nguyen were all Cheap Boys. (1stSupp.CT 154.)

respondent if the explanation had not been bolstered by something from far more credible-seeming source, namely, Detective Nye's "most common excuse" testimony.

On the night of the shooting, Trieu Binh told the police that he had been walking back from the bathroom at the time the shots were fired and had not seen the shooting. (7 RT 1227-1228, 1249.) "I don't know why or who or what caused it," he told them. "I just don't know." (7 RT 1255.) At trial, Trieu Binh maintained that this version was a lie, but, he testified, his "lie" was not due to a fear of telling them the truth. (7 RT 1257.) To the contrary, Trieu Binh was affirmatively "interested in getting the person who shot Sang." (7 RT 1255.)

Trieu Binh's initial explanation for lying was, "I was confused. This happen so fast. I didn't have a chance to think. Depressed." (7 RT 1228.) Thereafter, the prosecutor led Trieu Binh to agree that on the night of the shooting, he was "still within the gang subculture, in other words did not want to rat" (7 RT 1236), but when asked on cross-examination about his statements on the night of the shooting, Trieu Binh's testimony was, first, that he had been "confused" and, then, that he had been "[n]ot confused, but I was — I didn't have a brain to think at that time. I didn't think what to say." (7 RT 1248-1249.) Thereafter, he testified that he *had* been "confused." (7 RT 1250, 1251.) And after that, his testimony was that the "only reason" he lied was that he was "frustrated." (7 RT 1253.) No, "confused *and* frustrated." (7 RT 1254.) No, "frustrated, *not* confused." (7 RT 1255.) He did not want to "rat," but he *was* "interested in getting the person who shot Sang,"and he was not afraid to help the police, nor was he afraid that someone would come looking for him. (7 RT 1255, 1257.)

Thereafter, Trieu Binh testified it took him three or four months — the period of his weekly telephone conversations with Cheap Boys shot-caller

Khoi Huynh — to become "unconfused and unfrustrated" and to tell Detective Nye that the shooter was appellant. (7 RT 1262-1263, 1258.) Then, finally, on the prosecutor's redirect examination, Trieu Binh offered the explanation that he had been "confused" because he was caught between the police and a fear that something might happen to him. (7 RT 1346.)

The bottom line is this: no jury is ever required to accept a witness's "explanations" of his prior inconsistent statements as "credible" — and certainly, an appellate court cannot assume that it would — but the cold record of Trieu Binh's "explanatory" testimony provides ample reasons why appellant's jury — or any reasonable, uncontaminated jury — would not have done so.

Moreover, Trieu Binh himself furnished still more reasons to doubt his credibility: he lied about his membership in the Cheap Boys (see preceding discussion), and he changed his story significantly even after he came forward with his "truthful" claim that he saw appellant do the shooting (see discussion in the subparagraph 3, next).

And when one adds into the mix the indisputable fact that Trieu Binh's initial statement to police that he had been in the bathroom was *corroborated independently by the contemporaneous statements of each of the four other dinner-companion witnesses*, there remains not the remotest support for the argument that, on appeal, this Court can, must, or should conclude that Trieu Binh gave "credible explanations" for "lying" in his initial statements to the police. Nor would the Constitution permit this Court to make such a judgment.

Detective Nye's inadmissible testimony about the "most common excuses" given by persons at the scene of a gang crime committed at a restaurant went directly to this crucial "credible explanations" issue. It cannot be deemed to be harmless.

3. When, in the three-way phone call with Khoi Huynh and Detective Nye, Trieu Binh first came forward with his new story inculpating appellant, he told Nye that he had seen appellant walk inside the restaurant, hit Sang Nguyen, and say "Let's go outside." (7 RT 1318-13.) At trial, Trieu Binh's version was quite different. At trial, Trieu Binh said Sang came outside the restaurant and offered his hand to appellant, who thereupon fired a shot. (7 RT 1219-1220, 1223.)

Respondent seeks to downplay Trieu Binh's former version by asserting that "Trieu's first language was Vietnamese while Nye's was English." (RB 25, citing 7 RT 1343.) This sentence is literally accurate — Vietnamese was Trieu Binh's first language — but this hardly amounts to an undisputed or indisputable explanation for the discrepancy in Trieu Binh's story. Detective Nye did not know what Trieu Binh was going to say in the phone call. It was Trieu Binh himself who voiced the "let's go outside" story. Is respondent suggesting that Trieu Binh's facility with English was so poor at the time of the phone call with Nye that he would say appellant had walked inside the restaurant, hit Sang, and said "Let's go outside" when he actually meant that Sang met appellant outside, offered a handshake, and then was shot? Is respondent suggesting that Trieu Binh's English had improved so greatly by the time of trial that only his trial version is to be credited? If so, where is the evidence for any of this? Neither Trieu Binh nor any other witness made any such claims. Respondent is simply groping around and inventing a wildly prosecution-favorable inference in order to reach the conclusion that the improper admission of Detective Nye's "most common excuse" testimony was harmless. There is no legitimate factual or legal basis on which this Court may do the same.[11]

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[11] And given that it was Trieu Binh who disclosed his new story (continued...)

Respondent also asserts that there was "no real discrepancy" between the account that Trieu Binh gave Nye and the story he told at trial. (RB 25.) According to respondent, there is "no real discrepancy" because Trieu "explained" at trial that at the time he gave each version, he "recalled on both occasions that appellant and his companions had walked up to the front door of the restaurant, rather than through the front door." (RB 25-26, citing 7 RT 1317-1319.) However, Trieu Binh gave no testimony about having the same memory on "both occasions." His testimony was that what he had told Nye in the phone call was wrong, that it "didn't happen like that." (7 RT 1319.) Respondent has again invented a prosecution-favorable "explanation" for Trieu Binh's inconsistency.

Trieu Binh did later seem to claim that when he told Nye that appellant "walked inside the Dong Khanh Restaurant" and told Sang to "go outside," these events actually occurred "outside" the restaurant door (though he thereafter amended this again to say the events took place "right where the door is"). (7 RT 1319-1320, 1322-1323, 1325.) No jury was required to accept any of these versions as true, nor can this Court decide among them. Certainly, a jury was entitled to disbelieve that the shooter said, "Let's go outside" if he and Sang were outside already.

And beyond all this, the "explanation" that respondent has come up with for Trieu Binh's differing stories inculpating appellant fails entirely to account for the disappearance at trial of the punch that Trieu Binh had told Nye that appellant had thrown while inside the restaurant.

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[11](...continued)
during the three-way call, appellant does not understand the relevance of respondent's reference to Nye being an English-speaker.

d. Dinner Companion Linda Vu

Linda Vu was the other dinner-companion witness who eventually identified appellant as the shooter after having initially told the police that Trieu Binh Nguyen had been in the bathroom and that she had not seen the shooting herself. Respondent discusses various aspects of Linda's testimony but never explicitly articulates the reasoning process by which its discussion fits within the federal or state prejudicial-error analysis. As best as appellant can determine, respondent's underlying reasoning must be that the cold record establishes that Linda's trial testimony is so incontestably credit-worthy, and her deficiencies and inconsistencies so credibly explainable, that this Court can tell the testimony did not need to be bolstered by Detective Nye's improperly admitted opinion testimony. The very process of articulating respondent's underlying reasoning shows its fallaciousness. But it is also deficient factually.

1. As indicated, Linda told officers on the night of Sang Nguyen's death that she did not know what had happened outside the restaurant, she did not see the shooting, and she had no idea who shot Sang. (11 RT 2208-2209, 16 RT 3239.) She also said that Trieu Binh Nguyen and Binh Tran were in the bathroom when the shots were fired. (16 RT 3239.) Linda gave the police her word that she was telling the truth, and when she was asked if she was intimidated by gangs, she said she was not, and she started laughing. (11 RT 2209, 2235-2236.) The detective asked Linda if she was willing to tell the truth if she knew it, and she replied, "Yeah, I would if I knew it." (11 RT 2236.)

Respondent essentially contends that the jury must have accepted Linda's trial testimony that she had been lying when she made these statements and that the reason she lied was because "she knew that in the gang subculture it was not good to become an informant" and "she feared

retaliation and feared something would happen to her daughter." (RB 23-24, citing 11 RT 2258-2259, 2223.) However, respondent offers no justification beyond ipse dixit for its contention. And (1) given the inconsistency between Linda's trial claim of having been in fear during the interview and her actual light-heartedness at the time, (2) given Linda's later admission to the police that she had been asked to come forward by "members of the Cheap Boys" — a fact that respondent declines to address (see 17 RT 3321) — and (3) given (again) the fact that Linda's original story placing Trieu Binh Nguyen in the bathroom at the time of the shooting was corroborated by all four other dinner-companion witnesses, few reasonable jurors would have readily credited her trial explanation for her change of story, not without the support of Detective Nye's improperly admitted testimony.

2. As respondent notes, the AOB pointed out that Linda's credibility was also called into question by the facts that (1) her description of the shooter's height and "stocky" build did not fit appellant, (2) she insisted at trial that she had made a positive identification of appellant in a pretrial photo lineup when in fact she had been uncertain, and (3) six months after the shooting, she told police she thought the shooter was a friend of Sang Nguyen from CYA, a male named Chinh. (RB 26, AOB 93 fn. 65.) Respondent claims there are "no significant discrepancies" in the record with respect to these matters (RB 26), but:

- Respondent never ventures any explanation as to how Linda's description can be aligned with appellant.
- Respondent never explains how Linda's claim at trial that she had made a "positive" photographic identification of appellate prior to trial (11 RT 2201) can be squared with the two separate statements she had made at the photo lineup that "I don't know if I picked the right guy" (11 RT 2202, 2204-2205).

- And, as for Linda's explanation for having mentioned the male named Chinh, respondent correctly points out that Linda's claim *at trial* was that, on the night of the shooting, she had initially thought the shooter's name was Chinh but that she "had just been guessing" and that she was told by Trieu Binh Nguyen the same night that the shooter was named Lam. (RB 27.) However, her testimonial claim of "just guessing" was called into doubt by the very specificity of the name she supposedly conjured up — Chinh — and her added detail that Chinh was a friend of Sang Nguyen's from CYA — particularly given that there was a male named Chinh in the Nip Family gang. (17 RT 3240, 3307.) Moreover, a jury's doubts would only have increased because Linda's trial claim that Trieu Binh told her on the night of Sang's death that the shooter's name was Lam was difficult to reconcile with her preliminary hearing testimony that she had gotten the name "Lam" from "rumors." (See 11 RT 2206.) And if indeed, Linda had been told within moments of the shooting that the shooter's name was Lam, why did she even bring up Chinh's name when she was interviewed by Detective Nye six months after the shooting? (17 RT 3240.)

The upshot is that Linda Vu's trial testimony was not so credit-worthy, and her deficiencies and inconsistencies were not so credibly explainable, that this Court can legitimately conclude that appellant's jury did not use Detective Nye's improperly admitted opinion testimony to shore it up.[12]

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[12] Appellant notes in passing that respondent is not particularly accurate in saying that, when appellant testified, he "acknowledged knowing Linda Vu from church (22 RT 4256), seeing her there two or three times (22 RT 4256) and seeing her at church carnivals when they were younger (22 RT (continued...)

e. The Remaining Dinner Companions: Trieu Hai Nguyen, Michelle To, and Amy Pech

Of the three remaining dinner-companion witnesses — Trieu Hai Nguyen, Michelle To, and Amy Pech, all of whom told police on the night of the shooting that Trieu Binh Nguyen was in the bathroom at the time of the shooting — two (Trieu Hai and Michelle) changed their stories at trial and claimed that Trieu Binh was outside at the time. Respondent uses the same approach in discussing these two "new story" witnesses as it did with Trieu Binh Nguyen and Linda Vu. That is, respondent presents their testimony in a light very favorable to the prosecution, thus assuming they had lied to police and that the explanations they offered at trial for having done so were "credible." (RB 21-23, 24.) This approach is no more valid here than it was for the earlier witnesses. Only a few additional points need be made here about respondent's discussion, one as to each of the "new story" witnesses.

One of the most significant facts that indicates that the dinner-companion witnesses were telling the truth on the night of the shooting was that they all independently told the same story about who was in the bathroom. In discussing Trieu Hai Nguyen's testimony, respondent acknowledges Trieu Hai's admission that he "did not have the time to get together with others and plan the lie because the police came so quickly after the shooting to interview them." (RB 21-22.) Respondent seeks to undercut the force of this testimony

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[12](...continued)
4257)." (RB 15.) Appellant never claimed "knowing" Linda, he merely *thought* ("I think") he had seen Linda before, "probably twice, three time" *in total* (and not, as respondent claims, two or three times *at church*). (22 RT 4256.) He believed he had also seen Linda at a church carnival when "she was a kid," but appellant had not gone to the carnival "for a long time." (22 RT 4257.) In any event, Linda's version of her prior contacts with appellant were quite different. (7 RT 2158-2159.)

by stating that, according to Trieu Hai, "he and his brother [Trieu Binh] were interviewed by the police side by side," from which respondent infers that Trieu Binh "could therefore hear what [Trieu Hai] was saying when he told police that his brother and Binh Tran were in the bathroom when the gunshots were fired." (RB 22.) There are at least four flaws in respondent's suggested inference.

First, a jury was entitled to doubt that experienced police investigators would be so incompetent as to interview witnesses side by side, particularly in an investigation of a gang shooting.

Second, as this Court has recently made clear, "That an event *could* have happened, however, does not by itself support a deduction or inference it did happen." (*People v. Moore* (2011) 51 Cal.4th 386, 406, original emphasis.) Thus, the fact that Trieu Binh *could* have heard Trieu Hai telling the police who was in the bathroom does not support respondent's inference that Trieu Binh *did* hear Trieu Hai's statement. Moreover, there is nothing in the record to even hint that Trieu Hai made his statement as to who was in the bathroom before Trieu Binh made his similar statement.

Third, Trieu Binh himself never claimed to have heard what Trieu Hai told the police or to have followed his younger brother's lead.

And finally, on top of all these problems, respondent cannot explain how the other dinner companion witnesses — none of whom was alleged to have been interviewed within earshot of Trieu Hai or each other — could have come up with the same story, placing the exact same two people — and only those two people, out of the half dozen of adults at the dinner table — in the bathroom at the time of the shooting.

Thus, respondent's effort to weaken the force of the mutually corroborating statements from the dinner-companion witnesses fails for

multiple reasons even if it were a valid appellate approach to the prejudice analysis, which it isn't.

As for Michelle To's testimony, respondent seeks to bolster her credibility by pointing to her claim that she never discussed her testimony with her boyfriend Trieu Binh. (RB 23. See 19 RT 3584-3586.) But Michelle also claimed that she did "not really" see Trieu Binh on a regular basis after the shooting in 1995. (19 RT 3585.) Her claim was that she could not estimate how often that she saw him in 1995, and she thought she saw him roughly once a week in 1996, and even less in 1997. (19 RT 3596-3597.) It turned out, however, that she and Trieu Binh were actually married for most of 1997 and were in each other's company on a daily basis during that time. (19 RT 3604-3605.) These deceptions by Michelle would have caused any reasonable jury to harbor strong doubts about her claim that she did not discuss her testimony with Trieu Binh.

f. <u>The Dinner Companions: Other Problems</u>

Respondent's efforts to infuse dispositive credibility into the dinner companion witnesses' new stories are primarily based upon the testimony each witness gave to "explain" his or her own new story in isolation. But respondent also needs to find "credible explanations" for contradictions *between* the witnesses' new stories. The most salient of these is that Linda Vu's new story contradicted Trieu Binh's new story by placing Trieu Binh inside the jammed restaurant immediately after the shooting and by attributing to him the statement that he merely "thought" Sang had been shot. (11 RT 2141, 2176, 2242-2243.)

Respondent asserts that Linda's testimony was "ambiguous and viewed in its proper context, did not contradict Trieu Binh Nguyen's testimony." (RB 27.) But Linda testified at least six times that Trieu Binh, who was by the

cash register, said he "thinks" or "thought" Sang had been shot. (11 RT 2176, 2178, 2242-2243.) There was nothing "ambiguous" or "contextual" about this testimony.

Respondent points to statements made by Linda on re-direct examination, in which she claimed that after the shooting, Trieu Binh told her that he had seen the shooting and that the shooter's name was Lam. (RB 28.) Respondent apparent position is that this re-direct-examination testimony created an "ambiguity" or a "context" with respect to Linda's earlier claims that Trieu Binh told her he "thought" Sang had been shot and that in light of this "ambiguity" or "context," Linda's re-direct-examination testimony became so strong and unassailable as to overcome any prejudice from the improper admission of Detective Nye's testimony. If this is respondent's contention, it is practically self-defeating. Inconsistency in a prosecution witness's testimony is a bedrock credibility issue, one for the jury to decide. It is not an issue that an appellate court can or may resolve. And normally, inconsistency is thought to *detract* from a witness's credibility. It surely cannot be used to find an error harmless under a proper prejudice analysis.[13]

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[13] There were also discrepancies between Linda Vu and Trieu Binh Nguyen as to how the shooting that they supposedly witnessed took place. According to Trieu Binh, the assailant walked "pretty aggressively" toward the restaurant and, when Sang Nguyen emerged and extended his hand, shot him in the stomach. (7 RT 1214-1216, 1220, 1223, 1225.) But according to Linda Vu, the assailant looked through the restaurant's window and, when Sang emerged, the assailant put him in a headlock. (11 RT 2123, 2133.)

Appellant notes that respondent appears to misunderstand the record when it claims that Linda testified that Trieu Binh told her the shooter's name "right after the shooting." (RB 28.) Linda's testimony was that Trieu Binh told her this "after the shooting, *when I ran back in* . . . ." (11 RT 2223.) Linda could not have run "back in" until after she had gone outside, seen Sang Nguyen lying on the ground, and stayed with him until help arrived in about

(continued...)

3. Conclusion

This is not a record from which this Court could reasonably reach the conclusion that, despite the error in the admission of Detective Nye's "most common excuse" testimony, appellant's convictions can be affirmed under the state or federal tests. The case against appellant was a very close one by any reasonable assessment, and the error went straight to the crucial question of the credibility of the key dinner-companion witnesses. Respondent is able to argue for a finding of harmlessness only by taking a fundamentally incorrect approach to the entire prejudice question and by portraying the record in a one-sided and inaccurate manner. A reversal of Counts 6 and 7 is called for under any standard.

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[13](...continued)
two minutes. (11 RT 2141.) The fact that Trieu Binh was inside at this later time is more consistent with him having been in the bathroom at the time of the shooting than with him being outside. It also bears noting that Trieu Binh himself never testified he gave Linda the name of the shooter that night, or at any other time. Thus, the credibility of Linda's claim in this regard was itself very much in doubt.

2. APPELLANT WAS UNCONSTITUTIONALLY BARRED FROM INTRODUCING EVIDENCE THAT THE CHEAP BOYS GANG HAD A PLAN, MOTIVE, AND/OR OPPORTUNITY TO FRAME APPELLANT

In the AOB, appellant has argued that the trial court erroneously precluded or significantly curtailed the defense's efforts to show that the Cheap Boys had the motive and opportunity to frame appellant. The court did this (1) by precluding the defense from showing, through Cheap Boy Tin Duc Phan, that the Cheap Boys had a specific motivation to engage in "ratting retaliation" because they believed that Ky Nguyen, a Nip Family member, was "ratting" on a Cheap Boy (Lap Nguyen) and (2) by excluding evidence that Linda Vu, Khoi Huynh, and other Cheap Boys or associates had been found at a Cheap Boys "crash pad" in January 1995. (AOB 96-111.)

Respondent seeks to defend both rulings (RB 29-50), but its contentions are meritless.

A. The Exclusion Of Evidence From Tin Duc Phan

The trial court ruled that appellant could not inquire into Tin Duc Phan's knowledge or beliefs about Ky Nguyen because the defense had committed a discovery violation. Specifically, the trial court relied upon the fact that the defense investigator (Daniel Watkins) had not "talk[ed] to [Tin] about that question" and thus had not put Tin's evidence on the point into the report that had been turned over to the prosecution. (20 RT 3842-3843.) As the court explained,"I think that you've had adequate time to explore all the parameters that this witness can give to you. And if you don't have it in a statement that you've given to opposing counsel during your interviews, I'm not going to permit counsel to pursue that. Especially when you don't know what the answer is going to be." (20 RT 3843-3844.)

Appellant has pointed out that the trial court erred both in finding that a discovery violation had occurred and in precluding Tin's testimony as a sanction for the purported discovery violation. (AOB 100-105.) Respondent offers only a minimal defense against these two points. (See Subsection 3, pp. 46 et seq., *post.*) Instead, its main contentions are two-fold. First, it claims that the trial court had an entirely different reason for its ruling. According to respondent, the trial court based its ruling, not on a supposed discovery violation but on defense counsel's alleged violation of a purported agreement to limit his questioning of Tin Phan. Second, respondent offers a justification for the exclusion of evidence that the trial court did not rely on at all, namely, that the trial court "could . . . have acted within its discretion by excluding the proposed inquiry under Evidence Code section 352." Neither contention has any arguable merit. (Subsections 1 & 2, pp. 40 et seq., *post.*)

1. A Purported "Agreement"

Respondent's primary argument is that the proffered testimony was excluded because defense counsel had "a previous agreement with the prosecutor" to limit his direct examination of Tin Phan to a particular paragraph in defense investigator Watkins' report of his interview with Tin. (RB 30. See also RB 30-31, 32, 39-40.) This argument is incorrect on more than one level.

First of all, there was no agreement as to the matter here at issue. In the course of discussing her objections, the prosecutor read the judge two different parts of Watkins' report, the first having to do with statements Tin had made to Watkins about why Khoi Huynh had been shot and the second being the part that Respondent's Brief quotes, dealing with Tin's statements about "ratting" retaliation. (See 20 RT 3840, compare lines 2-6 with 17-26. See RB 31.) As the trial court found, it was only "the first part" that the prosecutor had objected to. (29 RT 3841.) Defense counsel himself stated he

merely agreed he would "not talk[] about Khoi Huynh being shot. That's what I agreed to [and] I wasn't getting there." (20 RT 3841. See also 20 RT 3834 [defense counsel distinguishes between the part of the report that he "wasn't going to ask" about and the part dealing with "Ky Nguyen Nip Family is ratting on Cheap Boy in a separate incident."].)

Given this state of the record, the trial court drew the unavoidable conclusion that "there was *not* an agreement as to what was permissible and what was not." (20 RT 3841.) Respondent conveniently omits any mention of the court's statement, although respondent does summarize what the prosecutor and defense counsel said immediately before and immediately after it. (RB 31-32.)

In short, then, the foundational premise for respondent's "agreement" contention is wrong. There was "not an agreement" of any sort with regard to the matter here at issue. (20 RT 3841.) This flaw disposes of respondent's "agreement" contention by itself.

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But even if defense counsel had made the agreement that respondent has posited, that would not aid respondent. Respondent does not cite a single authority to support the notion that an informal agreement of the sort that respondent hypothesizes here can *ever* be made binding on the defense, let alone under the circumstances here at issue. For here, not only was there no consideration for the "agreement," but just before Tin Phan was to take the stand, the prosecution interviewed him and learned he was "going to go sideways" with respect to the ratting-retaliation statements he had made to investigator Watkins. (20 RT 3828.) And indeed, when he testified, Tin did "go sideways." He first claimed he had no recollection about having told Watkins about the Cheap Boys' plan for ratting retaliation against appellant

(20 RT 3835), and then, on cross-examination, he denied any such plan had been formulated (20 RT 3836-3838).

Boiled down to its essence, then, respondent's contention is that by (supposedly) agreeing to limit its inquiry of Tin Duc Phan to what Tin told the defense investigator about ratting retaliation, the defense thereby precluded itself from impeaching Tin when he reversed himself on this very subject at trial. That would be an absurd agreement for any defense counsel to enter into, and there is not the slightest hint in the record that appellant's counsel did so here. It would also be an equally absurd proposition of law for the courts to agree with, because the truth-seeking function of a trial would be seriously undermined if a party is prevented from impeaching a witness who comes up with a new story for the first time at trial. Thus, it is not surprising that respondent cannot cite anything whatsoever that suggests that any "agreement" can have this effect, let alone an informal, consideration-free "agreement" such as respondent claims the defense entered into here.

With Tin's testimony precluding the defense from proving the "ratting retaliation" plan directly from the mouth of Cheap Boy Tin Duc Phan at trial, the defense was entitled to show the plan's existence circumstantially, by showing that Tin harbored the belief that Nip Family member Ky Nguyen had been "ratting" on Cheap Boy Lap Nguyen, from which the inference could reasonably be drawn that other Cheap Boys harbored that belief as well, thus creating a specific motive for the Cheap Boys to frame a Nip Family member via "ratting retaliation." If there was an agreement by defense counsel with respect to this subject area at all (and there was not), it did not encompass a prohibition against impeaching Tin when he went "sideways" at trial. Neither the facts nor the law lend any support to respondent's contention to the contrary.

2. Trial Court "Could Have Acted Within its Discretion by Excluding the Evidence"

Respondent's also contends that the trial court's ruling below should be upheld because the "trial court could . . . have acted within its discretion by excluding the proposed inquiry under Evidence Code section 352, since any probative value in the inquiry was substantially outweighed by the danger that it would confuse the issues, confuse the jury and consume an undue amount of time." (RB 34-35.) According to respondent, the excluded evidence "was only marginally relevant and highly speculative." (RB 34.) Respondent is wrong on all scores.

a. Respondent's Theory of Exclusion Cannot Be Raised for the First Time on Appeal

The first fatal defect in respondent's contention is that, as respondent tacitly admits, the trial court did not rely the principles of Evidence Code section 352, nor did it mention them. Its ruling was entirely based on its belief that the defense had violated a discovery rule.

Ordinarily, "[i]f the court's ruling or decision is right upon any theory of the law applicable to the case, it must be sustained regardless of the considerations which may have moved the trial court to its conclusion" (*People v. Mirenda* (2009) 174 Cal.App.4th 1313, 1330), but this general rule has exceptions, two of which apply to respondent's section 352 contention here.

First: "Although there is a principle of appellate review that a ruling, if correct in law, will not be disturbed on appeal merely because it was based upon a wrong reason if it was right upon any theory of law applicable to the case, that principle is inapplicable where the theory not advanced in the trial court and on which the correctness of the ruling depends involves controverted questions of fact or mixed questions of law and fact." (*Cramer*

v. Morrison (1979) 88 Cal.App.3d 873, 887, citations omitted.) "A new theory may be advanced for the first time on appeal only where it involves a legal question determinable from facts which are not only uncontroverted in the record but could not be altered by the presentation of additional evidence." (*Ibid.*, internal quotation marks omitted.)

Here in the present case, if the issue had been raised of whether the probative value of the excluded inquiry was substantially outweighed by the danger that it would "confuse the issues, confuse the jury and consume an undue amount of time" (see RB 35), appellant would have had the opportunity to address whatever concerns the trial court might have had. He would have had the opportunity to bolster any shortcomings the court might have perceived in the probative value of the evidence, and/or he could have taken steps to ameliorate any confusion or undue consumption of time that the trial court might have been worried about. However, because the section 352 justification was not raised below, appellant had no reason or opportunity to address these matters. Thus, under the principles discussed in *Cramer v. Morrison*, that justification cannot be raised now. To permit respondent to do so would be manifestly unfair. (See, e.g., *People v. Zamora* (1980) 28 Cal.3d 88, 97 fn. 4. See also, e.g., *People v. Yeoman* (2003) 31 Cal.4th 93, 118 & fn. 3; *People v. Hill* (1974) 37 Cal.3d 491, 498 fn. 5; *Giordenello v. United States* (1958) 357 U.S. 480, 488.)

Second: There is an additional, somewhat overlapping exception to the general rule regarding new theories on appeal. Because respondent is invoking section 352, "we are dealing not with a pure question of law but with the exercise of a trial court's discretion. It would be incongruous for an appellate court, reviewing such order, to rely on reasons not cited by the trial court. Otherwise, we might uphold a discretionary order on grounds never

considered by, or, worse yet, rejected by the trial court." (*People v. Bracey* (1994) 21 Cal.App.4th 1532, 1542.)

Indeed, when, as here, the newly proposed theory of admissibility involves a discretionary weighing that the trial court did not engage in, it would be unjust to invoke the general rule, because, as we have pointed out, it would effectively deprive the proponent of the opportunity he would have had at trial to either have the trial court exercise its discretion *in his favor* or to refine his presentation so as to meet whatever concerns the trial court might have had. Allowing section 352 to be invoked on appeal would be to create, in effect, a conclusive presumption that the trial court would necessarily have exercised its discretion against the defense.[14]

b. Respondent's Section 352 Theory of Exclusion Fails on Its Merits

As just shown, respondent cannot invoke Evidence Code section 352 for the first time on appeal, but even if it could, the section would not justify the exclusion of the evidence now at issue.

Evidence Code section 352 allows a trial court to exclude evidence "if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, or confusing the issues, or of misleading the jury." Although respondent mentions the full language of section 352 (RB 34-35), it never offers any argument that the admission of the excluded Tin Duc Phan evidence would "necessitate undue consumption of

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[14] Arguably, a section 352 theory might properly be raised for the first time on appeal if, no matter what elaboration or refinement the defense might conceivably have offered below, there could have been no reasonable exercise of discretion in favor of admitting the excluded evidence. Respondent, however, never comes close to making such an argument, nor would such an argument be tenable, constitutionally or otherwise, under the facts of this case.

time or create substantial danger of undue prejudice, or confusing the issues, or of misleading the jury." Instead, respondent's sole contention is that the evidence was "only marginally relevant and highly speculative." (RB 34.) Even this limited argument fails to hold water.

The relevance of the precluded questioning of Tin Phan is simple and straightforward: (1) Tin harbored the belief that Nip Family member Ky Nguyen had been "ratting" on Cheap Boy Lap Nguyen for having shot him (Ky) on January 6, 1995,[15] from which (2) the inference could reasonably be drawn that other Cheap Boys harbored that same belief as well, thus (3) creating a motive for the Cheap Boys to frame a Nip Family member such as appellant via "ratting retaliation." These inferences are simple common sense, and they are also supported by, among other things, (1) Tin's explicit (but hardly surprising) acknowledgment that he knew fellow Cheap Boy Lap Nguyen (20 RT 3834), and (2) Detective Nye's testimony that gang members "constantly are in communication with each other" and that they know about attacks their fellow gang members have made upon rivals (16 RT 3193-3194).

Respondent declares that this reasoning process is "highly speculative," but respondent does not explain why. As noted in the AOB, neither the trial court nor the prosecutor disputed that the inferences defense counsel sought to draw were reasonable ones, nor did they express any concerns about the accuracy of counsel's underlying factual representations. (See AOB 107-108 fn. 71.) Their only concern was that the proffered evidence violated discovery principles (an erroneous concern that we will address shortly, in Subsection 3, pp. 46 et seq., *post*).

Respondent does argue that the probative value of the inferences about a Cheap Boy frame-up was "diminish[ed]" because, according to respondent,

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[15] The AOB mistakenly states the date was January 5. (AOB 107 fn. 71.)

Trieu Binh Nguyen, Linda Vu, and Kevin Lac had all dropped out of the gang and thus the only "active" Cheap Boy to identify appellant at trial was Khoi Huynh, who would not have identified appellant as the shooter to protect the man who "really" shot him. (RB 35-36.) This argument, however, is simply another manifestation of respondent's unreasonably pro-prosecution approach to the evidence.

Respondent asserts that it would be "preposterous" to believe that "in order to retaliate against the Nip Family for 'ratting' on the Cheap Boys, Khoi Huynh sought to protect the man who really shot him by falsely accusing appellant of the crime." (RB 35. See also RB 42.) However, respondent's assertion assumes that Khoi Huynh actually knew who had shot him. It is not at all uncommon for shooting victims to have failed to have focused on their assailant's face or, for other reasons, to be unable to identify him, and indeed this is what Khoi Huynh himself initially told police, on at least three occasions. (See 13 RT 2476-2477, 2505-2506, 23 RT 4469-4470.) No juror was required to believe Khoi's later claim that he knew who his assailant was all along, nor can this Court resolve that credibility issue here.

With respect to respondent's claim that Trieu Binh Nguyen, Linda Vu, and Kevin Lac were not "active" Cheap Boys, this is doubly unavailing.

First, even if their claims to have dropped out of the Cheap Boys (or, in Linda Vu's case, the Southside Scissors) were credited, it would hardly cleanse them of their pro-gang predilections, as shown by the fact that they continued to maintain close contacts with members of the Cheap Boys even after they (supposedly) dropped out. (See, e.g., 10 RT 1971.)

Second, none of these witnesses' claims of having dropped out of the gang were credible. Certainly, the evidence was not so overwhelming that this Court can determine that the jury was compelled to believe them. We have already discussed the evidence undermining the claims made by Trieu Binh

Nguyen and Linda Vu that they had left the gang (see ARB §§ I.1.C.2.c & d, pp. 22-30, *ante*). To recapitulate briefly: Trieu Binh was described as a Cheap Boy by other witnesses at trial (10 RT 1973, 11 RT 2198), he discussed gang affairs in frequent phone calls with Cheap Boy leader Khoi Huynh in the months after he supposedly dropped out (7 RT 1262-1263, 17 RT 3316), and when he first came forward with his story that appellant was Sang Nguyen's shooter, he agreed that he was doing so precisely because he was "a gang member" (7 RT 1339-1340). As for Linda Vu, all four adult males at her table on the night Sang Nguyen was shot were Cheap Boys, and when she came forward to identify appellant, she did so because he had been asked to by "members of the Cheap Boys." (17 RT 3321.)

With regard to Kevin Lac, his initial testimony was that he stopped being "active"in the Cheap Boys when he "had a kid." (9 RT 1638.) Later, however, after it came out that the baby was not born until September 12, 1995 — i.e., *after* Lac had come forward with his new story identifying appellant, meaning that Lac was still an active Cheap Boy when he had done so — Lac changed the starting date of his alleged inactivity. (9 RT 1652.) Now, his claim was that he became inactive in January 1995, when he learned his wife was pregnant. (*Ibid.*) No jury was required to believe Lac's claim of having gone inactive at all, but Lac's change in the starting time of the "inactivity" would only have increased a rational jury's doubts about Lac's claim. And the claim was further undermined by Detective Nye, who testified that Lac "is" a Cheap Boy. (17 RT 3308.)

In sum, then, even if respondent's section 352 argument were available on appeal (which it is not), it would fail because (1) the relevance of the excluded evidence is straightforward, (2) respondent's effort to "diminish" the probative value of the evidence requires an unreasonably prosecution-centric approach to the record, and (3) respondent does not even attempt to claim that

the presentation of the evidence would be unduly time consuming or result in confusion of the jury or prejudice to the prosecution.[16]

3. The Purported Discovery Violation

Respondent also argues that the trial court's ruling precluding the defense from questioning Tin Duc Phan about "ratting" by Ky Nguyen was proper as a "discovery sanction." (RB 40.) To prevail on this argument, respondent has to show, first, that there was a discovery violation by the defense and, second, that exclusion of testimony was a permissible sanction for the violation. (See AOB 100-105.) Respondent fails to satisfy either criterion.

a. The Discovery "Violation"

Respondent tacitly concedes that Penal Code sections 1054 et sequitur do not authorize the "discovery" involved here,[17] but, respondent argues, "the descriptions of materials subject to discovery in Penal Code sections 1054.1

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[16] In the course of its section 352 argument, respondent says that "appellant tacitly acknowledges [that] the probative value of the inquiry depended on whether or not a Nip Family gang member named Ky Nguyen ever testified that Lam Nguyen shot him; whether or not Phan knew about the alleged 1995 shooting of Ky Nguyen; whether or not Phan heard about Ky Nguyen's alleged testimony identifying Lam Nguyen as the shooter; and whether or not Lam Nguyen's testimony preceded the date on which Cheap Boy witnesses told the police about appellant." (RB 35.) This sentence contains several mistakes. The Cheap Boy who shot Ky Nguyen was *Lap* Nguyen, not *Lam* Nguyen (appellant). Moreover, as the AOB explained, it did not matter whether Tin Duc Phan "knew" about the shooting by Lap Nguyen or whether Ky Nguyen actually "testified." It mattered only that Tin *believed* that Ky Nguyen was *cooperating* with the police. And, clearly, Ky, who was shot in January 1995, would have been cooperating before the Cheap Boy witnesses started telling the police in May 1995 that appellant was the shooter.

[17] See *People v. Zambrano* (2007) 41 Cal.4th 1082, *People v. Sanchez* (1998) 62 Cal.App.4th 460.

and 1054.3, do not exclude other types of materials from the reach of criminal discovery." (RB 40.) This argument is misleading.

Penal Code section 1054 provides that "no discovery shall occur in criminal cases *except as provided by this chapter [§§ 1054 et seq.], other express statutory provisions, or as mandated by the Constitution of the United States*." (§ 1054, subd. (e); see *Verdin v. Superior Court* (2008) 43 Cal.4th 1096, 1103.) So, when respondent says that "*Penal Code sections 1054.1 and 1054.3* do not exclude other types of materials from the reach of criminal discovery," it is, in effect, quoting only part of the statute. Unmentioned by respondent is the fact that section 1054 itself specifies what "other types of materials" are discoverable — namely, materials discoverable "as provided by . . . *other express statutory provisions*, or as mandated by *the Constitution of the United States*." (§ 1054, subd. (e).)

The reason respondent needs the italicized language to disappear is obvious. Respondent cannot possibly show — and does not attempt to show — that "other express statutory provisions or . . . the Constitution of the United States" require that un-obtained, unrecorded information from a witness must be ferreted out and then turned over to the other side. Respondent fails to show that any discovery violation occurred.

b. The Sanction of Preclusion of Testimony

Even assuming there was a discovery violation, that would not justify the trial court in precluding the proffered testimony as a sanction for the violation. As pointed out in the AOB, preclusion sanctions may be imposed against a defendant only (1) if "the record demonstrates a willful and deliberate violation which was motivated by a desire to obtain a tactical advantage at trial such as the plan to present fabricated testimony . . . ." ***and*** (2) "'*only* if all other sanctions have been exhausted.'" (*People v. Edwards*

(1993) 17 Cal.App.4th 1248, 1263-1264, quoting § 1054.5, subd. (c), italics added in *Edwards*.) Respondent makes no attempt whatsoever to show that "all other sanctions [had] been exhausted," thereby effectively conceding that the preclusion sanction was improper.

As unavailing as it is, respondent does attempt to satisfy the first prerequisite to the use of a preclusion sanction. According to respondent, "defense counsel's attempted inquiry of Tin Duc Lamb [sic] suggested a type of gamesmanship designed to gain an advantage over the prosecutor by leaving her unprepared to respond to the inquiry in light of the parties' agreement to restrict themselves to the paragraph referenced in the defense investigator's interview report discovered to the prosecutor." (RB 41.) This argument fails for several reasons.

First, it is premised upon the contention that there was an "agreement to restrict" the questioning of Tin Duc Phan to the paragraph here at issue. That contention is wrong. (See Subsection A.1, pp. 37 et seq., *ante*.)

Second, there is not the slightest hint in the record that the defense questioning was "a type of gamesmanship designed to gain an advantage over the prosecutor." The questioning only became necessary because, on the day he came to court, Tin Phan unexpectedly went "sideways" with respect to what he had told defense investigator Watkins. An unanticipated about-face by a witness does not amount to "gamesmanship" on the part of the party that called him. Moreover, neither the trial court nor the prosecutor so much as hinted that "gamesmanship" was involved here, nor did the prosecutor claim she would have been prejudiced by the inquiry the defense sought to engage in.

And third, of course, even if there had been some sort of "gamesmanship" — by which respondent presumably means "a willful and deliberate violation which was motivated by a desire to obtain a tactical

advantage at trial"[18] — the sanction of preclusion would still have been improper because (as the AOB pointed out and as respondent does not dispute) there was no showing that "all other sanctions [had] been exhausted."

It was thus error to use preclusion of testimony as a sanction for the defense's purported discovery violation.

4. Alleged Forfeiture of Federal Constitutional Claims

Respondent asserts that appellant's federal constitutional claims should be forfeited because they are "being made for the first time in this Court." (RB 32-33.) However, as this Court has repeatedly held (and as we have pointed out earlier, see ARB § I.1.B, p. 12, *ante*), a constitutional claim is *not* forfeited on appeal when, as here, "the new arguments do not invoke facts or legal standards different from those the trial court was asked to apply, but merely assert that the trial court's act or omission, in addition to being wrong for reasons actually presented to that court, had the legal consequence of violating the Constitution." (*People v. Gutierrez*, 45 Cal.4th at p. 809.) Although this principle is set forth in the very cases respondent cites,[19] respondent does not acknowledge it.

5. Prejudice

Respondent also contends that any error was "harmless under any standard." (RB 42.) Respondent asserts that appellant was able to show "ratting retaliation" via (1) defense investigator Watkins' testimony that Tin Phan had stated the Cheap Boys were engaged in ratting retaliation against appellant; (2) Khoi Huynh's phone conversations with Trieu Binh Nguyen, in which they discussed the shootings of Cheap Boys, (3) Khoi showing up at the

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[18] *People v. Edwards*, *supra*, 17 Cal.App.4th at page 1263.

[19] See *People v. Geier*, 41 Cal.4th at pages 610-611; *People v. Halvorsen*, 42 Cal.4th at page 408 footnote 7.

scene where Duy Vu and Tuan Pham had been killed and volunteering that appellant had shot him, (4) the testimony of Cindy Pin that "probably" when one gang member lies, the rivals will lie in retaliation, and (5) Investigator Janet Strong's testimony that she had told Khoi Huynh that Nip Family was testifying against Cheap Boys and that it had happened that gangs retaliate by testifying against a gang that had testified against them. (RB 33-34, 37.)

Respondent's contention is meritless, in part, because it misses the point of the omitted testimony and, in part, because it again improperly takes an excessively prosecution-favorable view of the evidence.

From the defense perspective, the key point to establish was that the Cheap Boys would use ratting retaliation *in this case*. It is true that defense investigator Watkins testified that Tin Duc Phan had told him as much, but (1) when Tin was examined by the prosecutor at trial, he denied that this was true (20 RT 3837-3838); (2) on re-direct examination by the prosecutor, Investigator Strong completely recanted the testimony mentioned by respondent, in which she had said that gangs do retaliate by testifying (13 RT 2545-2546, 2548, 2549); and (3) Detective Nye insisted that such retaliation never occurs (16 RT 3199).

In this context, it was crucial for the defense to establish not merely that retaliation does happen but, more importantly, that it had occurred *here*. The fact that the defense could have pointed to a specific incident that would, in the minds of the Cheap Boys, have created a motive to engage in "ratting retaliation" against the Nip Family would have made it much more likely that the Cheap Boys had engaged in such behavior in appellant's case. Without evidence of a specific triggering incident, investigator Watkins' testimony about what Tin had said to him was untethered and was substantially undercut by the contrary trial testimony of Tin Phan, Investigator Strong, and Detective Nye. A juror would naturally have asked, "What would possibly have caused

Tin Phan to tell Watkins that the Cheap Boys were engaged in ratting retaliation when there was no ratting by the Nip Family to retaliate against?" With evidence of a specific triggering incident, however, Watkins' testimony would have become far more plausible. The omitted evidence would have supplied an explanation for the ratting retaliation, a trigger for it. That was crucial evidence that no other testimony in the case provided.

Thus, given the closeness of the case against appellant, the error was prejudicial regardless of whether the state or federal standard is used.[20]

B. The Exclusion Of Evidence Relating To The Cheap Boys' "Crash Pad"

The second way in which the defense sought to prove the existence of a Cheap Boys agreement to frame appellant was to show that the Cheap Boys had a "crash pad" where they would meet to discuss the gang's situation and make nefarious plans and that those in attendance at these meetings included Linda Vu, Kevin Lac, and Khoi Huynh — i.e., all of the Cheap Boys members or close associates who lived in California and provided identification evidence for the prosecution at appellant's trial. The defense theory was that the crash pad gave the Cheap Boys a specific, readily available opportunity to conspire to falsely point the finger at appellant. As pointed out in the AOB, the trial court erroneously excluded this evidence as irrelevant. (AOB 108-111.) Respondent disagrees. (RB 43-50.) Its contentions have no merit.

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[20] Of the other items of evidence mentioned by respondent — items (2) through (4) in the listing at the outset of this subsection — one is weak evidence that ratting retaliation can occur (item (4)), but none of them has any tendency to show there was a specific factor motivating the Cheap Boys to engage in that behavior here. Thus, appellant does not see that these items contribute to the current discussion in any meaningful way.

1. Respondent's Reliance on Evidence Code Section 352

Respondent first asserts that the trial court used its discretionary weighing authority under Evidence Code section 352 as the basis for excluding the crash-pad evidence. Respondent writes:

> "Expressing concerns about the limited probative value of the proposed offer of proof (10 RT1948) and the possibility it would necessitate an undue consumption of time (10 RT 1947), the trial court nevertheless declined to make an immediate ruling on the offer of proof. It noted it would keep the witness on call should additional testimony increase the probative value of the offer of proof or should Harley more fully develop his offer of proof. (10 RT 1947-1948, 1954-1955.)"

(RB 44.)

Respondent has gotten its facts wrong. It is true that, on the pages respondent cites, the trial court did express concerns about limited probative value and undue consumption of time, but these concerns were *not directed at the crash-pad evidence*. Rather, the court was addressing a separate issue, one it had raised sua sponte when the defense sought to impeach Khoi Huynh's credibility by showing that Khoi had violated his probation by being at a video arcade with other Cheap Boys on May 14, 1992 (i.e., three years before the crash-pad raid). (See 10 RT 1943-1944.) When defense counsel responded to the court's objection by saying that his theory was that Khoi was the mastermind of a conspiracy to frame appellant Nguyen (in the course of which, counsel alluded briefly to "a crash pad up . . . in El Monte"), the trial court responded, "Well, *let me set that aside for a moment*." (10 RT 1945-1946.)

The court then turned counsel's focus back to the question of whether Khoi could be impeached by evidence that he was violating probation, i.e., whether a probation violation was an act "involving moral turpitude." (10 RT 1946.) It was in the context of discussing *this* issue and similar impeachment

that the court expressed its concerns about undue consumption of time (10 RT 1946) and limited probative value (10 RT 1950). These concerns did not relate to the crash-pad evidence.[21] (See also 10 RT 1954-1955.)

If further proof were needed that the trial court's concerns about probative value and consumption of time had nothing to do with the crash-pad evidence, there is more. All of the discussion just mentioned occurred during the morning court session on May 27, 1998. At the afternoon session that same day, defense counsel brought up "some *other areas that I didn't get into*" in the morning session. (10 RT 1965.) Counsel thereupon raised the admissibility of the crash-pad evidence. (10 RT 1965-1966.) The trial court's response was, "What you have just identified *might be permissible areas*. I can't make a definitive decision at this stage. I'll simply ask you don't go into this area. This is something that we need to have some time to discuss without the pressure of having the jury waiting in the hallway. And also brings into consideration some other subjects that we'd have to discuss."[22] (10 RT 1966.)

In several court sessions in the ensuing days, the subject of the crash-pad evidence was discussed further, but the trial court never even alluded to the reasons respondent offers for excluding the evidence, i.e., that the probative value of the evidence was substantially outweighed by the undue consumption of time needed to present it, or by prejudice to the prosecution or by its potential for causing confusion. It did, however, ask about relevance

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[21] Respondent's assertion that the court "would keep the witness [Khoi Huynh] on call" in case of further elaboration by the defense is also misleading. (See RB 44, citing 10 RT 1954-1955.) The trial court was keeping Khoi on call in case it allowed the prosecution to introduce "other acts of misconduct on the part of your client [i.e., appellant] or being a predicate act to show involvement by your client in the gang . . . ." (10 RT 1955.) As before, its order was unrelated to the crash-pad evidence.

[22] Respondent never mentions this colloquy.

and about whether the defense had "evidence of statements that were made between these individuals" when the crash pad was raided. (16 RT 3003-3004.) Nor did the court mention section 352 concerns when the matter was discussed on subsequent occasions. (See 16 RT 3005, 17 RT 3310, 3394-3395, 24 RT 4567, 27 RT 5340.)

The conclusion is irresistible, then, that the trial court did not base its ruling on a section 352 weighing. It simply concluded the evidence was irrelevant. And for reasons previously discussed, it would be improper for section 352 to be invoked here on appeal for the first time. (See ARB § I.2.A.2.a, pp. 40 et seq., *ante*.) Because none of the considerations on the "prejudice" side of the weighing process were raised below, the defense never had the opportunity or motive to address them or to tailor its presentation of the crash-pad evidence so as to satisfy whatever concerns the trial court might have had.

Beyond these flaws in respondent's argument, appellant is unable to see that there were *any* countervailing factors that would have justified exclusion of the evidence. Clearly, the evidence would not have required an undue consumption of time. It would have taken only a few minutes to present the evidence via an officer who had been at the crash pad when Khoi Huynh, Linda Vu, Kevin Lac, et al. were found there, and prosecution never once suggested it would contest the evidence in any way. Nor could it possibly be concluded that the evidence would confuse the issues or mislead the jury. Quite the opposite, it would directly give the jury some important information that it otherwise had only indirect support for: that the Cheap Boys in particular had a crash pad and thus had specific opportunities to frame appellant. This evidence certainly had no more of a tendency to confuse or mislead than the prosecution's evidence purporting to show that appellant was living in a Nip Family crash pad; if anything, the potential for

misunderstanding was less here because the relevance was more direct and obvious. (See 16 RT 3052.) And the prosecutor never claimed that was anything improperly prejudicial to her case about the evidence. (See *Piscitelli v. Salesian Society* (2008) 166 Cal.App.4th 1, 11 ["Pursuant to [§ 352], 'prejudicial' does not mean the evidence is damaging to a party's case. Instead, it means evoking an emotional response that has very little to do with the issue on which the evidence is offered."], internal quotation marks omitted.)

Not only did the trial court and the prosecutor fail to mention any countervailing considerations to offset the probative value of the crash-pad evidence, but even now on appeal, respondent cannot point to any. While respondent makes the introductory assertion that "[n]umerous factors . . . increas[ed] the danger that the proffered evidence would confuse the issues, confuse the jury, or consume an undue amount of time" (RB 47), respondent never thereafter identifies even a single such factor. Its entire presentation is aimed at "diminishing" the probative value of the crash-pad evidence. (RB 47.) When there is nothing on the prejudice (etc.) side of the scale, then the probative value of evidence cannot be "substantially outweighed by" its prejudicial (etc.) effects.

Any beyond all this is the principle that "Evidence Code section 352 must yield to a defendant's due process right to a fair trial and to the right to present all relevant evidence of significant probative value to his or her defense." (*People v. Cunningham* (2001) 25 Cal.4th 926, 999.)

Thus, respondent's attempt to bring this issue under the umbrella of section 352 is (1) factually inaccurate, (2) improperly raised here on appeal, and (3) meritless even if were accurate and properly raised.

2. Respondent's Attempt to "Diminish" the Probative Value of the Crash-Pad Evidence

Respondent's remaining contention is that "the probative value of the evidence was minimal." (RB 50.) According to respondent, "[n]umerous factors supported the trial court's ruling by diminishing any probative value the proffered evidence may have had . . . ." (RB 47.)

Appellant will turn to those "numerous factors" very shortly. Here at the outset, we point out that respondent cannot, and does not, claim that the evidence had *no* probative value. Its only contention is that the relevance of the evidence was "minimal" or "diminished." Inasmuch as respondent is thereby tacitly conceding the crash-pad evidence had some probative value, and inasmuch as Evidence Code section 352 does not justify the exclusion of the evidence here, that evidence was admissible under the explicit terms of Evidence Code section 351 and Article I, section 28, of the California Constitution, which provides, in relevant part, that "relevant evidence shall not be excluded in any criminal proceeding . . . ." (Art. I, § 28(f)(2).)

Nevertheless, because the factors respondent points to will be relevant to an assessment of prejudice, we will discuss them now. There are six such factors, but they amount to nothing but weak scattershot.

1. Respondent asserts that the probative value of the crash-pad evidence was diminished because "the El Monte crash pad raid occurred before the shootings of Sang Nguyen (counts six and seven), Khoi Vu (counts nine and ten), Duy Vu (counts eleven and twelve) and Tuan Pham (counts thirteen and fourteen)." (RB 47.) Respondent's assertion is factually correct but logically wrong. It overlooks the well understood, logical, common-sense inference once called the "presumption of continuity." The law has long recognized that "[p]roof of the existence at a particular time of a fact of a continuous nature gives rise to an inference, within logical limits, that it exists

at a subsequent time." (*Noell v. United States* (9th Cir. 1950) 183 F.2d 334, 338.) Thus, the fact that the Cheap Boys had a crash pad on January 29, 1995 (six days before the shooting of Sang Nguyen) is evidence that the crash pad, or one like it, existed thereafter.[23]

2. Respondent next says that "only one of the two charged shootings prior to the El Monte crash pad raid involved any Cheap Boy witnesses, to wit: the July 21, 1994, shooting of Tony Nguyen (counts two and three)." (RB 47.) This is irrelevant for the same reason as discussed in the previous paragraph. It is the existence of a crash pad *after* January 29, 1995, that is relevant, and its continued existence after that date is inferred via the routine, well recognized inference of continuity.

3. Respondent says, "Third, the proffered evidence did not include any evidence of statements between the Cheap Boys at the crash pad, leaving jurors to speculate about what if anything had been planned there." (RB 47-48.) This criticism is quite irrelevant to opportunity evidence. Opportunity evidence, by its very nature, is about "opportunity." It creates an inference about behavior. It does not require an eyewitness to confirm that the inferred behavior occurred. (See, e.g., *People v.* Baker (1974) 39 Cal.App.3d 550, 556 ["The prosecution is not restricted to eyewitness testimony that Baker destroyed exhibits, and it may prove such a fact by circumstantial evidence. Baker was the last person seen with the exhibits, he had both motive and opportunity to destroy them, and it is rationally inferable [sic] that he

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[23] See also, e.g., *People v. Macy* (1919) 43 Cal.App. 479, 483 ("it is sufficient to say that it was proved that the Johnson House was used for said immoral purposes as late as August 12, 1918, and that there was a course of such conduct up to that time. From this proof the presumption would follow that said condition continued to exist as long as is usual for things or conditions of such nature."); Civil Code, section 3547 ("A thing continues to exist as long as is usual with things of that nature.").

purloined the exhibits [or] had arranged for their destruction."], citations omitted.)

Detective Nye testified in general terms that a crash pad was a place where the gangs would "plan criminal activity" (among other things). (17 RT 3310.) Thus, the inference would have been that the Cheap Boys could easily have planned to frame appellant by using the opportunities that their crash-house provided. But without the evidence that the Cheap Boys *actually* had a crash pad and thus *actually* had the ready-made opportunity to plan criminal deeds and act with a unified front, Nye's testimony was entirely theoretical. True, the jury would have understood that gangs *as a rule* have crash pads, but without the excluded evidence, there was nothing to establish that the Cheap Boys *in particular* had or used crash pads. That was a gap that the defense needed to fill and that the excluded evidence would have filled.

4. Next, respondent repeats an argument it made earlier. It says that the probative value of the crash-pad evidence was diminished because Khoi Huynh was "the only Cheap Boy who identified appellant in any of the charged crimes" — Trieu Binh Nguyen, Linda Vu, and Kevin Lac having dropped out — and that it is "preposterous" to believe that Khoi would finger appellant as the person who shot him, rather than identify the person who really shot him. (RB 48.) However, as we have pointed out earlier, (1) Khoi claimed initially (and repeatedly) that he did not know who shot him, (2) it is not "preposterous" to conclude that Khoi might falsely identify appellant even if he did know he wasn't the shooter, (3) the claims of Trieu Binh Nguyen, Linda Vu, and Kevin Lac that they had left their gangs were both (a) subject to doubt and (b) of little significance even if credited, since they continued to associate closely with the Cheap Boys after they dropped out.

5. According to respondent, evidence that Cheap Boys gathered together at crash pads "cumulated evidence already before the jury," namely

the testimony of Detective Nye about crash pads that we mentioned in Number 3, above. (RB 48.) The short answer here is that Detective Nye merely testified that gangs generally have crash pad. Neither he nor any other witness established that the Cheap Boys in particular had a crash pad.

Respondent also says that the crash-pad evidence was cumulative because "jurors already knew that Khoi Huynh spent time at a known Cheap Boy hangout with eight other Cheap Boys before police contacted him there on May 14, 1992." (RB 48, citing 10 RT 1943-1944.) But the 1992 incident alluded to by respondent was mentioned only during proceedings "out of the presence of the jury." (See 10 RT 1944:4-5.) Thus, respondent's statement that "jurors already knew" about this is wrong. The jury *never* knew about it.

6. Finally, respondent alleges that the probative value of the crash-pad evidence was diminished because appellant would later testify he "was not a Nip Family gang member at all, but only associated with childhood friends who happened to be Nip Family gang members." (RB 49, citing RT 4011-4012.) This is makeweight: (1) the testimony by appellant came after the court had concluded the evidence was inadmissible, (2) the jury did not have to credit appellant's testimony and could have concluded (and apparently did conclude) that he was a Nip Family member, and, most significantly, (3) whether appellant considered himself a member of Nip Family or not is irrelevant to the current issue — what is relevant is whether the Cheap Boys *believed* him to be a member, and the fact that appellant "associated with childhood friends who happened to be Nip Family gang members" (RB 49) would easily cause Cheap Boys to conclude that he was a member.

3. Alleged Forfeiture of Federal Constitutional Claims

Respondent re-asserts verbatim its conclusory claim that appellant's federal constitutional claims should be forfeited because they are "being made

for the first time in this Court." (RB 49.) However, as this Court has repeatedly held (and as we have pointed out previously, see ARB §§ I.1.B, pp. 12 et seq., & I.2.A.4, p. 49, *ante*), a constitutional claim is *not* forfeited on appeal when, as here, "the new arguments do not invoke facts or legal standards different from those the trial court was asked to apply, but merely assert that the trial court's act or omission, in addition to being wrong for reasons actually presented to that court, had the legal consequence of violating the Constitution." (*People v. Gutierrez*, 45 Cal.4th at p. 809.) As before, respondent does not acknowledge this principle.

4. Prejudice

Respondent also contends that any error was harmless under the *Watson* test. (RB 49-50.) In support of its contention, respondent merely alludes to the last three of the six contentions that it claimed "diminished" the probative value of the evidence. (See Subsection 2, pars. nos. 4-6, pp. 58-59, *ante*.) No purpose would be served by repeating here was we have just said there. None of the three contentions is valid. Nor does respondent acknowledge the closeness of the case or the significance of the gap that the excluded evidence was intended to fill. Its claim that there was no *Watson* prejudice cannot be sustained. And, it bears noting, respondent offers no argument that an affirmance would be proper under a *Chapman* analysis.

C. Cumulative Prejudice From The Exclusion Of The Motive-Opportunity-Plan Evidence

Appellant has argued that even if this Court were to conclude that none of the foregoing errors individually warranted a reversal of Counts 6 and 7, then the cumulation of errors would. (AOB 111.) Respondent disagrees but says merely that "for reasons previously discussed [the errors] were harmless under any standard." (RB 50.) Respondent fails to come to grips with the

significance of the excluded evidence, which would have shown the jury that there was indeed a reason why the Cheap Boys would engage in ratting retaliation (to retaliate for Ky Nguyen's ratting) and that there was indeed a readily available opportunity for the Cheap Boys to plan that retaliation (at their crash pad). Nor, once again, does respondent deal with the closeness of the case. By any reasonable assessment, there was cumulative prejudice under both the *Chapman* and *Watson* standards.

3. ADDITIONAL ERRORS IN THE ADMISSION AND EXCLUSION OF EVIDENCE

In addition to improperly overruling appellant's objection to the purportedly expert testimony of Detective Nye and excluding the evidence of the Cheap Boys' motive and opportunity to frame appellant, the trial court erroneously excluded evidence aimed at impeaching the changed story of witness Michelle To (Temper Nguyen's girlfriend), and it improperly allowed the jury to use damaging hearsay evidence for the truth of the matter asserted. (AOB 112-118.) Respondent contends no error occurred in either regard.

A. Appellant Was Impermissibly Precluded From Impeaching Michelle To With Evidence That She Was Living With Trieu Binh Nguyen At The Time She Decided To Come Forward With Her New Story

On the night that Sang Nguyen was killed (Feb. 5, 1995), Michelle To was the girlfriend of Trieu Binh (Temper) Nguyen, and both she and Trieu Binh were among Sang's dinner companions. Michelle told the police on February 5 that Trieu Binh had been in the bathroom at the time of the shooting, and she reaffirmed this story to defense investigator Watkins on April 27, 1998, three weeks before Trieu Binh testified at trial. But when she herself testified on June 15, she claimed that she had lied to the police and to Watkins and that Trieu Binh had been outside when the shooter occurred. (19 RT 3576-3577.)

The defense attempted to explore how Michelle came to change her story and, particularly, whether the new story might have been instigated by Trieu Binh, but Michelle denied that she had even had "an opportunity to discuss with [Trieu Binh] what type of changes [she] was going to make in [her] testimony when [she] came out here." (19 RT 3586.) So, the defense naturally sought to ask her if she was "living at the same address" with Trieu Binh at the time she decided to change her story. (19 RT 3596.) As pointed

out in the AOB, this clearly was a proper inquiry, but the trial court refused to permit it. (See AOB 112-115, citing *People v. Sweeney* (1960) 55 Cal.2d 27, 41; *People v. Payton* (1939) 36 Cal.App.2d 41, 54-55; *People v. James* (1976) 56 Cal.App.3d 876, 886.)

Respondent contends that the trial court's ruling was proper. However, not only does respondent cite no law in support of its contention, it does not even mention the decisions cited in the AOB. Instead, respondent attempts to take a fact-based tack to avoid the case law. Respondent asserts that Michelle's testimony "established that they broke up before 1998" and that therefore the "impeachment inquiry was irrelevant . . . because if Michelle lived with Trieu Binh Nguyen at the same address, she most likely did so before they broke up." (RB 53.) These assertions are riddled with flaws.

1. First of all, the defense was not seeking to ask Michelle about whether she and Trieu Binh were living at the same address "before 1998." It obviously was focusing on the period during which she changed her story, i.e., the period after her April 27, 1998, phone call with the defense investigator.

2. Nothing was "established" by Michelle's testimony about having broken up with Trieu Binh. For one thing, Michelle was specifically asked *when* they broke up, and her answer was, "I don't remember." (19 RT 3595.) Respondent has created out of whole cloth the claim that "they broke up before 1998." (See RB 53.) For another, even Michelle's claim of having broken up did not "establish" that they had *in fact* split up. Michelle had shown herself to be very deceptive when describing their relationship. As respondent itself admitted on the previous page of its brief, Michelle at first "denied that they saw each other weekly or annually" in 1997 but later was compelled to "acknowledge[] they had been married in 1997 for '. . . a couple of months. A few months. About seven or eight.'" (RB 52, quoting 19 RT

3605.) No jury was required to consider as "established" her claim that they broke up at all, let alone respondent's gloss that they broke up "before 1998." Here, again, respondent both is relying an unreasonably pro-prosecution view of the record and is presenting that view as if it were uncontested and incontestible.[24]

3. The underlying legal premise of respondent's argument is that the trial court would have been permitted to preclude the defense's question if it believed that "if Michelle lived with Trieu Binh Nguyen at the same address, she most likely did so before they broke up." (RB 53.) But in addition to providing no factual support to justify such a belief, respondent offers no legal support that such a belief would be a proper basis for excluding evidence. Respondent cites nothing to justify the notion that a trial court can exclude evidence based upon its personal belief as to what scenario it thinks is the "most likely." Under the Constitution, it is the jury's sole prerogative to determine the facts, as we have discussed. And evidence is relevant if it has "*any* tendency in reason" to prove or disprove a disputed material fact. (Evid. Code, § 210.) The cases cited by appellant and ignored by respondent establish that the defense inquiry was relevant.

Finally, appellant notes that respondent again makes its conclusory claim that appellant's federal constitutional claims should be forfeited because they are made "for the first time in this Court." (RB 54.) However, as we have pointed out several times already, a constitutional claim is not forfeited on appeal when, as here, "the new arguments do not invoke facts or legal standards different from those the trial court was asked to apply, but merely

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[24] Michelle acknowledged that, after Trieu Binh testified at appellant's trial, he told her about his trial testimony (19 RT 3589, 3591), which is some indication by itself that they had a continuing relationship at that point.

assert that the trial court's act or omission, in addition to being wrong for reasons actually presented to that court, had the legal consequence of violating the Constitution." (*People v. Gutierrez*, 45 Cal.4th at p. 809.)[25]

B. The Trial Court Erred By Refusing To Give A Limiting Instruction As To Prejudicial Hearsay Evidence Relayed By Trieu Binh Nguyen

Appellant has argued that the trial court erred by denying the defense request to give a limiting instruction when Trieu Binh Nguyen testified that he went to the police because "[i]t get to a point that I heard lot of my friend went down from what happened, the same guy killed my friend, get to a certain point I can't stand it anymore." (7 RT 1237-1238. See AOB 115-117.)

Respondent implicitly concedes that the quoted testimony was admissible "solely to establish Trieu Binh Nguyen's state of mind" and "for no other purpose." (RB 57.) But, respondent says, a limiting instruction was properly denied because it was "unnecessary." (RB 57.) However:

1. Respondent's contention is that a limiting instruction was "unnecessary" because "[n]either the prosecutor nor Trieu Binh Nguyen ever suggested that he witnessed any shootings other than the shooting of Sang Nguyen on February 5, 1995." (RB 57.) Respondent is arguing against a straw man. Appellant has never claimed that the vice of Trieu Binh's testimony was that it "suggested he witnessed any shootings other than the

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[25] Included in respondent's forfeiture contention is the claim that appellant's argument that the trial court's ruling violated the Truth-in-Evidence provision of the California Constitution is also forfeited. But (1) there is no reason to treat a state constitutional ground any differently from a federal constitutional ground and (2) the state law requiring the admission of relevant evidence is now just as much grounded in the California Constitution as in the Evidence Code.

shooting of Sang Nguyen," nor does appellant see how any such argument could be made. What appellant is challenging is the fact that the jury was allowed to consider, for the truth of the matter asserted, that "others" had told Trieu Binh "that 'the same guy' was killing his friends." (AOB 116.) It was the hearsay from "others" that is at issue here, not any implication that Trieu Binh "witnessed [other] shootings."

2. What respondent undoubtedly intends to argue here is what it says later, namely, that the "context of Trieu Binh Nguyen's challenged testimony made its purpose clear, even without the limiting instruction." (RB 58-59.) But jurors are not lawyers. There is no basis in law or logic to impute to them the knowledge that Trieu Binh's testimony could be considered only for a limited, non-hearsay purpose. That is why limiting instructions are required in the first place. And any possible inference that the jury in appellant's case might somehow have harbored such a belief is laid to rest by the fact that, when it was instructed, the jury was told to "consider [] all the evidence," without limitation.[26] (27 RT 5255.)

3. Respondent's claim that a limiting instruction could be dispensed with here as "unnecessary" is contrary to established law. Evidence Code section 355 specifically says that "[w]hen evidence is admissible . . . for one purpose and is inadmissible . . . for another purpose, the court *shall* upon request *restrict the evidence to its proper scope and instruct the jury accordingly*." The case law says the same thing. (*People v. Sweeney* (1960) 55 Cal.2d 27, 41, *People v. Miranda* (1987) 44 Cal.3d 57, 83.) Respondent

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[26] Moreover, the prosecutor elicited two additional times the substance of what Trieu Binh had been told. (See RT 7 RT 1238 [prosecutor asks Trieu Binh if he talked to Detective Nye "when you felt that you just couldn't stand it anymore that he was killing your friends], 1348 [Trieu Binh decided to come forward "because your friends were dying from a rival gang, and largely from one person."].)

neither addresses these authorities (cf. AOB 116) nor cites any contrary authority of its own.

Moreover, the law is that evidence admitted without limitation may be considered for any and all purposes. (See, e.g., *Wicktor v. County of Los Angeles* (1960) 177 Cal.App.2d 390, 405-406 ["Though they be technically hearsay as to the truth of the facts stated, these statements of [plaintiff] are in evidence for all purposes and are in the status of hearsay which has been received without objection. Such evidence will support a finding of the truth of the substance of the hearsay statements."].) So, if the jury can be presumed to have understood the state of the law with respect to Trieu Binh's statements, it must be presumed to have known that it could consider "the truth of the substance of the hearsay statements."

Respondent's contention that a limiting instruction was "unnecessary" has no merit.[27]

C. The Errors, Considered Individually Or Cumulatively, Were Prejudicial With Respect to Counts 6 and 7

Appellant has argued that, whether considered individually or cumulatively the errors in precluding the inquiry of Michelle To and refusing to give a limiting instruction as to Trieu Binh Nguyen's testimony require a reversal of Counts 6 and 7. Appellant pointed out the closeness of the case, the weakening of the defense case by the former error, the enhancing of the

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[27] Respondent again asserts that appellant's federal constitutional claims should be forfeited because they are made "for the first time in this Court" (RB 57), but that assertion has no more merit here than in its previous iterations. (See, e.g., *People v. Gutierrez*, 45 Cal.4th at p. 809; *People v. Carasi*, 44 Cal.4th at p. 1289 fn. 15; *People v. Boyer*, 38 Cal.4th at p. 441 fn. 17; *People v. Verdugo*, 50 Cal.4th at p. 277 fn. 5; *People v. Loker*, 44 Cal.4th at p. 704 fn. 7; *People v. Lewis*, 39 Cal.4th at p. 990 fn. 5.)

prosecution's case by the latter, and the way that the prosecutor exploited absence of a limiting instruction. (AOB 117-118.)

Respondent deals with almost none of this. Respondent says nothing about the error with respect to the limiting instruction except, perhaps, to allude to its contention that it would have been "clear" to the jury that its consideration of Trieu Binh's testimony was limited. (RB 58-59.)

With regard to the precluded Michelle To inquiry, respondent says the error was harmless under the *Watson* test because "cross-examination revealed that Michelle To had been married to Trieu Binh Nguyen for seven or eight months in 1997 and that they therefore had ample opportunity to concoct a new story together had they chosen to do so." (RB 55.) But, as respondent admits in the very next sentence, Michelle "only decided to recant . . . some time after talking to the defense investigator on April 27, 1998" (*ibid.*), which means that it is irrelevant that she and Trieu Binh had an opportunity to concoct a new story in 1997. It was the period "after talking to the defense investigator" that appellant's inquiry was directed at. Respondent's "no prejudice" contention completely misses the point.

4. IF THIS COURT WERE TO CONCLUDE THAT DEFENSE COUNSEL FAILED TO PRESERVE ANY OF THE AFOREMENTIONED CLAIMS, THEN A NEW TRIAL WOULD BE REQUIRED ON THE GROUND THAT APPELLANT WAS DENIED HIS CONSTITUTIONAL RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL

In the AOB, appellant argued that if he were deemed to have forfeited any of the preceding claims because his trial counsel failed to properly preserve it (or them), then appellant was denied his Sixth and Fourteenth Amendment rights to effective assistance of counsel, as there could be no reasonable explanation for such a deficiency, and appellant was prejudiced thereby. (AOB 119-120.)

Respondent, having argued that appellant's constitutional claims should be defaulted, responds to the ineffective-assistance claim in an almost pro forma manner. Its contention is that this Court should reject the ineffective-assistance claim "because appellant cannot meet his dual burdens of proving from the state record that his trial counsel failed to act in a professionally reasonable manner and that different verdicts would have been reasonably probable had they acted differently." (RB 59.) Respondent does not dispute that deficient performance must be found if "there could be no reasonable explanation for trial counsel's professionally unreasonable inaction" (RB 59), but respondent does not even hint at a reasonable explanation for why trial counsel would have failed to preserve the constitutional claims respondent alleges are defaulted. Respondent's silence may be taken as a concession that no such explanation exists. (See, e.g., *People v. Bouzas* (1991) 53 Cal.3d 467, 480; *People v. Kunitz* (2004) 122 Cal.App.4th 652, 658; *Westside Center Associates v. Safeway Stores 23* (1996) 42 Cal.App.4th 507, 529.)

Nor does respondent address the question of prejudice, although presumably it relies upon its prior contentions regarding lack of prejudice, to which we have already responded.

There is, in short, nothing warranting a reply here.

5. IF REVERSAL OF COUNTS 6 AND 7 IS NOT REQUIRED BY ANY OF THE PRECEDING CLAIMS, REVERSAL OF THOSE COUNTS, AND MORE, WOULD BE REQUIRED BECAUSE OF CUMULATIVE PREJUDICE

In the AOB, appellant argued that each of the errors was sufficient alone to warrant a new trial as to Counts 6 and 7 but that the accumulation of errors was surely prejudicial as to those counts and as to Counts 2, 3, 4, 5, 9, 10, 13, and 14, as well. (AOB 121-122.) Respondent answers none of this. The only hint of a response is its statement, at the conclusion of its contentions with regard to the "limiting instruction" issue, that "respondent has previously discussed why the verdicts would not have changed in the absence of other claimed errors." (RB 59.) Appellant presumes that respondent is alluding to its discussion of cumulative prejudice with respect to appellant's second set of claims attacking Counts 6 and 7, namely, the challenges to the Tin Duc Phan testimony and the crash-pad evidence. (See ARB § I.2.C, pp. 60 et seq., *ante*.) But all respondent said at that time was that "for reasons previously discussed [the errors] were harmless under any standard." (RB 50.)

In short, respondent never makes any substantive argument as to why there was no cumulative prejudice requiring the reversal of Counts 6 and 7 (or the other counts enumerated in the preceding paragraphs). Nor does respondent ever allege the errors could be found harmless under the federal constitutional test. Thus, in light of the gaps in respondent's brief, there is nothing to which appellant can reply.

SECTION II.
COUNTS 13 AND 14
(relating to the May 6, 1995 shooting death of Tuan Pham)

In Counts 13 and 14, appellant Nguyen was charged with and convicted of the first-degree murder of Tuan Pham, a Cheap Boy gang member who, with pistol in hand, had jogged up to the car in which appellant was seated and (to use the trial court's words) "was actively seeking to kill the defendant." (31 RT 6082.) Appellant's presence in the car was undisputed. What was disputed was appellant's role in the ensuing exchange of gunfire and whether the shooting of Tuan Pham was done in self-defense. It was the prosecution's contention that appellant was the car's driver and that he fired one of the weapons that killed Tuan. The defense's position was that appellant was unarmed in the back seat and did not participate in the shooting and that, in any event, Tuan's killing was committed in self-defense. In his AOB, appellant has raised issues touching upon both aspects of the case. (AOB 123-229.) This ARB discusses those issues in the same order as the AOB did.

1. COUNTS 13 & 14 MUST BE REVERSED BECAUSE SELF-DEFENSE WAS ESTABLISHED AS A MATTER OF LAW; BUT IF A VALID LEGAL THEORY DOES EXIST UNDER WHICH SELF-DEFENSE COULD PROPERLY BE REJECTED, REVERSAL OF COUNTS 13 AND 14 WOULD STILL BE REQUIRED BECAUSE IT IS IMPOSSIBLE TO CONCLUDE BEYOND A REASONABLE DOUBT THAT NO JUROR RELIED UPON AN INVALID LEGAL THEORY

In Section II.1 of the AOB, appellant raised two interrelated challenges to the convictions in Counts 13 and 14. First, appellant argued that the evidence was insufficient to sustain the convictions because self-defense was established as a matter of law. As the AOB pointed out, appellant was in

immediate, mortal danger from Tuan Pham at the time Tuan was killed and while six theories had been proffered as bases for rejecting self-defense, three of the theories were (unbeknownst to the jury) inapplicable to this case as a matter of law, and the remaining theories were (again, unbeknownst to the jury) non-existent legal doctrines, two of which were created ad hoc by the prosecutor. Second, the AOB argued that even if one or more of the six theories could properly have allowed the jury to reject self-defense, reversal would still be required if one or more of the legal theories was *improper* because it is impossible to conclude, beyond a reasonable doubt, that the jury relied on a proper theory. (AOB 123-197.)

Respondent does not disagree as to the immediacy and deadliness of the danger Tuan Pham posed, nor on these facts could there reasonably be any disagreement. Instead, respondent disputes that appellant was entitled to use self-defense to protect himself from the immediate and mortal danger facing him. In effect, respondent takes the position that appellant was legally required to submit to being shot to death there on the street by a vigilante from a rival gang. Respondent's contention not only violates the precepts of a civilized society but is premised upon inaccurate and insupportable views of the evidence and the law.

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As noted at the outset of this brief, respondent has chosen to use these self-defense issues as the place to present its detailed statements of facts regarding all of the charges against appellant except Counts 6 and 7 (the killing of Sang Nguyen), which it addressed in connection with claims focused on those counts. (See RB 61-112, 13-29.) Our ARB has already replied to respondent's statements of the facts as to Counts 6 and 7 (see ARB § I.1.C.2, pp. 19-35, *ante*) and as to Counts 11 and 12 (the killing of Duy Vu, of which appellant was acquitted; see ARB Introduction, § B, pp. 3-7, *ante*).

Here in Section II of the ARB, appellant will reply only to respondent's statement of facts as to Counts 13 and 14. Our replies to respondent's factual statements as to the remaining counts will be made when those counts are addressed in this brief. For purposes of the current insufficient-evidence argument, we assume arguendo that appellant was the driver of the car that Tuan Pham had approached and that the jury's guilty verdicts on the counts other than Counts 13 and 14 are valid and accurate.

A. Respondent's Statement of the Facts re the Death of Tuan Pham

Serious factual deficiencies permeate respondent's substantive arguments regarding self-defense, and we will address those in due course, but respondent's initial Statement of Facts regarding the shooting of Tuan Pham (RB 98-112) has only a few that matter.

Perhaps most significant for purposes of the self-defense issues is respondent's statement that "[a]s [Tuan Pham] began to raise his shooting arm while standing a short distance behind the driver's door of the white/silver car, two gunmen in the white/silver car shot the man." (RB 99, citing 13 RT 2601-2608.) Respondent is correct that shooting from inside the car started only "as [Tuan] began to raise his shooting arm," but the implication that both gunmen in the car opened fire *while* Tuan was doing this is wrong. It was only the driver who fired as Tuan raised his arm. The right front passenger began firing later on. (See 13 RT 2601, 2604; 14 RT 2718-2719.) Indeed, respondent acknowledges the point elsewhere in its brief. (RB 100-101.)

Other deficiencies in the Statement of Facts go to the question of whether appellant was the driver. For example, respondent notes that eyewitness Robert Murray was shown a photo lineup containing appellant's picture, and respondent then says that Murray selected appellant's photo "as looking most like the shooter . . . insofar as he was clean shaven, had a clean

complexion, was young-looking, and had short, combed-back black hair." (RB 101, citing 14 RT 2724-2725, 2755-2756.) Respondent omits, however, that when Murray initially viewed the six pack, he did not select anyone and that it was only after "the talking back and forth [with police], and are you sure nobody looks like this or that" that he indicated that appellant was "possible." (14 RT 2723.) Respondent omits, too, that after viewing the six pack, Murray wrote "I cannot make any identification" on the identification form. (14 RT 2723, Exh. V.) And respondent neglects to mention that Murray failed to select appellant at a live lineup or in court. (14 RT 2750, 2723.)

Respondent also states that, in his testimony, appellant said that "his friend Hoan Viet Tran" was sitting in the front passenger's seat at the time of the shooting. (RB 111.) Appellant's testimony was that the front passenger was a male named Hong (not Hoan) whose last name he did not know, having only met him a few times at a pool hall. (22 RT 4041, 4055.) There is no mention of any Hoan Viet Tran in the transcript.[28]

Respondent also states that Tam Nguyen, the owner of the residence at 13401 Amarillo Street, "heard through the police that the renter of the attached studio apartment in May of 1995 was Lam Thanh Nguyen." (RB 108, citing 15 RT 2872.) Actually, the police told Tam that the renter's name was Lam Van Thanh. (15 RT 2872.)

B. Respondent's Theory #7: Lying-In-Wait Murder

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[28] There was a prosecution witness named Hoan Ngoc Bui (see 14 RT 2764), and at one point during appellant's testimony, the prosecutor referred to someone named Long Viet Tran (see 22 RT 4253-4254), but neither Hoan nor Long was alleged to have had any connection to the Tuan Pham shooting.

Respondent's most oft-repeated argument in favor of sustaining the judgment in Counts 13 and 14 is to propose a seventh theory for rejecting self-defense, one not offered to the jury below: lying in wait. (See RB 61, 113, 114, 116, 118, 119, 123, 125.) This argument fails on numerous levels.

1. A Lying-In-Wait Theory May Not Be Invoked or Relied on for the First Time on Appeal

It is firmly established that a judgment in a criminal case may not be sustained by resort to a theory different from those on which the case was tried. Both due process and the right to jury trial embody such a prohibition. "To conform to due process of law, [defendants] were entitled to have the validity of their convictions appraised on consideration of the case as it was tried and as the issues were determined in the trial court." (*Cole v. Arkansas* (1948) 333 U.S. 196, 202 [reversing an affirmance].) "This Court has never held that the right to a jury trial is satisfied when an appellate court retries a case on appeal under different instructions and on a different theory than was ever presented to the jury. Appellate courts are not permitted to affirm convictions on any theory they please simply because the facts necessary to support the theory were presented to the jury." (*McCormick v. United States* (1991) 500 U.S. 257, 270 fn. 8. See also, e.g., *Chiarella v. United States* (1980) 445 U.S. 222, 236 ["we cannot affirm a criminal conviction on the basis of a theory not presented to the jury"]; *Dunn v. United States* (1979) 442 U.S. 100, 107 ["[A]ppellate courts are not free to revise the basis on which a defendant is convicted simply because the same result would likely obtain on retrial"].)

The courts of this State are in complete accord. It is a "firmly entrenched principle of appellate practice that litigants must adhere to the theory on which the case was tried"; allowing a new theory on appeal "would be unfair to the trial court and the opposing litigant." (*Brown v. Boren* (1999)

74 Cal.App.4th 1303, 1316.) Thus, for example, "[w]hile a general verdict of guilt may be sustained on evidence establishing any one of the [forms of the] offenses, the offense shown by the evidence must be one on which the jury was instructed and thus could have reached its verdict." (*People v. Beaver* (2010) 186 Cal.App.4th 107, 123, citations omitted.) To the same effect are, e.g., *People v. Curtin* (1994) 22 Cal.App.4th 528, 531 ("While a general guilt verdict [in a theft case] may be sustained on evidence of any type of theft, the offense shown by the evidence must be one on which the jury was instructed and thus could have reached its verdict."), internal quotation marks omitted; *People v. Moses* (1990) 217 Cal.App.3d 1245, 1252 (after concluding there was no evidence of theft by larceny as charged: "The prosecution . . . cannot now change its theory on appeal and argue that the heifer had not been stolen but instead had been obtained by misappropriation under section 485."); and *People v. Green* (1980) 27 Cal.3d 1, 67 ("The fatal flaw in [the Attorney General's] 'continuous kidnapping' theory . . . is that it was simply not the theory on which the case was tried.").

The judgment in Counts 13 and 14 cannot constitutionally be upheld by resort to respondent's newly invoked lying-in-wait theory.

2. The Evidence Fails to Support a Lying-In-Wait Theory

Not only are there constitutional bars against resort to respondent's lying-in-wait theory, but the record fails to support it.

As this Court has recently noted, "Lying-in-wait murder consists of three elements: (1) a concealment of purpose, (2) a substantial period of watching and waiting for an opportune time to act, and (3) immediately thereafter, a surprise attack on an unsuspecting victim from a position of advantage" (*People v. Russell* (2010) 50 Cal.4th 1228, 1244, fn. and internal

quotation marks and citations omitted.) Even ignoring self-defense issues, the record would not support a finding of lying-in-wait murder.

It is difficult to understand how respondent can claim appellant committed "a surprise attack on an unsuspecting victim" when respondent continually claims that Tuan attempted to move his car from "the *anticipated* line of fire" in "the *anticipated* gun battle" (RB 116, 113. See also, RB 123 [Tuan "*anticipated* a shoot out before [he] exited the Oldsmobile."].) If Tuan "anticipated" a gun battle, then Tuan could not have been "an unsuspecting victim" subjected to "a surprise attack."

Nor can appellant possibly be found to have been in "a position of advantage" with respect to Tuan. Quite the contrary, appellant was confined in his seat in the car, whereas at the time Tuan raised his gun, Tuan was in a standing position at an angle to appellant and slightly behind him. (See RB 99 [Tuan Pham "began to raise his shooting arm while standing a short distance behind the driver's door"].) Tuan was in essentially the same position as law enforcement officers are taught to take when they approach the driver of a car in order to give *them* an advantage over the driver. And indeed, eyewitness Shawn Burchell described Tuan's position in these very terms: "You know how like when you get pulled over by a policeman, when he approaches your car, he doesn't come totally and face you at the door, he comes and asks for registration, and he's a little off to the side so almost if you did have a gun, you couldn't shoot him. [¶] That's where he [Tuan Pham] was. That's the only way I could explain that. He's almost like at where the back of the driver's side seat is. So he wasn't totally facing the vehicle. He was almost at an angle."[29] (13 RT 2602. See also 13 RT 2606.)

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[29] See, e.g., International Association of Chiefs of Police Model Policy re Motor Vehicle Stops (Dec. 2006), § IV.B.7 ["Approaching from the (continued...)

Each of these evidentiary flaws is dispositive of respondent's lying-in-wait theory by itself, but appellant wishes to comment upon two assertions that respondent makes repeatedly in the course of presenting that theory. First, respondent asserts that appellant "never thought of fleeing the scene" and "never backed away from the impending fight." (RB 61, 117. See also RB 116, 118, 125, 129, 130.) This assertion is defective both legally and factually. It is legally defective because, as the jury was instructed below,

> "[a] person threatened with an attack that justifies the exercise of the right of self-defense need not retreat. In the exercise of his right of self-defense a person may stand his ground and defend himself by the use of all force and means which would appear to be necessary to a reasonable person in a similar situation .... This law applies even though the assailed person might more easily have gained safety by flight or by withdrawing from the scene."

(27 RT 5283-5284. See also, e.g., *People v. Ross* (2007) 155 Cal.App.4th 1033, 1044 fn. 13 ["California belongs to the majority of jurisdictions with a '[n]o [r]etreat [r]ule,' under which the victim of an assault is under no

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[29](...continued)
driver's side, the officer should . . . stop at a point to the rear of the trailing edge of the left front door"]; Molnar, "Traffic Stop Survival, Part 1," *Law Officer Magazine* (June 1, 2010) ["As you reach the violator vehicle, conduct business from a position of advantage [and] don't ever pass the 'B' pillar."]' viewable at www.lawofficer magazine.com/pring/3685 (as of Nov. 16, 2011); Orwell [Oh.] Police Dept., "Traffic Stops" at http://www.orwellpolice.com/trafficstops.htm (as of Nov. 11, 2011) ("The purpose of the officer standing to the rear of the driver's door is for his own safety. It allows the officer a view of the entire interior of a vehicle and allows him to react if the driver or other occupant has a weapon."); Gonzalez, Conducting Safe and Lawful Traffic Operations and Vehicle Stops, viewable at http://www.scribd.com/doc/51556058/Police-Traffic-Stop-Training-Presentation-Part-1-by-R-Gonzalez , p. 15 (as of Nov. 11, 2011) ("Basic Traffic Stop Considerations - Review .... Conduct your approach at angles to your objective .... You want to remain behind the driver's door and force the driver to turn and face you.").

obligation to 'retreat to the wall' before exercising the right of self-defense, but is entitled to 'stand his ground.'"], quoting 1 Witkin, Cal.Crim. Law (3d ed. 2000) Defenses, § 74, p. 408.)

Respondent's assertion is also flawed factually because there was no evidence that any avenue of retreat was available. Appellant's car was stopped for a red light on eastbound Westminster at Brookhurst, a major intersection with businesses all around. (13 RT 2575.) There clearly was cross-traffic because cars not involved in the shooting had to wait for the green light before fleeing.[30] (See 13 RT 2612, 14 RT 2702-2703.) Certainly, the prosecutor below never claimed that appellant could have driven off. And in any event, as the AOB pointed out, "where the peril is swift and imminent and the necessity of action immediate[,] the law does not weigh in too nice scales the conduct of the assailed, and say he shall not be justified because he might have resorted to other means to secure his safety." (*People v. Hecker* (1895) 109 Cal. 451, 467. Accord *Brown v. United States* (1921) 256 U.S. 335, 343 ["Detached reflection cannot be demanded in the presence of an uplifted knife."].)

Respondent's second oft-repeated assertion is that "Tuan Phan [sic] only emerged from the Oldsmobile with a firearm after unsuccessfully attempting to back the Oldsmobile up and steer it out of the left turn lane." (RB 117. See also RB 114, 119, 123.) Appellant is not entirely clear what respondent's point is, but there is no evidence supporting the claim that Tuan was unable to steer out of the left turn lane. The prosecution's position at trial

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[30] In addition, as respondent acknowledges, just two minutes after the first police broadcast about the shooting, "Several cars were traveling north and southbound on Brookhurst and several cars were attempting to make a left-hand turn from westbound Westminster to northbound Brookhurst" and still other cars "were creating a traffic jam on Westminster near that intersection." (RB 103, referencing 14 RT 2677.)

was that Tuan backed up and stopped because he "wanted to get out of the line of sight of the car" that appellant was in. (27 RT 5184.) In other word, Tuan was not trying to "steer out of the left turn lane," as respondent would have it, but was trying to conceal himself in order to give himself the advantage of surprise in his impending attack.

In sum, not only is resort to lying in wait constitutionally barred by virtue of it never having been submitted to the jury, but the theory fails for lack of evidence as to essential elements of lying in wait. And there is yet another defect — equally fundamental — in respondent's effort to uphold the judgment as to Counts 13 and 14 under this theory . . . .

3. Respondent's Lying-in-Wait Theory Fails to Take into Account the Imminent Mortal Danger Facing Appellant

Even if the Constitution permitted respondent to invoke lying in wait for the first time on appeal (which it doesn't), and even if there were sufficient evidence to support the theory (and there isn't), that still would not justify resort to the theory here because there is yet another fundamental flaw with the effort to invoke the theory. The flaw is that respondent fails to take any account of the imminent mortal danger facing appellant at the time he shot Tuan Pham. Many acts of self-defense — indeed, probably most of them — would amount to first-degree murder if the element of imminent mortal danger were ignored. The endangered person will often have intentionally inflicted the mortal wound with intent to kill and have had time to premeditate and deliberate because, as the jury was instructed in appellant's case, "[t]he law does not undertake to measure in units of time the length of the period during which the thought must be pondered before it can ripen into an intent to kill which is truly deliberate and premeditated." (3 CT 1010, 27 RT 5262.) The dispositive factor in whether a killing with such a mental state is a justifiable homicide or a criminal one is the presence (or appearance) of imminent

danger. (§ 197. See also, e.g., *People v. Barry* (1866) 31 Cal. 357, 358 ["In cases of necessary self defense, the act done in such defense is justified on the ground that it was necessary for the preservation of the life of the slayer, and the intent to take the life of the assailant as a necessity may precede the act which results in his death."].)

Lying in wait is one "kind of willful, deliberate, and premeditated killing." (§ 189.) It is "the functional equivalent of proof of premeditation, deliberation and intent to kill." (*People v. Russell*, 50 Cal.4th at p. 1257, internal quotation marks and citations omitted.) Thus, by the plain terms of section 197,[31] lying-in-wait murder is subject to the same "justifiable homicide" exemption as is the usual form of premeditated and deliberate murder. And a person who has acted in response to imminent mortal danger may well have not disclosed his ability or intent to use lethal force against his assailant; he may well have had to wait for an opportune time to act; and he may well have surprised the assailant and used lethal force from a position of at least temporary advantage — because otherwise he might not have been able to preserve his life at all. None of this negates the imminent mortal danger facing him. None of this means that self-defense is unavailable.

Respondent negates the entire concept of self-defense by trying to use lying in wait to impose criminal liability on appellant without taking into account the imminent mortal peril confronting him at the time of the shooting. Not only does respondent seek to negate statutory law regarding justifiable homicide, but its position, if accepted, would run afoul of the constitutional

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[31] In relevant part, section 197 provides that homicide "by any person" is justifiable "[w]hen resisting any attempt to murder any person . . . or to do some great bodily injury upon any person" or "[w]hen committed in the lawful defense of such person . . . when there is reasonable ground to *apprehend* a design to . . . do some great bodily injury, and imminent danger of such design being accomplished."

right to self-defense, the existence of which respondent never disputes. (See AOB 127-131. See also *McDonald v. Chicago* (2010) 561 U.S. ___, 130 S.Ct. 3020, 3036, 177 L.Ed.2d 894 ["Self-defense is a basic right, recognized by many legal systems from ancient times to the present day, and . . . 'the central component' of the Second Amendment right" to keep and bear arms], quoting *District of Columbia v. Heller* (2008) 554 U.S. 570, 599, emphasis deleted.)

4. Conclusion

In sum, then, respondent's efforts to sustain the verdicts in Counts 13 and 14 on the basis of lying-in-wait murder must be rejected for multiple, independent reasons: (1) the theory may not be invoked here on appeal when it was not presented below; (2) the theory fails for lack of factual support in several regards; (3) the theory fails to account for the imminent mortal danger that Tuan Pham posed to appellant and negates self-defense altogether, and (4) applying the theory here would violate the state and federal constitutional rights to self-defense.

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We will now turn to respondent's contentions regarding the six legal theories that were made available to the jury to support its verdicts with regard to Counts 13 and 14. As noted in the AOB, those theories were:

1. the "mutual combat" theory,
2. the "initial aggressor"theory,
3. the "seeks a quarrel" or "contrived self-defense" theory,
4. the "decent person" theory,
5. the "emotional reaction" theory, and
6. the "multiple motivation" theory.

Respondent contends that the first three theories and Theory #6 are properly applicable to this case and support the jury's rejection of self-defense

and that the remaining two theories, which respondent tacitly concedes would be invalid, were not presented to the jury at all. Respondent's position has the following consequences:

First, respondent is not seeking to use Theories #4 or #5 to sustain the judgment against appellant's insufficient-evidence challenge. That challenge thus turns on whether Theory #1, #2, #3, or #6 can legally sustain the judgment in Counts 13 and 14.

Second, even assuming arguendo that this Court were to conclude that one or more of Theories #1, #2, #3, and #6 can support the verdicts against appellant's insufficient-evidence challenge, the judgment as to Counts 13 and 14 would still have to be reversed for a new trial unless "'it is possible to determine from other portions of the verdict that the jury necessarily found the defendant guilty on a proper theory'"[32] or that there is some other way to "conclude, beyond a reasonable doubt, that the jury based its verdict on a legally valid theory."[33] Respondent does not contend that it is possible to determine from other portions of the verdict that the jury necessarily found appellant guilty on the basis of Theories #1, #2, #3, or #6 . Indeed, respondent makes no argument whatsoever that verdicts in Counts 13 and 14 could be upheld if one or more of Theories #1, #2, #3, or #6 were found to be invalid or if one or both of the concededly invalid Theories #4 and #5 were in fact presented to the jury. In essence, respondent acknowledges that, under

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[32] *Ibid.*, quoting *People v. Guiton* (1993) 4 Cal.4th 1116, 1130. See also *Griffin v. United States* (1991) 502 U.S. 46, 59; *Stromberg v. California* (1931) 283 U.S. 359, 368.

[33] *People v. Chun* (2009) 45 Cal.4th 1172, 1203.

the facts of this case, a new trial is required if *any* invalid theory was presented to the jury.[34]

C. Theory #1: Mutual Combat

Like the prosecutor below, respondent seeks to justify the rejection of self-defense as to Counts 13 and 14 on the basis of the mutual-combat exception to the self-defense doctrine. In the AOB at pages 134 to 156, appellant set forth reasons why that exception is inapplicable to this case:

1. The crucial testimony from Detective Nye that underlies the mutual-combat exception was "inherently improbable or incredible," "wholly unacceptable to reasonable minds," and "so contrary to the teachings of basic human experience, so completely at odds with ordinary common sense, that no reasonable person would believe [it] beyond a reasonable doubt." (*Kolender v. San Diego County Civil Service Comn* (2005) 132 Cal.App.4th 1150, 1155, internal quotation marks omitted; *United States v. Chancey* (11th Cir. 1983) 715 F.2d 543, 546, cited in *People v. Mayfield* (1997) 14 Cal.4th 668, 735. See AOB 136-141.)
2. Even if Detective Nye's testimony were credited, appellant's actions on May 6, 1995 — responding at the last possible moment to a surprise attack that Tuan Pham launched — cannot be deemed to be "mutual combat." (See AOB 141-145.)
3. Even viewing the events of May 6, 1995 against the backdrop of the ongoing war between the Nip Family and the Cheap

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[34] Respondent does claim that some of appellant's challenges are forfeited, but none of those claims have arguable merit. We reply to those claims at the end of the discussion of the six theories.

Boys, the shooting of Tuan Pham still does not fit within the concept of "mutual combat" as enacted into statute, and it would be neither appropriate nor constitutional for this Court to enlarge the mutual-combat exception so as to cover this case. (See AOB 146-153, 154.)

4. At the very least, the second and third reasons just mentioned raise "serious and doubtful constitutional questions" and thus trigger the "canon of constitutional avoidance." (*People v. Superior Court (Romero)* (1996) 13 Cal.4th 497, 509, *Harris v. United States* (2002) 536 U.S. 545, 555. See AOB 145, 153-154, 155.)

We now turn to respondent's contentions with regard to these several matters.

1. Detective Nye's Testimony Did Not Provide Substantial Evidence in Support of the Mutual-Combat Theory, i.e., Evidence That Was "Reasonable, Credible, and of Solid Value"

The key evidence for the prosecution with respect to its mutual-combat theory was Detective Nye's testimony that members of the Nip Family and Cheap Boys gangs would "actually seek rivals each time they go out" and that "any time either one of those two gangs saw somebody from the rival gang, they would attempt to kill that other person." (16 RT 3212-3213, 3211.) As the AOB pointed out, this testimony was essential to the prosecution theory because without it, the evidence merely showed appellant to be lawfully stopped at a red light at the time Tuan Pham was shot. In order to turn the attack by Tuan into mutual combat on appellant's part, the prosecution had to establish that appellant was out looking for a Cheap Boy to do battle with at that time. And the only evidence the prosecution offered to establish that

appellant was out looking for a Cheap Boy was Nye's testimony that *all* members of both gangs were *always* looking to shoot rivals, *whenever* they were out in public. Without such evidence, there was no basis for arguing that appellant's act of shooting was anything other than justifiable self-defense. The threshold problem with this testimony, however, is that it defies human experience and common sense, as even the Supreme Court has recognized.[35] (See *United States v. Brown* (1965) 381 U.S. 437, 455-456.)

Respondent's answer to appellant's point is *not* to argue that Nye's testimony can be deemed to be credible, reasonable, or substantial. Rather, respondent claims that appellant "has misinterpreted Nye's testimony by overstating Nye's assertions." (RB 126. See also RB 120, 136.)

Respondent says, first, that "Nye never claimed the sole activity of every gang member was killing a member of a rival gang" (RB 120, 126, 136), but appellant has never alleged Nye so testified.

Respondent also says that Nye "never claimed . . . that no gang member left his home unless he did so for the purpose of killing another gang member." According to respondent, Nye merely testified that "armed gang members from one gang would *regularly* hunt gang members from another gang." (RB 120, 126, 136. See also RB 121 ["regularly hunting"], 122 ["regularly hunted"].) But no transcript citation is provided to support this "regularly hunted" characterization of Nye's testimony. And the reason there is no transcript citation is that Nye never said "regularly hunted" or anything comparable to it. Rather, Nye's testimony was as we have quoted. He testified that gang members would "actually seek rivals *each time they go out*"

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[35] As explained in the AOB 141-154 and below in Subsections 2 and 3, pp. 87 et seq., *post*, even if Nye's testimony could be credited, the evidence would be insufficient to establish mutual combat. Without his testimony, there is no support at all for the prosecution's mutual-combat theory.

and that "*any time* either one of those two gangs saw somebody from the rival gang, they would attempt to kill that other person." (16 RT 3212-3213, 3211.) It is not appellant who has "misinterpreted Nye's testimony" here.

2. The "Mutual Combat" Doctrine Does Not Apply to a Surprise Attack Such As Tuan Pham Was Attempting to Perpetrate on Appellant

Appellant has argued that, viewing the events of May 6, 1995 on their own terms, what took place here was an attempted surprise attack by Tuan Pham and that the target of a surprise attack cannot be deemed to have engaged in mutual combat when he defends his life from the imminent lethal danger posed by the attacker. (AOB 141-145.) Respondent contends that "Tuan Pham's attack was not a surprise, since appellant and appellant's passenger anticipated it and were armed and waiting for Pham before Pham could fire his first shot. And Pham's own unsuccessful actions — attempting to back the Oldsmobile up and steer the Oldsmobile out of its position in the left turn lane before retrieving his firearm from the Oldsmobile — suggests both sides anticipated a shoot out before Pham exited the Oldsmobile in order to approach the Honda on foot." (RB 123.) With due respect, this is nonsensical on several levels.

First of all, as we have already pointed out, no evidence supports respondent's claim that Tuan made an unsuccessful attempt to move his car of the left turn lane (see Subsection B.2, p. 80, *ante*), but even if respondent were correct, it hardly matters. For if Tuan did try to move his car, that does not begin to establish that *appellant* "anticipated a shootout before Pham exited the Oldsmobile." In fact, there is not the slightest evidence appellant was aware of Tuan's presence until Tuan approached the Honda. And even if appellant *had* anticipated a shootout once Tuan failed to move his car, that hardly matters, either. All it means is that appellant now realized that Tuan

would attack him and that he would have to defend himself. The victim of a surprise attack will often recognize that he is being attacked — or is about to be attacked — before the assailant fires his first shot, but that does not negate the fact that the assailant has undertaken a potentially deadly attack.

Second, insofar as respondent seems to be suggesting that appellant's encounter with Tuan Pham was mutual combat because appellant was already armed, that suggestion also fails. "[A] defendant claiming . . . self-defense will always have had the means to rebuff the victim's attack, or else the homicide would not have occurred." (*People v. Vasquez* (2006) 136 Cal.App.4th 1176, 1179.) In addition, "one may know that if he travels along a certain highway he will be attacked by another with a deadly weapon, and be compelled in self-defense to kill his assailant, and yet he has the right to travel that highway, and is not compelled to turn out of his way to avoid the expected unlawful attack." (*People v. Gonzales* (1887) 71 Cal. 569, 578. See also *Thompson v. United States* (1894) 155 U.S. 271, 278 [similar].) Thus, the fact that an attack of some sort might be expected and that one has armed himself in anticipation of that possibility does not mean that the attack, if it occurs, is mutual combat rather than an attack in which he is entitled to use self-defense.

What makes it particularly difficult to classify the encounter with Tuan Pham as mutual combat is the fact that appellant never had any opportunity to withdraw from the combat. Respondent asserts that "[m]utual combat does not require any opportunity to withdraw in good faith from the struggle" and that "[w]hether or not such an opportunity exists is an independent factual issue for the jury." (RB 124.) Respondent might or might not be correct in the situation where deadly force is used after lethal mutual combat is under way, but that is not what appellant is talking about here. Appellant is arguing that when deciding whether an encounter is mutual combat *at all* — whether

it meets the definition of "mutual combat" ab initio — it matters that one party poses an imminent deadly peril and the other party *never has an opportunity to withdraw* from the attack and has no choice but to respond with deadly force or to die. To call that situation "mutual" combat would be to distort the very meaning of the term. (*People v. Ross* (2007) 155 Cal.App.4th 1033, 1045 [mutual combat is combat "*pursuant to mutual intention, consent, or agreement preceding the initiation of hostilities.*"], original emphasis.) And it would just as plainly violate the constitutional right to self-defense.

Respondent also contends that "jurors in the case at hand could reasonably decide . . . that appellant had . . . an opportunity [to withdraw] at some point prior to the fatal shooting of Tuan Pham." (RB 124.) But where would that opportunity have arisen? Respondent does not point to anything specific. It merely refers to the entirety of "the substantial evidence summarized in respondent's argument VII(b), ante." (RB 124, referring to RB 98-112.) Appellant takes respondent's failure to point to any specific evidence as a tacit acknowledgment that no such evidence exists. (*Lewis v. County of Sacramento*, *supra*, 93 Cal.App.4th at pp. 113, 114 ["established rules of appellate procedure . . . require that all assertions of fact be supported by citations to the record"; counsel must "provid[e] exact record page citations for each fact cited"].)

Respondent further makes the assertion that this was mutual combat because appellant and Tuan Pham spotted each other "at some point before the two cars arrived at the intersection of Westminster and Brookhurst." (RB 116. See also RB 112 & 114 [both similar].) However, on none of the occasions where this assertion is made does respondent offer any citation to support it.

Undoubtedly the reason for this omission is that there is, in fact, nothing to cite. It is simply an invented "fact."[36]

In a somewhat similar vein, respondent also asserts that "[o]n May 6, 1995, appellant and his passenger precipitated the gun battle resulting in Tuan Phan's [sic] death by spotting the Cheap Boys before the Cheap Boys spotted them." (RB 117. See also RB 119 [similar].) But not only is there (again) nothing in the record to support the claim that appellant and his passenger spotted the Cheap Boys first (and respondent again cites nothing), but even if there were, it is difficult to see how the mere act of "spotting" members of another gang could be deemed to have "precipitated the gun battle."[37]

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[36] That appellant had a gun at the ready before Tuan Pham reached appellant's car may explain why appellant survived the encounter but provides no basis for finding beyond a reasonable doubt that appellant saw Tuan Pham before Pham exited his vehicle and started moving toward appellant's car.

[37] Also unreasonable on their face are respondent's assertions (1) that appellant "never gave the Cheap Boys any opportunity to stop the fight" and (2) that "since Tuan Phan [sic] only emerged from the Oldsmobile with a firearm after unsuccessfully attempting to back the Oldsmobile up and steer it out of the left turn lane," the inference is that "appellant and his passenger . . . armed themselves first." (RB 116, 117.)

Respondent also states that "[a]ppellant and his passenger shot Phan [sic] down before he was able to raise his weapon." (RB 117.) This contradicts not only the evidence that Tuan was shot as he raised his gun (13 RT 2602-2603) but also respondent's own Statement of Facts, where respondent acknowledges that Tuan was shot "[a]s [he] began to raise his shooting arm." (RB 99.) And, of course, even if Tuan had not yet actually begun to raise his gun, that would not undermine appellant's use of deadly force in the slightest. The mere act of "drawing or attempting to draw a gun is sufficiently proximate to be deemed imminent. A defendant is not required to wait until an assailant 'gets the drop on him.'" (Wharton's Criminal Law (15th Ed. 1994) § 127, p. 184, fns. omitted.)

3. The "Mutual Combat" Exception to the Self-defense Doctrine Does Not Come into Play as the Result of the Type of Gang War Shown by the Evidence in This Case

Even viewing the events of May 6, 1995 against the backdrop of the conflict between the Nip Family and the Cheap Boys, the shooting of Tuan Pham by appellant still does not fit within the concept of "mutual combat" as embodied in the law of this State, and it would be neither appropriate nor constitutional for this Court to enlarge the mutual-combat exception so as to cover this case. (AOB 146-154.)

a. This Gang War Was Not "Mutual" Combat

Appellant does not dispute that the prosecution's evidence showed there had been a war in the sense of recurrent attacks by one gang against the other, but the evidence did not show "mutual combat" such that members of each side were required by law to submit to being shot to death by anyone in the rival gang who endeavored to kill them. Not only would a contrary conclusion distort the term "mutual" and the concept of "mutual combat," but it would lead to irrational consequences and would be inconsistent with a society governed by laws rather than by street justice. (AOB 146-150.)

Respondent disagrees, claiming that "appellant takes an overly narrow view of the words 'mutual combat.'" (RB 123.) Respondent's disagreement, however, is completely free of citation to case law or other authority and fails to address any of the authority cited by appellant. (RB 123-124.)

Respondent's position seems to be that mutual combat was established by evidence from Detective Nye to the effect that "[h]unting rivals was a major gang activity" of Asian gangs, that the gangs "involved themselves in street warfare wherever they happened to meet," that "[s]hooting rivals enhanced the status of the gang and the gang member within the gang," and

that "Nip Family gang members spotting Cheap Boys would attempt to kill them and vice versa." (RB 123-124.) But all that this testimony established was that members of each gang would attempt to kill members of the other gang. This was "mutual" combat only in the sense that the gang war, like any war, "possess[ed] a quality of reciprocity or exchange." (*People v. Ross*, 155 Cal.App.4th at p. 1044.) But that is not what "mutual combat" means in the self-defense context. Rather, "as used in this state's law of self-defense, 'mutual combat' means not merely a reciprocal exchange of blows but one *pursuant to mutual intention, consent, or agreement preceding the initiation of hostilities*." (*People v. Ross*, *supra*, 155 Cal.App.4th at p. 1045, original emphasis. Accord, e.g., *People v. Fowler* (1918) 178 Cal. 657, 671 ["duel or other fight begun or continued by mutual consent or agreement, express or implied."]; *People v. Hecker* (1895) 109 Cal. 451, 462 ["prearranged duel, or by consent"]; *People v. Rogers* (1958) 164 Cal.App.2d 555, 558 [no mutual combat because there was no "prearrangement to fight anybody" and no "gangs agree[ing] to meet for combat"].) Respondent does not make any effort to argue that the war between the Nip Family and the Cheap Boys satisfied this meaning of "mutual" combat. And certainly none of the individual incidents prior to May 6, 1995, had the appearance of being mutual combat within the legal definition of the term.

As before, the conclusion that this gang war could not be deemed to be mutual combat is also shown by the fact that it is impossible for a member of one gang who no longer wishes to participate in the war, or who never participated in the first place, to withdraw from the combat. If there is no way to withdraw, then the combat cannot rationally be deemed to be "mutual" in any meaningful sense of the term. (See AOB 147-149.) Respondent does not dispute appellant's premise. Respondent does not contest that there were no means by which a gang member could communicate withdrawal. In essence,

respondent concedes that withdrawal was impossible. (Cf. AOB 148-149.) Respondent's sole counter-contention is that the inability to withdraw is irrelevant because mutual combat "does not require any opportunity to withdraw" and that opportunity for withdrawal is "an independent fact question for the jury." (RB 124.) But, as we have discussed, whatever validity such a contention might arguably have once an individual instance of actual combat is under way, the contention fails to address the issue of how to define "mutual combat" in the first place. In this context, the fact that withdrawal is impossible is extremely relevant. For if withdrawal is impossible — and if, as a result, the basic right to self-preservation is deemed to be forfeited — then by no stretch of logic can a response to an attack by the other side be deemed to be "mutual" combat.

In the AOB, appellant pointed to another irrational consequence of applying the mutual-combat exception to the facts of this case, namely, that in an attack by a member of one gang against a member of other gang, the victim would, under the law, be forbidden from defending himself only if the attacker were from a gang that was at war with the victim's gang. Giving such a legal advantage to gangs at war would be a legal absurdity. Respondent acknowledges appellant's point but does not respond to it. (RB 124.)

The upshot is that appellant's case does not fit within the traditional "mutual combat" mold, and trying to force a fit leads to irrational results. No statute or decision cited by respondent or known to appellant justifies the effort to force the square peg of this case into the round hole of mutual combat, nor could this Court lawfully do so now. (See *People v. Chun* (2009) 45 Cal.4th 1172, 1183 ["There are no nonstatutory crimes in this state"]; *Keeler v. Superior Court* (1970) 2 Cal.3d 619, 632 ["it is clear the courts cannot go so far as to create an offense by enlarging a statute, by inserting or

deleting words, or by giving the terms used false or unusual meanings."].) In short, extending the mutual-combat doctrine to appellant's case would be "unexpected and indefensible by reference to the law which had been expressed prior to the conduct in question" and thus would violate Due Process. (*Bouie v. City of Columbia* (1964) 378 U.S. 347, 354.)

Moreover, using such a mutual combat theory to deprive a person of the legal ability to defend himself would violate the constitutional right to self-defense. (See *McDonald v. City of Chicago*, 561 U.S. ___, 130 S.Ct. 3020; *District of Columbia v. Heller*, 554 U.S. 570.)

At the very least, the doctrines of constitutional avoidance and of lenity in the interpretation of criminal laws forbid reaching the conclusion that the mutual combat exception can be invoked here.

Nothing respondent has said undermines any of appellant's points as to why the mutual-combat exception is inapplicable to the Tuan Pham shooting incident.

b. Uncertainty, Vagueness, and Overbreadth

The impropriety of attempting to apply a gang-war theory of mutual combat to appellant's case becomes even more pronounced when one considers the uncertainties, vagueness, and overbreadth inherent in such a theory — uncertainties even as to the theory's basic elements — and also when one considers the many policy questions that only a Legislature can and should answer if such a theory is to be created. In his AOB, appellant set forth multiple sets of such uncertainties and questions. (AOB 150-154. Cf. *People v. Oates* (2004) 32 Cal.4th 1048, 1059 [this Court notes several unresolved questions raised by a party's interpretation of a statute and concludes, "We would have to read a great deal into the statute in order to address these practical problems, and the statute's failure to address any of

these questions is yet another indication that the Legislature did not intend" the interpretation for which the party was advocating].)

Respondent's brief contains a lengthy discourse that appears to be aimed at answering appellant's points (RB 125-132), but with due respect, appellant is unable to follow respondent's arguments. They appear to be neither accurate nor responsive to the issues raised.

Respondent devotes much of its argument to addressing appellant's contention that "the prosecutor relied on an unconstitutional mutual combat theory of gang war." (RB 125, citing AOB 150-154.) According to respondent, appellant's contention is "[b]ased upon his previously discussed interpretation of the cited testimony regarding Asian gang warfare and his previous references to the prosecutor's closing argument relying on Nye's testimony." (RB 125, citations omitted.) However, appellant did not mention or cite either Detective Nye's testimony or the prosecutor's closing argument in the AOB discussion at issue here, in which appellant pointed out the problems of uncertainty, vagueness, overbreadth, with the gang-war theory of mutual combat (AOB 150-154). Indeed, except for our challenge to Detective Nye's "any time they go out" testimony, appellant's contentions concerning the mutual-combat theory have all assumed Nye's testimony to be accurate. (See AOB 146 ["The prosecution's evidence, *with Detective Nye's testimony*, failed to show there was "mutual combat" between the Nip Family and the Cheap Boys gang at all."]. See also AOB 148, 149 fn. 101, 150, 155.) Respondent appears to be creating a straw man to fight against.

As for the prosecutor's arguments, the AOB again did not cite them in the course of the argument currently being addressed, but it did cite them to extent that they outlined a gang-war theory of mutual combat that appellant presumed respondent would use on appeal to sustain the verdicts. Respondent claims that "appellant has either overstated the meaning of the [prosecutor's]

referenced remarks or taken them out of context," citing page 136 of the AOB as the place where appellant committed these errors. (RB 127. See also RB 125.) What did appellant say about the prosecutor's argument at AOB page 136? Here is the text in question:

> "Based on [Detective Nye's] evidence, the prosecutor argued to the jury that the 'two gangs were mutually at war,' that the warring gang members 'think about killing the rivals all the time,' that 'they were all engaged in combat on May 6th, 1995,' and that there was 'no right to self-defense' in this 'mutual combat situation.' (26 RT 4972, 4979, 5002; see also 26 RT 4977 [self-defense is "not available in the gang situation where both sides . . . are actively seeking out the other to fight'].)"

(AOB 136.)

Appellant is at a loss to understand what overstatements he made in this passage or how he took the prosecutor's quoted remarks out of context. Indeed, isn't respondent itself making essentially the same arguments in defense of the mutual-combat doctrine as the prosecutor made in the remarks appellant quoted? Isn't respondent, like the prosecutor, asking this Court to look to gang-related events that occurred at separate times and separate places from the May 6, 1995, shooting in order to justify the use of the mutual-combat exception to the self-defense doctrine?

At any rate, the legal point to which respondent purports to be responding is appellant's argument that there are many unresolvable definitional issues that, for systemic and constitutional reasons, preclude the application of a gang-war theory of mutual combat to appellant's case. Detective Nye's testimony and the prosecutor's closing argument (see RB 126-130) do nothing to address those issues or the systemic or constitutional problems, which is why the AOB did not cite them in the course of its discussion. As far as appellant can determine, respondent's entire foray into

what the prosecutor and Detective Nye said is an irrelevant tangent. It is not responsive to appellant's points.

Respondent does eventually acknowledge the multiple sets of unresolved and unresolvable questions surrounding the gang war theory of mutual combat (RB 130-131), but respondent does not deal with any of them. It does not deny they exist, nor does it try to answer them. Instead, without citing anything, the RB merely says that "[n]one of the hypothetical problems perceived by appellant could exist at a trial like appellant's, in which the jury (1) determines the facts surrounding the charged crime; (2) determines how those facts would have appeared to the defendant from all the evidence of the defendant's background and experience, and from all the evidence surrounding the charged crime; and (3) reaches its verdict based on an objective determination of how a reasonable person with defendant's history and background would react when faced with those apparent facts." (RB 132.) With due respect, appellant does not understand how the quoted sentence responds to the issues appellant has raised. There is nothing here to which appellant can meaningfully reply.

D. Legal Theory #2: The "Initial Aggressor" Theory

A second theory on which respondent claims the verdicts in Counts 13 and 14 may be sustained is the "initial aggressor" theory. However, as appellant has argued, that theory fails as a matter of law for two independent reasons. First, the "initial aggressor" doctrine only applies to the circumstances and situation of the deceased and defendant *at the time the killing occurred.* It does not apply when there has been either a pause in the assault by the initial aggressor, a separation of the initial aggressor from the assailed person, or a retreat by the initial aggressor from the scene of his initial aggression. Second, the initial-aggressor exception to the self-defense

doctrine does not apply when "initial aggressor" is confronted at a later time by someone who was neither the victim of the "initial" assault nor present at and endangered by that assault but who has decided to try to exact revenge by his own hand. (AOB 156-162.) In support of these propositions, appellant cited a number of cases and discussed three of them at some length. (See AOB 158-161, discussing esp. *People v. Robertson* (1885) 67 Cal. 646, *People v. Baldocchi* (1909) 10 Cal.App. 42, and *People v. Randle* (2005) 35 Cal.4th 987.)

Respondent, remarkably, does not deal with any of the case law appellant has cited or discussed. Not a single case appellant has relied on — not *Robertson* or *Baldocchi* or *Randle* or any other decision — is even mentioned in the RB. Indeed, respondent's discussion of the "initial aggressor" issue is entirely free of authority of any sort. (See RB 132-134.) Instead, respondent simply asserts that appellant "participated as an initial aggressor" in the prior shootings with which he was charged — as if such participation, if true, somehow establishes that appellant can be considered to be an initial aggressor when attacked by Tuan Pham at a later date and requires appellant to have allowed Tuan to shoot him to death. But plainly, it doesn't, certainly not in light of the case law that appellant has cited and respondent has ignored. The only rational conclusion to be drawn from the RB is that no rebuttal to appellant's argument is possible and that it would require an ex post facto, *Bouie*-violating reformulation of the initial-aggressor doctrine to enable it to be applied to this case.[38]

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[38] Respondent's argument seeks to reformulate appellant's claims into a challenge to the prosecutor's jury argument, but that is a mischaracterization. Appellant's claims were, are, and always have been that there is no substantial evidence to support the convictions in Counts 13 and 14 and that even if there were a theory that justifies the convictions, they (continued...)

These legal problems with the attempt to invoke an initial-aggressor theory to sustain Counts 13 and 14 are themselves dispositive of that theory. However, out of an excess of caution, appellant will also briefly reply to two of the more salient factual deficiencies in respondent's argument with regard to the theory.

First: The AOB pointed out that Counts 13 and 14 cannot be sustained on the basis that appellant "actually initiated the war" between the Nip Family and the Cheap Boys, as the prosecutor told the jury, because the uncontradicted evidence was that appellant did not start the war. (AOB 157, citing and comparing 26 RT 4978 and 10 RT 1906.) Respondent asserts, again, that appellant "has taken the prosecutor's remark . ... out of its immediate context and out of the context of the prosecutor's longer discussion about self-defense." (RB 134, citation omitted.) However, respondent does not explain either what the "immediate context" or the "longer discussion" context might be that would make the prosecutor's words mean something other than what they say on their face.

Second: Appellant acknowledges that the prosecution presented evidence that, if credited, indicates that appellant was an initial aggressor in the shootings of Sang Nguyen (Counts 6-7) and Khoi Huynh (Counts 8-9), but in a footnote, appellant has denied that the "initial aggressor" label could be attached to the shootings of Tony Nguyen (Counts 2-3) or Huy (PeeWee) Nguyen (Counts 4-5), neither of whom was a Cheap Boy. (See AOB 157 fn.

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[38](...continued)
would still have to be reversed because the jury was given improper legal theories on which to convict. Appellant cited the prosecutor's jury argument merely in order to "identify legal theories that respondent will presumably [and does actually] rely" and to "show legal theories that one or more jurors may have relied on as the basis for rejecting self-defense." (AOB 132.)

109.) Respondent's only reasoned response to appellant's entire "initial aggressor" challenge involves this footnote. Respondent says that appellant was an initial aggressor as to the Tony Nguyen shooting because, even though appellant was unarmed and seated in the rear of the shooter's car, appellant "help[ed] to spot Cheap Boys and Cheap Boy associates in the car driven by Tony Nguyen and thereby trigger[ed] and aid[ed] and abett[ed] Nip Family gang member Nghia Phan when he fired his gunshots into Tony Nguyen's car." (RB 134.) However, (1) no evidence supports the claim that appellant "spotted" the Cheap Boys in Tony's car, (2) no evidence supports the necessary inference that appellant communicated the Cheap Boys' presence to Nghia Phan, let alone that he "triggered and aided and abetted" Nghia Phan's act of firing his gun, and (3) respondent cites nothing to support the unstated premise that a non-shooter, particularly one seated in the rear of a car, can be deemed to be an "initial aggressor" for purposes of denying him the right to self-defense on a later occasion.

As for the shooting of PeeWee Nguyen, respondent says appellant's status as an initial aggressor is supported by PeeWee's testimony that "before he was shot, a man asked him if he was from T.R.G. and punched him in the face when he said he only associated with T.R.G." (RB 143.) For present purposes, however, it should suffice to note that respondent fails to explain how initial aggression against PeeWee — who was not in any way associated with the Cheap Boys — could possibly have made appellant an initial aggressor with respect to Cheap Boy Tuan Pham.

But ultimately, these deficiencies are of marginal import because, as we have discussed, the legal defects in the effort to apply the initial-aggressor exception are dispositive.

E. Legal Theory #3: The "Seeks A Quarrel" Theory

The third theory that respondent relies on as a basis for rejecting self-defense is the "seeks a quarrel" theory, but as appellant has explained, that theory fails for four separate reasons: (1) it is premised upon the unsubstantial testimony of Detective Nye, (2) the theory's very terms have to be distorted in order to fit the evidence in this case, (3) the theory is inconsistent with the case law, which establishes that the theory "appl[ies] to the circumstances and situation of *the deceased* and defendant *at the time the killing occurred*, and under which he asserts that he was justified in taking the life of deceased,"[39] and (4) application of the "seeks a quarrel" theory here would run afoul of the doctrine of lenity in construing criminal statutes, the canon of constitutional avoidance, and due process. (AOB 162-164.)[40]

Respondent does not address either of appellant's latter two points. Nor does respondent cite any case law whatsoever anywhere in its discussion of the merits of this theory. Instead, respondent addresses only points (1) and (2), but even this limited defense of the "seeks a quarrel" theory is unavailing.

As to the insubstantiality of Detective Nye's testimony (appellant's first point), respondent merely repeats verbatim the assertions that it made earlier and that appellant has already addressed in this brief. (See ARB § II.1.C.1, pp. 85 et seq., *ante*.) There is no need this the ARB to repeat our earlier reply here. We incorporate that discussion by reference.

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[39] *People v. Glover* (1903) 141 Cal. 233, 242.

[40] Appellant refers to the theory as the "seeks a quarrel" theory rather than as the "contrived self-defense" theory, the other label sometimes used for the theory, because the jury at appellant's trial was instructed only in the language of "seeks a quarrel." (27 RT 5285-5286.) As a result, if there is a difference between the two formulations, only the "seeks a quarrel" formulation may constitutionally be used here on appeal. (Cf. ARB § II.1.B.1, pp. 75 et seq., *ante* [cannot affirm on basis of theory not presented to jury].)

In response to appellant's second point — the distortion of the "seeks a quarrel" theory's terms — respondent argues that "the concept hunting for rivals to shoot equates with seeking a quarrel with the intent to create a real or apparent necessity of exercising self-defense." (RB 136.) However, as the AOB pointed out, this is wrong factually and logically. The "hunting" evidence from Detective Nye most definitely did *not* indicate that members of the Nip Family or Cheap Family would "hunt[] for rivals *with the intent to create a real or apparent necessity of exercising self-defense.*" (RB 136.) Rather, according to Nye's evidence, gang members simply sought out *the opportunity* to shoot their rivals. Not only does it require a distortion of the English language to equate "opportunity to shoot" with "seeking a quarrel," but it would defy common sense. As the AOB pointed out, the very act of creating a need for self-defense would increase the danger to the "hunter" and would decrease the chance that the "hunt" would be successful. Respondent fails to grapple with any of these problems. And, as we have pointed out, respondent does not deal at all with the remainder of appellant's arguments, points (3) and (4), *ante.*

F. Legal Theory #4: The "Decent Person" Theory

In the AOB, appellant argued that a fourth improper theory was offered below as a basis for rejecting self-defense in this case. Specifically, the jury instructions and the prosecutor's argument to the jury authorized the jury to reject appellant's claim of self-defense on the impermissible basis that appellant was a gang member and was not the type of reasonable, decent, good, ordinary person to whom the doctrine of self-defense was applicable. In support of this claim, appellant quoted extensively from both the instructions and the prosecutor's argument to the jury. (AOB 165-169.)

To its credit, respondent does not claim that such a "decent person" theory is a valid one and may be used to justify the verdicts in Counts 13 and 14. Rather, respondent's contention is, in essence, that no such theory was presented to the jury. According to respondent, the prosecutor's references to "decent" persons were merely "emotional language" that the prosecutor used "in order to emphasize that appellant could not set up his own standard of conduct as a criminal street gang member in order to justify or mitigate the charged crimes." (RB 138.)

The first flaw in respondent's position is that it entirely ignores the instructions given the jury. As appellant pointed out (AOB 168-169), instructions indicated that a defendant must be a reasonable person himself in order to invoke self-defense. Thus, one instruction told the jury that the imminence of the danger must "appear at the time *to the slayer as a reasonable person.*" (27 RT 5281-5282, 3 CT 1048; CALJIC No. 5.12.) Another instruction explained that a person may defend himself "if, *as a reasonable person,* he has grounds" for believing himself in danger. (27 RT 5282-5283, 3 CT 1051; CALJIC No. 5.30.) And most explicitly of all, an instruction informed the jurors that "[i]f one is confronted by the appearance of danger which arouses *in his mind as a reasonable person* an actual belief and fear that he is about to suffer bodily injury *and if a reasonable person* in a like situation, seeing and knowing the same facts, would be justified in believing himself in like danger," then self-defense would be available if he acted on the basis of those fears. (27 RT 5284, 3 CT 1054, CALJIC No. 5.51.) This instruction certainly indicated *both* that the defendant had to be "a reasonable person" *and* that his fears had be those that a "reasonable person" would also harbor. There is, at the very least, a reasonable likelihood that jurors would have so understood the instructions.

The prosecutor's argument to the jury is the one facet of the current issue that respondent does address, but even that limited discussion is flawed. For one thing, it does not contain a single citation to the transcripts, for reasons that are readily apparent. Yes, in the course of her argument about manslaughter, the prosecutor did refer to the fact that a person cannot "set up their own standards . . . [l]ike it's not an ordinary or reasonable gang member . . . . ." (26 RT 4962.) However, the prosecutor immediately explained that such standards are not allowed precisely "[b]ecause [the law has set up] a specific exception for good, decent people." (*Ibid.*) "[I]t's very limited situations," the prosecutor said, applicable to "a decent, ordinary person in that unique situation." (*Ibid.*) "When you look at that instruction," she added, "you'll see it specifically says an 'ordinary and reasonable person.'" (26 RT 4966.) She emphasized this point repeatedly, characterizing the reasonable person standard as applying to "an ordinary, decent, reasonable person, basically a good person," "a good, decent person," "a decent ordinary person," "good decent people" (twice), "a decent ordinary person" (twice), "a decent, reasonable, ordinary person,"and an "average, decent, reasonable person." (26 RT 4961-4962, 4966-4967.) She specifically contrasted gang members with "a decent person" and "us, as decent people" and "ordinary people." (26 RT 4972, 27 RT 5169.)

This was the background that the prosecutor referred to when she addressed the issue of self-defense. "Again it's the reasonable person standard," she said, referencing her earlier remarks about "decent" persons. (26 RT 2475.)

And, tellingly, the prosecutor was now invoking those remarks in the context of the jury's decision as to whether "the circumstances [were] such as would excite the fears of a reasonable person placed in a similar position." (*Ibid.*) But the question of whether or not a reasonable person would be in

fear of imminent death or great bodily injury was hardly a debatable question in appellant's case. Tuan Pham was approaching appellant with a gun and, as the trial court would later note, "was actively seeking to kill the defendant." (31 RT 6082.) Appellant was indisputably in immediate, mortal danger, and any reasonable person would understand the situation as such. Thus, the obvious purpose of the prosecutor making reference to her discussion of the "reasonable person standard" in this self-defense context — indeed, the only conceivable purpose — was to communicate to the jury that self-defense only applied to "a decent person," to "an ordinary, decent, reasonable person, basically a good person," and not to gang members like appellant. That is the import of the prosecutor's argument, and it is one that any juror would have understood and credited, especially since the prosecutor told the jury she knew the law and since the trial court effectively validated the legal points she made in her argument. (26 RT 4943-4944, 27 RT 5231.) At a minimum, there is a reasonable likelihood that the prosecutor's remarks would have been so understood and credited by one or more jurors.

In sum, then, respondent's effort to deny that the "decent person" theory was presented to this jury suffers from three fatal flaws: (1) it fails to account for the instructions, (2) it misperceives the prosecutor's argument, and (3) its deficiencies are especially prominent when the instructions and the prosecutor's argument are measured against the "reasonable likelihood" standard. (See *Boyde v. California* (1990) 494 U.S. 370, 380; *People v. Clair* (1992) 2 Cal.4th 629, 663.)

G. Legal Theory #5: The "Emotional Reaction" Theory

The record in this case suggests a fifth theory that might conceivably have been invoked to justify the jury's rejection of self-defense with respect to Counts 13 and 14, namely, a theory that self-defense is not available unless

the defendant not only reasonably *believed* he was in imminent danger but also *had an emotional reaction of fear to* the danger. In the AOB, appellant argued (1) that this theory emanated from the instructions and the prosecutor's argument, (2) that the theory was invalid as a legal matter (AOB 169-171) and (3) that even if the theory did exist, the theory lacked the necessary factual support so as to allow this Court to uphold the verdicts in Counts 13 and 14 (AOB 171-174).

As was true with the "decent person" theory just discussed, respondent commendably does not claim that the "emotional reaction" theory is a valid one. In effect, respondent admits that such a theory is unavailable to support the verdicts and thus that appellant's point (2) is correct. Respondent's only argument of consequence is that this theory was not presented to the jury at appellant's trial, an argument that goes *not* to appellant's sufficiency-of-the-evidence challenge to the verdicts but solely to the question of whether reversal would be required if the evidence were sufficient to authorize the rejection of self-defense in this case under some valid and applicable theory (see AOB 194-197).

Respondent's contention is that the jury was not presented with an "emotional reaction" theory because "[t]he prosecutor did not misstate the law by using the word 'emotion' since fear is an emotion." (RB 140.) Again, however, respondent completely ignores the instructions. As the AOB pointed out, the instructions themselves indicated that appellant had to have an emotional reaction of "fear" in addition to a "belief" in imminent danger in order to invoke self-defense, and the prosecutor's argument exploited this language in a way that made it reasonably likely that jurors would construe the instructions to require an emotional reaction of fear. (AOB 170.) Respondent's failure to address the instructions is a tacit concession that appellant's point (1) is correct in and of itself.

Moreover, even if it were appropriate for respondent to disregard the instructions (which it isn't), respondent's contention that "[t]he prosecutor did not misstate the law by using the word 'emotion' since fear is an emotion" would still be unavailing . For one thing, the prosecutor did not simply "use the word 'emotion.'" The phrase she uttered was "*so overcome* with emotion." (26 RT 4875.[41])

But more fundamentally, the "fear" upon which self-defense depends is not the "emotion" form of "fear." A defendant can rely on self-defense without experiencing the emotion of feeling afraid. As "a leading criminal law treatise"[42] points out, "if [a defendant] acts in proper self-defense, he does not lose the defense [even if] he enjoys using force upon his adversary because he hates him." (2 LaFave, Substantive Criminal Law (2d ed. 2003) § 10.4(c), pp. 149-150.[43]) Thus, quite plainly, the "fear" that allows an individual to resort to lethal self-defense is not fear *as an emotion*, but fear as in a *belief, apprehension, or concern* about imminent death or great bodily harm. It is this difference between fear as an emotion and fear as an awareness or expectation of impending harm that the prosecutor was erasing by her argument and that was consistent with the instructions. (See, e.g., § 197, subd. 3 [homicide by any person is justifiable "[w]hen committed in the

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41 See also the prosecutor's related discussion in the context of manslaughter, e.g., 26 RT 4961 ("so much feeling in the person, that they're overwhelmed"), 4962 ("overwhelmed by feelings" and "overwhelmed at that particular moment"), 4966 ("so overwhelming to just overcome your rational thought with passion").

42 *In re Jorge M.* (2000) 23 Cal.4th 866, 873.

43 See, e.g., *Commonwealth v. Acevedo* (Mass. 2006) 845 N.E.2d 274, 287 (recognizing that self-defense may be available where the defendant "presents no evidence about his emotional state [or] denies experiencing strong feelings of passion, anger, fear, fright, or nervous excitement.").

lawful defense of such person . . . when there is reasonable ground to *apprehend* a design to . . . do some great bodily injury, and imminent danger of such design being accomplished."]; *People v. Flannel* (1979) 25 Cal.3d 668, 675 ["To be exculpated on a theory of self-defense one must have an honest and reasonable *belief* in the need to defend."]; *People v. Mitchell* (1939) 14 Cal.2d 237, 252 ["The essence of the self-defense situation is a reasonable and bona fide *belief* in the imminence of death or great bodily harm."].)

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As a result of respondent's tacit concession that the "emotional reaction" theory is not a valid basis upon which this Court may sustain the verdicts in Counts 13 and 14 and that the theory would be an improper basis for the jury to have rejected self-defense as to those counts, appellant's further argument that the evidence was insufficient to support such a theory has become moot. (See AOB 171-174.) Nevertheless, inasmuch as respondent devotes considerable time and effort to the argument, we will respond briefly here.

Appellant's insufficient-evidence argument focused on the prosecutor's contention that appellant's act of smiling at witness Robert Murray shortly before Tuan Pham arrived at the Honda indicated that appellant had no emotional reaction of fear to the deadly situation confronting him. The AOB argued that no evidence supported the prosecutor's contention and that, to the contrary, sources from multiple disciplines — including the U.S. Government and a Vietnamese company — make clear that it would be a culturally ignorant interpretation of appellant's act for this Court to rely on it in support of an "emotional reaction" theory for rejecting self-defense.

Respondent takes issue with the AOB argument at some length, but at no point does respondent offer any basis to doubt the accuracy of the AOB's

premise, i.e., that the smile of a Vietnamese person can convey multiple emotions, including fear, anxiety, and confusion, and cannot be accurately interpreted, particularly by Westerners. Respondent's only tenable point is that "appellant may not rely on the internet sources he now cites because they are not part of the trial record, were never offered into evidence at trial, and have not been embraced by both parties as accurate" and that appellant has not "sought judicial notice for these internet sources." (RB 141.) But all appellant is attempting to do is to show that the prosecutor's argument about appellant's smile was unsupported and cannot be relied on here. Moreover, the practice of bringing social facts to an appellant court's attention has an established lineage. (*Rivera v. Division of Industrial Welfare* (1968) 265 Cal.App.2d 576, 590, fn. 20 ["The 'Brandeis brief,' which brings social statistics into the courtroom, has become a commonplace."].[44])

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[44] See, e.g., *People v. Albillar* (2010) 51 Cal.4th 47, 62 (citing book on gangs as a basis for rejecting claim of insufficient evidence re gang enhancement); *In re Marriage Cases* (2008) 43 Cal.4th 757, 828 fn. 50 (citing N.J. Civil Union Review Com., First Interim Rep. (Feb. 19, 2008) pp. 6-18 <http:// www. nj. gov/ oag/ dcr/ downloads/ 1 st- Interim Report- CURC. pdf> [as of May 15, 2008] regarding problems faced by children raised by same-sex parents who are not allowed to marry); *Roby v. McKesson Corp.* (2009) 47 Cal.4th 686, 723, Werdegar, J. dissenting (citing <http:// money. cnn. com/ magazines/ fortune/ fortune 500_ archive/ snapshots/ 2000/ 850. html> [as of Nov. 30, 2009] as source of information relevant to exemplary damages for a corporation); *People v. Sorden* (2005) 36 Cal.4th 65, 79 fn. 2, Kennard, J., concurring (citing Health & Wellness Resource Center, at http:// infotrac.galegroup.com [as of June 23, 2005] to show that "'periods of adjustment disorder . . . may evolve into a major depressive disorder'"). See also, e.g., *Ballew v. Georgia* (1971) 435 U.S. 223 (relying on social science to conclude that larger groups of factfinders are more reliable than smaller ones); *Roper v. Simmons* (2005) 543 U.S. 551, 569-570, 573 (relying on social science to conclude that Constitution prohibits execution of juveniles).

H. Legal Theory #6: The "Multiple Motivation" Theory

The sixth and final theory in the record that could support the rejection of self-defense as to Counts 13 and 14 is the "multiple motivation" theory, i.e., the theory that self-defense is unavailable if a defendant who acts in self-defense also has some other motivation for acting as well. This theory, premised upon Penal Code section 198, was presented to the jury via CALJIC No. 5.12 (see 27 RT 5281), but as a careful examination of legislative history shows, and as common sense confirms, the theory is not in fact a valid one. (AOB 174-193.)

Respondent, of course, disagrees that error occurred. Its argument, in full, is that

> "[n]otwithstanding appellant's contention to the contrary, the trial court's instruction does not bar self-defense to a defendant who entertains multiple motives when killing his assailant; nor has any opinion so interpreted the pertinent language of Penal Code section 198. Like Penal Code section 198, the instruction simply bars the defendant from acting upon any of his motives other than his reasonable fear of death or great bodily injury. (See: *People v. Trevino* (1988) 200 Cal.App.3d 874, 877-880.)"

(RB 143.)

The problems with respondent's argument are profound. First of all, respondent is positing a distinction between a defendant who "entertains multiple motives when killing his assailant" and a defendant who "act[s] upon any of his motives other than his reasonable fear of death or great bodily injury," as if appellant were making the former argument but not contesting the latter point. (*Ibid.*) But appellant most definitely does dispute the latter point. Indeed, the AOB's entire 20-page argument was devoted to refuting it. Appellant disputed it on multiple bases, none of which respondent addresses. Indeed, the AOB pointed out that the very distinction respondent draws

between "entertaining multiple motives when killing" and "acting upon the other motives" is illusory and incapable of being implemented in the real world. (See AOB 191.) Respondent does not answer any of the points raised in appellant's briefing.

We showed from the legislative history that the language of Penal Code section 198, upon which respondent's "acting upon other motives" contention is based, was not intended to create the theory that respondent seeks to defend but rather was intended merely to confirm that a defendant's subjective belief in, or fear of, imminent danger had to be a reasonable one. (AOB 175-185.) Respondent does not address the legislative history, let alone cast any doubt upon it.

We pointed out that respondent's "acting upon other motives" contention is inconsistent with common sense (AOB 191-192), with the Constitution (AOB 187), with the only "leading criminal law treatise"[45] to have addressed it (AOB 186, 192), and with other statutes enacted at the same time as section 198 (AOB 185). Respondent does not address these matters, either.

We further noted that *People v. Trevino, supra*, 200 Cal.App.3d 874 — the sole authority cited by respondent — did not consider the various points appellant has raised here and thus is not authority for rejecting them and that, in addition, the language from *Trevino* that respondent relies on was dictum. (AOB 187-190.) Again, the response from the RB is silence.

Finally, we argued that the doctrines of constitutional avoidance and of lenity in the interpretation of criminal laws would preclude this Court from reaching the conclusion for which respondent argues. (AOB 186-187.) Respondent says nothing in response.

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[45] *In re Jorge M.*, 23 Cal.4th at page 873, referring to LaFave & Scott, Substantive Criminal Law.

In sum, respondent has not effectively answered appellant's arguments except in the most perfunctory, conclusory fashion. There is nothing for appellant to do here except to reaffirm that his AOB arguments remain true.

I. Even If This Court Were to Conclude That There Exists One or More Legally Valid Theories upon Which the Rejection of Self-Defense Might Be Based, Counts 13 and 14 Would Have to Be Reversed

In the AOB, appellant has argued that even if this Court were to conclude that one or more of the legal theories discussed above could validly support the rejection of self-defense as to Counts 13 and 14, a reversal of those counts would still be required unless the Court concluded that *all* of the theories presented to the jury were valid because there is no basis for determining beyond a reasonable doubt that any particular theory was or was not relied upon. (AOB 194-197.) Respondent does not disagree. Its only contention is that the jury was presented with no invalid theories. (RB 144-145.) As the preceding 30-plus pages of the instant ARB make clear, appellant disagrees with that contention, but since respondent does not dispute that reversal would be required if any invalid theory were presented to the jury, there is nothing to which appellant needs to reply here.

J. Respondent's Forfeiture Arguments Have No Merit

Respondent makes numerous arguments that appellant's claims are forfeited. All of those arguments are meritless.

Primarily, respondent argues that appellant's challenges to Theories #1 to #6 are forfeited because "appellant failed to object in the trial court to the prosecutor's challenged argument and failed to ask the trial court for a curative admonition that would have cured the alleged prejudice." (RB 133, 135-136, 137. See also RB 126, 131, 138, 143, 144 [all similar].) Respondent is wrong for at least four reasons:

1. Claims of insufficient evidence — which appellant makes as to all theories that have been proposed as bases for upholding the verdicts in Counts 13 and 14 — are not forfeited by a supposed failure to object below. (*People v. Butler* (2003) 31 Cal.4th 1119, 1126; *People v. Rodriguez* (1998) 17 Cal.4th 253, 262.)
2. Claims that invalid theories were presented to the jury — which appellant has made as to all theories but which would come into play only if there were a valid basis for upholding Counts 13 and 14 — are not forfeited when the claims are based on both the instructions and arguments by the prosecutor that are consistent with the instructions. (*People v. Morgan* (2007) 42 Cal.4th 593, 612-613; *People v. Green* (1980) 27 Cal.3d 1, 63-69.)
3. Objections to the prosecutor's arguments would have been futile, since the trial court believed that those arguments amounted to "good efforts . . . to be accurate" and did not contain any "major difference" from the instructions. (27 RT 5231.)
4. If, despite the foregoing, this Court were somehow to conclude that any of appellant's claims would otherwise be forfeited, then appellant would have been denied his Sixth Amendment right to the reasonably effective assistance of counsel, since there could be no tactical or reasonable reason to allow the jury to convict appellant of murder based on an invalid theory. (*Strickland v. Washington* (1984) 466 U.S. 668; *People v. Pope* (1979) 23 Cal.3d 412, 426.)

Respondent contends that appellant's challenge to the "multiple motivations" theory (Theory #6) is also forfeited because appellant "fail[ed]

to request amplification or clarification of the instruction in the trial court." (RB 48, 50.) This contention fails for the same four reasons as just discussed and for a fifth reason, as well:

5. While instructing the jury using statutory language is generally appropriate, a trial court has a sua sponte duty to clarify terms "when their statutory definition differs from the meaning that might be ascribed to the same terms in common parlance" or "when a statutory term does not have a plain, unambiguous meaning, has a particular and restricted meaning, or has a technical meaning peculiar to the law or an area of law." (*People v. Estrada* (1995) 11 Cal.4th 568, 574-575; *People v. Roberge* (2003) 29 Cal.4th 979, 988, internal quotation marks and citations omitted.) Here in the present case, the clause in the instructions that "the party killing must act under the influence of those [reasonable] fears alone" (27 RT 5281) plainly meets the requirement for sua sponte instruction. The actual meaning of the clause "differs from the meaning that might be ascribed to the same terms in common parlance." The clause "does not have a plain, unambiguous meaning." It has "a particular and restricted meaning" under the law. The trial court thus had a sua sponte duty to clarify it. Additionally, the court had a duty to give a corrective instruction when the prosecutor "ma[d]e an improper contrary suggestion."[46] (*People v. Livaditis* (1992) 2 Cal.4th 759, 784.)

K. <u>In Sum</u>

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[46] See AOB at page 193.

The evidence in this case shows without contradiction — and without any dispute from respondent — that appellant was in immediate, actual, and mortal danger from Tuan Pham at the time he shot him and that appellant waited until the last possible moment before acting. Notwithstanding the immediate mortal danger, the position of the prosecution below and of respondent here on appeal has been that appellant had no right to protect his life and that, in essence, the law required him to submit to being shot to death there on the street by a vigilante gang member.

Six theories were offered below to support that result, and a seventh theory has been proposed on appeal, but none of the theories can lawfully be applied here, not without violating or improperly expanding the law of this State and not without violating the supreme law of the land. And if there were doubts about the impermissibility of applying any of these theories to appellant, those doubts would have to be resolved in favor of appellant under the doctrines of constitutional avoidance and of lenity in the interpretation of criminal laws.

And even assuming that one or more of the theories would justify the rejection of self-defense, the judgments as to Counts 13 and 14 still could not stand unless *all* of the theories presented to the jury were valid ones. And on this record, no such conclusion would be possible.

2. IF COUNTS 13 AND 14 ARE NOT ORDERED DISMISSED FOR THE REASONS SET FORTH IN THE PRECEDING SECTION, COUNT 13 WOULD NONETHELESS HAVE TO BE SET ASIDE BECAUSE EVEN IF SELF-DEFENSE COULD BE REJECTED ON A MUTUAL-COMBAT OR MULTIPLE-MOTIVATION THEORY, SUCH A HOMICIDE WOULD BE NO MORE THAN MANSLAUGHTER

In the AOB, appellant has argued that, even assuming arguendo the guilty verdicts in Counts 13 and 14 could permissibly be premised a theory of mutual combat or multiple motivation, those theories would only have justified manslaughter convictions, not murder. (AOB 196-199.)

With respect to mutual combat, appellant relied on the common law and on an 1864 decision from this Court, as well as two more recent decisions to the same effect. (3 Blackstone's Commentaries 184; *People v. Sanchez* (1864) 24 Cal. 17, 27; *People v. Lee* (1999) 20 Cal.4th 47, 60 fn. 6; *People v. Whitfield* (1968) 259 Cal.App.2d 605, 609.) Appellant acknowledged that language in *People v. Bush* (1884) 65 Cal. 129, 129, might appear to be in conflict with these three cases, but appellant noted (1) that *Bush* had not been interpreted that way (see *People v. Ross*, *supra*, 155 Cal.App.4th at p. 1043 fn. 11) and (2) that this Court's more recent decision in *Lee* cited *Sanchez*'s language with approval. (AOB 196-197.)

Respondent, in its brief, ignores the common law. And while respondent mentions the holding of *Sanchez*, it makes no effort to explain that holding away. Instead, respondent simply points to the arguably contrary language from *Bush* but fails to address any of the post-*Bush* decisions (*Lee*, *Ross*, and *Whitfield*) except to assert, in conclusory fashion, that these decisions were "err[oneous]" in their understanding of *Sanchez*. (RB 145-146.) Appellant stands by his analysis of the state of the law.

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As for the multiple-motivations theory, respondent asserts that "no legal authority . . . supports the manslaughter claim now raised by appellant." (RB 146.) Respondent is wrong. In the AOB at page 198, appellant cited *People v. Levitt* (1984) 156 Cal.App.3d 500, 509, for its holdings that "if the degree of force used [is] influenced by any motivations aside from a belief in the necessity to act in self-defense, then manslaughter [is] an appropriate verdict on that ground alone." (See also *id.* at p. 510 [voluntary manslaughter verdict support by fact that jury could have found that defendant's lethal response to the danger he faced "was attributable more to a preconceived intent to kill than to the actual danger."].) Respondent has ignored *Levitt*.

3. REVERSAL OF COUNTS 13 AND 14 IS REQUIRED BECAUSE OF SEVERAL INSTRUCTIONAL ERRORS REGARDING SELF-DEFENSE

Even if all of the preceding arguments were rejected, the convictions in Counts 13 and 14 would still have to be reversed because of errors in the instructions relating to self-defense. (See AOB 202-217.) Respondent, however, disagrees. (RB 147-162.)

A. The Trial Court Committed Reversible Error by Refusing to Instruct the Jury That There Is But One Standard for Self-Defense, Applicable to All Persons

At pages 202 to 206, the AOB has argued that the trial court committed reversible error when it refused to instruct the jury that "[t]he law of self defense applies equally to all persons, regardless of whether he or she is a member of a criminal street gang." (See 3 CT 954; 25 RT 4872.)

Respondent does not deny that the instruction was correct as a matter of law nor that it was relevant to the case. Rather, respondent's contention is that the proposed instruction was "argumentative" and "duplicative." (RB 147-148.) It was "argumentative" because "it singled out a special class of persons, namely criminal street gang members, in order to invoke favorable inferences from the trial evidence." (RB 147.) It was "duplicative" because "it added nothing relevant to the trial court's general self-defense instructions." (RB 148.)

Although the instruction did talk about self-defense being available "whether or not" a person was a gang member, that cannot reasonably be characterized as an effort to "invoke favorable inferences from the trial evidence." Actually, the instruction drew no "inferences from the evidence" at all. It simply made an accurate statement about the law. Nor did the "whether or not a gang member" language make the instruction

"argumentative" in any other way that appellant can perceive. However, even if it did, the trial court should then have tailored the instruction to eliminate the (supposed) argumentativeness, rather than refuse it entirely. (*People v. Fudge* (1994) 7 Cal.4th 1075, 1110 ["To the extent that the proposed instruction was argumentative, the trial court should have tailored the instruction to conform to the requirements of [*People v.] Wright*, rather than deny the instruction outright."]; *People v. Hall* (1980) 28 Cal.3d 143, 159 [similar].) If, as respondent claims, the argumentativeness was in the "whether or not" clause, the trial court could simply have eliminated that clause and left the rest.

Moreover, the trial court did not refuse the instruction on the basis of its alleged argumentative nature. Thus, respondent's effort to invoke that basis now on appeal would improperly deprive appellant of the opportunity to change the instruction to satisfy the court's purported concerns. (See ARB § I.2.A.2.a, pp. 40 et seq., *ante*.)

As for respondent's claim that the instruction was "duplicative" because it "added nothing to the trial court's general self-defense instructions," that is plainly untrue. Without the defense's proposed language, the instructions could reasonably be interpreted as allowing the jury to view self-defense as applicable only to a person who was himself a decent, reasonable person, thus allowing the jury to reach a conclusion to that effect, and as we have seen, the prosecutor's argument to the jury — the language of which respondent has ignored — encouraged the jurors to do so. (See ARB, § II.1.F, p. 102, *ante*).

Respondent contends that any error was harmless because "[s]ubstantial evidence supported the jurors' verdicts and their finding, under the trial court's instructions, that appellant was not acting in self-defense when he killed Tuan Phan." (RB 151.) This contention is another instance of

respondent's fundamentally incorrect approach to the question of prejudice. As we have pointed out,[47] there is "a striking difference between appellate review to determine whether an error affected a judgment and the usual appellate review to determine whether there is substantial evidence to support a judgment.'" (*People v. Arcega*, 32 Cal.3d at p. 524, internal quotation marks omitted.) Respondent's approach to the question of prejudice cannot be squared with governing law.[48]

B. If This Court Rejects Appellant's Contention That Appellant's Belief That His Life Was in Imminent Danger Was Reasonable as a Matter of Law, the Trial Court Committed Reversible Error by Refusing to Instruct the Jury on Imperfect Self-Defense

Appellant has argued in the AOB that, unless the Court agrees that there was no basis for doubting the reasonableness of appellant's fear of imminent peril, the trial court committed reversible error by refusing to instruct the jury on imperfect self-defense. (AOB 206-207.)

Respondent begins its counter-argument, uncontroversially enough, by saying that "the trial court need only give an imperfect self-defense voluntary manslaughter instruction when faced with substantial evidence that appellant

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[47] See ARB section I.C.1, page 14 et sequitur, *ante*.

[48] Of respondent's other arguments here, the only one meriting a reply is the contention that appellant is precluded from pointing to the prosecutor's remarks when arguing prejudice because trial counsel failed to object to those remarks at trial. (RB 149.) But whether a prosecutor exploited an error has long been understood to be highly relevant to questions of prejudice. (See, e.g., *People v. Lee* (1987) 43 Cal.3d 666, 677; *People v. Woodard* (1979) 23 Cal.3d 329, 341; *People v. Harvey* (1985) 163 Cal.App.3d 90, 106.) As far as appellant is aware, there is no law in California or any other jurisdiction that supports respondent's notion that a prejudice inquiry can only look to statements to which an objection was lodged below. Certainly, respondent cites nothing so suggesting.

killed the victim in the actual but unreasonable belief in the necessity to defend himself." (RB 152.) And respondent does not deny that a person in appellant's situation would conclude that his life was in imminent, mortal danger. Still, respondent says the instruction was properly refused. According to respondent, it was permissible to refuse the instruction because the only possible interpretation of the evidence was that appellant did not shoot Tuan Pham in order to protect himself from the imminent, mortal danger that Tuan posed but "for reasons unrelated to defending himself, e.g., to enhance his status as a Nip Family gang member and to enhance the status of Nip family in its gang war with the Cheap Boys." (*Ibid.*)

This contention is unsupported and unsupportable ipse dixit. It is another manifestation of respondent taking unreasonable liberties with the record and common sense. Moreover, respondent's view is one that the trial court itself necessarily rejected when it agreed to give instructions on "perfect" self-defense. So, even if there were some doubt about the evidence of self-defense (which there isn't), the trial court's decision to instruct, without objection by the prosecution, would be determinative. (*People v. McKelvy* (1987) 194 Cal.App.3d 694, 705 ["A trial judge's superior ability to evaluate the evidence renders it highly inappropriate for an appellate court to lightly question his determination to submit an issue to the jury. A reviewing court certainly cannot do so where, as here, the trial court's determination was agreeable to both the defense and the prosecution."].)

There is no arguable merit to respondent's contention. And since respondent does not deny that if error did occur, a reversal is required, no further reply is needed here.

C. The Trial Court Committed Reversible Error by Failing to Instruct the Jury Sua Sponte on the Legal Meaning of "Mutual Combat"

In the AOB, appellant argued that, assuming arguendo the verdicts in Counts 13 and 14 could be upheld on a "mutual combat" theory, the trial court committed reversible error by failing to instruct sua sponte on the legal meaning of "mutual combat." (AOB 207-211.)

Respondent disagrees. Respondent asserts that the term "mutual combat"in a jury instruction has "'the power to mask ambiguity and even inaccuracy'" only when used "in a case which presented no facts supporting it." (RB 155.) Respondent does not explain why this would be so. If the term is potentially misleading to a juror (and it is), why would it matter if there is no evidence, a little evidence, or a lot of evidence to support it in its proper sense? How does the admission of evidence resolve an "ambiguity" in a legal instruction? How does it correct an "inaccuracy"? In the present case, the prosecutor advanced a gang-war theory of mutual combat that ignored the essential requirement of a pre-hostilities mutual agreement or consent to do battle. (See ARB § II.1.C.3.a, pp. 91 et seq., *ante*.) To the extent any juror relied upon mutual combat to reject self-defense, an instruction properly conveying this mutuality requirement could have altered the outcome. Certainly, there was precious little evidence, if any, that appellant had agreed or consented to engage in hostilities with Tuan Pham before Pham reached the rear of the driver's door of appellant's car and started to raise his gun arm.

Respondent also contends that any error "would not have warranted reversal under any standard." (RB 156.) Its position is that the question of whether the killing of Tuan Pham was done in mutual combat was "not a complex one under the facts of the case and would not have been resolved differently had the trial court further clarified the words 'mutual combat"

because "[s]ubstantial evidence supported the prosecution's mutual combat scenario . . . ." (*Ibid.*)

As a threshold matter, respondent misstates the test used under the federal Constitution. That test requires an appellate court to reverse unless it can "conclude beyond a reasonable doubt that the jury verdict would have been the same absent the error." (*Neder v. United States*, 527 U.S. at p. 19.) To make this determination, the court "asks whether the record contains evidence that could rationally lead to a contrary finding with respect to the omitted [instruction]." (*Ibid.*) A reversal is called for it "where the defendant contested the omitted element and raised evidence sufficient to support a contrary finding." (*Ibid.*) Respondent does not attempt to claim that the error can be deemed to be harmless under this standard. (See also *People v. Mil* (2012) ___ Cal.4th ___, 135 Cal.Rptr.3d 339, 352 ["Our task, then, is to determine whether the record contains evidence that could rationally lead to a contrary finding with respect to the omitted element."], internal quotation marks omitted.)

But even using the *Watson* standard, respondent's sufficiency-of-the-evidence approach is wrong, as we have pointed out. Moreover, as the AOB discussed at page 207, the question of mutual combat was a close one, close enough that there is at least a "a *reasonable chance*, more than an *abstract possibility*" that a different outcome would have occurred in the absence of the error. (*College Hospital v. Superior Court*, 6 Cal.4th at p. 715, original emphases.)

D. The Verdicts on Counts 13 and 14 Must Be Reversed Because the Jury Was Not Instructed on the Impossibility of Withdrawal with Respect to the Mutual-Combat and Initial-Aggressor Doctrines

Appellant has argued in the AOB that if there were valid bases to reject self-defense as to Counts 13 and 14, then — under the circumstances of this case and the theories of mutual combat and initial aggressor that were used in this case — either the trial court committed reversible error by failing to instruct the jury sua sponte on the legal concept of impossibility of withdrawal, or else trial counsel provided ineffective assistance for failing to request such an instruction. (AOB 211-214.)

For its part, respondent does not dispute the substantive points appellant has made. (Compare AOB 211-213 with RB 158.) That is, respondent does not deny that if the mutual-combat and initial-aggressor theories used in this case are valid theories, then they logically must make allowance for the use of self-defense when there is no opportunity to withdraw from the "mutual combat" or "initial aggression."

Rather than contesting appellant's reasoning, respondent claims that the reasoning is based upon a "faulty premise." What is the faulty premise? As best as we understand, appellant is alleged to be wrong in contending that the prosecutor propounded a mutual-combat theory or an initial-aggressor theory that relied on events occurring before May 6, 1995, the day Tuan Pham was shot. According to respondent, the prosecutor's argument, properly understood, was merely that "appellant was both the initial aggressor *in the immediate conflict* leading to the shooting and a mutual combatant *in the immediate conflict* resulting in the shooting." (RB 158.)

Respondent is suggesting that the prosecutor offered some theory based solely on appellant's conduct on May 6, 1995 (the date of the "immediate conflict") to support a finding that appellant was a mutual combatant or an

initial aggressor, but respondent does not explain what that theory was or what evidence might support it. As we have discussed, there is no evidence to support a finding beyond a reasonable doubt that appellant was aware of Tuan's Pham's presence before seeing him approach on foot or that appellant agreed on May 6, 1995, to do battle with him, nor is there any evidence that appellant took actions on that date that made him an initial aggressor. (See also AOB 141-145.) And it is simply a denial of the plain record for respondent to allege that the prosecutor did not rely on a theory that looked to events occurring prior to the date of the shooting of Tuan Pham — "gang war" theory — to defeat self-defense. That was not just *a* theory that the prosecutor relied on. It was *the* theory.[49]

In short, respondent is wrong in contending that a "faulty premise" underlies appellant's claim that the trial court had a sua sponte duty to instruct on impossibility of withdrawal. The prosecutor did rely, and in fact had no choice but to rely, upon a gang-war theory to support her mutual-combat and initial-aggressor theories of liability. The instructions on impossibility of withdrawal should have been given.

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Respondent also appears to contend that appellant's claim is forfeited because defense counsel did not object to the prosecutor's argument or request a "curative admonition" at trial. (RB 158.) It should be quickly apparent, however, that neither contention is applicable to a claim that the trial court has a sua sponte duty to instruct. A duty to instruct sua sponte is, by definition, a duty that exists even in the absence of a request for a "curative admonition" or an objection to a prosecutor's argument.

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[49] See, e.g., 26 RT 4972, 4977-4979, 5002. See also 2 RT 309 (prosecutor says "of course" she is prosecuting based on a gang war theory).

And even if the forfeiture argument were correct, that would not resolve the current issue because, in that event, defense counsel would have rendered constitutionally ineffective assistance by failing to request an instruction on impossibility of withdrawal. (AOB 206, 214.) Respondent contends there was no deficient performance because "[a]s explained above, the prosecutor did not introduce new legal theories calling for additional instruction." (RB 159.) Respondent appears to be referencing its contention that the current claim is based upon a "faulty premise." That contention has already been dealt with.

Respondent also contends that there is no reasonable possibility of different verdicts if the jury had been instructed on withdrawal because the jury rejected appellant's testimonial claim that he was not a Nip Family member and that he "did not know who was involved in the May 6, 1996, shootout" (RB 159), but those contentions completely fail to address the central point: how could appellant have withdrawn from the type of mutual combat or initial aggression that was used in this case as a basis for rejecting self-defense? Without addressing this issue, respondent's claim of no prejudice lacks persuasiveness.[50]

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[50] Not to mention two additional problems with respondent's argument. First, appellant never testified that he "did not know who was involved" in the shootout, only that he did not know who *the assailants* were, and the jury's verdict on the gang enhancement in Count 14 did not show the jury rejected this testimony, since under Detective Nye's testimony, the jury could have found appellant's shooting was done for the benefit of the Nip Family regardless of whether the person shot was a member of the Cheap Boys. Second, even assuming arguendo the jury rejected appellant's claim that he was not a member of the Nip Family, that rejection would have no bearing upon a defense of withdrawal unless, perhaps, this Court were to approve the theory that all gang members are always mutual combatants and/or initial aggressors whenever they encounter their rivals during a gang war (assuming the term "gang war" can be defined in a constitutional (continued...)

E. The Verdicts on Counts 13 and 14 Must Be Reversed Because the Jury Was Not Instructed on Ignorance or Mistake of Fact

Finally, appellant has argued that the trial court committed reversible error by failing to instruct the jury on ignorance or mistake of fact on the basis that, given the gang-war theories and evidence the prosecutor relied on to defeat self-defense, the jury could have found that appellant did not know his assailants were Cheap Boys. (AOB 215-217.)

Respondent does not deny that ignorance or mistake of fact would be a defense to the anti-self-defense theories presented to the jury in this case. In effect, respondent concedes that appellant's basic legal contention is correct. (See RB 160-161.)

In addition, respondent acknowledges, as it must, that a trial court has a sua sponte duty to instruct on such a defense whenever "the defendant is relying on the defense, or if there is substantial evidence supportive of such a defense and the defense is not inconsistent with the defendant's theory of the case." (RB 160. See *People v. Maury* (2003) 30 Cal.4th 342, 424; *People v. Russell* (2006) 144 Cal.App.4th 1415, 1427.)

Respondent further acknowledges, as again it must, that under "appellant's own testimony . . . appellant did not recognize his assailants on May 6, 1995, and did not know they were Cheap Boys gang members." (RB 160.)

And respondent does not deny, and thus tacitly concedes, that ignorance or mistake of fact with respect to whether his assailants were Cheap Boys would "not [have been] inconsistent with the defendant's theory of the case." (See RB 160-161.)

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[50](...continued)
manner).

These concessions and acknowledgments should lead directly to the conclusion that appellant's claim has merit, but of course they don't. Instead, respondent asserts that "[t]he trial court had no sua sponte duty to give the instruction." (RB 160.) Why did the trial court have no sua sponte duty? It is impossible to tell. Nothing respondent says after making this assertion even arguably supports it.

Respondent points to appellant's testimony that he was a passenger in the car and did not shoot Tuan Pham, but that testimony does not negate the facts (1) that appellant also testified that he did not recognize his assailants and did not know they were from the Cheap Boys, (2) that appellant's testimony on this point constitutes substantial evidence, (3) that the defense, having elicited this testimony, was obviously relying on it, and (4) that a defense based upon lack of knowledge was not inconsistent with the defense at trial, which (as respondent admits elsewhere, see RB 159) included "challenging the legitimacy of the prosecutor's arguments that Tuan Phan's [sic] killer did not act in self-defense."

Respondent also asserts that an instruction on ignorance or mistake of fact "would only have benefitted appellant" if the jury concluded that appellant lied about his having been the back seat passenger and not involved in the shooting of Tuan Pham. (RB 161.) This may be true, but it is not a reason for refusing an instruction. A jury is entitled to disbelieve part of a witness' testimony and still credit others, and the instructions have to address this possibility. (*People v. Sinclair* (1998) 64 Cal.App.4th 1012, 1018 [jury has "right to accept part of the testimony of a witness, while rejecting the rest."]; *People v. Barton* (1995) 12 Cal.4th 186, 196 ["Truth may lie neither with the defendant's protestations of innocence nor with the prosecution's assertion that the defendant is guilty of the offense charged, but at a point between these two extremes."]; *People v. Ceja* (1994) 26 Cal.App.4th 78, 86

["The jury was entitled to accept portions of a witness's testimony and to disbelieve other portions"]; *People v. Daya* (1994) 28 Cal.App.4th 697, 712-713 ["The jury should not be constrained by the fact that the prosecution and defense have chosen to focus on certain theories"]; *People v. Mayweather* (1968) 259 Cal.App.2d 752, 756 [self-defense instructions required although "inconsistent with defendant's own testimony."].)

The only remaining question is whether the error in failing to give the instruction on ignorance or mistake of fact requires reversal, and respondent offers no argument on the point. There is good reason for the omission. Under the Constitution, the test is "whether it appears beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." (*Neder v. United States*, 527 U.S. at p. 15.) In the context of an omitted instruction, the test requires an appellate court to reverse unless it can "conclude beyond a reasonable doubt that the jury verdict would have been the same absent the error." (*Id.* at p. 19.) To make this determination, the court "asks whether the record contains evidence that could rationally lead to a contrary finding with respect to the omitted [instruction]." (*Ibid.*) A reversal is called for it "where the defendant contested the omitted element and raised evidence sufficient to support a contrary finding." (*Ibid.* Accord, *People v. Mil*, 135 Cal.Rptr.3d at p. 352 ["Our task, then, is to determine whether the record contains evidence that could rationally lead to a contrary finding with respect to the omitted element."], internal quotation marks omitted.) Respondent cannot and does not maintain that the error here can be deemed to be harmless under this standard, or any other.

4. REVERSAL OF COUNTS 13 AND 14 IS REQUIRED BECAUSE OF THE ERRONEOUS ADMISSION OF EVIDENCE REGARDING APPELLANT'S ROLE IN THE SHOOTING

At trial, the prosecution offered several items of evidence in order to establish that appellant was in fact the driver of the car from which Tuan Pham was shot. Prominent among them was testimony from Garden Grove Officer Vincent On, which was admitted to show that appellant was the person who, 17 days after Tuan's death, fled from police and dumped a gun that had been used in the shooting. Officer On's testimony was that the person who fled looked "similar" to "somebody named Lam Thanh Nguyen" as depicted in a photograph that On had seen 15 or 20 minutes earlier. (15 RT 2849.) However, as the AOB argued, On's testimony was entirely inconsequential unless the photograph actually was of appellant. And that foundation was entirely missing because no evidence was produced that the photograph was of appellant. (AOB 218-229.)

Respondent purports to disagree, but it concedes appellant's central point. It admits there was no evidence that "the photograph depicted appellant." (RB 164 [twice].) However, if there was no evidence that the photograph resembled appellant, what was the foundation for On's testimony? What made the testimony relevant? Respondent's answer is difficult to follow. Respondent contends that it was permissible for the trial court to allow Officer On to give his "limited" testimony because (1) "On was a competent witness who had personal knowledge of the correctness of the photographic representation he described" and (2) On "could testify from personal knowledge that the photograph depicted the face of a person named Lam Thanh Nguyen." (RB 164.) But neither statement is correct in any sense that appellant can perceive. On had no "personal knowledge" whatsoever of the "correctness" of the photo he described, nor did he have any personal

knowledge that the photograph depicted "a person named Lam Thanh Nguyen," let alone that it depicted the Lam Thanh Nguyen who was the defendant in the case or that it *accurately* depicted him. Respondent's contention is a non-starter.[51]

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Respondent asserts that any error in admitting the testimony was harmless because "[p]owerful independent evidence established" that appellant was the person who fled from the car. (RB 168.) Most of the

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[51] Indeed, respondent admits on this same page that Officer On "did not assert that the photograph accurately depicted the man named Lam Thanh Nguyen." (RB 164.) Is respondent arguing that while On was unable to say the photograph "accurately" depicted "the" person named Lam Thanh Nguyen, On nevertheless could testify that the photo depicted "a" person with that name without any need to show the "accuracy" of the depiction or a connection to appellant? If so — and appellant is not confident he is following respondent's argument — then respondent seems to be taking the position either that authentication is not required to rely on a photograph or that relevance is not required. Either way, the argument would be contrary to law.

In a footnote, the AOB pointed out that the line of cases allowing an inference of identity to be drawn from uncommon names is irrelevant to his "authentication" challenge. (AOB 223 fn. 143.) Respondent does not disagree about the irrelevance of these cases but claims appellant's point should be forfeited because it was not raised below. (RB 164-165.) However, appellant had no opportunity or reason to make this point below because neither the prosecutor nor the court relied on these cases to justify the admission of Officer On's objected-to testimony. Respondent cites nothing that supports its apparent belief that appellant has to object at trial to the use of an irrelevant line of decisions that no one mentioned at the time.

Respondent again asserts that appellant's federal constitutional claims should be forfeited because not raised below (RB 165), but that assertion fails for the reasons previously discussed. (See ARB § I.1.B, p. 12, *ante*, and cases cited.) Nothing else in respondent's discussion of the merits of appellant's claim requires further discussion in this ARB.

"powerful" evidence that respondent points to relates to the claim that appellant lived at the Amarillo Street residence that all three of the car's occupants were walking away from before they entered the car. But the evidence is not "powerful" even as to appellant living at the residence, and it is obviously less powerful as proof that he was the fleeing passenger.

The evidence respondent points to as establishing that appellant lived at the Amarillo Street house was (1) Detective Nye's testimony that Monica Tran told him that she believed appellant lived near Hoover and Trask, (2) evidence that appellant's prescription medicine bottle was found on top of a television in the Amarillo Street residence, (3) evidence that a brown jacket was found at the house, which was the same color jacket as witnesses had described the Duy Vu shooter as having worn, and (4) the fact that three firearms were found in the bedroom, which respondent claims is indicative of appellant's occupancy because "appellant tended to show off firearms wherever he was staying." (RB 169.) However:

(1) Monica Tran's belief, per Detective Nye: Monica Tran, a convicted felon (she was convicted in Texas of aggravated robbery with a deadly weapon, 10 RT 2041), was speaking to detectives after having been arrested for a probation violation, the probation having been imposed because of a residential burglary conviction in juvenile court. (10 RT 2029.) She was told by the detectives that how much time she would receive for the violation would depend upon her probation officer, and while Monica did not recall the detectives telling her that he would talk to the probation officer if she gave him information about appellant, she did recall that the detective asked her specifically about appellant. (10 RT 2033-2034, 2039.) Even so, she merely "believed" that appellant lived nearby.

(2) The medicine bottle: The bottle was found on May 23 on top of the television set in the living room of the apartment. (15 RT 2933, 16 RT 3168-3169.) Appellant had *lost* it, which was the reason he was going to Dr. Dinh when he was arrested at Dinh's office two days later. (21 RT 4052-4054.) Moreover, in the *bedroom* of the apartment — the room most likely to have signs of who the resident is — there was a prescription bottle belonging to someone *other than* appellant. (15 RT 2932-2933, 2936-2937, 2966, 16 RT 3168.)

(3) The brown jacket: This brief has already addressed the subject of the brown jacket: how Jeanette Mandy testified that it was not the jacket worn by Duy Vu's shooter, how it was much too large for appellant, and how respondent's efforts to explain away Mandy's testimony and the bad fit run contrary to common knowledge and experience. (See ARB Introduction, Subsection B, pp. 6 et seq., *ante*.) We perceive no need to repeat that here.

(4) Firearms found in the house: The three firearms were all found in the bedroom, where the only indicium of occupancy pointed to someone other than appellant (to Huy Pham, whose name was on the prescription bottle found in that room). The weapons were all fingerprinted, but appellant's prints were not on them. (15 RT 2965.) Nor were the weapons connected to any of the crimes with which appellant was charged. And as for respondent's assertion that appellant "tended to show off firearms where he was staying" (RB 169), it is flawed because the record contains no evidence that appellant had ever stayed at any of the places respondent identifies (the home of Monica

> Tran's sister, the motel that Shannon Choeun, Cindy Pin, and Me Kim visited, Huy Pham's car). And in any event, if evidence that appellant "showed off firearms" outside of his home is "powerful evidence" that appellant was living in a place where different guns are found, then — given the number of households in Orange County that had guns — appellant must have been living all over the county.

These facts hardly amount to "powerful evidence" that appellant lived in the Amarillo Street house, and whatever limited probative value they might have is undermined by the fact that the house contained no bills that could be attributed to appellant, no identification cards, no mail, no membership cards, no photographs, no fingerprints, no address books, no writings of any sort, and no keys were found on appellant later on.

The remaining "powerful, independent evidence" that purportedly establishes that appellant was the fleeing passenger is Officer On's testimony that the passenger was a Vietnamese male of about appellant's size and Detective Nye's testimony that Cuong Le, one of the two other people in the car with the passenger, was a Nip Family member.[52] (RB 170.) Both of these items of evidence are consistent with appellant being the passenger, but neither is particularly probative of that conclusion. There are many male Vietnamese within or close to the size range that On gave. And not only were there many members of the Nip Family, but the absence of evidence as to the gang membership of the other occupant of the car reduces the probative value of the Cuong Le evidence still further.

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[52] Respondent also says that Cuong Le was "an acquaintance of appellant" (RB 170, citing 21 RT 4065), but neither the cited RT page, nor any other, supports this claim.

Neither individually nor cumulatively does the "powerful independent evidence" that appellant was the fleeing passenger come close to living up to that description.

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Respondent also contends that "the trial record . . . shows appellant would have been convicted of counts thirteen and fourteen even had On's testimony about the photograph been excluded" because "[s]ubstantial evidence showed appellant was the driver who shot Tuan Pham . . . ." (RB 167.) We have already pointed out that respondent's "substantial evidence" approach to the question of reversible error is fundamentally wrong. (See ARB §§ I.1.C.1, pp. 14 et seq., & II.3.A, pp. 118 et seq., *ante*.) That error undermines respondent's harmlessness contention here by itself, but the points respondent offers to support the contention are also themselves problematic.

Initially, respondent argues that the jury's ten guilty verdicts "show that jurors disbelieved all the major points of appellant's testimony and therefore did not believe appellant's claim that he was an unarmed back seat passenger on May 6, 1996 . . . ." (RB 167.) This argument has several defects. First, it entirely ignores the not-guilty verdicts as to the Duy Vu shooting (Counts 11 and 12). Second, insofar as it relies on the jury's guilty verdicts as to counts other than those relating to the death of Tuan Pham, the argument is inconsistent with instructions telling the jury that "each count charges a distinct crime" and that the jury's duty was to "decide each count separately." (27 RT 5295.) Thus, the fact that the jury disbelieved appellant's testimony as to most of the other shootings with which he was charged does not shed light on the question of prejudice as to the Tuan Pham shooting. And third, while the jury obviously did come to disbelieve appellant's testimony as to his role in the Tuan Pham shooting, the issue for purposes of the current prejudice inquiry is, in effect, whether that disbelief could have been *a result of the*

error in admitting Officer On's testimony. That is what our entire discussion of prejudice was aimed at showing, and respondent's attempt to invoke other verdicts to support its claim of harmlessness as to the present error is an irrelevant sidetrack.

Respondent points out that eyewitness Robert Murray described the car from which the driver shot Tuan Pham was a white Honda and that Monica Tran recalled that appellant drove a white Honda. (RB 167.) This evidence has some tendency to indicate that appellant was the driver, but it is hardly such strong evidence as to justify the conclusion that the error in admitting Officer On's testimony was harmless. The fact that appellant had driven a white Honda on some occasions is hardly inconsistent with him being a passenger in a white Honda on others. Especially is this true, given that no evidence was produced that appellant was the actual owner of such a car or that he had passengers in the car with him when Monica saw him.

Next, respondent claims that eyewitness Murray "selected appellant's photo from a photo lineup as the photo looking most like the shooter." (RB 167.) As we have already pointed out, however, respondent omits that when Murray initially viewed the photo lineup, he did not select anyone and that it was only after "the talking back and forth [with police], and are you sure nobody looks like this or that" that he indicated that appellant was "possible." (14 RT 2723.) Respondent omits, too, that after viewing the six pack, Murray wrote "I cannot make any identification" on the identification form. (14 RT 2723, Exh. V.) And respondent neglects to mention that Murray failed to select appellant at a live lineup. (14 RT 2750, 2723.)

Finally, respondent relies upon appellant's birdshot injuries as proof that appellant was the driver and not a rear passenger. (RB 168.) According to respondent, "[b]irdshot struck the left side of appellant's back, rather than striking him all the way across his back, because that was the side left

unprotected by the driver's seat as appellant turned around to shoot back at the second gunman." (RB 168.) Appellant has discussed the birdshot evidence at some length in the AOB (see AOB 224-226), and respondent's argument glosses over that discussion. For one thing, while respondent talks about how the birdshot hit "the left side of appellant's back," it disregards that the birdshot hit appellant's left *mid-back* and *lower* back. (See Exh. 140.) Respondent does not even attempt to show how a person could be in the driver's seat and yet be hit in the mid-back and lower back by birdshot fired from directly behind the vehicle. How would these areas be "left unprotected by the driver's seat as [the driver] turned around"?

In addition, the "driver" scenario cannot be reconciled with the fact that appellant sustained injuries to the *inside* of the fingers of his *left* hand. If, as respondent is contending, appellant was shooting out the driver's window either toward Tuan Pham or toward the shotgun wielder, how would he be hit on the inside of the fingers of his left hand? The AOB pointed out this anomaly (AOB 225-226), but respondent declines to address it.

The fact is that the shotgun pellet evidence is more consistent with appellant being the passenger than with him being the driver. At the very least, that evidence adds nothing of significance to respondent's claim that the error in admitting Officer On's testimony was harmless.

Even considering all of the factors respondent points to cumulatively (and disregarding respondent's improper approach to the prejudice question), this Court cannot reasonably conclude that, beyond any reasonable doubt, the error did not contribute to the verdicts. (*Chapman v. California*, 386 U.S. at p. 24.) It is also impossible to deny there is at least "a *reasonable chance*, more than an *abstract possibility*" that a different outcome would have occurred in the absence of the errors. (See *College Hospital, Inc. v. Superior Court*, 6 Cal.4th at p. 715, original emphases.) The error requires reversal.

THE ATTEMPTED MURDER COUNTS
(Counts 2-3, 4-5, 9-10)

III.
COUNTS 2 AND 3
(relating to the July 21, 1994 shooting of Tony Nguyen)

In Counts 2 and 3, appellant was convicted of attempted murder and gang participation in connection with the shooting of Tony Nguyen on July 21, 1994 (six months before the killing of Sang Nguyen and ten-plus months before the shooting of Tuan Pham). It was agreed by both parties at trial that Tony Nguyen had actually been shot by one Nghia Phan, who fired from the front passenger seat of a car driven by a female named My Tran. Appellant was convicted as an aider and abettor to the shooting. The only evidence placing appellant at the scene of the shooting was the testimony of Kevin Lac, a Cheap Boy, who, despite having known appellant since before the shooting and despite having been shown photographs of appellant on several occasions without making an identification, decided 13 months later that appellant had been a rear passenger in the car.

1. THERE IS INSUFFICIENT EVIDENCE TO SUPPORT THE JURY'S VERDICT THAT APPELLANT AIDED AND ABETTED THE CRIMES CHARGED IN COUNTS 2 & 3

Appellant has argued in the AOB that, even assuming that appellant was indeed a rear passenger in the car driven by My Tran, the evidence was insufficient to establish that he was an aider and abettor. The evidence fell short as to three separate elements of aiding-and-abetting liability: (1) appellant's *knowledge* of Nghia Phan's unlawful purpose, (2) appellant's *intent or purpose* to commit, encourage, or facilitate Nghia's crime, and (3) an *act or advice* by appellant to aid, promote, encourage, or instigate the crime.

The AOB pointed out that the reasoning used by the prosecutor below to justify convictions on these counts — what she called "aiding and abetting backup" (27 RT 5194) — was actually her reliance upon two logical fallacies: the fallacy of the sweeping generalization and the fallacy of division. Moreover, her reasoning cannot be squared with Supreme Court law or the prohibition against guilt by association. (See AOB 230-235, citing, inter alia, *United States v. Brown*, *supra*, 381 U.S. at pp. 455-456.)

And in further support of our challenge to the convictions in Counts 2 and 3, the AOB pointed to *People v. Williams* (1997) 16 Cal.4th 153, 225-226, in which this Court held that no instruction was required as to the possible accomplice status of a prosecution witness because the evidence was insufficient as to the "intent" element of aider-and-abettor liability. Since such an instruction is required merely when "a triable issue of fact" exists as to whether the witness was an accomplice,[53] the *Williams* holding provides strong corroboration that the evidence was insufficient in appellant's case to establish his guilt *beyond all reasonable doubt*. (AOB 235-236.)[54]

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[53] *People v. Snyder* (2003) 112 Cal.App.4th 1200, 1219.

[54] *People v. Sully* (1991) 53 Cal.3d 1195 similarly supports appellant. There, the defendant was charged was six serial murders. A woman, Tina Livingston, picked up the first victim (who owed Livingston money), brought her to the defendant's warehouse, and helped the defendant kill her there and clean up afterwards. (*Id.* at p. 1211.) Later, after the defendant told her he wanted to find a girl and kill her before anyone else "had" her, Livingston found another victim for him, and this victim was also killed at the warehouse. (*Id.* at p. 1212.) Subsequently, Livingston helped the defendant dispose of the body of the fifth victim (another woman killed at the warehouse) and attempted to destroy incriminating evidence. (*Id.* at p. 1213-1214.) And when the defendant requested Livingston to drive the sixth victim to his warehouse, Livingston did so and then proceeded to wait at a nearby bar, returning to the warehouse and seeing the victim being stabbed.

(continued...)

For its part, respondent contends the evidence is sufficient. Nowhere, however, does respondent address the fallacies of logic in the "aiding and abetting backup" theory.

Nowhere does respondent acknowledge, let alone attempt to explain away, this Court's holding in *Williams* or the Supreme Court's observation in *United States v. Brown*, *supra*, 381 U.S. at pages 455-456.

And nowhere does respondent point to any specific evidence showing that appellant had the requisite knowledge of Nghia Phan's purpose, or that he shared Nghia's criminal required intent, or that he engaged in an action that aided Nghia's commission of the offense, let alone that all three showings were made. Instead, respondent presents a five-page summary of "the substantial evidence supporting counts two and three"[55] and then refers back to that five-page summary, in undifferentiated masse, as support for various

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[54](...continued)

The trial court did not give accomplice instructions as to Livingston's involvement in the sixth murder, and this Court found the trial court acted properly. Despite the fact that Livingston had participated in prior murders at the warehouse, and despite the fact that she drove the sixth victim to the warehouse herself and waited nearby, the evidence did not support even "an inference of accomplice liability on Livingston's part." (*Id.* at p. 1228.) "It is not sufficient that [the alleged aider and abettor] merely gives assistance with knowledge of the perpetrator's criminal purpose," the Court noted. (*Id.* at p. 1227.) The inferences that Livingston knew that Victim 6 was to be robbed and that her death at defendant's hands was clearly foreseeable were "at best highly speculative." (*Ibid.*)

The evidence as to Livingston's possible accomplice status dwarfs that as to appellant's, and since the evidence was insufficient even to raise a triable issue as to Livingston's involvement, the evidence in the present case must be insufficient to prove appellant's guilt beyond a reasonable doubt.

[55] RB 171-175, quoting RB 171.

conclusory statements. Thus, for example, respondent says that the "foregoing substantial evidence" shows that "[a]ppellant helped spot as potential targets Cheap Boys Vinh Kevin Lac and Tinh Dam, and/or Cheap Boy associates Tony Nguyen, Chynna Vu and Truong Nguyen." (RB 175.) But what evidence supports the assertion that *appellant in particular* "helped" to spot these people "as potential targets"? Respondent cites nothing, undoubtedly because there is nothing to cite.

Similarly, respondent says that "[a]ppellant and his Nip Family confederates then premeditated and planned the shooting by advising driver My Tran to follow Nguyen's car and pull up next to Nguyen's at the intersection." (RB 175.) But what is the evidence that *appellant* "premeditated and planned the shooting" or "advised the driver"? Again, respondent cites nothing, because nothing of the sort exists.

And in like manner, respondent asserts that "[a]ppellant remained in the back seat ready to assist the shooter should the shooter be disabled in a potential gun battle which never occurred." (RB 176.) But "remain[ing] in the back seat" only establishes"mere presence at the scene of a crime or failure to prevent its commission," which is insufficient to establish aiding and abetting. (*People v. Richardson* (2008) 43 Cal.4th 959, 1024, internal quotation marks omitted.) So, what supports the statement that, while "remaining in the back seat," *appellant himself* actually was "ready to assist the shooter should the shooter be disabled"? Respondent does not tell us. The only conceivable support might be the generalized "aiding and abetting backup" reasoning that the prosecutor used below. But as the AOB pointed out (and respondent ignores), that reasoning is fallacious as a matter of standard logic. (AOB 233-234.) It also has been rejected by the courts (a point that respondent also declines to address). (AOB 234.) And it essentially relies on guilt by association (to which respondent's response, in full, is that

"[t]he trial record belies the contention"). (Compare AOB 234-235 with RB 177.)

The fact is that this record shows that the person who Kevin Lac eventually claimed was appellant merely sat in the back seat of the car and, at one point, may have looked in the direction of Tony Nguyen's car. Nothing in the RB provides substantial evidence that appellant knew of Nghia Phan's purpose to shoot, or that appellant took an action that aided or encouraged Nghia to fire, or that he shared Nghia's intent if he did take such an action, and even less does the record support all three findings. On this record, the convictions in Counts 2 and 3 cannot stand.[56]

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[56] In the course of its arguments, respondent states that "[p]eople who associated with the Cheap Boys and Nip Family knew how hot their war was in February, March, April and May of 1995." (RB 175.) Monica Tran did so testify (see 10 RT 2022), but respondent does not explain the relevance of this testimony to the shooting of Tony Nguyen, which occurred in *June 1994*, 8 to 11 months prior to the period addressed by Monica's testimony. In a similar vein, respondent twice talks about "the state of war existing between the Nip Family and Cheap Boys in 1994 and 1995." (RB 173, 176, citing 16 RT 3210-3212 [testimony of Det. Nye].) But the testimony to which respondent refers (16 RT 3210-3212) does not support the statement. All that Nye talked about was that as of "*March of 1995*" the "rivalry between Nip Family and Cheap Boys [had] reached deadly status." (16 RT 3210.) Nye did not testify about "the state of war" at the time of the shooting of Tony Nguyen, nine months *before* "March of 1995."

2. THE TRIAL COURT UNCONSTITUTIONALLY PREVENTED THE DEFENSE FROM FULLY IMPEACHING KEVIN LAC, THE PROSECUTION'S KEY WITNESS AS TO COUNTS 2 AND 3

The only evidence purporting to place appellant in the car from which Nghia Phan shot Tony Nguyen came from the testimony of Cheap Boy Kevin Lac. The process by which Kevin came to point to appellant as a rear passenger in the car certainly cast some suspicion on Kevin's truthfulness and accuracy, but nothing showed him definitively to be a liar. There was, however, such definitive evidence. Several witnesses could credibly have shown Kevin to have lied about whether guns were possessed by Kevin himself and/or by a fellow passenger in Tony Nguyen's car, and Kevin's own interview with police would have impeached his claim that the defense was selective in its portrayal of one of Kevin's police interviews. Nevertheless, the trial court precluded or drastically limited the defense in its effort to present these lines of impeachment. In the AOB, appellant has argued that the court's rulings constituted reversible error. (AOB 238-250.) Respondent differs. (RB 178-196.)

A. Impeachment of Kevin Lac's Claim That He Did Not Have a Gun and Did Not Know If Truong "Trippy" Nguyen Had One

At trial, Kevin Lac testified that, on the occasion when Tony Nguyen was shot, he (Kevin) did not have a gun and did not know whether fellow passenger Truong "Trippy" Nguyen had one. (9 RT 1684.) The defense sought to impeach Kevin's testimony, but the trial court excluded most of the impeaching testimony (from Chynna Vu, Linda Vu, Alisa Trujillo, and Laura Hughey) and allowed the defense to call only the two least credible witnesses on the subject (Gene Melancon, Floriberto Villanueva). The court ruled that

the excluded evidence was cumulative and inconsistent with the defense position that appellant was not in the shooter's car. Appellant has argued that these were both improper reasons for excluding the evidence. (AOB 238-247.)

For its part, respondent does not defend the trial court's rulings on either of the bases actually used by the court ("cumulative" and "inconsistent defense"). Nor does respondent deny the credibility problems related to the two witnesses who were allowed to testify. (RB 188 ["Whether or not the prosecutor contested the testimony of Melancon and Villanueva," the excluded testimony was inadmissible].) Respondent instead seeks to justify the trial court's ruling by resorting to rationales that the trial court did not use below.

1. Chynna Vu

Chynna Vu was in an excellent position to confirm that Kevin Lac had a gun and/or that Trippy Nguyen drew a gun (which Kevin would have seen) because she was a passenger in the car with them. However, the trial court not only precluded the defense from asking Chynna about such matters before she arrived on the stand, but even after she testified that Lac ran from the scene, it would not allow the defense to ask whether Kevin was carrying anything in his hands as he fled. (25 RT 4716, 4719-4720.)[57]

Respondent contends these rulings were correct because the defense was seeking to "exceed[] the scope of Chynna Vu's direct-examination testimony," which was "limited to describing the identity of the passengers in Tinh Dam's car when Tony Nguyen was shot" and the trial court "could

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[57] In the AOB, appellant stated that Chynna had testified "for the prosecution" that Kevin Lac fled from the scene, but actually this testimony was on cross-examination. (25 RT 4716.)

properly sustain the prosecutor's objection" on this basis. (RB 186, 187.) This contention is unavailing for several reasons.

First: respondent is wrong that the defense was seeking to exceed the scope of Chynna's direct examination. Respondent is correct that her direct examination was "limited to describing the identity of the passengers in Tinh Dam's car when Tony Nguyen was shot," but one problem with her direct-examination testimony was that Kevin Lac and Trippy Nguyen, whom she claimed were in the car, were not around when the police arrived a few moments later. If her direct examination testimony was correct, she had to account for their absence. Thus, it was well withing the range of proper cross-examination to question her about why Kevin and Trippy were not around, including the circumstances intimately connected to her explanation.

Moreover, after she testified that Kevin and Trippy fled, Chynna sought to put a benign spin on their flight, essentially claiming they ran off because "they'd have probation violations" if they remained, and "they didn't want to violate probation." (25 RT 4716.) Appellant was fully entitled to show that the actual reason they fled was because they were in possession of a weapon and not because, as a jury would have understood Chynna to be saying, they happened to be innocently at the scene of a shooting.

Second: In any event, the prosecutor did not object that the Chynna's testimony could or should be excluded on the basis that it exceeded the prosecution's direct examination. Thus, respondent merely argues that the trial court "could" have excluded the defense evidence on this basis. But had this reason been offered below, the defense could easily have requested to reopen its case to elicit the testimony. Indeed, this is undoubtedly why the prosecutor did not object on this basis. Since respondent's "beyond the scope" contention would deprive appellant of the opportunity he would have

had at trial, it cannot be invoked now on appeal. (See ARB § I.2.A.2, pp. 40 et seq., *ante*.)

Next, respondent asserts that Chynna "was not in a good position to know whether or not Kevin Lac lied when he denied seeing a weapon in Tin Dam's car because Kevin Lac never claimed in his prosecution testimony that there was no weapon in Tinh Dam's car." (RB 188) Respondent has created a straw man. Appellant's AOB argument did not say or imply that Kevin "claimed there was no weapon in Tinh Dam's car." Rather, it accurately characterized Kevin's testimony as being that he did not have a weapon himself and did not know if Trippy had one (which necessarily meant that he did not see Trippy with a gun). As a fellow passenger in the car, Chynna was in an extremely good position from which to testify that Kevin displayed a weapon, and she was in an equally good position from which to testify that Trippy did, which, in turn, would reasonably have led to the inference that Kevin was aware of Trippy's gun.

Finally, respondent claims that "[i]f anyone carried a gun from the car, it would in any event have been Truong Nguyen rather than Lac." (RB 188.) Respondent bases this contention primarily upon Floriberto Villanueva's trial testimony that the man whom he saw with a gun had been in the back seat, whereas Kevin had been in the front seat. (19 RT 3708.) But Villanueva did not see any front seat passenger at all, so his testimony as to the original positioning of the armed man he saw, even if fully credited, does not establish that Kevin was not himself holding a weapon as he ran away. And since other witnesses saw a male doing something with a gun that Villanueva did not see — putting a gun into his waistband (see 18 RT 3419-3420 [Hughey], 19 RT 3664 [Melancon]) — the most reasonable inference is that there were two males who displayed guns, one of whom had been the front passenger that Villanueva did not see (i.e., Kevin Lac). And, in any event, a jury could

reasonably have concluded that the fact that Trippy openly displayed a gun meant that it was likely that Kevin saw this and thus was lying when he said he did not know whether Trippy had a gun.[58]

2. Linda Vu

Linda Vu was a passenger in a car traveling in tandem with Tony Nguyen's car, and thus she, too, was in a position to testify to seeing Kevin Lac and Trippy with guns, especially since one or both them apparently got into her car afterwards. (See AOB 244-245.) Respondent contends that the trial court did not preclude defense counsel from questioning Linda about this subject and that, instead, defense counsel "volunteered" not to question her. (RB 190, citing 19 RT 3651.) The contention is meritless. The trial court had

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[58] In a footnote, the AOB pointed out that respondent could not complain that the record fails to affirmatively demonstrate that Chynna would have testified to seeing Kevin and Trippy having a gun because (1) no such showing is required on cross-examination and (2) the prosecutor below did not deny the defense's claim as to what Chynna would testify to. (AOB 244 fn. 152, citing Evid. Code, § 354, subd. (c) and *Tossman v. Newman* (1951) 37 Cal.2d 522, 525-526 [re point (1)] and *People v. Linder* (1971) 5 Cal.3d 342, 348 fn. 2 [re point (2)].) Respondent addresses this footnote at considerable length (RB 189-191), but only two arguably relevant matters are offered. First, respondent asserts that Evidence Code section 354 does not apply when the cross-examination in question is beyond the scope of direct examination. (RB 190.) Respondent cites nothing that supports this claim. Moreover, for the reasons already discussed, the cross-examination was not beyond the scope of direct examination. Second, respondent asserts that *Linder* presented a "sui generis scenario." (RB 190.) Tthis assertion is pure ipse dixit. Of course, the precise *facts* of *Linder* are different from the present case, but why is *Linder*'s *reasoning* inapplicable? Respondent does not explain, and no explanation is apparent to appellant. Indeed, the conclusion that the prosecutor at appellant's trial was tacitly acknowledging there was a factual basis for the defense questioning is corroborated by the fact that the prosecutor repeatedly objected that such questioning was "improper *character* evidence." (18 RT 3404, 3405, 3406, 3427.) The only way the questioning could have been depicted as "character" evidence is if it showed Kevin to be in possession of a gun.

already made very clear that it would not allow the defense to pursue this subject with any witness other than Melancon and Villanueva. (See 18 RT 3426, 3514, 19 RT 3641.) And if there were any doubt about the point, it would be resolved by the fact that the trial court did not disagree when counsel said, "I want to [question Linda Vu about guns at the scene], but in lieu [sic] of the court's rulings, I'm not." (See 19 RT 3651.)

Respondent also asserts that "Linda Vu would not in any event have testified that Kevin Lac or Truong Nguyen carried a gun" (RB 190), but it offers no coherent support for this statement. If respondent were correct, why would the prosecutor say she "would object to" Linda being asked? (19 RT 3651.) Why would she repeatedly say such questioning was just "improper character evidence"?[59] (18 RT 3404, 3405, 3406, 3427.)

3. Alisa Trujillo and Laura Hughey

The remaining evidence that the trial court precluded would have come from Alisa Trujillo and Laura Hughey, the two women working at the nearby urology center. (See AOB 239-240, 245.) Respondent contends that the testimony of these eyewitnesses was inadmissible because "the probative value . . . was substantially outweighed by its substantial danger of misleading and confusing the jurors by confusing the issues in the case." (RB 186.) The argument lack merit. The probative value of the evidence was that it would have seriously impeached the credibility of the prosecution's essential witness,

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[59] Parenthetically, we note the obvious: the evidence the defense sought to present was not proffered for the purpose of showing "character" but to impeach Kevin Lac. It is axiomatic that evidence that is admissible for one purpose is not rendered inadmissible because it might be inadmissible for another. Further, given the prosecution gang expert's testimony concerning the general activities of Cheap Boy (and Nip Family) gang members, any character traits inferable from evidence showing Kevin Lac and/or Truong Nguyen in possession of a gun could not have had any prejudicial impact.

Kevin Lac. It would have directly shown Kevin to be a liar and would have done so in a far more credible way than either Villanueva or Melancon did.

Respondent claims that the evidence would not have impeached Kevin, but respondent's reasoning does not hold up. According to respondent, the testimony of Trujillo and Hughey "would not have impeached Lac because Lac never claimed in his prosecution testimony that there were no guns in Tinh Dam's car and never stated in his prosecution testimony that no one in Tinh Dam's car had a gun." (RB 186.) Respondent is invoking its straw man again. Appellant has never suggested that Kevin Lac "claimed there were no guns" in the car or that "no one in the car had a gun." Rather, as we have pointed out, Kevin's testimony was that he did not have a weapon himself and did not know if Trippy had one, which necessarily meant that he did not see Trippy with a gun. The testimony of Trujillo and Hughey was that at least one person from the car was displaying a weapon as he fled. If the person was Kevin, then Kevin was a liar. If the person was Trippy, then the jury could reasonably infer that Kevin saw Trippy with a gun at some point, either outside the car or inside it, since Hughey's evidence would have been that the man was "putting a large pistol inside the front of his pants" as he ran (18 RT 3419), indicating that he had displayed the gun earlier.

Not only is respondent wrong about the probative value of the testimony of Trujillo and Hughey, but respondent does not complain the evidence was prejudicial, nor does it explain how the evidence might have misled or confused the jury. In short, respondent can find nothing to put on the opposite side of the scale to outweigh the evidence's probative value. Respondent's claim that the evidence was properly excluded under Evidence Code section 352 has no merit.

4. Alleged Forfeiture

Respondent again tenders its claim that appellant's federal constitutional claims should be forfeited because appellant "fail[ed] to make them in the trial court." (RB 191.) However, as we have pointed out previously (see ARB §§ I.1.B, p. 12, & I.2.A.4, p. 49, *ante*), a constitutional claim is not forfeited on appeal when, as here, "the new arguments do not invoke facts or legal standards different from those the trial court was asked to apply, but merely assert that the trial court's act or omission, in addition to being wrong for reasons actually presented to that court, had the legal consequence of violating the Constitution." (*People v. Gutierrez*, 45 Cal.4th at p. 809.)

5. Prejudice

Finally, respondent makes a limited prejudice argument. It does not dispute that, if federal constitutional error occurred, a reversal is called for. Rather, it argues merely that if there was "state court error," then the error was "harmless, non-reversible error because it is not reasonably probable different verdicts would have been reached under counts two and three absent the error." (RB 192.)

Respondent's claim is that the error was harmless under *Watson* (1) because "Lac never claimed there were no guns in Tinh Dam's car" and (2) because the excluded evidence "would not [sic] have added little if any material impeachment to the impeachment of Lac's testimony." (RB 192-193.) The former is simply a repeat of respondent's mischaracterization of appellant's argument, one that we have already dealt with twice in this section of the ARB. The latter is conclusory and fails to confront any of appellant's arguments about why the evidence was important and not cumulative. (See AOB 242-246.) Respondent has declined to address or contest these arguments directly, and to the extent it is possible to view respondent's current

claim as addressing them indirectly, the responses are purely conclusory and assertional. There is nothing to which appellant can meaningfully reply here except to refer the Court to the discussion at pages 242-246 of the AOB.

B. Impeachment of Kevin Lac's Claim That the Defense Was Being Selective in Its Questioning about His Police Interview of May 25, 1995

When the defense sought to cross-examine Kevin Lac about his police interview of May 25, 1995, in which Kevin had been shown photographs of appellant but failed to say that appellant was in the shooter's car, Kevin claimed that the defense was being selective in how it was portraying the interview. "You're just hitting the ones that you want to try to get me on," Kevin testified. "There's a lot of stuff in there that would help out the [prosecution]." (9 RT 1742.) The defense immediately sought to show that Kevin's statements were untrue by having him review the interview, but the trial court sua sponte decided to preclude that line of questioning. In the AOB, appellant has argued the trial court's actions constituted error. (AOB 247-249.)

Respondent asserts that "Lac's gratuitous remark did not suggest how he in any way incriminated appellant during the May 25, 1995, police interview" (RB 196), but this assertion is either beside the point or wrong. Kevin was claiming that the defense was being selective and that there was "a lot of stuff" in the interview that would "help out" the prosecution, and this claim very clearly insinuated that Kevin had in some way implicated appellant in the interview. The defense was entitled to show that this insinuation was wrong. (See, e.g., *Davis v. Alaska* (1974) 415 U.S. 308, 314.)

Respondent further asserts that the defense questioning was "argumentative insofar as it sought to involve the witness in an argument without appreciably furthering the resolution of any material issue in the

case." (RB 196.) But the questioning was not argumentative at all. Kevin had asserted that there was "lots of stuff" in the interview that would have been helpful to the prosecution on the question of appellant being in the shooter's car. Either Kevin was correct, or he was not, but without knowing what Kevin might have been referring to, the jury could not determine what the actual facts were or where the truth lay. Calling such questioning "improperly argumentative" is akin to arguing that evidence is "unduly prejudicial" simply because it harms one side's case. But of course, "'prejudicial' does not mean the evidence is damaging to a party's case. Instead, it means 'evoking an emotional response that has very little to do with the issue on which the evidence is offered.'" (*Piscitelli v. Salesian Soc.* (2008) 166 Cal.App.4th 1, 11, quoting *Rufo v. Simpson* (2001) 86 Cal.App.4th 573, 597, other citations omitted.)[60]

C. The Erroneous Exclusion Of Evidence Compels The Reversal Of Counts 2 And 3

Appellant has argued that the errors just discussed were prejudicial as to Counts 2 and 3 under both the *Chapman* and *Watson* standards. The case against appellant was extremely close. Appellant was tied to the offenses only by Kevin Lac's testimony, and Kevin not only was a member of a rival gang,

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[60] Respondent repeats its argument that appellant's federal claims are forfeited because not made in the trial court. (RB 196.) This contention is wrong for the reasons previously discussed. (See, e.g., ARB § I.1.B, p. 12; II.1.J, p. 112, *ante*.)

Respondent also contends that any error in precluding the defense questioning was harmless. Respondent's contention consists entirely of the conclusory statements that "the trial record does not support" a finding of prejudice and that "it is not reasonably probable that appellant would have enjoyed a more favorable outcome if permitted to inquire further." (RB 196.) These are not arguments but assertions to which no reasoned reply is possible.

but he first implicated appellant some 13 months after the shooting despite having known appellant before the shooting and despite the police having shown Kevin two photographs of appellant during the 13-month period. Kevin's credibility was thus key to a conviction, and while there were other reasons to doubt his credibility, the excluded evidence — showing that he was untruthful about having a gun, about seeing Truong Nguyen with a gun, and about having said something helpful to the prosecution at the May 25th interview — would have exposed him as a liar in a direct way that no other evidence did. The cumulative effect of these errors warrants reversal even if neither error would do so individually. (See AOB 249-250.)

As noted in the preceding subsections, respondent denies that reversal is required as the result of either error, but respondent does not consider the cumulative effect of the errors. Again, there is nothing for an ARB to reply to.

3. REVERSAL OF COUNTS 2 AND 3 IS REQUIRED BECAUSE OF THE PREVIOUSLY DISCUSSED ERRORS IN EXCLUDING EVIDENCE OF THE CHEAP BOYS' PLAN, MOTIVE, AND OPPORTUNITY TO FRAME APPELLANT

The AOB has argued that the trial court's error in excluding defense-favorable evidence of the Cheap Boys' plan, motive, and opportunity to frame appellant for Sang Nguyen's death also requires reversal of Counts 2 and 3. (See AOB § III.3, p. 251. See also AOB § I.2, pp. 96-111; ARB § I.2, pp. 36 et seq., *ante*.)

The RB's response, in its entirety, is that "for reasons previously set fourth in respondent's argument III . . ., *ante*, those rulings were not erroneous and did not in any event affect the verdicts, including the verdicts under counts two and three." (RB 197.) This conclusory response does not deny the closeness of the case against appellant as to these counts, and it fails to address the fact that Kevin Lac, whose testimony was the sine qua non of the prosecution's case here, was one of the very Cheap Boys arrested at the gang's crash pad. Respondent's silence on these key matters should be fatal to its position.

4. REVERSAL OF COUNTS 2 AND 3 IS REQUIRED BECAUSE OF THE PREVIOUSLY DISCUSSED ERRORS RELATED TO THE ADMISSION OF THE PREJUDICIAL HEARSAY EVIDENCE RELAYED BY TRIEU BINH NGUYEN

Appellant has argued in the AOB that the trial court's errors in allowing the prosecution to elicit improper testimony from Trieu Binh ("Temper") Nguyen and in not giving a limiting instruction had a prejudicial effect on Claims 2 and 3, the shooting of Tony Nguyen. (See AOB § III.4, p. 252. See also AOB § I.3.B, pp. 115-118, ARB § I.3.B, pp. 65 et seq., *ante*.)

The RB's response is identical to its response to the preceding argument. In its entirety, the response is that "for reasons previously set fourth in . . . respondent's argument V, *ante*, those rulings were not erroneous and did not in any event affect the verdicts, including the verdicts under counts two and three." (RB 197.) Again, respondent declines to address the closeness of the case against appellant as to these counts, thus providing nothing to which appellant can meaningfully reply.

5. REVERSAL OF COUNTS 2 AND 3 IS REQUIRED BECAUSE OF MULTIPLE CONSTITUTIONAL AND STATE LAW ERRORS COMMITTED IN CONNECTION WITH THE REBUTTAL TESTIMONY OF PROBATION OFFICER STEVEN SENTMAN

After the defense presented evidence indicating that appellant was out of state when Tony Nguyen was shot, the prosecution sought to call appellant's former probation officer, Steven Sentman, as a rebuttal witness, and a cascade of errors ensued. As the AOB pointed out, the trial court allowed Sentman to testify despite the fact that Sentman was in violation of a court order excluding witnesses and despite the fact that Sentman based his testimony on documents that had been withheld from the defense and that contradicted representations Sentman had made to the court on several occasions beforehand. Then, the trial court refused to instruct the jury with regard to the belated disclosure of the new documents, and it prohibited the defense from calling a witness to impeach Sentman's new version of the facts. (AOB 253-268.) Respondent denies that any of this was improper (RB 197-223), but its contentions lack merit.

A. Violation of the Order Excluding Witnesses

The trial court allowed Mr. Sentman to testify despite the fact that he had violated a court order excluding witnesses by being present when appellant had testified. Since Sentman was the prosecution's witness, the prosecutor had a duty to advise him of the witness-exclusion order (*People v. Valdez* (1986) 177 Cal.App.3d 680, 691-692), but she clearly failed to do so. It is settled that any party who "chooses to keep a potential witness present presumably does so knowing that except on good cause the witness will no longer be available for testimonial purposes." (*Id.* at p. 692.) "Later, if the party seeks to call the witness who remained in the courtroom, the prior

knowledge of the court order and apparent election to keep the witness present will be deemed 'fault' as in 'you were responsible for keeping the witness present.'" (*Ibid.*)

Respondent argues, first, that "[a]ppellant has not shown there was a trial court order excluded witnesses [sic]." (RB 197.) The short answer is that if no such order actually existed, it is inconceivable that the trial court and prosecutor would both have failed to point that out on either of the two occasions that the defense objected on this basis. (24 RT 4656-4657, 4663-4664.)

Second, respondent asserts that neither the prosecutor nor Mr. Sentman "knew" Sentman would be a rebuttal witness and that the prosecutor did not "kn[o]w" that Sentman was in the courtroom. (RB 199.) Again, however, one would have expected the prosecutor to have mentioned such a lack of knowledge if indeed it was the case, but she did not. And in any event, as the above-quoted language from *People v. Valdez* makes clear, "knowledge" that a person would be called as a witness is not what triggers the duty to ensure compliance with a witness-exclusion order. If a person is merely a "potential" witness, the party in question must see to it that the witness complies with the court order or else must accept "that except on good cause the witness will no longer be available for testimonial purposes." (*Valdez*, 177 Cal.App.3d at p. 692.) Any other conclusion would open the door to wholesale disregard of witness-exclusion orders, since counsel could virtually always claim, in good faith, that he or she didn't "know" for certain that the witness would be called.

Third, respondent asserts that "the anticipated testimony by Sentman did not appear to be prejudicially impacted by his presence in the courtroom during appellant's testimony." (RB 200.) Au contraire. At a motion to suppress evidence brought prior to trial, Sentman had testified in a manner that, while favorable to the prosecution on the suppression issue, was entirely

consistent with the defense at trial.[61] (See AOB 255-256.) By being in the courtroom during appellant's trial testimony, Sentman learned what portions of his version of events needed to be changed in order to be a prosecution-favorable witness at trial.

Finally, respondent contends that "the alleged error was in any event harmless under any standard because the prosecutor could have conveyed to Sentman the points in appellant's testimony that she wished rebutted even had Sentman been absent from the courtroom during appellant's testimony." (RB 200.) This contention makes no sense. The "alleged error" was allowing Sentman to testify after the violation of the witness-exclusion order. If Sentman had not been allowed to testify, Sentman would not and could not have "rebutted" any of "the points in appellant's testimony that [the prosecutor] wished rebutted."

B. Sanction for the Unjustifiedly and Misleadingly Belated Discovery

Prior to trial, the Probation Department had represented that four "chronos" constituted "all records" that the Department had related to appellant. Also prior to trial, Probation Office Sentman had represented to the court, in two reports and in testimony under penalty of perjury at the motion to suppress evidence, that "[p]hone contact was made monthly with the defendant until approximately December of '94"[62] and that "minimally I

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[61] Sentman's testimony was favorable to the prosecution at the motion because it tended to contradict the defense contention there had been "a de facto termination of [appellant's] probation" when the Probation Department allowed appellant to move out of state, which, according to the defense, precluded justifying the challenged search as a "probation search.".

[62] 25 RT 4766; see also, e.g., Supp.CT 51 (losing contact with appellant "[a]s of December, '94"), 25 RT 4766 ("[n]o contact 1-95").

talked to him at least once a month, if not more" between August and November 1994.[63] At trial, however, after the defense rested, Sentman came forth with some "field notes" that had been in the same file as the chronos and upon which he based an entirely new and different story. The new story was that the only time he had spoken with appellant was on August 2, 1994, after which he "had no personal contact with the defendant at all." (25 RT 4803.) Despite the contrary pre-trial representations and the unjustifiably belated production of the field notes, the trial court permitted Sentman to testify to his new version of the facts and thereby committed error. (AOB 262-264.)

Respondent claims the issue is forfeited "because [appellant] never objected to Sentman's use of the field notes when he testified as a rebuttal witness and never moved to exclude any reference to the field notes in Sentman's rebuttal testimony." (RB 201. See also RB 217 [similar].) By focusing on the "use of" and "reference to" the field notes in Sentman's testimony, respondent appears to misunderstand the issue. The *entirety* of Sentman's rebuttal testimony was based upon the withheld field notes, and it was the *entirety* of that testimony that the defense sought to exclude. And as the trial court explicitly stated, "I did not find that [Sentman's] testimony should be stricken or precluded." (25 RT 4873.) As this quotation plainly shows, the trial court understood the defense to be seeking to "preclude" Sentman's entire testimony. Further objections to Sentman's "use of" or "reference to" those notes in the course of his testimony was not required, and in any event, in light of the trial court's rulings, would have been futile.[64]

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[63] 1 RT 65; see also 1 RT 66.

[64] The trial court made its quoted statement in the course of denying a lesser, instructional sanction for the failure to provide timely discovery: "I did not find that [Sentman's] testimony should be stricken or (continued...)

Respondent contends that the issue is also forfeited because "appellant himself used the field notes in his cross-examination of Sentman." (RB 201.) This contention is meritless. "'"An attorney who submits to the authority of an erroneous, adverse ruling after making appropriate objections or motions, does not waive the error in the ruling by proceeding in accordance therewith and endeavoring to make the best of a bad situation for which he was not responsible."' (*Mary M. v. City of Los Angeles* (1991) 54 Cal.3d 202, 212-213, quoting *People v. Calio* (1986) 42 Cal.3d 639, 643, and *Leibman v. Curtis* (1955) 138 Cal.App.2d 222, 225.)

On the merits, respondent's defense of the admission of Sentman's testimony, in toto, is that "[n]otwithstanding appellant's contention to the contrary, the prosecutor complied with Penal Code section 1054.1, subdivision (f), by procuring copies of the field notes and providing them to defense counsel before Sentman's rebuttal testimony and by providing to defense counsel prior to trial all the other pertinent reports Sentman prepared regarding his probationary supervision of appellant." (RB 217.) Respondent is correct that the defense did, prior to trial, have "the other pertinent reports Sentman prepared," but those reports told a very different story from the one Sentman offered at trial based on the field notes. It is the withholding of the *field notes* that is at issue here, and respondent's suggestion that the end-of-trial production of the field notes was proper because the prosecutor "complied with Penal Code section 1054.1" is wrong on the law and disregards the full context.

For one thing, section 1054.7 requires (and required at the time of trial) that discovery be provided "at least 30 days prior to the trial."

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[64](...continued)
precluded, nor do I think I should give this special instruction." (25 RT 4873.) The denial of that lesser sanction is addressed in Subsection D, *post*.

In addition, when defense counsel requested documents like the field notes from the prosecution two years before trial, "the prosecutor advised me [defense counsel] that they did not have that information and I should go directly to the Probation Department." (25 RT 4841.) And when the defense went "directly to the Probation Department" with a subpoena duces tecum, the Department's response was that the only documents that existed were the four chronos. (3 CT 937; Exh. WW, 3rd page.) Indeed, as respondent itself admits, "[t]he Probation Department provided none of the field notes when it responded to the April 22, 1996 defense subpoena duces tecum, *although it kept the field notes in the same probation file as the chronos*." (RB 200.) At no time did either the prosecutor, the Probation Department, or Mr. Sentman ever suggest there was any justification for the last-minute disclosure of the field notes.

Thus, the issue here is not merely that the field notes were divulged belatedly, which would be troubling enough by itself. This case also involves multiple affirmative misrepresentations by the Probation Department and by Sentman himself, misrepresentations on which the defense relied in preparing for trial. (See, e.g., 25 RT 4762.) The only remedy for what happened here was the exclusion of Sentman's testimony.[65]

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[65] Tellingly, respondent does not argue that if there was error, that error could be deemed harmless as to Counts 2 and 3.

Appellant notes parenthetically that respondent errs when it says that appellant testified that when he went to Alabama in the summer of 1994, he "worked at a part time job at T & W Seafood in Bayou La Batre." (RB 205, citing 21 RT 4019-4021.) Appellant worked in the Alabama seafood industry on several occasions, and, as the RT pages cited by respondent actually show, appellant was unable to say when he worked at T & W Seafood. His testimony was that he worked there "at some point in time" or "from time to time." (See 21 RT 4020-4021.)

C. The Trial Court's Double Standard

The trial court's decision to permit Mr. Sentman to testify despite the clear discovery violation stands in marked contrast to its decision to preclude the defense from impeaching Tin Duc Phan because of a supposed discovery violation by the defense. (See AOB 264. See also AOB § I.2.A, pp. 97-105 and also ARB § I.2.A, pp. 36 et seq., *ante*.) The RB responds that "there was no double standard" because the trial court was correct in precluding the impeachment of Tin Phan. (RB 218.) Respondent is wrong about the propriety of the trial court's ruling with respect to Tin Phan (see ARB § I.2.A, pp. 36 et seq., *ante*), but even if respondent were correct, its argument does nothing to address the double-standard question. If it was appropriate to preclude the defense from eliciting evidence to impeach Tin Phan because of a *defense* discovery violation, then why wasn't it also appropriate to preclude the prosecution from producing evidence to impeach appellant because of the *prosecution's* far more blatant discovery violation? This is the question posed by appellant's double-standard argument, and respondent fails to deal with it.

D. Refusal to Instruct on Belated Discovery

In the AOB, appellant has argued that the trial court erred by refusing the defense request that the jury be instructed that the failure to disclose the field notes could be considered on the question of Sentman's credibility and accuracy. (AOB 264-265.)

Respondent asserts that the instruction was properly refused because there was no "evidence that appellant's ability to challenge Sentman's rebuttal testimony was adversely effected by the late disclosure of the field notes" and no "evidence supporting an inference that the late disclosure of the field notes was triggered by an attempt by the prosecutor to gain a tactical advantage over the defense." (RB 219, citing *People v. Bell* (2004) 118 Cal.App.4th 249,

254.) Respondent's argument does not make sense. An unjustified failure to comply with discovery obligations is itself "relevant evidence the jury could consider in assessing the credibility of [a witness's] testimony." (*People v. Riggs* (2008) 44 Cal.4th 248, 310.) The credibility assessment does not turn on whether the opposing party has been "adversely affected" by the delay or by whether the delay was part of a scheme to "obtain a tactical advantage." Rather, it turns on whether "inferences . . . might (or might not) be drawn" as the result of the tardy disclosures. (*Ibid.*)

As for *People v. Bell*, the only authority cited by respondent, it does not support respondent's position. True, *Bell* did find error in the giving of a prosecution-favorable instruction related to belated disclosures by the defense, but the *reasons* the instruction was found to be erroneous are inapplicable to the instruction that the defense proposed in the present case. Of most significance, the instruction in *Bell* "invite[d] the jurors to speculate" because "it told them to evaluate the weight and significance of a discovery violation without any guidance on how to do so." (118 Cal.App.4th at p. 257. See also *id.* at pp. 255-256 [discussing the "no guidance" and "speculation" points].) In the present case, by contrast, the proposed instruction would have focused the jury on exactly the relevant point: the credibility and accuracy of Sentman's testimony.

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Respondent also contends that any error in refusing the instruction was nonprejudicial. According to respondent, "[a]ppellant's trial counsel had [the] benefit of the notes when questi[o]ning appellant, and appellant cannot show a reasonable probability of a different outcome if the instruction had been given as requested." (RB 219.) Respondent is in error as to when defense counsel was given the notes. They were turned over to the defense on June

24, 1998. (See 25 RT 4761.) Appellant's testimony had ended six days earlier. (See 22 RT 4284.)

As for respondent's contention that there is no "reasonable probability of a different outcome," respondent does not deny that reversal would be required under the *Chapman* test, and in any event, the contention is, again, conclusory. It does not address the closeness of the case against appellant or the weaknesses of the only testimony placing appellant at the scene of the shooting, nor does it deal with the fact that Sentman's new story, based on the field notes, must have been key to the jury resolving its doubts in the prosecution's favor as to Counts 2 and 3.

E. Precluding Defense Rebuttal Testimony from Le Nguyen

Completing the quintuplet of errors arising from the Sentman evidence was the trial court's refusal to allow the defense to call Le Nguyen to rebut Sentman, ruling that her testimony was irrelevant because she did not see appellant at "some out-of-state location" between July 4 and July 19 and could not testify that he "actually left the area." (AOB 265-268.) As the AOB argued, Le's testimony was relevant (1) as circumstantial evidence that appellant was out of state, (2) as evidence of appellant's "statement of intent [or] plan" when "offered to prove . . . acts or conduct of the declarant" (Evid. Code, § 1250, subd. (a)(2)), (3) as corroboration that appellant did in fact leave the state as he told her he was going to, and (4) as impeachment of Sentman's claim that he saw appellant in person on July 13 and 19, 1994.

Respondent offers a smattering of justifications for the trial court's ruling, but none has merit. (RB 220-223.)

First: respondent contends that "Le could not testify appellant left the state or even left the area after leaving her apartment." (RB 221.) This

contention is factually incorrect. As the AOB pointed out, Le was prepared to testify that she contacted appellant by phone in July by dialing a phone number in Alabama. (25 RT 4815, 4856.) Respondent's contention is also incorrect as a matter of law and logic because, with or without the July phone call, the fact that appellant stopped living with Le and was not seen again by her after he told her he was going to Alabama was circumstantial evidence that appellant had in fact left the state. That reasoning is embodied in Evidence Code section 1250 itself. (See Evid. Code, § 1250, Comment — Assembly Committee on Judiciary ["a statement of the declarant's intent to do certain acts is admissible to prove that he did those acts."].)

Second: respondent contends that Le's testimony would "not rebut Sentman's testimony that his field notes and chrono file showed personal contacts with appellant on July 13 and July 19 [of 1994], since the field notes and chrono file referenced in Sentman's testimony also reported that appellant mentioned the possibility of moving to Minnesota when he came in to see Sentman on July 13." According to respondent, "Sentman could not have confused those reported contacts with contacts with Le in which Le told Sentman that appellant moved to Alabama and told Sentman how appellant could be reached in Alabama." (RB 221-222.) There are several flaws in this contention.

For one thing, respondent simply presumes that Sentman's most prosecution-favorable version of events in July 1994 is what is controlling, as if that version were so firmly established that the defense could be precluded from introducing contrary evidence. Appellant knows of no support in the law for this way of approaching an issue of admissibility, and respondent cites none.

Moreover, and contrary to what respondent suggests, the field notes did not themselves indicate that Sentman met with appellant in person on either July 13 or 19. Rather, after looking at the field notes, Sentman testified that he and appellant met in person "as best as I can remember." (25 RT 4741.) It was thus Sentman's purported memory, not the field notes or the chronos directly, that was the source of his trial claim of having had personal contact with appellant in July.

And Sentman's memory was highly suspect. Among other things, his claim at trial that appellant mentioned the possibility of moving to *Minnesota* in July was in conflict with the probation report he had authored in May 1995, in which he wrote that "[i]n July of '94 [appellant] was allowed to move to the state of *Louisiana*" to live "with his family," with no mention of Minnesota whatsoever. (25 RT 4768; see Supp.CT 51.) What Sentman wrote in the report was also what he had testified to at the pre-trial motion to suppress, namely, that he had given appellant permission to move to Louisiana in July 1994. (1 RT 61, 62.)[66]

Third: respondent contends that Le's testimony as to appellant's "statement of intent [or] plan" was not admissible under Evidence Code section 1250 because the statement was "made under circumstances indicating its lack of trustworthiness," namely, "the self-serving nature of the statement and appellant's desire to shield Le from any knowledge of his impending criminal activities." (RB 222.) But here again, respondent's argument is

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[66] Indeed, Sentman's basic reliability as a recorder of events is cast into doubt by his references to "Louisiana" as the place where appellant was going to live "with his family." Appellant had family in Alabama, not Louisiana, and the phone number he gave Sentman had an Alabama area code. The AOB discussed this additional sign of Sentman's unreliability (AOB 256 fn. 156), and respondent does not dispute it.

premised on the theory that it is proper for the trial court to exclude evidence by adopting a prosecution-favorable view of the case, as if that view were incapable of being contradicted. Not only does such an approach unconstitutionally usurp the jury's function and violate the Sixth Amendment right to a jury trial,[67] but its premises are wrong. Nothing except speculation supports respondent's assertions that appellant's statements to Le were "self-serving." The statements were unremarkable, made in the course of what was just the type of conversation that would be expected when a family member plans on moving out, and the statements were corroborated by appellant's subsequent absence from Le's house and his presence at a phone in Alabama. The mere *possibility* that a person may have spoken falsely, without more, is "insufficient to render . . . statements unreliable" under Evidence Code section 1252. (*People v. Guerra* (2006) 37 Cal.4th 1067, 1114. Accord *People v. Rowland* (1992) 4 Cal.4th 238, 264.)

As for respondent's assertion that appellant had a "desire to shield Le from any knowledge of his impending criminal activities," there is again no support for the claim other than unadorned speculation. Moreover, the claim is premised upon the assumption that appellant was guilty of the crimes charged in Counts 2 and 3, i.e., that he was in fact the back seat passenger in the car from which Tony Nguyen was shot some days later. But this was the very point that the evidence was offered to undermine, and it was a point that the jury had the sole power to decide, not the trial court. This is undoubtedly why respondent cites nothing to support its premise that a trial judge can exclude defense-favorable evidence if he or she concludes the defendant is guilty of the crime charged.

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[67] See ARB section I.1.C.1, pages 14 et sequitur, *ante*.

And on top of all of these points, no evidence was presented that the offenses against Tony Nguyen were planned days in advance, let alone that appellant was involved in or aware of such planning, so respondent's claim that appellant had "knowledge of impending criminal activities" at the time of his statements to Le is speculation piled upon speculation.

Finally, respondent's claim of unreliability was not made below, so that appellant had no opportunity to produce facts to show its reliability. Consequently, that ground is not available to justify the trial court's ruling now. (See ARB § I.2.A.2, pp. 40 et seq., *ante*.)

Fourth: respondent contends that Le's testimony would have been cumulative of the testimony of appellant's sister Nen in a few respects. (RB 222.) However, respondent does not attempt to argue that the entirety of Le's testimony could be deemed to be cumulative. Most significantly, respondent does not dispute that Nen did not testify about having any contacts with Sentman during July 1994 or at any other time.

But even as to matters where Le would have given similar testimony to Nen, the trial court could not properly have excluded that testimony as cumulative. "Evidence that is identical in subject matter to other evidence should not be excluded as 'cumulative' when it has greater evidentiary weight or probative value."[68] Thus, evidence is not cumulative where, for example, "[t]he jury would be more inclined to believe" it than already admitted evidence, or where it "repeats or fortifies a part of the [proponent's] case which had been attacked" by the other side, or where it is "the most effective

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[68] *People v. Mattson* (1990) 50 Cal.3d 826, 871, citing *People v. Carter* (1957) 48 Cal.2d 737, 748-749.

way" to present a relevant matter.[69] Moreover, appellate courts have recognized that "[i]t is often invaluable to have evidence come from different sources."[70] Virtually all of these considerations apply to Le's testimony. Her testimony would have "fortified a part of [appellant's] case which had been attacked" by the prosecution via Sentman's testimony. And not only would Le's testimony have been "invaluable" for having "come from [a] different source[]," but since Le was the person with whom appellant was actually living before he left, her testimony was "the most effective way" to present the testimony and had "greater evidentiary weight or probative value" than Nen's.

Fifth: Respondent asserts that appellant's federal constitutional claims should be forfeited because they are "being made for the first time in this Court." (RB 223.) This contention is wrong for the reasons previously discussed. (See, e.g., ARB §§ I.1.B, p. 12; II.1.J, p. 112, *ante*.)

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[69] *People v. Carter*, *supra*, 48 Cal.2d at page 748; *People v. Graham* (1978) 83 Cal.App.3d 736, 741, disapproved on other grounds in *People v. Guiuan* (1998) 18 Cal.4th 558; *Jones v. City of Los Angeles* (1993) 20 Cal.App.4th 436, 446. See also *Chambers v. Mississippi* (1993) 410 U.S. 284, 294 (due process violated where exclusion of defense evidence made the defense case "far less persuasive than it might have been").

[70] *Monroy v. City of Los Angeles* (2008) 164 Cal.App.4th 248, 267.

6. IF REVERSAL OF COUNTS 2 AND 3 IS NOT REQUIRED BY ANY OF THE PRECEDING CLAIMS BY ITSELF, REVERSAL WOULD BE REQUIRED BECAUSE OF THE CUMULATIVE PREJUDICE OF THE ERRORS

Appellant has argued that the reversal of Counts 2 and 3 is required as the result of the cumulative impact of all of the preceding errors. (AOB 269.) Respondent disagrees (RB 223), but inasmuch as its argument is short and conclusory, there is nothing to which appellant can reply.

7. IF THIS COURT WERE TO CONCLUDE THAT DEFENSE COUNSEL FAILED TO PRESERVE ANY OF THE AFOREMENTIONED CLAIMS, THEN A NEW TRIAL WOULD BE REQUIRED ON THE GROUND THAT APPELLANT WAS DENIED HIS CONSTITUTIONAL RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL

The AOB argues that if this Court were to conclude that any of the aforementioned claims here in Section III were forfeited, then appellant was denied his constitutional right to the effective assistance of counsel. (AOB 270-271.) Respondent disagrees in conclusory fashion but does not deny that there was no tactical reason for any failure to object or any objection deemed to be inadequate. (Compare AOB 270 with RB 224.)

Respondent does contend that the constitutional issues raised in Section III should be forfeited. Its argument is that "[n]otwithstanding appellant's allegation, this Court has found constitutional claims forfeited when not raised in the trial court" and that therefore, this Court "should find the pertinent constitutional claims forfeited here." (RB 24, citing *People v. Tafoya* (2007) 42 Cal.4th 147, 166; *People v. Geier, supra*, 41 Ca1.4th at p. 609; *People v. Halvorsen, supra*, 42 Ca1.4th at pp. 413-414.) We have shown the defect in

this contention before: a constitutional claim is *not* forfeited on appeal when "the new arguments do not invoke facts or legal standards different from those the trial court was asked to apply, but merely assert that the trial court's act or omission, in addition to being wrong for reasons actually presented to that court, had the legal consequence of violating the Constitution." (*People v. Gutierrez*, *supra*, 45 Cal.4th at p. 809. See also, e.g., ARB §§ I.1.b, p. 12; II.1.J, p. 112, *ante*.) Indeed, this principle of law is acknowledged in two of the very cases respondent cites. (See *People v. Geier*, 41 Ca1.4th at pp. 610-611; *People v. Halvorsen*, 42 Ca1.4th at p. 408 fn. 7.) Respondent makes no effort to show why this principle is not controlling as to the constitutional claims now at issue.

IV.
COUNTS 4 AND 5
(relating to the November 24, 1994 shooting of Huy "PeeWee" Nguyen)

In Counts 4 and 5, appellant was convicted of attempted murder and gang participation in connection with the shooting of Huy "PeeWee" Nguyen on November 24, 1994 (four months after the shooting of Tony Nguyen, two-plus months before the killing of Sang Nguyen, and five-plus months before the killing of Tuan Pham). The offenses occurred outside the Mission Control video arcade and in the immediate aftermath of a fight in which PeeWee and several associates had been beating the male who would do the shooting. The primary contested issue at trial was whether appellant was the shooter. The two eyewitnesses upon whom the prosecution's case depended were, at best, inconsistent, and other witnesses affirmatively contradicted them. The defense also attempted to take the position that the killing was done in unreasonable self-defense and thus was no more than attempted manslaughter, but the trial court refused to instruct the jury as to that possibility. (See Section 1, which follows.)

1. THE TRIAL COURT'S REFUSAL TO INSTRUCT ON UNREASONABLE SELF-DEFENSE REQUIRES REVERSAL OF COUNTS 4 AND 5

In the AOB, appellant has argued that the trial court erred in refusing to instruct on imperfect self-defense in light of the established principle that "[i]n the exercise of his right of self-defense . . . a person may pursue his assailant until he has secured himself from danger if that course . . . appears reasonably necessary" and that "[t]his law applies even though the assailed person might more easily have gained safety by flight or by withdrawing from the scene." (27 RT 5283-5284, 3 CT 1053, quoting CALJIC No. 5.50; accord CALCRIM No. 3470. See AOB 272-275.)

In evaluating appellant's claim, this Court does "'not view the evidence in the light most favorable to the [respondent]" and does "not . . . draw all inferences in favor of the judgment.'" Rather, it must "view the evidence in the light most favorable to defendant[]." (*Whiteley v. Philip Morris* (2004) 117 Cal.App.4th 635, 655, quoting *Logacz v. Limansky* (1999) 71 Cal.App.4th 1149, 1156 and citing, inter alia, *Henderson v. Harnischfeger Corp.* (1974) 12 Cal.3d 663, 674. See also *People v. Randle* (2005) 35 Cal.4th 987, 1004 [reversal required because of refusal to instruct on unreasonable defense of others where the evidence was "susceptible of the interpretation that defendant's belief in the necessity of protecting [a third party], supposing he held such a belief, was unreasonable"].) The Court also does "not evaluate the credibility of witnesses, a task for the jury." (*People v. Breverman* (1998) 19 Cal.4th 142, 162.)

An imperfect-self-defense instruction was called for here in appellant's case because, viewing the record in the light most favorable to appellant, there was evidence from which a jury could reasonably have concluded either (1) that appellant believed that PeeWee, although wounded, was still capable of inflicting further grievous injury by procuring a firearm or enlisting help from armed associates, or at least (2) that the prosecution had failed to prove beyond a reasonable doubt that appellant did not so believe. (AOB 272-275.)

Respondent contends there was no substantial evidence to support imperfect self-defense, but at most, its argument suggests merely that there was no basis for a *reasonable* belief in the need for self-defense once PeeWee had been shot. (RB 229.) Respondent does not show that the evidence is incapable of the interpretation that appellant had an *unreasonable* fear that PeeWee could still cause him serious harm. Respondent recognizes that an endangered person "may pursue his assailant until he has secured himself from

danger if that course likewise appears reasonably necessary." (RB 229.) Respondent also acknowledges that appellant has argued that a jury could reasonably have "found that appellant . . . believed it was still necessary to secure himself from imminent lethal danger by preventing PeeWee from obtaining a firearm or summoning one or more comrades who had a firearm." (RB 230.) To these points, respondent's answers, in full, are that "there was no substantial evidence supporting this instructional scenario" and that "the trial record belies the contention." (RB 229, 230.) These responses are entirely conclusory and citation-free. They do not deal with the evidence (assumed to be true for present purposes) that PeeWee had initiated an unprovoked assault on appellant, that he had then garnered and deployed considerable force in support of that assault, and that after being shot, PeeWee had run into the arcade from which, appellant could have believed, PeeWee could muster still more serious force to use against appellant.

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Appellant has argued that the refusal to instruct on imperfect self-defense violated the federal Constitution. (AOB 275.) Respondent's position is that any error is of state law only. (RB 230-231.) This Court has agreed with respondent and held that the *Watson* test applies. (See *People v. Randle*, *supra*, 35 Cal.4th at p. 1003; *People v. Breverman*, *supra*, 19 Cal.4th 142.) Appellant respectfully disagrees with this Court's holdings and requests that the Court reconsider the issue if it concludes that the *Watson* test is not satisfied here. The trial court's ruling violated the Constitution because it was a refusal to instruct on a defense, it undermined the requirement of proof beyond a reasonable doubt and the right to a meaningful opportunity to present a defense, and it denied appellant due process of law. But there is no need to reach that issue. Prejudice must be found under *Watson* because "the

evidence was . . . susceptible of the interpretation" that appellant acted in the belief in the necessity to pursue PeeWee for the reasons we have discussed. (See *Randle*, *id.* at p. 1004. See also, e.g., *Krotin v. Porsche Cars North America* (1995) 38 Cal.App.4th 294, 298 ["we must assume the jury might have believed [appellant's] evidence and, if properly instructed, might have decided in [appellant's] favor."], internal quotation marks and citations omitted.) The error here plainly cannot be deemed to have been harmless even under the *Watson* test.[71]

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[71] As an aside, appellant notes that there are significant deficiencies in respondent's summaries of the testimony of Cindy Pin and Shannon Choeun, the prosecution's eyewitnesses. For example, respondent omits (1) the discrepancy between their descriptions of the shooter and appellant's actual characteristics, (2) their limited opportunity to observe the shooter (Shannon characterized hers as a "glimpse"), (3) their failures to select appellant's photograph from photo lineups, (4) the six-month delay before viewing appellant in a live lineup (at which Cindy was uncertain), and (5) their expressions of uncertainty when they saw appellant at the preliminary hearing and at trial. (Compare AOB 18-22 with RB 226-227.)

Respondent omits that when Me Kim (a companion of Cindy and Shannon at the scene) saw appellant's photograph in a photo lineup, she indicated he did not look like the shooter; that when she viewed a live lineup in which appellant was a participant, she selected two other individuals as looking like the shooter; and that when she saw appellant in court, she again did not think he was the shooter. (18 RT 3453-3458, 3485.)

Respondent omits that Andy Ja testified that he knew appellant and saw PeeWee fighting at the arcade but that appellant was not the person PeeWee was fighting with. (19 RT 3550, 3566, 3568.)

And respondent errs when it says Shannon "saw PeeWee arguing with appellant." (RB 227.) Shannon saw PeeWee aruging with a male, but she could not say who the male was. (See AOB 20.)

2. THERE IS INSUFFICIENT EVIDENCE TO SUPPORT THE JURY'S VERDICTS AS TO (1) THE CRIME OF ACTIVE GANG PARTICIPATION IN COUNT 5 AND (2) THE GANG-BENEFIT ENHANCEMENTS ATTACHED TO COUNTS 4 AND 5

In the AOB, appellant has argued that there was no substantial evidence that the shooting of PeeWee Nguyen was gang-related and that therefore this Court must set aside the jury's verdicts as to the gang-participation crime in Count 5 and the gang-benefit enhancements attached to both Counts 4 and 5. The argument was premised upon (1) eyewitness testimony that it was PeeWee who initiated an unprovoked assault upon the shooter (who for present purposes we assume was appellant), (2) eyewitness testimony that after having shot PeeWee, the shooter uttered words of personal affront and having nothing to do with a gang ("If anyone is against me, I'll shoot them, too."), and (3) the fact that, unlike every other incident with which appellant was charged, the prosecutor never even attempted to elicit an opinion from her gang expert (Det. Nye) that this offense was gang related or done for the benefit of the gang, nor did she make any such claim in her arguments to the jury. (See AOB 276-278.)

Respondent does not agree. (RB 231-236.) Its contention is that evidence "supported the reasonable inference that on November 24, 1994, appellant was hunting for rival gang members at Mission Control, a known Cheap Boy hang out, spotted Pee Wee, who he believed belonged to another deadly rival gang, T.R.G., and tried to kill Pee Wee following a fight in order to promote his own reputation as a Nip Family gang member and in order to enhance the reputation of Nip Family." (RB 233.) According to respondent, the record "show[s] a gang confrontation rather than a personal dispute." (RB 234.)

In part, respondent's contention is based on an overreaching view of the evidence, and in part, it is simply ipse dixit. Consider, for example, respondent's assertion that Mission Control was "a known Cheap Boys hangout," an assertion that respondent makes twice and that it supplements by stating that "[p]olice had contacted Cheap Boy shot caller Khoi Huynh there along with eight other Cheap Boys on May 14, 1992." (RB 233, 234, citing 10 RT 1943-1944 [testimony of Khoi Huynh]; 17 RT 3316 [Det. Nye].) But Detective Nye's testimony does not support either statement. All Nye testified to on page 3316 is that Khoi Huynh was "one of the shot-callers," "one of the leaders of the Cheap Boys Gang . . . and seems to speak for the members of the gang." As far as appellant can determine, Nye did not mention Mission Control anywhere in his testimony. And as for Khoi Huynh's testimony, Khoi expressly *denied* that Mission Control was a Cheap Boys hangout. (17 RT 1943.) All he testified to was that he had been to Mission Control several times and that he and several other Cheap Boys had been contacted there by police on May 14, 1992 — which was three and one-half years before PeeWee was shot.[72]

Consider, too, respondent's statement that in the fight with PeeWee, "appellant was assisted by his friends" and that "[a]lthough they denied participating in the fight, appellant's most likely allies in the fight were Jimmy, Mexican Andy and Andy Ja." (RB 233-234, citing 18 RT 3467 [Me

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[72] Even if the jury disbelieved Khoi's denial that Mission Control was a Cheap Boys hangout, such disbelief would not create evidence of the opposite of what he said. It is well established that """[d]isbelief [of a witness' testimony] does not create affirmative evidence to the contrary of that which is discarded."" (*People v. Loewen* (1983) 35 Cal.3d 117, 125, quoting *People v. Jimenez* (1978) 21 Cal.3d 595, 613, and *Estate of Bould* (1955) 135 Cal.App.2d 260, 264. See also, e.g., *Beck Dev. Co. v. Southern Pac. Transp. Co.* (1996) 44 Cal.App.4th 1160, 1205 [same].)

Kim], 3502-3504 [Mexican Andy]) However, there is no evidence in respondent's cited pages that anyone helped appellant during the fight. In fact, Mexican Andy expressly *denied* he was involved. (18 RT 3503-3504.) In any event, neither Jimmy (Phung A. Le), Mexican Andy (Hung Van Pham), nor Andy Ja (Khanh Troung Nguyen) were members of the Nip Family, further undermining respondent's claim that their (supposed) participation in the fight showed that appellant was acting to benefit the Nip Family.

Respondent may be inferring this was a gang offense based upon PeeWee's testimony that before he was shot, he was approached by an unknown male who asked him "Are you in a gang? Do you belong to T.R.?" and that when PeeWee answered that he had friends in Tiny Rascals, the male hit him without saying anything further, whereupon PeeWee ran into the video arcade. (7 RT 1302-1303.) But there are serious problems with reliance upon this testimony. For if PeeWee's testimony was accurate, then both of the prosecution's eyewitnesses (Shannon Choeun and Cindy Pin) were completely wrong about seeing a prolonged fight and completely wrong as to how the fight began. And if the jury credited PeeWee's version and disbelieved Shannon's and Cindy's versions, it is inconceivable that the jury would nevertheless have found Shannon and Cindy to be reliable enough in their identification evidence to justify guilty verdicts as to this offense. Thus, the guilty verdicts themselves show the jury did not credit PeeWee's version. And in any event, PeeWee was unable to connect the man who hit him to the person who shot him.

But the most telling evidence against respondent's claim that the shooting of PeeWee Nguyen was committed "in order to promote [appellant's] own reputation as a Nip Family gang member and in order to enhance the reputation of Nip Family" is the fact that the shooter

spontaneously proclaimed that he had shot PeeWee for having been "against me," words that a person acting to enhance the reputation of his gang would plainly not use. This evidence is, undoubtedly, a prime reason why Detective Nye did not offer any opinion that the shooting of PeeWee was committed for the benefit of the gang. Respondent does take note of this "against me" evidence but never actually deals with it. All respondent does is point to its summary of the evidence en masse and assert, without further explanation, that something in that summary "belies the contention." (RB 235.) Respondent is obviously unable to explain away this key fact.

3. REVERSAL OF COUNTS 4 AND 5 IS REQUIRED BECAUSE OF THE PREVIOUSLY DISCUSSED ERRORS RELATED TO THE ADMISSION OF THE PREJUDICIAL HEARSAY EVIDENCE RELAYED BY TRIEU BINH NGUYEN

In the AOB, appellant argued that reversal of Counts 4 and 5 is called for because of the trial court's errors in permitting the prosecution to elicit hearsay evidence from witness Trieu Binh Nguyen and by not giving a limiting instruction that such evidence was not to be considered for the truth of the matter asserted. (AOB, Section IV.3, p. 279. See AOB Section I.3.B, pp. 115-117 and ARB Section I.3.B, *ante*.)

The RB's response is merely to refer to its earlier arguments concerning these issues. (RB 236.) Neither here nor anywhere else does respondent in any way challenge the AOB's characterization of the prosecution's case as "far from overwhelming" and "lack[ing] strength" with regard to Counts 4 and 5. (AOB 279.) Appellant thus refers the Court to the briefing cited in the preceding paragraph.

4. REVERSAL OF COUNTS 4 AND 5 IS REQUIRED BECAUSE OF THE PREVIOUSLY DISCUSSED ERRORS ARISING FROM THE REBUTTAL TESTIMONY OF PROBATION OFFICER STEVEN SENTMAN

The AOB further argued that the errors arising from the prosecution's decision to call Probation Officer Steven Sentman as a rebuttal witness also require reversal of Counts 4 and 5. (AOB Section IV.4, p. 280. See AOB Section III.5, pp. 253-268;[73] ARB Section III.5, *ante*.) The RB briefly

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[73] Appellant notes that the AOB referred to Section III.5 as being on pages 121-122 of the AOB. The correct pages are as stated in the accompanying text, AOB 253 to 268.

summarizes its defenses of the trial court's rulings on the Sentman issues but does not elaborate further. (RB 237.) There is nothing for appellant to reply to here. Appellant refers the Court to the briefing cited above in this paragraph.

5. IF REVERSAL OF COUNTS 4 AND 5 IS NOT REQUIRED BY ANY OF THE PRECEDING CLAIMS BY ITSELF, REVERSAL WOULD BE REQUIRED BECAUSE OF THE CUMULATIVE PREJUDICE OF THE ERRORS

In the AOB, appellant has argued that the cumulation of errors would require that Counts 4 and 5 be reversed even if no individual error would compel that result. (AOB Section IV.5, p. 281.) Respondent summarily denies that there were any errors of state or federal law or that there is any prejudice under the *Watson* test, but respondent does not elaborate. (RB 237-238.) Other than pointing out that the *Chapman* test applies, there is nothing to which appellant can reply here.

6. IF THIS COURT WERE TO CONCLUDE THAT DEFENSE COUNSEL FAILED TO PRESERVE ANY OF THE AFOREMENTIONED CLAIMS, THEN A NEW TRIAL WOULD BE REQUIRED ON THE GROUND THAT APPELLANT WAS DENIED HIS CONSTITUTIONAL RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL

Finally, appellant has argued that if any of the claims raised with regard to Counts 4 and 5 would otherwise be deemed to have been forfeited, those counts would still have to be reversed on the same ground because of ineffective assistance of counsel. (AOB Section IV.6, p. 282.) Respondent asserts that appellant "cannot prove [ineffective assistance] from the state record" but does not address appellant's point that the record makes clear that

there was no tactical reason for any inadequacy on trial counsel's part. (Compare AOB 282 with RB 238.)

Respondent also reiterates its contention from the Tony Nguyen issues that any constitutional issues raised in Section IV should be forfeited. (RB 238.) Appellant will thus reiterate his response to that contention, namely, that constitutional claims are *not* forfeited on appeal when "the new arguments do not invoke facts or legal standards different from those the trial court was asked to apply, but merely assert that the trial court's act or omission, in addition to being wrong for reasons actually presented to that court, had the legal consequence of violating the Constitution." (*People v. Gutierrez*, *supra*, 45 Cal.4th at p. 809. See also, e.g., ARB § III.7, pp. 170-171 *ante*, citing *People v. Geier*, 41 Ca1.4th at pp. 610-611; *People v. Halvorsen*, 42 Ca1.4th at p. 408 fn. 7. See also ARB § I.1.B, p. 12, *ante*.) Respondent makes no effort to disprove this principle is controlling as to the constitutional claims now at issue.

V.
COUNTS 9 AND 10
(relating to the March 11, 1995 shooting of Khoi Huynh)

In Counts 9 and 10, appellant was convicted of shooting Khoi Huynh, the Cheap Boys "shot caller," as Khoi exited a pool hall on March 11, 1995 (three-and-one-half and seven-and-one-half months after the shootings of Tony Nguyen and PeeWee Nguyen, respectively, and one month after the killing of Sang Nguyen). The issue at trial was whether the shooter was appellant. The four eyewitnesses who were not gang members had all selected the photograph of one An Phung as depicting the shooter, and Khoi Huynh himself gave inconsistent stories about whether appellant, whom he knew, did the shooting.

1. REVERSAL OF COUNTS 9 AND 10 IS REQUIRED BECAUSE OF THE PREVIOUSLY DISCUSSED ERRORS IN EXCLUDING EVIDENCE OF THE CHEAP BOYS' PLAN, MOTIVE, AND OPPORTUNITY TO FRAME APPELLANT

In the AOB, appellant has argued that reversal of Counts 9 and 10 is required because of the trial court's errors in excluding evidence that the Cheap Boys believed the Nip Family was "ratting" on them and evidence that the Cheap Boys had a crash pad, where they could meet to discuss and plan gang actions. (AOB 285-286. See AOB 96-111, ARB Section I.2, *ante*.) Among other things, the AOB pointed out that the prosecution's case against appellant was "hardly airtight" and "less than overwhelming." (AOB 283, 285.)[74]

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[74] Appellant has noticed that the heading for this argument in the AOB mistakenly referred to Counts 2 and 3. (See AOB 285.) However, as (continued...)

On the merits, respondent describes, in summary fashion, its earlier defenses of the trial court's rulings on the these issues but does not elaborate further. (RB 239.) Because of the abbreviated nature of respondent's argument, appellant merely directs the Court to, and incorporates, the briefing cited in the preceding paragraph.

Respondent does devote considerable space to the question of prejudice. (RB 240-245.) Nowhere, however, does respondent deny that the case against appellant as to Counts 9 and 10 was a close one. Instead, respondent takes the same fundamentally incorrect approach to prejudice that it has taken from the start. It views the evidence from an extremely prosecution-favorable perspective — often, an unreasonably extreme perspective — as if it were proper to presume not only that the jury took that perspective but also that the jury would have taken that perspective in the absence of the errors. In fact, of course, respondent has no basis in law or fact for either presumption. We have previously discussed in detail the foundational flaws in this approach, and we see no need to repeat that discussion here. (See ARB § I.1.C.1, pp. 14 et seq., *ante*.) Those flaws undermine respondent's entire discussion here.

But even if one were to disregard the use of a fundamentally incorrect approach, respondent's discussion of the facts is still very badly flawed. For example, addressing the fact that all four of the non-gang eyewitnesses selected the photograph in Position #4 (An Phung) from a photo lineup rather than appellant's photograph in Position #6, respondent says this can be explained away because in "the clerk's transcript reproduction" of Exhibit C,

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[74](...continued)
the context for the argument and its actual text indicated, the argument was directed at Counts 9 and 10.

those photographs "look remarkably the same, particularly around the eyes, and are both distinct from the remainder of the photographs in the lineup" and in addition "photo number six is an extreme and distorted close-up of appellant's face which cuts off a portion of appellant's ears." (RB 240.) Later, respondent says that "photo number six was a distorted close-up of appellant's face which offered no dimensional perspective of the face and only depicted a portion of appellant's ears." (RB 242.) With due respect, none of this is accurate.

Of course, we do not know for certain what respondent's specific copy of "the clerk's transcript reproduction" of Exhibit C looks like, but if it resembles appellant's, it simply consists of faces outlined in uneven white lines against a black background, lacking detail or even shades of gray. (2 CT 640.) The actual Exhibit C consists of six color photographs of full faces. (See copy of Exh. C at the back of this brief.) But in neither the actual Exhibit C nor in the Clerk's Transcript version of that exhibit do Photo #4 and Photo #6 "look remarkably the same." An Phung has a long, thin face, whereas appellant's face is rounder, fleshier. As for the areas "around the eyes," An Phung has dark, full eyebrows, whereas appellant's are light and sparse.[75]

With regard to respondent's assertion that Photo #4 and Photo #6 are "distinct from the remainder of the photographs in the lineup," this is further unsupportable ipse dixit. Perhaps *appellant's* photo, being a slightly nearer

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[75] Respondent notes with apparent agreement the prosecutor's remarkable closing argument contention that the photo of Anh Phung "must look a lot like" appellant's photo because witnesses at both the Khoi Huynh and Duy Vu crime scenes selected the photo of Anh Phung as that of the shooter. (RB 242.) Since the photos in fact do not look alike, a far more reasonable inference is that Anh Phung, and not appellant, was involved in each of those incidents, and that appellant should have been acquitted not only of the Duy Vu charges, but the Khoi Huynh charges as well.

close-up than the other photos, was somewhat "distinct" for making his face larger than the other five, but that fact is affirmatively harmful to respondent's position, because it means appellant's face was *more* prominent in the display and thus gives *more* significance to the fact that the witnesses failed to select appellant as the shooter.

Nor is it possible to understand respondent's claim that appellant's photograph was "distorted." If it is "distorted" at all — and we do not see it — it is no more distorted than any of the other five photographs in the array.

And finally, as for respondent's claim that appellant's photograph "cuts off a portion of appellant's ears" and "only depicted a portion of appellant's ears," the most that can be said is that a tiny portion of the very farthest edges of his ears are missing in Photo #6. Not only are the missing portions insignificantly small, but the subjects depicted in Photos # 1 and #5 also have the edges of their ears cut off, and indeed the right ear of Photo #4 (An Phung) is slightly cut off as well. Certainly, there is more than enough of appellant's ears showing in the photo so that any observer could see that he, unlike An Phung, did not have big ears, which is one of the characteristics that Jeremy Lenart used when selecting An's photograph (see RB 240, citing 9 RT 1792).

Most of the remainder of the RB (RB 242-245) is devoted to respondent's explanations for why the inconsistencies in the identification evidence from Jeremy Lenart and Khoi Huynh are "not as problematic as appellant contends." (RB 243, 244.) At best, these explanations are manifestations of respondent's incorrect belief that a court is supposed to assess prejudice by looking solely at evidence and inferences favorable to the prosecution. At worst, these explanations are based on misunderstandings of

the facts or their significance.[76] Either way, they do not in any way justify or support the conclusion that the trial court's errors were non-prejudicial with respect to Counts 9 and 10.

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[76] Respondent suggests, for example, that Lenart's prior felony conviction was not significant because it occurred "more than two years after witnessing the shooting." (RB 243.) But the conviction affected his credibility at trial, not his ability to perceive at the time of the shooting. And the fact that Lenart was placed on probation after the shooting gave him a motive to cooperate with the prosecution that he had not had earlier.

Respondent also suggests that the "apparent contradictions" in Lenart's versions of event are "explained by Investigator Janet Strong mixing up portions of her interview of Khoi Huynh with her interview of Jeremy Lenart." In support of this assertion, respondent cites "the prosecutor's unsuccessful foundational objection to the pertinent cross-examination inquiry of Jeremy Lenart." (RB 243.) However, (1) a prosecutor's unsuccessful objection is not evidence, (2) it was a report by Deputy McClure, not Investigator Strong, that the prosecutor was concerned about in raising her objection (see 9 RT 1775-1777), (3) the prosecutor's concern about McClure's report had to do with a supposed mistake regarding names, not regarding the events that Lenart had said took place (9 RT 1776-1777), and (4) Lenart himself admitted to depicting events to McClure in a way that was different from his trial testimony (1778-1779).

As for Khoi Huynh, respondent purports to "explain[] both Khoi's memory loss as a trial witness regarding any of the details of the shooting and the identities of the shooter, and his earlier reluctance to identify the shooter when he was interviewed by Strong" as being the product of his "reluctance as a gang member to risk the stigma of cooperating with the police" until he "had an understandable change of heart . . . after his friend Tuan Pham was shot." (RB 245.) This is an extremely pro-prosecution view of Khoi's inconsistencies. Among the problems with it — problems that a jury uncontaminated by error would likely have found to be telling — are that Khoi had fingered appellant in March 1995, well before May 6, 1995, shooting of Tuan Pham (and then Khoi reversed himself, too) and that if he had indeed had "an understandable change of heart after Tuan Pham was shot," then he would not have feigned a memory loss at trial.

2. REVERSAL OF COUNTS 9 AND 10 IS REQUIRED BECAUSE OF THE PREVIOUSLY DISCUSSED ERRORS RELATED TO THE ADMISSION OF THE PREJUDICIAL HEARSAY EVIDENCE RELAYED BY TRIEU BINH NGUYEN

In the AOB, appellant argued that reversal of Counts 9 and 10 is called for because of the trial court's errors in permitting the prosecution to elicit hearsay evidence from witness Trieu Binh Nguyen and by not giving a limiting instruction that such evidence was not to be considered for the truth of the matter asserted. (AOB, Section V.2, p. 287. See AOB Section I.3.B, pp. 115-117 and ARB § I.3.B, pp. 65 et seq., *ante*.)

The RB's response is merely to refer this Court to its earlier arguments concerning these issues. (RB 245-246.) Neither here nor anywhere else does respondent in any way challenge the AOB's characterization of the prosecution's case as "far from overwhelming" with regard to Counts 9 and 10. (AOB 287.) Appellant thus refers the Court to the briefing cited in the preceding paragraph.

3. IF REVERSAL OF COUNTS 9 AND 10 IS NOT REQUIRED BY ANY OF THE PRECEDING CLAIMS BY ITSELF, REVERSAL WOULD BE REQUIRED BECAUSE OF THE CUMULATIVE PREJUDICE OF THE ERRORS

In the AOB, appellant has argued that the cumulation of errors would require that Counts 9 and 10 be reversed even if no individual error would compel that result. (AOB Section V.3, p. 288.) Respondent summarily denies that there were any errors of state or federal law or that there is any prejudice under the *Watson* test, but respondent does not elaborate. (RB 246.) Other than pointing out that the *Chapman* test applies, there is nothing to which appellant can meaningfully reply here.

4. IF THIS COURT WERE TO CONCLUDE THAT DEFENSE COUNSEL FAILED TO PRESERVE ANY OF THE AFOREMENTIONED CLAIMS, THEN A NEW TRIAL WOULD BE REQUIRED ON THE GROUND THAT APPELLANT WAS DENIED HIS CONSTITUTIONAL RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL

Finally, appellant has argued that if any of the claims raised with regard to Counts 9 and 10 are deemed to have been forfeited as direct-appeal issues, those counts would still have to be reversed because of ineffective assistance of counsel. (AOB Section V.4, p. 288.) Respondent summarily asserts that appellant "cannot prove [ineffective assistance] from the state record" but does not elaborate. (RB 246.) There is again nothing to which appellant can meaningfully reply.

VI.
GANG CONVICTIONS AND ENHANCEMENTS
(Counts 3, 5, 7, 10, 14, plus ten § 186.22(b) enhancements)

1. THE EVIDENCE WAS INSUFFICIENT TO ESTABLISH THE "PRIMARY ACTIVITIES" ELEMENT OF THE GANG CRIMES AND ENHANCEMENTS

In the AOB, appellant has argued that the evidence was insufficient to support the jury's guilty verdicts as to the five active-gang-participation crimes and the true findings as to the ten gang-benefit enhancements because of the lack of evidence that commission of crimes enumerated in section 186.22, subdivision (e), was one of the *primary* activities of the Nip Family. The argument is that a determination of the *primary* activities of a group requires familiarity with the group's other activities, its non-criminal activities, so that the number and nature of the enumerated crimes committed by certain of its members on its behalf can be assessed for primariness, but there was no such other-activities evidence presented at appellant's trial. (AOB 289-293.)

Respondent does not deny that no other-activities evidence was presented. Instead, respondent argues that since gang expert Nye testified that "[h]omicides, attempted homicides, assaults, assault with deadly weapons, home invasion robberies, burglaries, auto theft, and narcotics sales" were some of the Nip Family's primary activities until 1994 and 1995 (16 RT 3178-3179) and since he had "personally investigat[ed] Asian gang crimes in Orange County, talk[ed] to several thousand Asian gang members, and talk[ed] to witnesses as well as gang members involved in the Asian gang crimes he investigated in Orange County" (RB 248), the required showing of primariness was made. This argument is a non-sequitur.

Consider an example used by this Court in *People v. Sengpadychith* (2001) 26 Cal.4th 316. "Though members of the Los Angeles Police Department may commit an enumerated offense while on duty," the Court pointed out, "the commission of crime is not a *primary activity* of the department." (*Id.* at pp. 323-324, original emphasis.) Of course, this Court only knew that the commission of crime is not a "primary" activity of the Los Angeles Police Department because it had a good idea of the non-criminal activities that the department engages in.

But even if an observer arrived from another planet and knew nothing except that some members of an entity called the Los Angeles Police Department committed some enumerated offenses while on duty, it would still be fallacious for that observer to conclude that such offenses were among the department's "primary" activities. It would be a fallacy — the Fallacy of Selective Observation, also known as the Fallacy of Enumeration of Favorable Circumstances — because it would be drawing a conclusion as to primacy based on facts selectively observed and reported, on cherry-picked facts, without any information as to the overall picture of the department's activities.

It is this same fallacy that respondent is relying on here (and that the prosecution relied on below) to sustain the "primary activities" element. The prosecution elicited no examples of any of other Nip Family activities which the jury could use to put the evidence about some members' crimes into perspective and make a judgment about whether, beyond a reasonable doubt, commission of enumerated crimes was "one of the *primary* activities" of the group. No evidence shed light on any *non-criminal* of the activities of the Nip Family in a way that would support the jury's verdict on this element. The gang-benefit enhancement failed for this foundational reason.

2. IT IS IMPERMISSIBLE BOOTSTRAPPING TO ADD GANG ENHANCEMENTS TO SUBSTANTIVE GANG OFFENSES

Citing principles set forth in *People v. Arroyas* (2002) 96 Cal.App.4th 1439, *People v. Briceno* (2004) 34 Cal.4th 451, and *People v. Jones* (2009) 47 Cal.4th 566, appellant has argued that it was impermissible bootstrapping for the prosecution to add gang enhancements under section 186.22(b) to the substantive gang offenses in Counts 3, 5, 7, 10, and 14 (§ 186.22(a)). (See AOB 294-296.)

Without mentioning any of the cases appellant cited, respondent disagrees. Its argument is that there is no bootstrapping because "street terrorism (Pen. Code, § 186.22, subd. (a)), and the gang enhancement (Pen. Code, § 186.22, subd. (b)(1)) do not describe the same conduct." Respondent explains that the substantive offense (§ 186.22(a)) "requires both that defendant willfully promote, further, or assist in any felonious criminal conduct of the criminal street gang and that defendant actively participate in the criminal street gang," whereas the enhancement (§186.22(b)) "does not require that the person actively participate in the criminal street gang [although] it does require that the person specifically intend to promote, further, or assist in any criminal conduct by gang members." (RB 249.)

Unwittingly, perhaps, respondent has effectively conceded appellant's point. Yes, the offense described in subdivision (a) is narrower in its reach than the enhancement in subdivision (b), but that does not negate the bootstrapping point. For respondent does not deny that — even though subdivision (a) is narrower than subdivision (b) — every violation of subdivision (a) would include a violation of subdivision (b). It is that

automatic "double dose of harsher punishment"[77] that invokes the anti-bootstrapping principles upon which appellant relies and that may explain why respondent does not address the cases appellant cited.[78]

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[77] *Briceno*, 34 Cal.4th at page 465, internal quotation marks omitted.

[78] The prosecutor's decision to attach a section 186.22(b) enhancement to a section 186.22(a) substantive offense appears to be unique to this case. As far as appellant can determine, that combination has not been charged in any reported decision in this State. The enhancement has always been attached to some substantive crime other than the gang-participation offense in section 186.22(a).

OVERALL GUILT-PHASE ISSUES

VII.
CLAIMS RELATED TO THE ARREST AND PROSECUTION OF THE DEFENSE INVESTIGATOR

1. THE JUDGMENT MUST BE REVERSED FOR INEFFECTIVE ASSISTANCE OF COUNSEL ARISING FROM THE CRIMINAL DERELICTIONS OF THE DEFENSE INVESTIGATOR, DANIEL WATKINS

In the AOB, appellant has argued that the entire judgment must be reversed because unreasonable actions taken by defense investigator Daniel Watkins constituted a violation of appellant's Sixth and Fourteenth Amendment rights to the effective assistance of counsel. (AOB 297-316.) Furthermore, if this Court were to disagree, the case would still have to be remanded to the superior court so that an appropriate inquiry could be undertaken into whether trial counsel had a conflict of interest in presenting the motion for new trial in which the ineffective-assistance claim was raised. (AOB 317-320.)

Respondent contends otherwise. (RB 250-268.) Respondent's disagreements, most of which are limited in scope to begin with, are also meritless.

A. Ineffective Assistance of Counsel

With respect to the claim of ineffective assistance of counsel, the AOB argued (1) that severe derelictions of an investigator are properly evaluated under an ineffective-assistance-of-counsel analysis, using the two-step test set forth in *Strickland v. Washington* (1984) 466 U.S. 668 and its progeny, (2) that Daniel Watkins' actions in seeking to "put a shut" on prosecution witness Khoi Huynh constituted deficient performance (*Strickland*'s Step

One), and (3) that appellant was prejudiced as the result of that deficient performance (*Strickland*'s Step Two). (AOB 297-316.)

1. The Applicability of *Strickland*

Respondent does not in any way dispute the application of *Strickland* principles to these facts.

The only legal point respondent makes involves a subsidiary matter. Respondent asserts that a trial court's denial of a motion for new trial is reviewed under an abuse-of-discretion standard. (RB 258, citing *People v. Verdugo*, *supra*, 50 Cal.4th at p. 308, and *People v. Nesler* (1997) 16 Cal.4th 561, 582.) If what respondent means is that this Court will "accept the trial court's credibility determinations and findings on questions of historical fact if supported by substantial evidence" (*Nesler*, *ibid.*), appellant does not disagree. If, however, respondent means to suggest that this Court owes deference to a trial court's finding of no prejudice, respondent is wrong. As the *Nesler* decision itself makes clear, the issue of prejudice "is a mixed question of law and fact subject to an appellate court's independent determination." (*Ibid.*)

2. Deficient Performance

As far as appellant can determine, respondent does not deny that Daniel Watkins' challenged actions — actions that resulted in felony charges being filed against him related to witness tampering and obstruction of justice — were unreasonable and constituted deficient performance. Nor could any rational person dispute the point.

Respondent does devote several pages to arguing that "Hung Mai rather than Watkins likely initiated the alleged effort to silence Khoi Huynh." (RB 259. See also RB 260 [similar].) There are two independent answers to this argument. The shorter response is to demur. Why does it matter whether

Watkins "initiated" the effort to silence Khoi? Respondent never explains. Whichever of the two initiated it — Mai or Watkins — the fact remains that Watkins was involved hook, line, and sinker in witness tampering and obstruction of justice and was engaging in this behavior in disregard of trial counsel's wishes. And it is *the fact* of Watkins' involvement that matters, not whether he initiated the misdeeds.

The longer answer is that the evidence shows clearly and convincingly that it *was* Watkins who initiated the effort. The key evidence is the "put a shut" conversation itself. For in that conversation, Mai explicitly indicated that it was Watkins who was initiating the effort to silence Khoi Huynh. Speaking to Watkins, Mai said, "*You want* me to put a shut on Khoi" and "if *you want* . . . I need that soon if *you want* that taken." (5 CT 1726 ¶67c, ellipses in original indicating pauses or incomplete sentences.) The AOB highlighted this evidence, but respondent does not deal with it, presumably because it cannot be reconciled with the claim that Mai initiated the effort to silence Khoi.

It may be true, as respondent argues, that there was evidence from which one could infer that Mai had a *motive* to "ingratiate himself with appellant" (RB 259), but the most that this motive evidence does is explain *why* Mai would cooperate with Watkins' scheme. It does not show that he *actually* was the instigator of that scheme. And not only is there no other evidence of any sort that Mai was the instigator, but Mai's own words in the "put a shut" conversation refute that conclusion. It was "you" (Watkins) who wanted "me" (Mai) to "put a shut on Khoi."

The instigator was Watkins.[79]

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[79] The trial court's actual reasoning for denying the ineffective-
(continued...)

3. Prejudice

In the AOB, appellant argued that Watkins' derelictions prejudiced the defense in four ways. For one thing, they produced Khoi Huynh's false claim of lack of recall at trial, which (1) prevented the defense from directly impeaching Khoi's claim that appellant was the shooter and (2) undercut the defense claim that the Cheap Boys were framing appellant. In addition, Watkins' challenged actions caused Watkins himself to fake a memory loss when the defense called him as a witness to impeach Tin Duc Phan, which (3) destroyed his credibility as to his testimony that Tin had admitted that Cheap Boys were framing appellant by testifying against him and (4) cast a pall of suspicion, distrust, and disbelief over the entire defense team. (AOB 313-316.)

As to the first of these items, respondent does not deny that Watkins' misdeeds produced Khoi's false claim that he had no recall. Nor could respondent reasonably dispute the point, since — as the prosecutor told the trial court — Khoi had been "cooperative for three years" and that it was only at trial that he had "come in and [could] not remember anything about being shot seven times." (21 RT 3982.)

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[79](...continued)
assistance claim was that "I cannot come to the conclusion that Watkins is, in fact, part and parcel of that operation" to silence Khoi Huynh. (31 RT 6075.) This reasoning is so plainly at odds with the record that even respondent declines to defend it. Instead, respondent makes the narrower argument discussed in the preceding text, namely, that Watkins did not *initiate* the operation. And, as we have just pointed out, respondent's narrower argument fails (1) because it does not change the conclusion that the deficient-performance prong of the *Strickland* test has been met and also (2) because the evidence explicitly shows that Watkins *did* initiate the scheme and overwhelms any speculation by respondent to the contrary.

Instead, respondent argues that "Khoi's feigned memory loss on the witness stand did not cripple appellant's trial counsels' opportunity to impeach Khoi['s] identification of appellant" because the defense was able to impeach Khoi's out-of-court identifications of appellant with the instances in which Khoi had failed to identify him. (RB 262-263.) But respondent ignores the essence of the prejudice. Because of Khoi's feigned memory loss, the prosecution was able to have Khoi's out-of-court identification come before the jury through the polished testimony of police officers rather than through the directly impeachable testimony of Khoi himself. Moreover, appellant was deprived of the opportunity of having the jury see and evaluate Khoi's demeanor when making his identification and having the jury hear Khoi try to explain his several failures to identify him. When credibility is at issue, the opportunity to see and hear the witness give crucial evidence is of utmost importance, and it was this opportunity that Watkins caused the defense to lose. "[T]he manner of the [witness] while testifying is oftentimes more indicative of the real character of his opinion than his words." (*People v. Stewart* (2004) 33 Cal.4th 425, 451, internal quotation marks omitted. See also, e.g., *Smith v. Phillips* (1982) 455 U.S. 209, 222, conc. opn. of O'Connor, J. [live testimony permits fact-finder "to observe the [witness'] demeanor under cross-examination and to evaluate his answers in light of the particular circumstances of the case."].)

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With respect to the second form of prejudice, respondent asserts that "Khoi's feigned memory loss did not undermine the defense claim that Khoi was a major participant in a Cheap Boys scheme to frame appellant in retaliation for Nip Family members testifying against Cheap Boys." (RB 263.) According to respondent, the defense was still able to rely on the evidence that

after Khoi told Investigator Janet Strong that appellant shot him, Khoi "explained" that he "could not testify in court regarding the shooting because of his association with a gang and the stigma attached to gang members who testified." (*Ibid.*) But this "explanation" by Khoi is exactly *appellant's* point because it is inconsistent with the defense's frame-up theory. Khoi's claim of a need to avoid stigma provided a prosecution-favorable explanation for why a gang member would do just what Khoi purported to be doing in court, i.e., refusing to testify against a member of an opposing gang who had committed a crime. Refusing to testify is the antithesis of participating in a "ratting retaliation" frame-up.

Thus, Khoi's "explanation" to Investigator Strong as to why he would not incriminate appellant in court did not advance the defense theory of a Cheap Boys frame-up. To the contrary, the "explanation" undercut that theory because if the Cheap Boys had a plan to *depart* from standard gang norms and to frame appellant by testifying against him (as Tin Duc Phan told Daniel Watkins), then Khoi would not have *adhered* to gang norms and refused to testify against appellant for the gang-business-as-usual reason he gave Investigator Strong. Respondent's logic is exactly backwards. Khoi's "explanation" proves appellant's point about prejudice, not respondent's.

Respondent also repeats an argument it made in connection with Counts 6 and 7 (the killing of Sang Nguyen), i.e., that the claim of a frame-up is "preposterous because it required jurors to believe that in order to retaliate against the Nip Family for 'ratting' on Cheap Boys, Khoi protected the person who really shot him by falsely accusing appellant of the crime." (RB 263.) First, however, as pointed out earlier, respondent's assertion assumes that Khoi actually did know who had shot him. It is not at all uncommon for shooting victims to have failed to focus on their assailant's face or, for other

reasons, to be unable to identify him, and indeed Khoi himself had told police on at least three occasions that he was unable to identify the person who shot him. (See 13 RT 2476-2477, 2505-2506, 23 RT 4469-4470.)

Second, it would not have been "preposterous" for the jurors to conclude that Khoi would falsely identify appellant even if he did know appellant was not the shooter. Respondent's claim of preposterousness is based entirely upon the perspective of someone outside the gang culture. To most non-gang members, it would be "preposterous" that anyone would refuse to cooperate with police when they are themselves the victims of an attack, and it would be equally "preposterous" that someone would want to commit crimes when there are many civilian witnesses around, yet this is how gang members behave, according to the prosecution's evidence. (See 16 RT 3187-3188, 3192-3193, 3209.) As a result, no juror would find it "preposterous" that, even if Khoi knew who shot him, he would be willing to finger someone else in order to advance his gang's interests. Especially is this true since, as respondent admits elsewhere, gang members do "not need to retaliate against the same person" who triggered the desire for retaliation. (RB 62, citing 16 RT 3188-3189.)

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As for the remaining two forms of prejudice — Item (3) (Watkins' credibility was undermined with respect to Tin Duc Phan's prior statement) and Item (4) (cloud was cast over the defense team as a whole) — respondent denies that they materialized, but its denials are entirely conclusory. Respondent offers no reasoning whatsoever to support its denials. (RB 263-264.) There is nothing for this ARB to reply to.

B. If the Judgment Is Not Reversed for Ineffective Assistance of Counsel Due to Watkins' Derelictions, the Case Must Be Remanded for a Renewed Motion for New Trial, with New Counsel Appointed to Represent Appellant

Appellant has argued that if the judgment is not reversed for the reasons just discussed, then the case must be remanded for an adequate inquiry into whether trial counsel had a conflict of interest in presenting the new trial motion, with appellant represented by new counsel at the hearing. What happened below — with the trial court allowing defense counsel to handle the motion without a searching inquiry into potential conflict — was serious error in light of the facts (1) that an attorney cannot be expected to urge his or her own ineffectiveness, (2) that lead counsel Harley had a personal and long-standing professional relationship with Watkins, (3) that at earlier in camera hearings, trial counsel had failed to disclose the full extent of Watkins' then-existing legal problems, withholding the fact that Watkins was the defendant in two pending misdemeanor cases, (4) that there was direct and circumstantial evidence linking attorney Harley to Watkins' improper endeavors with Mai — both the scheme to "put a shut" on Khoi Huynh and the attempt to kill Alex Nguyen — and (5) that the prosecutor dealing with the motion for new trial expressed concern over whether trial counsel was "capable of bringing this type of motion as opposed to some independent counsel taking a look at it and presenting it." (AOB 317-320.)

Respondent acknowledges that the AOB raised these points (RB 265-266), but it declines to address any of them. Instead, respondent digresses. Or, perhaps more accurately stated, respondent reformulates appellant's claim, transforming it into something it isn't. Rather than addressing whether a *remand for further inquiry into a conflict* is necessary if a trial court has failed to adequately inquire into that possibility, respondent devotes its briefing to

arguing about principles that purportedly apply when a defendant asserts that an inadequate inquiry by the trial court should *directly result in a new trial.* But that is not appellant's claim here in this subsection. Appellant is asking for a remand, a chance to establish, with the assistance of unconflicted counsel, that his trial counsel had a conflict and were adversely affected by it in presenting the motion for new trial.

Principles applicable when a new trial is directly sought are necessarily different from those applicable when a remand for mere further inquiry is sought. For example, while respondent may be correct that a defendant who directly seeks a new trial would have to show that his counsel's performance was adversely affected by a conflict (see *Mickens v. Taylor* (2002) 535 U.S. 162), it makes no sense that the same showing would be required when what is sought is only a remand for an adequate inquiry into a conflict. For if the defendant did make such a showing of adverse effect, then there would be no need for further inquiry or a remand. A right to a new trial would already have been established.

The relevant principles for when a remand for further inquiry is called for are those outlined in *Wood v. Georgia* (1981) 450 U.S. 261, the primary authority cited in the AOB but not mentioned in the RB. A hearing is required when "the possibility of a conflict of interest [is] sufficiently apparent at the time of the [motion for new trial]," i.e., when the record "strongly suggests" that a conflict of interest "actually existed at the time of the [motion] or earlier." (*Id.* at pp. 272, 273.) In the instant case, these principles call for consideration of the five factors listed at the outset of this subsection and that were discussed in the AOB but that respondent declines to discuss. Those factors "strongly suggest" that a conflict of interest actually existed at or before the time the motion for new trial was brought. And, as the Supreme

Court specifically admonished in *Wood*, "[a]ny doubt as to whether the court should have been aware of the problem is dispelled by the fact that the State raised the conflict problem explicitly and requested that the court look into it." (*Wood*, 450 U.S. at pp. 272-273.).

VIII.
OTHER OVERALL GUILT-PHASE ISSUES

1. THE TRIAL COURT IMPROPERLY ALLOWED THE PROSECUTION TO INTRODUCE EVIDENCE OF WEAPONS UNCONNECTED TO ANY OF THE CHARGED SHOOTINGS

In section VIII.1 of the AOB, appellant has argued that the trial court committed reversible error when it allowed the prosecution to admit evidence of four firearms connected to appellant but unconnected to any of the charged shootings. (AOB 321-325.) Respondent disputes appellant's conclusion, but it barely addresses appellant's arguments, and it offers only conclusory statements to support its own claims. (See RB 268-271.)

Respondent's contention is that the challenged evidence was relevant to showing whether appellant was "an active member of the Nip Family engaged in a deadly war with the Cheap Boys and the Tiny Rascals Gang," specifically, "an active Nip Family gang member during 1994 and 1995 with ready access to guns maintained for the ongoing, deadly gang war between the Nip Family and rival gangs." (RB 269, 270.) These are respondent's assertions, but, like the prosecutor below, respondent offers neither case law nor reasoning to support them.

The AOB quoted the following passage from *People v. Henderson* (1976) 58 Cal.App.3d 349:

> "Neither logic, experience, precedent nor common sense supports the proposition that, from the possession in one's home of two loaded guns, a reasonable inference may be drawn that the possessor has an intent to commit the crime of an assault with a deadly weapon. Evidence of possession of a weapon not used in the crime charged against a defendant leads logically only to an inference that defendant is the kind of person who surrounds himself with deadly weapons - a fact of *no relevant* consequence to determination of the guilt or innocence of the

> defendant. . . . The inference sought by the prosecution is purely one of *sheer speculation* — the antithesis of relevancy."

(*Id.* at p. 360, emphases in original, citing *People v. Riser* (1956) 47 Cal.2d 566, 577 and *People v. Vaiza* (1966) 244 Cal.App.2d 121, 125. See AOB 323.)

Respondent declines to mention *Henderson*, let alone the cases it cited.

The AOB also noted that the prosecutor's reasoning below, which respondent essentially adopts, was a transparent effort to admit "propensity" evidence, a predisposition to resort to "guns . . . for the ongoing, deadly gang war." Appellant cited *People v. Barnwell* (2007) 41 Cal.4th 1038, in which this Court had held it was error to admit evidence that, one year before a charged murder, the defendant (a gang member) had possessed a weapon of the same caliber, make, and model as murder weapon but there was "no suggestion that the pistol found [a year earlier] was the weapon involved in this case." (*Id.* at pp. 1044, 1056.) This Court held that "such evidence tends to show not that [the defendant] committed the crime, but only that he is the sort of person who carries deadly weapons." (*Id.* at p. 1056.) Respondent contends that *Barnwell* is irrelevant here because the *Barnwell* prosecutor had "sought to show defendant['s] possession of a specific weapon used in the charged crime with evidence that he possessed other weapons" (RB 269), whereas in the present case, the prosecutor sought to show appellant's "active" membership in the Nip Family gang "with ready access to guns maintained for the ongoing, deadly gang war" (RB 270). There are several flaws in this contention.

First of all, if there is a chain of reasoning that might connect possession of guns with active gang membership and maintaining guns for use by gangs, it would be one that relies on inferences as to the propensity of the person possessing the guns. After all, none of the guns at issue in this case

was tied to any crime, so the only way they might be connected to criminality is if gun possession warranted an inference of their owner's propensity to engage in criminality of some sort. But relying on a propensity inference is precisely the forbidden "logic" that was the basis for the *Barnwell* decision and that underlies the prohibition of Evidence Code section 1101. (See *Barnwell*, 41 Cal.4th at p.1056 ["evidence that other weapons were found in the defendant's possession . . . tends to show not that he committed the crime, but only that he is the sort of person who carries deadly weapons."].)

Second, the "propensity" line of reasoning does not stand up to scrutiny even if it were allowed (which it isn't). As the AOB pointed out, possession of guns is extremely widespread in this society. (AOB 323.) Does such gun possession — possession of guns not connected to any crime — have a tendency in reason to indicate that those millions of citizens are "active members" of gangs or that they maintain their guns for use by gang members? Clearly not, which likely explains why respondent declines to address the point.[80]

The AOB further argued that if the challenged evidence had any probative value, it was substantially outweighed by the evidence's prejudicial effect. (AOB 324.) Respondent disagrees, saying that the "high probative value of the evidence" was "not substantially outweighed by any substantial danger of undue prejudice (Evid. Code, § 352) because it did not uniquely

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[80] At least 40 to 43 percent of American households had guns in the 1990's, and three-quarters of these had two or more. (See National Institute of Justice, *Guns in America: National Survey on Private Ownership and Use of Firearms* (May 1997), pp. 1-2 (viewable at http://www.tscm.com/165476.pdf as of Jan. 23, 2012); Gallup, *Americans and Guns: Danger or Defense*, http://www.gallup.com/poll/14509/americans-guns-danger-defense.aspx (viewed on Jan. 23, 2012).)

tend to evoke an emotional bias against appellant as an individual while bearing little or no relevance to the material issues in the case." (RB 269-270.) However, if any probative value could be derived from possession of guns never used in any crime, that value would, for the reasons just discussed, be quite low, and on the other side of the scale, the evidence was "highly prejudicial in nature." (*People v. Henderson, supra*, 58 Cal.App.3d at p. 360.) The balance tipped heavily against admission.[81]

The AOB further argued the trial court's willingness to allow the prosecution to admit evidence of guns against appellant was hard to reconcile with its reluctance to admit gun evidence to impeach Kevin Lac. (AOB 325. See AOB 238-247; ARB § III.2, pp. 143 et seq., *ante*.) Respondent contends that both rulings were permissible "discretionary rulings." (RB 270.) Respondent supports its contention by erroneously contending that the Kevin Lac gun evidence was irrelevant to impeaching Lac, whereas the gun evidence as to appellant was somehow relevant to show appellant was participating in a gang war. (RB 270. See ARB § III.2.A, pp. 143, ante [showing relevance of gun evidence to impeach Lac].) Respondent is wrong as to each category of gun evidence. The trial court's permitting the introduction of pro-prosecution gun evidence, while excluding such evidence when it served the defense, reflected a lack of evenhandedness, inconsistent with due process but consistent with how it handled other matters, such as the alleged discovery

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[81] In support of its just-quoted argument, respondent purports to cite to *People v. Felix* (1994) 23 Cal.App.4th 263, 285-286. (RB 270.) There is no case with that name and that citation. Presumably, respondent intends to cite *People v. Felix* (1994) 23 Cal.App.4th 1385, 1396, but that case, which involved the admission of evidence of a defendant's drug addiction, lends no support to respondent's claim that it was proper to admit the evidence of weapons not used in any crime here.

violations. (See AOB 96-111 and ARB § I.2.A.3, pp. 46 et seq., *ante* [excluding defense evidence for alleged discovery violation]; AOB 253-268 and ARB § III.5.B, pp. 158 et seq., *ante* [refusing to exclude prosecution evidence despite acknowledged discovery violation].)

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Finally, respondent argues in conclusory fashion that if there was error, it "does not warrant reversal given the independent evidence which established [appellant's] guilt and undermined his defense." (RB 271.) But, as we have seen, respondent bases such assertions on its uniformly and excessively pro-prosecution view of the evidence. To an objective observer, the evidence against appellant as to each of the offenses of which he was convicted was weak, suspect, or both, as we hope this brief and the AOB have made clear.

Moreover, the prosecutor clearly exploited the error now at issue. She used the improper weapon evidence in precisely the "propensity" manner that she had said she would. The guns found at the Amarillo Street residence were, she told the jury, "another piece of evidence for you to consider realizing this is an ongoing war between the two gangs. They are both ready for battle at any time. And they are both always heavily armed to be ready for that battle. And that was the purpose of the guns coming into evidence from that address. It was just another indication of the ongoing war. The constant preparation. The constant readiness to kill." (27 RT 5208-5209.)

In such situations, reversal is required under both the *Chapman* and *Watson* tests.

2. APPELLANT'S CONSTITUTIONAL RIGHTS WERE VIOLATED WHEN THE TRIAL COURT ALLOWED THE PROSECUTION TO INTRODUCE STATEMENTS APPELLANT MADE DURING HIS MAY 25, 1995, INTERROGATION AFTER HE HAD REPEATEDLY ASSERTED HIS RIGHT TO COUNSEL

The AOB has argued that the trial court committed multiple errors when it permitted the prosecution to introduce, as impeachment of appellant's testimony, certain improperly obtained statements that appellant had made to Detective Nye on May 25, 1995. The AOB argued first that, notwithstanding *Harris v. New York* (1971) 402 U.S. 222, and *Oregon v. Hass* (1975) 420 U.S. 714, those statements were inadmissible even on rebuttal because (1) they were obtained in deliberate, systematic, and officially sanctioned violation of *Miranda* after appellant had repeatedly invoked his right to counsel and (2) they were involuntary. (AOB 326-337.) The AOB further argued (3) that if those statements were admissible, then the trial court erred by failing sua sponte to limit the jury's use of those statements to impeachment. (AOB 337-339.) Finally, the AOB argued (4) that if this Court should conclude that there is insufficient evidence to sustain the foregoing claims, it would have to reverse and remand for a further hearing because full development of the record was obstructed by the prosecutor's flurry of meritless objections, most of which were erroneously sustained. (AOB 340.)

Respondent, naturally, disagrees with all of this. (RB 271-285.)

A. The Illegally Acquired Statements Were Inadmissible for Any Purpose, Given *Miranda* and Its Progeny

There are two separate reasons why, notwithstanding *Harris v. New York* and *Oregon v. Hass*, the principles of *Miranda* and its progeny preclude the admission, as impeachment evidence, of the statements that Detective Nye

illegally obtained from appellant. For one thing, exclusion is called for by the fact, undisputed by respondent, that Nye obtained the statements by knowingly and deliberately continuing to question appellant in violation of clearly established *Miranda* principles. Appellant has acknowledged that this Court ruled against him on this point in *People v. Peevy* (1998) 17 Cal.4th 1184, and since respondent does not address the matter in its brief, there is nothing further for the instant ARB to say on this score other than to request again that this aspect of *Peevy* be overruled as inconsistent with Supreme Court precedent. (See AOB 335 fn. 191 and accompanying text.)

The second reason that *Miranda* et al. require that the illegally obtained statements not be admitted on rebuttal — the reason that was discussed in more depth in the AOB — is that the *Miranda* violation was not merely knowingly and deliberately committed by Detective Nye but was the product of officially sanctioned Police Department training by the District Attorney's Office, which taught officers to ignore suspects's invocations of their *Miranda* rights for the very purpose of securing impeachment evidence. (AOB 331-335.) As explained in the AOB, this line of attack on the admission of appellant's statements is not precluded by *Peevy*. Indeed, *Peevy* supports the challenge, as does the Supreme Court's decision in *Missouri v. Seibert* (2004) 542 U.S. 600, for reasons discussed in detail in the AOB.

Respondent takes the position that illegally obtained statements may be used as impeachment regardless of the systematic or official nature of the illegality. Its contention is that notwithstanding police or government policy encouraging *Miranda* violations, "the goal of police deterrence is outweighed by the specter of uncontested perjury that would result from the exclusion of voluntary prior inconsistent statements offered for the purpose of impeachment." (RB 274. See also RB 275, 285.) In advancing this

contention, however, respondent never once mentions, let alone deals with, *Peevy* or *Seibert*. That omission speaks volumes about the soundness of respondent's contention.

Moreover, the blinkered argument that respondent does offer is unavailing because it begs the question. It may be true that when "the goal of police deterrence" is generally met, then pursuant to *Harris* v. *New York* and *Oregon v. Hass*, the balance favors allowing the use of illegally obtained statements as rebuttal. In that situation, there is a deterrent effect produced by the threat of excluding the statements from the prosecution's *case-in-chief*, and the added deterrence that would come from excluding the statements for *impeachment* is outweighed by the need to bring out prior inconsistent statements.

But in the present case, one of the premises for this balancing operation is entirely different. For there is no "police deterrence" *at all* when officers are instructed through official training and policy to illegally ignore suspects's invocations of *Miranda* rights for the purpose of obtaining statements that may be used for impeachment. In this context, the weightiness of the deterrence side of the balance is substantially greater than in the *Harris* and *Hass* settings. Indeed, now the interest in deterrence is fully as weighty as it was in *Miranda* itself.

When weight is increased on one side of a balance scale, it is simply wrong to ignore that fact and contend, as respondent does, that the balance is the same as when the far lesser weight was present. Or, put another way, it is wrong for respondent to argue that the weighing process that *Harris* and *Hass* undertook on the premise that excluding illegal statements from the prosecution's case-in-chief would have a deterrent effect is the same weighing process that takes place when the premise is shown to be non-existent. (See

Missouri v. Seibert, 542 U.S. at 618-619 (conc. opn. of Kennedy, J.) [exceptions to *Miranda* are allowed only when "the central concerns of *Miranda* are not likely to be implicated," and a central concern was "'the general goal of deterring improper police conduct.'"], quoting *Oregon v. Elstad* (1985) 470 U.S. 298, 308.)

B. The Statements Were Inadmissible Because Involuntary

The admission of appellant's statements on rebuttal was also erroneous because the statements were involuntary. They were involuntary because, by first honoring appellant's invocation of his right to counsel and then resuming the questioning with the explanation that although appellant had asked for an attorney, nevertheless "[w]e just have to get some other things clear," Detective Nye was telling appellant that his right to counsel did not apply to the questions he was about to ask, that appellant had no right not to make "other things clear." (AOB 335-337. See 9/29/06 Supp.CT 1250)

Respondent contends, first, that this issue is forfeited "because [appellant] never contended in the trial court that his statements were involuntary." (RB 275.) With due respect, respondent's contention is far off base. The trial court's very language as quoted in the RB shows that the court admitted the challenged statement because, in part, it "didn't see anything that was overbearing in terms of [the interrogating officers'] conduct or the way that they handled or processed the accused." (22 RT 4129, quoted at RB 272.) The court's invocation of the concept of "overbearing" and its conclusion that the statements were "not involuntary" show that it understood it was ruling on voluntariness. (See also 22 RT 4133 [concluding that appellant's "statements are not involuntary"].) Indeed, respondent uses the exact same "overbearing" language itself when it argues that the statements were not involuntary. (See RB 276 [statements not involuntary because no "overbearing" of — and

nothing showing that detectives "overbore" — appellant's will].) There is no forfeiture. (See, e.g., *People v. Brown* (2003) 31 Cal.4th 518, 534 ["issue is properly before us" where "trial court spoke as if it were deciding the question"].)

Moreover, as respondent stated just before its claim of forfeiture, *Harris* allowed the admission of "*voluntary* prior inconsistent statements offered for the purpose of impeachment." (RB 274. See also RB 273 [similar], 275 [twice, similar].) Under respondent's own arguments, voluntariness is an element of a ruling allowing the use of illegally obtained statements on rebuttal.[82]

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That appellant's statements were involuntary is shown by the fact that they were made in response to Detective Nye resuming the interrogation and telling appellant that, notwithstanding his invocation of his right to counsel, "[w]e just have to get some other things clear," which effectively told appellant that he had no right to refuse to answer what Nye was about to ask him. (See 9/29/06 Supp.CT 1250.) Respondent's answer is to assert that "the detectives did not affirmatively mislead appellant by making him any false promises or by telling appellant his statements could not be used in court." (RB 279.) But this is a hypertechnical non-answer. Respondent does not categorically deny that the detectives "affirmatively misled" appellant.

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[82] Respondent cites *People v. Marks* (2003) 31 Cal.4th 197, 228-229, in support of its claim of forfeiture. The issue in *Marks* was whether a defendant could argue on appeal that two of the prior convictions used to impeach his testimony did not involve moral turpitude. This Court found these contentions forfeited because the defendant had brought no challenge at all against the use of one of the prior convictions and had conceded below that the second conviction did involve moral turpitude. Nothing in *Marks* is relevant here.

Rather, respondent's contention is that the detectives did not affirmatively mislead him *in either of two specific ways*: they did not mislead him by the device of "making false promises," and they did not mislead him by the device of "telling appellant his statements could not be used in court." Respondent is correct that neither of these devices was used, but (1) the AOB never claimed they were and (2) so what? The underlying governing principle is whether the challenged statements were the product of a "deliberate police violation of *Miranda* coupled with a misrepresentation." (*People v. Bey* (1993) 21 Cal.App.4th 1623, 1628.) It has long been clear that misrepresentations other than the two specific types noted by respondent will render a statement involuntary. (See, e.g., *Lynumn v. Illinois* (1963) 372 U.S. 528 [misrepresentation by police officers that a suspect would be deprived of state financial aid for her dependent child if she failed to cooperate with authorities rendered the subsequent confession involuntary]; *Spano v. New York* (1959) 360 U.S. 315 [misrepresentation by the suspect's friend that the friend would lose his job as a police officer if the suspect failed to cooperate rendered his statement involuntary].)

Respondent does not deny that what Detective Nye told appellant — that "[w]e just have to get some other things clear" — was misleading in a way that directly bore on voluntariness — it told appellant he had no choice but to answer — and respondent tacitly admits there was a "deliberate police violation of *Miranda*" here. In light of these undisputed and indisputable facts, appellant's statements were "coerced and involuntary." (*People v. Bey*, *supra*, 21 Cal.App.4th at p. 1628.) Nothing in the RB undermines that conclusion in the least.

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Appellant has pointed out that the trial court misunderstood the record. The court said that appellant invoked his right to an attorney in response to being asked about his association with the Nip Family, when in fact appellant had invoked his rights three times before he was asked about this matter. (AOB 330, citing 22 RT 4129). The AOB further pointed out, in a footnote, that a consequence of this misunderstanding is that no deference is to be given to the trial court's factual findings. (AOB 331 fn. 190, citing *People v Cluff* (2001) 87 Cal.App.4th 991, 998, *Johns v. City of Los Angeles* (1978) 78 Cal.App.3d 983, and *Stack v. Stack* (1961) 189 Cal.App.2d 357, 368.)

Respondent does not deny that the trial court made a "misstatement," but it states that the trial court "did not rely on the alleged misstatements and omission" and therefore "the trial court's determination [that the statements were voluntary] is entitled to deference regardless of the cited misstatements and omission so long as substantial evidence supports the determination." Respondent asserts that *People v. Carmony* (2004) 33 Cal.4th 367, 379, distinguished *People v. Cluff* "on this ground." (RB 280.)

Contrary to respondent's arguments, however, (1) this Court *independently* reviews a trial court's determination regarding voluntariness and defers only to a trial court's *factual* findings and only if those findings are supported by substantial evidence (*People v. Guerra* (2006) 37 Cal.4th 1067, 1093); (2) *Carmony* did *not* distinguish *Cluff* on the ground proposed by respondent, nor does respondent address *Johns* or *Stack*, the other two cases cited in the AOB; (3) if, as respondent claims, the trial court did not rely on the actual number of times appellant had invoked his rights, that would itself be error because repeated refusals to honor a defendant's rights are relevant to, and indicative of, involuntariness (see *People v. Neal* (2003) 31 Cal.4th 63,

80, 82), and in any event (4) there is no factual finding that respondent points to as warranting deference with respect to the question of involuntariness.[83]

C. The Trial Court Violated *Miranda* By Failing To Limit The Jury's Use Of Appellant's Statements To Impeachment Purposes

The AOB argued that even assuming that appellant's May 25, 1995 statements were admissible as rebuttal evidence for purposes of impeachment, the trial court erred by failing sua sponte to limit the jury's use of the statements to impeachment only. (AOB 337-339.)

Respondent contends, first, that this claim is forfeited because trial counsel "fail[ed] to request modification of the trial court's prior inconsistent statement instruction and [failed] to request a special limiting instruction." (RB 281.) This contention is inapplicable to a claim that the trial court has a sua sponte duty to instruct. A duty to instruct sua sponte is, by definition, a duty that exists even in the absence of a request. (See *People v. Padilla*

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[83] Respondent asserts that appellant "has himself misconstrued the transcript of the videotaped interview" because "appellant only invoked his right to counsel twice" before the detectives asked him about his gang affiliation, and not three times, as the AOB stated. While the point is hardly dispositive, respondent is not correct. The disagreement depends upon what occurred before the detectives "terminat[ed] the initial portion of the interview." (RB 280, citing 9/29/06 Supp.CT 1249.) The AOB said that appellant had invoked his right to counsel twice before the initial termination, and the RB claims he invoked only once. The AOB accurately laid out the colloquy. After appellant indicated he understood his rights and was told by a detective that "We wanna ask you a few questions," appellant replied, "Think I got to talk to my attorney." (9/29/06 Supp.CT 1249.) That was the first invocation. Then, the detective asked, "You want to talk to your attorney?" and appellant replied, "Yeah. If I have one. If they give me one." (*Ibid.*) That was the second invocation. (The third invocation came after the questioning was renewed, just before appellant was asked about Nip Family membership. See 9/26/09 Supp.CT 1250.)

(1995) 11 Cal.4th 891, 971 [no objection needed when claim is that there was sua sponte duty to instruct].)[84]

Respondent cites this Court's decisions in *People v. Coffman* (2004) 34 Cal.4th 1, 63, and *People v. Gutierrez* (2002) 28 Cal.4th 1083, 1134, as establishing that there was no instructional error. However, neither *Gutierrez* or *Coffman* involved illegally acquired post-*Miranda* statements that were used to prove an element of a charge in an information, as was done here.

D. The Errors Require Reversal of All Counts; If Not, the Gang Crimes and Enhancements Must Be Reversed

Appellant has argued in the AOB that as a result of any of the foregoing errors, reversal is required of the gang crimes and enhancements, and of all substantive offenses, as well. (AOB 339.) Respondent argues to the contrary. According to respondent, appellant's trial testimony that he "had never been" a member of the Nip Family was "thoroughly impeached" and "unbelievable" and "cumulated appellant's previous admissions" without resort to the illegally obtained statements and therefore any error was harmless beyond a reasonable doubt. (RB 282, 284.)

Two preliminary points. First, the question to be decided is "whether the State has met its burden of demonstrating [beyond a reasonable doubt] that the admission of the [illegally obtained statement] did not contribute to [the defendant's] conviction." (*Arizona v. Fulminante* (1991) 499 U.S. 279, 296, citing *Chapman v. California*, 386 U.S. at p. 26.)

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[84] Respondent cites *People v. Williams* (2000) 79 Cal.App.4th 1157, 1170, in support of its claim of forfeiture, but *Williams* involved a defendant's failure to ask for a modification of an instruction given. *Williams* did not hold that a defendant could not raise for the first time on appeal a claim that a trial court had a sua sponte duty to give an instruction.

Second, the question of whether or not appellant "had ever been" a Nip Family member was not an ultimate issue at trial. Gang membership was not required in order for the prosecution to establish either the substantive gang offense (§ 186.22(a)) or the gang-benefit enhancement (§186.22(b)). However, a finding of *contemporaneous* gang membership would be highly probative of (1) whether appellant was "actively participat[ing]" in the gang at the time of the charged offenses (§ 186.22(a)) and (2) whether he committed the charged offenses "for the benefit of" the gang (§186.22(b)). (27 RT 5287, 5290.) Moreover, if appellant claimed he "had never been" a Nip Family member and if the jury found that claim to be false, then the jury was entitled to disbelieve appellant's entire testimony. (27 RT 5248-5249.) Thus, the question on appeal is whether the State can prove beyond a reasonable doubt that the improperly admitted evidence did not contribute to such findings by the jury. This requires an assessment of whether the improperly admitted evidence was "'unimportant in relation to everything else the jury considered on the issue in question, as revealed in the record.'" (*People v. Flood* (1998) 18 Cal.4th 470, 494, quoting *Yates v. Evatt* (1991) 500 U.S. 391, 403.)

In presenting its arguments that the error was harmless, respondent does not deal with "everything else the jury considered on the issue in question." Rather, respondent again focuses entirely upon evidence it believes is favorable to the prosecution, and it disregards all evidence to the contrary. But if account is taken of "everything the jury considered," then one finds considerably less in the cited prosecution-favorable evidence than respondent believes and considerable weight to contrary evidence.

Respondent points to several items of evidence that it claims shows appellant's gang membership so overwhelmingly as to "thoroughly impeach"

appellant's claim that he was not a gang member. But appellant explained the most significant-seeming of these items when he testified. As the AOB pointed out, appellant testified that he knew many Nip Family gang members (21 RT 4066), including his two best friends, whom he had known since childhood (Huy Pham and John Cho) and who had joined the Nip Family (21 RT 4057-4058, 22 RT 4151, 4153, 4155, 4193-4194), as had other friends and acquaintances from elementary and high school (21 RT 4011, 4059-4060, 22 RT 4143-4144, 4145). Until his arrest in 1992, appellant hung around with Nip Family members and engaged in social activities with them, such as picnicking and partying (21 RT 4011-4012, 4056, 4066-67, 22 RT 4198). However, appellant did not consider himself a member of the gang. (21 RT 4067.) He had never joined the gang or been "jumped into" or initiated into it. (21 RT 4011, 22 RT 4140, 4158.)

Appellant acknowledged he had told law enforcement officers that he had been with Nip Family, but he did this because the police insisted he was a member and told him that if he hung out with the gang, he was a gang member. (21 RT 4071, 22 RT 4142, 4157, 4195-4198.)

> "I say I kick back with them in sophomore year, and I did get arrested with them and I was in the group with them. So, they did put me down I was a member, and I do admit like I am a member at that time because I was hanging with them. But they never jumped me in. I never walk in. I don't have no tattoo of Nip Family. And I don't represent myself as a gang member. And I don't have in that picture, two pictures you show me in the gang picture group [Exhs. 135, 136] there was no — none of my picture in it. And if you could find out, I know you could, that you could never find a picture like with me in a group like that throwing sign or anything like that."

(22 RT 4140.)[85]

Appellant also acknowledged that when he pleaded guilty to assault in 1992, he had admitted the offense was done in association with a criminal street gang and with specific intent to assist criminal conduct by gang members. (21 RT 4068.) But, as we pointed out several paragraphs ago, such an admission does not include an admission of gang membership.[86]

Appellant's testimony thus accounted for most of the items that respondent points to as purportedly conclusive proof of gang membership: that Detective Nye "met appellant in 1990 in the company of other active members of the Nip Family," that appellant admitted the section 186.22(b) gang enhancement in 1992, that "[w]hen Nye later visited appellant at his house, appellant claimed gang membership by admitting he was part of the gang," and that at trial appellant "acknowledged knowing ten to fifteen gang members" and "identified the photographs of many more." (RB 282, 283-284.) Not only are some of these items remote in time from the charged offenses, but appellant's testimony explained how they were consistent with

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[85] To similar effect: "Like I mean like they [i.e., Nip Family members are] my friend and I go out with them, and go picnic and party and stuff like that. But I'm not like gang and stuff like that. Because I don't join a gang and I never been jumped in the gang, so I wouldn't consider myself — I mean I associate with them so like if they call me gang member, I don't know what — so like if I hang with them, if they call me gang member, so — so I guess I'm a gang member. But I don't consider myself a gang member." (21 RT 4066-4067.)

[86] Appellant's testimony about this admission shows his lack of legal sophistication on the point: "Like I said, I'm not a gang member. So I associate with them, and I did sign that paper, and I was in the car so they charge me as gang member. So I admit I was a gang member, but I don't go around like in group and make trouble." (21 RT 4070-4071.)

his claim of not being a gang member. In its prejudice analysis, respondent simply assumes, ipse dixit, that appellant's explanation was disbelieved by the jury without resort to the improperly admitted evidence, an assumption that is at odds with common sense.

In fact, appellant's claim that he was not a gang member was actually supported by objective factors. He had no gang tattoos, he was neither in possession of nor otherwise tied to any gang paraphernalia, and he did not appear in even one photograph of Nip Family members. These uncontested facts should have caused the jury to credit appellant's explanation for the evidence respondent relies on, and likely would have but for the improperly admitted evidence. It is not possible to conclude, beyond a reasonable doubt, that the error did not contribute to the verdicts. "An error in admitting plainly relevant evidence which possibly influenced the jury adversely to a litigant cannot . . . be conceived of as harmless." (*Chapman v. California*, 396 U.S. at pp. 23-24.)[87]

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[87] The remaining factors respondent relies on have low probative value, if any, on the issue of prejudice. (RB 282-284.) It is true, for example, that Detective Nye testified that "information" imparted to him from members of the Nip Family and their rivals, confidential informants, and other police investigators was that appellant was with Nip Family (see 16 RT 3202), but this was undated and unsupported hearsay. The same is true of Nye's testimony that Monica Tran told him appellant was from the Nip Family; Monica was merely repeating what she had heard from unspecified friends. (10 RT 2028). And even if respondent were correct that Khoi Huynh identified appellant as a gang member — Nye's testimony on the point is not free from ambiguity (see 13 RT 2485) — Khoi's credibility was, to put it mildly, subject to doubt. (With due respect, appellant does not understand the relevance of the rest of the items of evidence respondent mentions, i.e., the handgun in the glove box of Huy Pham's car, the guns at the Amarillo Street residence, and appellant's testimony that Tiny gave him the handgun after the (continued...)

E. Appellant Was Unconstitutionally Precluded from Fully Developing the Record on The Current Issue

In the AOB, appellant has argued that if this Court were to conclude that the record in this case does not contain sufficient evidence to sustain appellant's *Miranda* and involuntariness claims, it would have to reverse and remand because the prosecutor impeded the full development of the record by interposing a barrage of meritless objections, eight of which were improperly sustained. (AOB 340; see 22 RT 4111-4116.[88]) Respondent asserts, in conclusory fashion, that the trial court "did not abuse its discretion" in sustaining the prosecutor's objections, but respondent makes no effort to supports its assertion. (RB 285.) For example:

- What was "vague" about asking Detective Nye whether he had "been trained on what to do when [suspects] say they want to talk to an attorney"? (22 RT 4111.)
- What was "vague" — and what "facts not in evidence" were assumed — by then asking "what have you been taught to do" when a suspect says he wants to talk to an attorney? (*Ibid.*) On examination of an adverse witness, a question that assumes facts not in evidence would be one that is "misleading and unfair in putting unintended words into the witness' mouth, and in bringing before the jury facts that cannot be proved." (3 Witkin, Cal. Evid. 4th (2000) Presentation, § 172, p. 235.) The question to which the prosecutor's objection was sustained

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[87](...continued)
shooting of Tuan Pham.)

[88] Upon recount, it appears that the prosecutor interposed 13 objections in these 6 pages of the Reporter's Transcript.

presented none of these problems, not to mention that the trier of fact here was a judge, who would presumably not have been misled or induced to consider unproven facts.

- What was "vague" or "compound" — and what "facts not in evidence" were "assume[d]" — when Nye was next asked, "Generally what are you taught to do when a suspect invokes a right to an attorney"? (22 RT 4111-4112.)

Respondent offers nothing to justify these rulings or any others.

Respondent also argues that defense counsel actually did find out "the extent of Detective Nye's training regarding the interrogation of suspects who have invoked the[ir] *Miranda* rights" and that his training did not matter because statements obtained by an officer systematically trained by his department and the district attorney's office to improperly disregard invocations of *Miranda* are per se admissible as long as the statements were voluntary. (RB 285.) By these arguments, respondent appears to be acknowledging that, for purposes of the *Miranda* and involuntariness issues raised in the AOB, the record is adequate to establish that appellant's statements were obtained by Nye in deliberate, systematic, and officially sanctioned violation of *Miranda* after appellant had invoked his right to counsel. If that is what respondent is acknowledging, then respondent is correct — the present issue about inability to develop the record disappears, leaving only the questions of whether statements obtained under such circumstances may be admitted as impeachment. (See Subsections A and B, *ante*.) If respondent is saying something else, appellant is unable to apprehend what it might be.

3. REVERSAL OF ALL COUNTS IS REQUIRED BECAUSE OF THE PREVIOUSLY DISCUSSED ERRORS ARISING FROM THE REBUTTAL TESTIMONY OF PROBATION OFFICER STEVEN SENTMAN

In the AOB, appellant has argued that the errors that arose in connection with the prosecution's decision to call Probation Officer Steven Sentman as a rebuttal witness require reversal of all of the counts of which appellant was convicted, because the errors adversely affected the jury's assessment of appellant's credibility as a witness. (AOB 341. See also AOB 253-268, ARB § III.5, pp. 156 et seq., *ante*.) Respondent summarily contends that appellant's argument is meritless for the reasons it set forth earlier. (RB 285-286.) Because respondent adds nothing new here, there is nothing for this ARB to reply to.

4. REVERSAL OF ALL COUNTS IS REQUIRED BECAUSE OF THE PREVIOUSLY DISCUSSED ERRORS RELATED TO THE ADMISSION OF THE PREJUDICIAL HEARSAY EVIDENCE RELAYED BY TRIEU BINH NGUYEN

Similarly, appellant argued in the AOB that the errors related to the trial court's decision to permit the prosecution to elicit hearsay evidence from witness Trieu Binh Nguyen require reversal of all counts. (AOB 342. See also AOB 115-117, 121-122, 252, 279, 287; ARB§§ I.3.B, pp. 65 et seq.; III.4, p. 154; IV.3, p. 180; V.2, p. 188, *ante*.) As with the preceding subsection, respondent summarily contends that appellant's argument is meritless for the reasons it set forth earlier. (RB 286.) As before, there is nothing for this ARB to reply to.

5. SHOULD APPELLANT BE DEEMED TO HAVE FORFEITED ANY ARGUMENTS OR ISSUES SET FORTH IN THIS APPEAL AS A RESULT OF ACTS OR OMISSIONS BY HIS TRIAL COUNSEL, THEN APPELLANT WAS DEPRIVED OF HIS CONSTITUTIONAL RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL

The AOB also argued that if this Court were to conclude that appellant's trial counsel failed to preserve any of appellant's arguments or issues for review on appeal, or if it were to conclude that any of the objections or arguments by counsel was insufficient to allow the claim(s) to be raised on appeal, then appellant was denied the effective assistance of counsel. (AOB 343. See also AOB 121-122, ARB § I.4, pp. 69 et seq., *ante*.) Respondent contends that appellant cannot establish deficient performance and prejudice, but it does not offer any justification for trial counsel having failed to object to the matters that respondent has claimed are forfeited, and respondent does not offer any further argument about prejudice, presumably relying upon what it had said in connection with the purportedly forfeited claims. (RB 286-287.) There is, thus, nothing to which this ARB can reply.

6. IF REVERSAL OF THE JUDGMENT OR ANY PARTS THEREOF IS NOT REQUIRED BY ANY OF THE PRECEDING CLAIMS INDIVIDUALLY, REVERSAL WOULD BE REQUIRED BECAUSE OF THE CUMULATIVE PREJUDICE OF THE ERRORS

The AOB further argued that cumulative prejudice from all of the errors in this case would require reversal of the entire judgment, even if no individual issue or other combination of issues did. (AOB 344-349.) Respondent contends that if there was more than one error, they were cumulatively harmless. (RB 287.) Respondent's contention, however, is

entirely conclusory, with no reasoning or explanation provided beyond its bare assertion. Once again, there is nothing for this ARB to reply to.

7. CLAIMS OF INSUFFICIENT EVIDENCE MUST BE ADDRESSED ON APPEAL EVEN WHEN THE JUDGMENT IS REVERSED FOR OTHER REASONS

Finally, appellant argued in the AOB that his claims of insufficient evidence must addressed on appeal even if the judgment is reversed for other reasons. (AOB 350.) Respondent does not mention the point. Under these circumstances, there is nothing else to say in this ARB.

ISSUES RELATED TO THE STATE'S INVOCATION OF THE DEATH PENALTY

IX. ISSUES ARISING DURING JURY SELECTION

1. THE TRIAL COURT UNCONSTITUTIONALLY PRECLUDED THE DEFENSE FROM DETERMINING WHETHER JURORS WOULD BE PREVENTED FROM VOTING FOR LIFE WITHOUT PAROLE, OR SUBSTANTIALLY IMPAIRED IN THEIR ABILITY TO DO SO, IF THEY FOUND APPELLANT GUILTY OF TWO OR THREE MURDERS UNDER THE MULTIPLE-MURDER SPECIAL CIRCUMSTANCE

In the AOB, appellant has argued that the trial court impermissibly restricted voir dire inquiry into the question of whether prospective jurors would be prevented or substantially impaired in their ability to return a verdict of life without parole if they found appellant guilty of more than one murder. (AOB 354-372.)

There do not appear to be any disputes between appellant and respondent as to the applicable legal principles. The ultimate question is whether the trial court allowed voir dire that was "specific enough to determine" if the jurors harbored such disqualifying views with respect to multiple murders, or whether the voir dire was "so abstract that it fail[ed] to identify" such jurors. (*People v. Cash* (2002) 28 Cal.4th 703, 720; *People v. Zambrano* (2007) 41 Cal.4th 1082, 1121.) The AOB argued that because of the trial court's rulings, the truncated voir dire at appellant's trial was obscure, abstract, and unfocused and generally failed to identify prospective jurors who harbored a disqualifying bias because of the multiple-murder aspect of the case.

Respondent's position is that the trial court "only limited death-qualification voir dire that sought penalty phase prejudgment by prospective jurors" and that this limitation was triggered by defense counsel's improper questioning of prospective jurors. (RB 289. See also RB 296, 298.) Respondent is correct that the reason the trial court gave for imposing its limitations was to avoid having prospective jurors prejudge their penalty verdict, but (1) respondent is wrong that defense counsel precipitated that limitation and (2) the trial court's rulings went far beyond any reasonable view of what impermissible "prejudgment" entails.

A. Defense Counsel Did Not Trigger the Court's Limitation on Inquiry into the Multiple-Murder Aspect of the Case

The trial court's limitation on voir dire began, not with defense counsel's questioning of jurors, but near the outset of trial proceedings, with its rulings on the juror questionnaires. As the AOB pointed out, the defense proposed a questionnaire that sought to elicit, among other things, "Attitudes Regarding the Death Penalty." (2 CT 521.) Of particular relevance here, the defense questionnaire explained that "[i]f a penalty phase is required in this case it will be because the defendant has been found guilty beyond a reasonable doubt of more than one offense of murder in the first or second degree," and then it asked, "With these convictions and special circumstance findings in mind, do you have such a conscientious opinion concerning the death penalty that, regardless of the evidence that might be developed during both phases of the trial, you would automatically vote for the death penalty and under no circumstances vote for a verdict of life imprisonment without the possibility of parole?" (2 CT 525, 526.) Immediately thereafter, it asked whether there was "anything about the nature of the convictions and special

circumstance findings in this case that would impact your ability to be an impartial juror." (2 CT 526.)

These questions were clear and direct, and they focused the prospective jurors on the multiple-murder aspect of the case ("with these convictions and special circumstance findings in mind" and "anything about the nature of the convictions and special circumstance findings in this case"). And then, tracking plain language that has long been approved by this Court,[89] they targeted prospective jurors who would not be fair and impartial at the penalty phase due to the multiple-murder nature of the case.[90]

Despite the plain, simple, and proper nature of the defense questions, the trial court refused to accept them. It announced that it had "made some changes or . . . deleted some questions" in the defense questionnaire and that "the most drastic" changes were in the section entitled "Attitudes Regarding the Death Penalty," and it directed defense counsel to "copy . . . verbatim" the changes it had made. (2 RT 360, 362.)

Insofar as is now relevant, the trial court eliminated from the questionnaire all references to the multiple-murder nature of the case. In place of the defense questions, the court's questionnaire merely asked the prospective juror to assume that the defendant had been "found guilty of first degree murder and . . . . one or more [sic] of the special circumstances" and

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[89] See, e.g., *People v. Avila* (2006) 38 Cal.4th 491, 527 et sequitur and footnote 23 (question 99).

[90] If the questions had a shortcoming, it was that their reach was *underinclusive* in identifying the impermissibly pro-death jurors, because the questions targeted only jurors who would "automatically vote for the death penalty" and did not seek to identify those jurors whose ability to consider a life sentence was "substantially impaired." But the questions were merely preliminary ones, and in any event, that possible shortcoming was not of concern to the court or, obviously, the prosecutor.

then asked if the juror would automatically refuse to vote in favor of life without parole. (7 RT 1857.) However, the questionnaire never told the prospective jurors what the special circumstance *in this case* was. The questionnaire gave *examples* of special circumstances, but, unbeknownst to the jurors, those examples were entirely irrelevant to the case (felony murder, killing of peace officer). And while the questionnaire did contain a general definition of "special circumstance," that definition was comprised of virtually incomprehensible or meaningless language. Moreover, the questionnaire repeatedly led the jurors to believe that there was more than one "special circumstance" in the case, which of course was not true. (See AOB 358-360.)

Consequently, when the court's questionnaire asked the prospective jurors whether they harbored any views that would cause them to automatically vote for death, the question did not focus the jurors on the multiple-murder nature of the case. The questionnaire thus did nothing to enable the court or the parties to identify jurors who would be prevented or substantially impaired in their ability to return a verdict of life without parole if they found appellant guilty of more than one murder.

From the outset of the case, then, and long before defense counsel asked any questions on voir dire, the trial court made its views clear as to what constituted impermissible "prejudgment." As the trial court's modifications to the defense questionnaire indicate, merely asking the prospective jurors whether the multiple-murder nature of the case would prevent or substantially impair their ability to impose a sentence less than death was, to the court, equivalent to asking them to prejudge their penalty-phase verdict. That reasoning is obviously flawed, and it cannot be squared with this Court's holdings that "[m]ultiple murder falls into the category of aggravating or mitigating circumstances 'likely to be of great significance to prospective

jurors'"[91] and thus that inquiry must be allowed that is "specific enough to determine" if the jurors harbored such disqualifying views.[92]

B. The Trial Court Laid Down the Law at the Ensuing Proceedings

The gap in the court's questionnaire would not have been a problem if the subsequent oral voir dire could have been used to fill in the gap, but it couldn't. This was because, as the trial court explicitly informed counsel, "[w]hen we talked about what questions are put in the questionnaire and what not to, I was making certain rulings about the admissibility of asking questions of the jurors." (5 RT 626.) It should come as no surprise, then, that the oral voir dire was conducted consistently with the trial court's views about "prejudgment." The court did not itself ask any question designed to get at whether two or three murder convictions might prevent or substantially impair the prospective jurors' ability to return a verdict of life without parole at the penalty phase, and when defense counsel did, the court interrupted and told him to move to "a different area." (4 RT 731. See also 4 RT 733.)

Respondent contends that the real problem was that counsel's questions impermissibly sought "penalty phase prejudgments" (RB 296), but this contention has two problems. First, what was impermissible about asking a juror whether she felt that, after having "convicted [a defendant] of two separate first-degree murders," she "would be leaning towards the imposition

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[91] *People v. Vieira* (2005) 35 Cal.4th 264, 286, quoting *People v. Cash*, 28 Cal.4th at page 721. Accord *People v. Carasi* (2008) 44 Cal.4th 1263, 1287.

[92] *People v. Cash*, 28 Cal.4th at pages 720, 721. Accord, e.g., *People v. Carasi,* 44 Cal.4th at page 1286 (quoting *Cash*); *People v. Zambrano*, 41 Cal.4th at page 1120 (the death qualification process "must probe 'prospective jurors' death penalty views as applied to the general facts of the case . . . .'"), quoting *People v. Earp* (1999) 20 Cal.4th 826, 853.

of death"? (4 RT 731 [juror 97]; see RB 296.) That was a preliminary (though obviously not sufficient) inquiry into the question of bias related to the multiple-murder aspect of the case. Equally difficult to understand is the impropriety of asking a juror — who has already identified herself as a death penalty supporter — whether she would "lean one way or another" based upon "the charges, that there are three separate murder counts . . . ." (4 RT 733 [juror no. 214].) Yet these are the questions that the trial court refused to allow to be answered, interrupting and directing counsel to "get into a different area."

The second and more fundamental problem with respondent's contention is that it does not deal with the trial court's explicit statements detailing its views as to what "prejudgment" encompassed and as to what voir dire was disallowed. The morning after intervening in defense counsel's voir dire, the court articulated in no uncertain terms precisely what inquiry it would and would not allow into the multiple-murder aspect of the case: it would not allow any mention of the matter whatsoever. In the court's view, "when you [counsel] put in that first component, sir, [i.e., when counsel tells the jurors that] 'you're not going to get [to the penalty phase] until beyond a reasonable doubt he's been convicted of two or three counts of first-degree murder,' well, that puts [the jurors] in a position of having to make a quick judgment call about factor (a) without them even realizing that's what they're doing." (5 RT 778, internal quotation marks added.) Consequently, the court declared, "all I'm going to allow you to ask is set out the procedure. 'Only if the jury makes a determination that the special circumstances are true,' without going into anything more, 'will it trigger off a second part.' (5 RT 779, internal quotation marks added.)

Defense counsel specifically asked if he could "define the special circs [sic] in this case," and the court replied, in unambiguous language, "No, that's what I don't want to do in this stage." (5 RT 781.) Voir dire was to be conducted "without identifying the special circumstance." (5 RT 782.) And the court threatened defense counsel with being chastised "out there in front of everybody" if he went beyond the court-prescribed limits. (5 RT 784.)

Thereafter, the court conducted most of the relevant voir dire itself, using the language quoted in the AOB at pages 363 to 366. Without focusing the prospective jurors either on the fact that more than one murder conviction would be a prerequisite to reaching the penalty phase or on whether their ability to return a non-death verdict might be impaired as the result of that fact, the court asked mostly very broad and general questions about whether the jurors could "consider whatever evidence is forthcoming," or could "look at all of the evidence that might come in under the different factors," or would "take a look at the crime," or "give full consideration to both sides [and] be willing to look at each factor that evidence is presented before making a decision," or "give full consideration to any evidence that's presented," or would "look at those other facts other than the circumstances of the crime."

But being willing to look at, consider, fully consider, or take a look at mitigating evidence is what nearly all prospective jurors would agree they can and would do in most any case. That does not mean they would also be open to returning a non-death verdict or that they are not substantially impaired in their ability to return a verdict of life without parole. (Cf., e.g., *Abdul-Kabir v. Quarterman* (2007) 550 U.S. 233, 250 & fn. 12 [not sufficient merely to allow jury to hear mitigating evidence; jury must also be able to give effect to such evidence]; *Penry v. Lynaugh* (1989) 492 U.S. 302, 319 [similar]; *People v. McKinnon* (2011) 52 Cal.4th 610, 650 [prospective juror who "stat[ed] his

willingness to 'consider' the evidence and instructions and impose the penalty he 'personally feel[s] is appropriate'" was an "ambiguous response [that] may have implied his understanding that, after such 'consider[ation],' his personal preference could still prevail"]. Cf., *People v. Thomas* (2011) 51 Cal.4th 449, 471 [while prospective juror "consistently explained that . . . she could consider the death penalty and there was a possibility she could vote to impose it," nevertheless other beliefs "would make it very difficult for her to vote for the death penalty and she did not think she could do it."].

And since none of this voir dire would have been generally understood as asking the jurors about the specific effect on them of the multiple-murder nature of this case, it could not possibly have identified all the jurors who were prevented or substantially impaired in their ability to return a verdict of life without parole because of that factor. This Court has held that a defendant has a right to identify and exclude jurors who are biased in this way, and the voir dire below was clearly inadequate to the task. It was not "specific enough to determine" if the jurors harbored such disqualifying views. (*People v. Cash*, 28 Cal.4th at p. 720. See also, e.g., *Morgan v. Illinois* (1992) 504 U.S. 719, 735 [jurors who would always vote to impose death can "in all truth and candor respond affirmatively" to general questions of fairness and impartiality, "personally confident that [their] dogmatic views are fair and impartial, while leaving the specific concern unprobed. . . . It may be that a juror could, in good conscience, swear to uphold the law and yet be unaware that maintaining such dogmatic beliefs about the death penalty would prevent him or her from doing so."].)

The upshot is (1) that contrary to respondent's contention, the limitations imposed on multiple-murder voir dire were not triggered by defense counsel and (2) the effect of the trial court's ruling went far beyond

making sure the prospective jurors were not asked to prejudge the penalty phase. The court's rulings — from questionnaire through the oral voir dire — prevented the defense from ascertaining whether the jurors were prevented or substantially impaired in their ability to return a verdict of life without parole if they found appellant guilty of more than one murder.

C. Purported Forfeiture

Respondent contends that the current claim is "forfeited because appellant neither exhausted his peremptory challenges nor expressed any dissatisfaction with the jury which was selected, rendering any error nonprejudicial." (RB 288.) However, "[w]hen voir dire is inadequate, the defense is denied information upon which to intelligently exercise both its challenges for cause and its peremptory challenges. Because the exercise of peremptory challenges cannot remedy the harm caused by inadequate voir dire, we have never required, and do not now require, that counsel use all peremptory challenges to preserve for appeal issues regarding the adequacy of voir dire." (*People v. Bolden* (2002) 29 Cal.4th 515, 537-538.)

Respondent also asserts that any complaint about the court's changes to the juror questionnaire is forfeited because counsel "fail[ed] to suggest to the trial court that the referenced contextual information be included in the final voir dire questionnaire, particularly since the pertinent information was apparently excluded from the final questionnaire solely because it was contained in 'duplicate questions.'" (RB 297.) Similarly, respondent alleges that any challenge to the trial court's failure to ask jurors about the multiple-murder aspect of the case is forfeited because counsel failed to "seek[] an opportunity to ask that question during oral voir dire and [failed to] suggest[] the trial court ask that question during oral voir dire." (RB 298.) These contentions are obvious makeweight.

No reasonable observer could read the record in this case and conclude the defense committed the forfeitures respondent postulates. The trial court explicitly rejected the defense's proposed language in the questionnaire and substituted its own, in what it admitted were "drastic changes" that it directed defense counsel to "copy . . . verbatim." (2 RT 360, 362.) It also made clear that its rulings as to "what questions are put in the questionnaire and what not to" carried with it "rulings about the admissibility of asking questions of the jurors." (5 RT 626.) It laid down "the ground rules here." (5 RT 776.) After defense counsel cited the relevant principles and authority supporting his request to ask prospective jurors whether a multiple-murder finding would preclude them from voting to impose a life-without-parole sentence, the court stated "all I'm going to allow you to ask is set out the procedure," i.e., counsel could mention "the special circumstances" but "without going into anything more." (5 RT 777-779.) The court specifically and expressly prohibited counsel from "defin[ing]" or "identifying" the special circumstance in this case. (5 RT 781, 782.) The court noted that "you're objecting," but the court "want[ed] it clear [that] this is my ruling." (5 RT 782.) "I have to tell you that I will not permit that . . . and I don't want to do that in front of the jury." (5 RT 784.) And it threatened counsel with being reprimanded "out there in front of everybody" if counsel ventured beyond the court's limits. (5 RT 784.)

There is not a scintilla of support for respondent's claims of forfeiture. And even if there were, the record makes crystal clear that whatever further objection respondent claims should have been made would have been futile. (Civ. Code, § 3532 ["The law neither does nor requires idle acts."]; *People v. Welch* (1993) 5 Cal.4th 228, 237 ["Reviewing courts have traditionally

excused parties for failing to raise an issue at trial where an objection would have been futile"].)[93]

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[93] The cases cited by respondent are so clearly distinguishable as to warrant little discussion. Neither of the two cases respondent cites regarding "failure to object or suggest pertinent modifications to the trial court's juror questionnaire" (*People v. Foster* (2010) 50 Cal.4th 1301, 1324; *People v. Robinson* (2005) 37 Cal.4th 592, 617) involved a trial court rejecting questions on a defense-proposed questionnaire, nor did either involve a court that required the defense to "copy" the court's revisions "verbatim." Moreover, in *Foster*, the court afforded the defense "unlimited questioning" of jurors at oral voir dire. (50 Cal.4th at p. 1324.) As for *People v. Vieira*, 35 Cal.4th at page 286, which respondent cites for the proposition that forfeiture arises when counsel fails to "seek[] an opportunity to ask [the relevant] question during oral voir dire [or to] suggest[] the trial court ask that question," respondent's own characterization of the default cannot be reconciled with the record in the instant case, and moreover, it ignores the fact that in *Vieira*, unlike here, the court "never suggested that defense counsel could not raise the issue in voir dire" and "never ruled that the question was inappropriate." (35 Cal.4th at p. 286.) Nor did any of these cases involve the issue of futility.

2. THE TRIAL COURT UNCONSTITUTIONALLY PRECLUDED THE DEFENSE FROM DETERMINING WHETHER JURORS WOULD BE PREVENTED FROM VOTING FOR LIFE WITHOUT PAROLE, OR SUBSTANTIALLY IMPAIRED IN THEIR ABILITY TO DO SO, AS A RESULT OF MISCONCEPTIONS ABOUT SUCH A SENTENCE

The trial court refused to allow any inquiry into whether prospective jurors harbored views about a sentence of life without parole that prevented or substantially impaired them in their ability to vote in favor of such a sentence. The court based its decision on its belief that this Court had "expressly said that it's wrong for the judge to tell the jury that life imprisonment without the possibility of parole means just that." (4 RT 625-626.) In the AOB, appellant pointed out that the trial court's belief was wrong. While this Court had held that it is incorrect to instruct a jury that a sentence of life without parole "'will *inexorably* be carried out,'"[94] there are roughly a half-dozen reasons why that holding is inapplicable to the voir dire that defense counsel sought to conduct at appellant's trial. (AOB 377-382.)

The RB's response is two-fold. First, respondent contends that voir dire inquiry into this area would have "encouraged the type of penalty phase speculation prohibited by this Court" in the cases cited in the AOB. (RB 301.) This contention is meritless. The present issue is about asking questions of jurors on voir dire, not about giving the jury binding instructions, and the purpose of such an inquiry is to *prevent* the verdict from being contaminated by the type of speculation that this Court has condemned. The trial court

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[94] *People v. Musselwhite* (1998) 17 Cal.4th 1216, 1271, quoting *People v. Gordon* (1990) 50 Cal.3d 1223, 1277, further internal quotation marks omitted. Accord: *People v. Arias* (1996) 13 Cal.4th 92, 172; *People v. Thompson* (1988) 45 Cal.3d 86, 131.

would hardly have "encourage[d] speculation" merely by finding out whether a juror believes that a defendant sentenced to life without parole will inevitably or likely be released and, if so, whether the juror would be able to set aside that belief in making his or her sentencing determination. Such a belief is, of course, both speculative and, as shown in the AOB (pp. 378-379), highly unrealistic, and if not set aside, would impair the juror's ability to choose between the options actually provided by California law: death or life without possibility of parole. Thus, the effect of permitting such voir and, if need be, the excusal of prospective jurors who cannot set aside such beliefs would be precisely the opposite of "encourag[ing] speculation." It would *eliminate* speculation from the sentencing jury's sentencing deliberations and enhance the reliability of any determination of the appropriate sentence.

The RB's second response to the present claim is to contend that "appellant never proposed a voir dire question asking jurors if they could follow such an instruction [but] instead proposed asking jurors to speculate about whether someone sentenced to life without the possib[i]lity of parole would ever be paroled." (RB 302.) However, the questions that defense counsel asked were plainly preliminary in nature, and the trial court clearly understood this, for its objection was not to the way the questions were worded but to the entire subject matter the questions were trying to get into. It was the *topic area* that the court was precluding. As the court specifically said, "Don't get into *that area*," and it directed counsel to move on to "other topics" and "other areas." (4 RT 627, 628.) "I don't know how to say it in a nice way," the court stated, "but I'm not going to let you get into that, okay?" (4 RT 628.)

Thus, respondent's contention about trial counsel not having proposed a question about the prospective jurors' ability to follow an instruction is insupportable in light of the record and what actually transpired below.[95]

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[95] One of the reasons given in the AOB as to why the trial court's reasoning was wrong requires modification. While the AOB was accurate at the time in stating that this Court had approved instructions that directed the jury to assume a sentence of life without parole will be carried out, this Court has since concluded that such an instruction should not be given and that the jury should instead be instructed to "not be influenced by speculation or by any considerations other than those upon which I have instructed you." (*People v. Letner* (2010) 50 Cal.4th 99, 206.) Obviously, appellant's trial counsel had no way of knowing in 1998 (when the voir dire in this case was conducted) that this Court would modify its views in 2010. Nor does *Letner* alter the merits of the current issue. As the AOB explained and as this brief has reiterated in the preceding paragraphs, the very purpose of the requested voir dire now at issue was to *prevent* speculation and inaccuracy from affecting the jury's penalty-phase verdict. The concerns that motivated *Letner* thus support the voir dire that defense counsel sought to undertake here.

3. THE TRIAL COURT UNCONSTITUTIONALLY PRECLUDED THE DEFENSE FROM GOING BEYOND THE JUROR QUESTIONNAIRES IN DETERMINING WHETHER THE PROSPECTIVE JURORS MIGHT BE PREVENTED OR SUBSTANTIALLY IMPAIRED FROM RETURNING A NON-DEATH VERDICT AT THE PENALTY PHASE

In *People v. Stewart* (2004) 33 Cal.4th 425, 440-455, this Court held that reversible error occurred when a trial court relied entirely upon prospective jurors' written questionnaire responses when determining whether those jurors's death-penalty views rendered them unqualified to serve. In the AOB, appellant has argued that equivalent error occurred at his trial. (AOB 383-388.)

Respondent disagrees but never mentions *Stewart*, nor does it address the claim on the merits. Instead, respondent's contention is that appellant's claim is "forfeited because appellant never raised this objection below." (RB 302.) According to respondent, objection should have been made "when the trial court explained the procedure now challenged by appellant." (RB 303, referencing 2 RT 378-379.) However, in the course of "explain[ing] the procedure," the trial court never indicated it would limit the voir dire to the written questionnaires. Quite the contrary, as respondent acknowledges, the court "granted counsels' request to orally voir dire the prospective jurors following the trial court's oral voir dire." (RB 302-302.) It authorized each side to conduct their own voir dire for one-half hour at each of the four planned voir dire sessions. (2 RT 377-378.)

Moreover, it was not only counsel whom the trial court indicated would not be limited by the questionnaire. As shown in the very quotation upon which respondent bases its forfeiture argument, counsel asked whether the court would itself "engage in some type of comprehensive voir dire in

addition to . . . [t]his juror questionnaire that they'll fill out," and the court replied, "Yes, that's correct." (2 RT 379.)

There was no indication anywhere in this proceeding that the trial court was going to limit counsel to the jurors' questionnaire responses.

Nor was there any such indication in ensuing proceedings. Quite the contrary, given that the court foresaw that the questionnaire could "be difficult for prospective jurors" and that by the time the jurors got to the death penalty questions they might "start to lose attention as to what is going on in that regard" (2 RT 389), the implication was that additional questioning would be necessary and permissible. It was not until the issue arose concerning whether prospective jurors might be disqualified based on their views about life with parole that the trial court first declared that counsel would not be allowed to go beyond the questionnaires. (4 RT 625-627.) And indeed, the court made that ruling based upon an error: it incorrectly believed (despite defense counsel's protestation to the contrary) that "[t]he questionnaire tells you what they feel about these particular topics." (4 RT 625.)

Respondent's claim of forfeiture lacks any merit.

X.
OTHER ISSUES ARISING FROM THE USE OF THE DEATH PENALTY

1. THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY PRECLUDING THE DEFENSE FROM INTRODUCING EVIDENCE ABOUT LIKELY CONSEQUENCES OF A SENTENCE OF LIFE WITHOUT PAROLE

At the penalty phase of appellant's trial, the defense sought to call Norman Morein, a sentencing consultant, to testify in three areas: (1) the prison conditions to which life-without-parole ("LWOP") inmates would be subjected, (2) the unlikelihood that LWOP prisoners would ever be presented to the governor for parole consideration via commutation, and (3) the socially useful work that appellant could do while a prisoner serving an LWOP sentence. The trial court refused to allow Mr. Morein to testify.

In the AOB, appellant argued this ruling was improper for two separate reasons. First, exclusion of this evidence violated state law; fundamental principles of statutory construction show that when the electorate enacted Penal Code section 190.3 to govern admission of penalty phase evidence, it intended to permit consideration of the actual impact of a sentence on the defendant. (AOB 391-398.) Second, and in any event, developments in the United States Supreme Court's Eighth Amendment jurisprudence independently require that such evidence be admissible during the sentencing phase of a capital case. (AOB 398-402.) Because of the importance of this kind of evidence, a new penalty phase is required. (AOB 402-404.)

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Respondent does not dispute the admissibility of Morein's proposed testimony with regard to the improbability of commutation, the second of the three topic areas Morein was to address.

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Respondent does contend that insofar as Morein would have testified to conditions of confinement for LWOP prisoners (Morein's first topic area), his testimony was "not relevant to the penalty determination because it has no bearing on defendant's character, culpability, or the circumstances of the offense under either the Federal Constitution or Penal Code section 190.3, subdivision. (k)" and because it "involves speculation as to what future officials in another branch of government will or will not do." (RB 305-306, citing *People v. Martinez* (2010) 47 Cal.4th 911, 963; *People v. Jones* (2003) 29 Cal.4th 1229, 1261; *People v. Quartermain* (1997) 16 Cal.4th 600, 632; *People v. Fudge*, *supra*, 7 Cal.4th at p. 1117; *People v. Daniels* (1991) 52 Cal.3d 815, 876-878; *People v. Thompson*, *supra*, 45 Cal.3d at pp. 138-139.)

Respondent is correct that in *People v. Thompson* and its progeny, this Court has rejected appellant's constitutional claim, holding that admission of "conditions of confinement" evidence is not required by the Constitution. However, the AOB explained in detail why those decisions are inconsistent with decisions of the Supreme Court and should be reconsidered. (AOB 399-402.) Inasmuch as respondent does not address any of appellant's points, there is nothing to which the ARB can reply.

Respondent says that evidence concerning conditions of confinement for a person serving an LWOP sentence was properly excluded because it involved speculation as to what future state officials would or would not do. Appellant would point out, however, that any choice between the sentencing options confronting a penalty jury unavoidably involves some speculation or assumptions, articulated or not, about what state officials will or will not do, and it would be far more conducive to reliable sentencing determinations if the sentencing jury were presented with actual evidence concerning current

prison conditions for LWOP-sentenced inmates. There would be no guarantee that LWOP sentencing conditions would never change, but the jury's choice would be far better informed. Further, there is little reason to believe that conditions for such inmates would dramatically change any time soon. Certainly, respondent points to nothing suggesting any material change has been made in the 14 years since Morein was called to testify or is currently in the works.

As for appellant's *statutory* claim related to admission of evidence what an LWOP sentence entails, the AOB set forth two separate bases for concluding that, as a matter of statutory construction, section 190.3 authorizes the admission of such evidence. The first basis was the electorate's decision to authorize, via section 190.3, admission of evidence of "any matter relevant to . . . mitigation." As the AOB pointed out, at the time section 190.3 was enacted, this phrase had a well-understood meaning that embraced the impact of a sentence upon the defendant. (AOB 392-396.) The implications of the use of the word "mitigation" in section 190.3 were neither raised nor addressed in any of the cases cited by respondent, and thus neither those cases nor any others of which appellant is aware are authority for rejecting appellant's first statutory-construction argument. (*People v. Williams* (2004) 34 Cal.4th 397, 405 ["cases are not authority for propositions not considered"]; *People v. Barragan* (2004) 32 Cal.4th 236, 243 [same].)

The second basis for appellant's statutory argument in support of Morein's conditions-of-confinement testimony is the electorate's decision, also embodied in section 190.3, to authorize admission of "*any* matter relevant to . . . sentence." (AOB 396-398.) While this Court rejected a similar argument in *People v. Thompson*, 45 Cal.3d at p. 139, it did so without considering many of the crucial indicia of statutory intent that the AOB

pointed to. (AOB 396-398.) Thus, appellant's second statutory-construction argument remains viable under this Court's precedents.

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It is unclear whether respondent addresses the third aspect of appellant's current claim, which involves Morein's proposed testimony about the socially useful work that appellant could do while a prisoner serving an LWOP sentence. Respondent does not specifically refer to this matter, but it may be that respondent believes such testimony is encompassed within the holdings of *Thompson* et al. that preclude "conditions of confinement" evidence. If that is respondent's belief, respondent is wrong. As one of *Thompson*'s progeny has specifically held, evidence that a defendant is likely to be productive in prison *is* "relevant and admissible mitigating evidence," and "[e]xclusion of this mitigating evidence thus violates the constitutional requirement that a capital defendant must be allowed to present all relevant evidence to demonstrate he deserves a sentence of life rather than death." (*People v. Fudge*, 7 Cal.4th at p. 1117.)

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The only remaining question, then, is prejudice, and respondent does not dispute that if either state or federal law required admission of any of the Morein evidence, reversal of the penalty judgment is required.

2. THE TRIAL COURT UNCONSTITUTIONALLY LIMITED DEFENSE COUNSEL'S ARGUMENT TO THE PENALTY JURY

In addition to excluding Mr. Morein's testimony, the court also precluded defense counsel from making arguments to the penalty jury about (1) the harshness of serving such a sentence, (2) imprisonment's future impact on appellant, and (3) other well-known cases where life without parole was imposed. (AOB 405-407. See 28 RT 5613; 30 RT 5770-5771, 5831.)

As far as appellant can determine, respondent does not offer any defense of the trial court's ruling prohibiting counsel from discussing "any of the future possible impact prison may have on a person," Item (2) in the preceding paragraph. (28 RT 5613.)

With regard to the trial court's preclusion of argument concerning the harshness of an LWOP sentence — Item (1), above — the AOB cited three decisions by this Court that explicitly allow such argument: *People v. Gutierrez* (2002) 28 Cal.4th 1083, 1159-1160, *People v. Daniels* (1991) 52 Cal.3d 815, 877-878, and *People v. Thompson*, *supra*, 45 Cal.3d at page 131 footnote 29. (AOB 405.) Respondent contends that these decisions only allow counsel to "argue the severity of a sentence of life without the possibility of parole when contrasting it to the death penalty alternative in order to stress to jurors the gravity of their task." (RB 308.) Respondent's argument cannot be reconciled with the language or reasoning of these cases. Thus, for example, "characterizing the full nature of a sentence of life in prison without the possibility" is "proper argument" by defense counsel and "permissible." (*Gutierrez*, 28 Cal.4th at pp. 1159-1160.) And "[d]efense counsel's remarks to the jury during closing argument as to what life without possibility of parole would really mean . . . were also within the scope of legitimate argument to the extent the remarks impressed on the jury the gravity

of its task." (*Thompson*, 45 Cal.3d at p. 131 fn. 29. See also *Daniels*, 52 Cal.3d at pp. 877-878 [defense counsel may point out to jury the "rigors of confinement."].)

Finally, as for Item (3), above — the ability of counsel to comment on other well-known cases — the AOB acknowledged that this Court has uniformly upheld such restrictions but argued that these rulings could not be reconciled with other decisions allowing prosecutors to comment on well-known cases. (AOB 405-406.) Respondent asserts that the two lines of decision are reconcilable, saying that prosecutors are allowed to refer to "notorious villains . . . not for the purpose of comparison, but solely to illustrate a larger point." (RB 309.) With due respect, appellant does not see how the distinction respondent perceives has any meaningful content or creates a workable rule. Nor does appellant see why defense counsel who comment on well-known cases are not also merely "illustrating a larger point" nor why prosecutors who comment on well-known cases are not themselves doing so for "the purpose of comparison." Respondent has offered nothing but conclusory amphigory to harmonize the two lines of cases.

The AOB also argued that the errors committed by the trial court require reversal of the penalty judgment. (AOB 406-407.) The RB's response, in its entirety, is that "reversal of the penalty phase verdict is unwarranted because there is no reasonable possibility the verdict would have been different absent the error." (RB 310.) Respondent does not discuss any of the mitigating factors in the case, or anything else. There is nothing to which this ARB can reply.

3. CONFLICTING INSTRUCTIONS WERE GIVEN WITH RESPECT TO THE NEWLY INSTALLED ALTERNATES' ABILITY TO CONSIDER LINGERING DOUBT

In the AOB, appellant has argued that the alternate jurors who substituted into the penalty trial were given conflicting instructions as to their ability to consider lingering doubt. (AOB 408-411.)

Respondent argues, first, that this claim is forfeited because "appellant did not request amplification or clarification of these instructions in the matter now suggested in the trial court." (RB 311-312.) Respondent overlooks section 1259, which specifically provides that "[t]he appellate court may also review *any instruction given . . . even though no objection was made thereto in the lower court, if the substantial rights of the defendant were affected thereby.*" Respondent also overlooks that appellant is not claiming that the instruction to alternate jurors should have been modified but rather that, in the context of this case, the instruction was erroneously given. Such claims are not forfeited by a failure to ask for "amplification or clarification." (See, e.g., *People v. Hillhouse* (2002) 27 Cal.4th 469, 503.)

Respondent argues that the alternate jurors would not have found the instructions to be inconsistent because "[t]he distinction between reasonable doubt and lingering doubt was not subtle, sophisticated, or unintuitive" and because counsel for both side discussed lingering doubt "without excepting the alternate jurors." (RB 312.) Appellant disagrees about whether a layperson would find the distinction to be intuitive or easy to grasp. The concept of reasonable doubt by itself is difficult to define (see *Victor v. Nebraska* (1994) 511 U.S. 1, 5 ["defies easy explication"]), and the difference between reasonable doubt and lingering doubt is even more so (see *Franklin v. Lynaugh* (1988) 487 U.S. 164, 188 [residual doubt is " a state of mind that

exists somewhere between 'beyond a reasonable doubt' and 'absolute certainty.'], O'Connor, J., concurring.)

Respondent itself does not explain the difference except to say that "reasonable doubt" applies at the guilt phase and "lingering doubt" at the penalty phase, which is not an explanation as to the substance of either concept, let alone does it explain the substantive difference between them. (RB 312.) And while respondent is correct that neither counsel excepted the alternates from their discussions of lingering doubt, the alternates knew that the judge's instructions prevailed over counsel's arguments (30 RT 5840), and they also knew that one instruction targeted them and them alone — the instruction requiring acceptance of the guilt-phase verdicts.

Respondent also asserts that "[t]he alternate jurors would have to abandon logic to infer from the trial court's instructions that they should step out of the jury room or stop their ears when the other ten jurors discussed lingering doubt during penalty phase jury deliberations." (RB 312.) Respondent's scenario is imaginative but overstated. The alternates would have to do no more than any penalty juror would do when, for example, other jurors discuss the weight to be given to other-crimes evidence that these jurors believe has been proven beyond a reasonable doubt but that the juror does not personally believe has been so proved. The juror would simply tell himself or herself, "The discussion does not apply to me." In neither situation is the juror required to "step out of the jury room or stop their ears."[96]

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[96] Respondent also argues that the trial court had no sua sponte duty to instruct on lingering doubt (RB 312-313), but with due respect, appellant fails to comprehend respondent's point. Respondent admits that even if there was no duty to give an explicit instruction, the fact remains that the jury was entitled "to consider lingering doubt." (RB 313.) If the court failed to give the instruction explicitly mentioning lingering doubt but had (continued...)

4. THE JUDGMENT AGAINST APPELLANT VIOLATES THE FEDERAL CONSTITUTION BECAUSE APPELLANT'S CAPITAL TRIAL WAS CONDUCTED, AND/OR HIS APPEAL IS BEING CONDUCTED, BEFORE JUDICIAL OFFICERS WHO EITHER HAD TO WIN, OR STILL HAVE TO WIN, A VOTE OF THE POPULACE IN ORDER TO STAY IN OFFICE AND WHO THUS HAD OR HAVE A MOTIVE, INCENTIVE, AND TEMPTATION TO RULE AGAINST HIM

Appellant has argued that the death penalty judgment must be reversed because the judge who presided at his trial and the justices who will decide his appeal are subject to voter approval and thus had or have the motive, incentive, and temptation to rule against him. (AOB 412-422.) Respondent contends that "[j]udicial rulings alone almost never constitute a valid basis for a claim of judicial bias" and that consequently appellant "cannot . . . support his argument with commentaries about the fervor of the electorate, the political nature of the judicial elections or the high percentage of capital cases affirmed by. this Court." (RB 314.) This argument is meritless. For one thing, appellant's claim is based on much more than "judicial rulings alone." Second, even if, as respondent indicates, judicial rulings alone "almost never constitute a valid basis for a claim of judicial bias," why does that imply that appellant "cannot . . . support his argument with commentaries about the fervor of the electorate, the political nature of the judicial elections or the high percentage of capital cases affirmed by. this Court"? This is a non-sequitur, and indeed it is stated in conclusory terms, with nothing cited to support it.

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[96](...continued)
solely instructed on Factor (k) — which "would have sufficed to inform the penalty phase jurors of their ability to consider lingering doubt" (RB 313) — the instruction to the alternates would have conflicted with what that instruction indicated.

5. CALIFORNIA'S DEATH PENALTY STATUTE, AS INTERPRETED BY THIS COURT AND APPLIED AT APPELLANT'S TRIAL, VIOLATES THE UNITED STATES CONSTITUTION

In conformity with appellate counsel's understanding of how *People v. Schmeck* (2005) 37 Cal.3d 240 indicates he should proceed, the AOB argued that California's death penalty law, as interpreted by this Court and applied at his trial, is unconstitutional for numerous reasons, all of which the Court has repeatedly disagreed with, and has asked the Court to reconsider. (AOB 423-430.) Respondent agrees that appellant's claims have been previously rejected but opposes reconsideration. (RB 314-317.) Under the circumstances, there is no need for this ARB to add to the discussion in the AOB and, unless directed by the Court to do otherwise, will submit these issues on the AOB briefing, per *Schmeck*.

6. SHOULD APPELLANT BE DEEMED TO HAVE FORFEITED ANY ARGUMENTS OR ISSUES SET FORTH IN PART SIX OF THIS BRIEF AS A RESULT OF ACTS OR OMISSIONS BY HIS TRIAL COUNSEL, THEN APPELLANT WAS DEPRIVED OF HIS CONSTITUTIONAL RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL

Appellant has argued that if any of the claims raised in Part Six (§§ IX and X) of the AOB are deemed to have been forfeited as direct-appeal issues, the judgment would still have to be reversed because of ineffective assistance of counsel with respect to those claims. (AOB § X.6, p. 431.) Respondent summarily asserts that appellant "cannot prove [ineffective assistance] from the state record" (RB 318), but respondent does not elaborate, so there is nothing to which appellant can meaningfully reply.

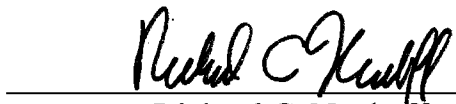
7. CUMULATIVE PREJUDICE FROM THE PENALTY PHASE ERRORS AND THE ERRORS FROM THE GUILT PHASE

In the AOB, appellant has argued that the cumulation of errors would require that the penalty judgment be reversed even if no individual error would compel that result. (AOB § X.7, p. 432.) Respondent summarily denies that there were any errors of state or federal law or that there is any prejudice, respondent but does not elaborate. (RB 318-319.) There is nothing to which appellant can meaningfully reply here other than to point out that the *Chapman* standard applies directly to federal error and that an equivalent test is used when penalty-phase error is found under state law. (*People v. Jones*, *supra*, 29 Cal.4th at p. 1264 fn. 11.)

CONCLUSION

For all of the reasons set forth in the AOB and in the current ARB, the guilt- and penalty-phase verdicts against appellant Lam Nguyen must be set aside, and the case remanded for dismissal of the counts for which there is insufficient evidence and a new and fair trial as to the remaining counts.

DATED: March 4, 2012

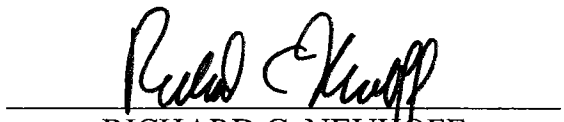


Richard C. Neuhoff
Counsel for Appellant Lam T. Nguyen

CERTIFICATE OF COMPLIANCE

I certify that the attached Appellant's Reply Brief uses a 13 point Times New Roman font and contains 74,853 words.

Dated: March 4, 2012



RICHARD C. NEUHOFF
Counsel for Appellant

Trial Exhibit C

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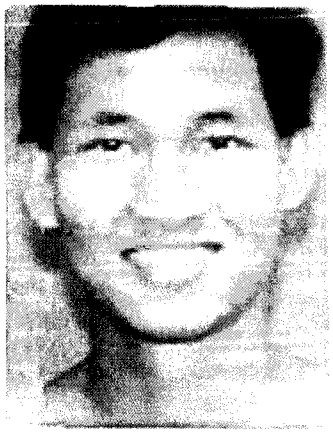

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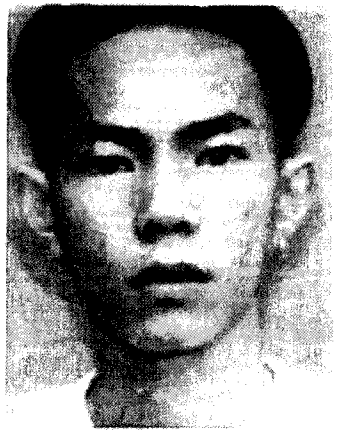

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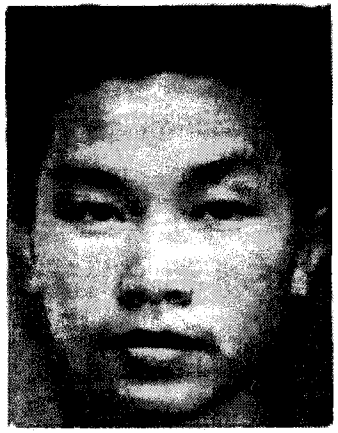

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